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**PUBLIC SERVICE COMMISSION**

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March 8, 2010

Annette Marie Bendish  
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North Dakota Public Service Commission  
600 E Boulevard Ave., Dept 408  
Bismarck, ND 58505

Re: BNSF Railway Company - Case No. RR-10-26  
BNSF Railway Company - Case No. RR-10-27  
Our File No. 96220.001

Dear Ms. Bendish:

Enclosed herewith is the original and seven copies of BNSF's Waiver of its right to cross-examine and present further evidence with respect to the letter received from Col. Steven A. Tabor after the March 1, 2010 hearing.

Also enclosed are the proposed Findings of Fact, Conclusions of Law and Orders I was directed to draft and submit to the Commission. For your convenience, I am also enclosing seven copies of each draft.

If you have any questions, or there is anything further that I need to submit, please let me know.

Thank you for your consideration.

Sincerely,



Stephen W. Plambeck

SWP/bjb  
Enc.

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Proposed Findings of Fact, Conclusions of Law and Order

BNSF Railway Company

Stephen Plambeck - Nilles Law Firm

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**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**BNSF Railway Company**  
**Review of Private Railroad Crossings**  
**Application**

**Case No. RR-10-27**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

\_\_\_\_\_, 2010

**Appearances**

Commissioners Tony Clark, Brian P. Kalk, Kevin Cramer, Chairman.

Stephen W. Plambeck, Attorney, Nilles Law Firm, 201 North Fifth Street, P.O. Box 2626, Fargo, ND 58802-1525, on behalf of BNSF Railway Company.

Annette Bendish, Legal Counsel, Public Service Commission, 600 E Boulevard Ave, Dept. 408, Bismarck, ND 58505, on behalf of the Public Service Commission.

Bonny M. Fetch, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, ND 58501-1882, as Procedural Hearing Officer.

**Preliminary Statement**

On January 12, 2010, BNSF Railway Company (BNSF) submitted a letter petition requesting the Commission review two private railroad crossings near Manvel, ND, and to issue an order determining whether or not audible devices warning of a train's approach should be sounded at these crossings under North Dakota Century Code §49-11-21.

On January 27, 2010, the Public Service Commission issued a Notice of Hearing scheduling a hearing for March 1, 2010, at 10:00 a.m. in the Commission Hearing Room. The Notice of Hearing identified the following issues to be considered:

1. Whether the railroad should sound a warning device at private crossing DOT #062517W near Manvel, ND, based on the safety concerns of the public.
2. Whether the railroad should sound a warning device at private crossing DOT #062518D near Manvel, ND, based on the safety concerns of the public.

On March 1, 2010, at 10:00 a.m., the public hearing was held in the Commission Hearing Room. Lynn Leibfried, P.E., Manager Public Projects, BNSF, presented evidence by affidavit and in response to questions from the Commission. Marc Halvorson, North Dakota State Legislative Director for Railroad Employees and Ron Huff, Brotherhood of Locomotive Engineers, offered testimony.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered all testimony and evidence presented, the Commission makes the following:

### **Findings of Fact**

1. In response to the amendments to North Dakota Century Code section 49-11-21 resulting from passage of 2009 House Bill 1342, BNSF has been removing whistle posts at private grade crossings in North Dakota.
2. In the process of removing whistle posts from private grade crossings, BNSF identified two railroad crossings the Commission may wish to review to determine whether, as a matter of public safety, the Commission in the exercise of its jurisdiction may direct that audible warnings of a train's approach be sounded.
3. The two private grade crossings which BNSF brought to the Commission's attention as part of its letter petition are as follows:
  - a. A private grade crossing located near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250; and
  - b. A private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250.
4. The photographs which accompanied BNSF's request with respect to private grade crossing DOT #062517W show a tree, a tree line, a change in elevation between the railroad tracks and the road with which it intersects and a curve in the railroad tracks that may restrict the view of motorists and train crews as they approach the crossing.
5. The photographs which accompanied BNSF's request with respect to private grade crossing DOT #062518D, show trees, vegetation, a change in elevation between the railroad tracks and the road with which it intersects and a curve in the railroad tracks that may restrict the view of motorists and train crews as they approach the crossing.
6. Marc Halvorson and Ron Huff provided information to the Commission, including a letter from an adjacent landowner requesting removal of the whistle post, but also acknowledged there was a safety concern due to the trees that may restrict the view that operators of motor vehicles and trains may have of one another as they approach the crossing.

7. The Commission received no evidence in response to the notice of this hearing directly from any adjacent landowner or person who may use either crossing that the safety concerns of the public would not warrant audible warnings of a train's approach to either crossing.

From the foregoing Findings of Fact, the Commission now makes its:

### **Conclusions of Law**

1. The Commission has jurisdiction under North Dakota Century Code section 49-11-21 to order railroads to sound audible warning devices at private grade crossings based on the safety concerns of the public.

2. The public safety concerns at the private grade crossing located near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250 necessitate the sounding of audible warnings of a train's approach.

3. The public safety concerns at the private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250, necessitate the sounding of audible warnings of a train's approach.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

### **Order**

The Commission orders:

1. An audible warning of a train's approach be sounded at the private grade crossing located near Manvel, ND, identified as DOT #062517W at milepost 13.02 on Line Segment 250.

2. An audible warning of a train's approach be sounded at the private grade crossing located near Manvel, ND, identified as DOT #062518D at milepost 13.19 on Line Segment 250.

### **PUBLIC SERVICE COMMISSION**

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Tony Clark  
Commissioner

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Kevin Cramer  
Commissioner

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Brian P. Kalk  
Commissioner