

**SOUND TRANSIT**

**RESOLUTION NO. R99-22**

**Operating & Capital Agreement with Burlington Northern and Santa Fe Railway for the Seattle-to-Tacoma Commuter Rail System**

**BACKGROUND AND COMMENTS**

Meeting:	Date:	Type of Action:	Staff Contact:	Phone:
Finance Committee	7/15/99	Discussion	Paul W. Price	(206) 398-5111
Finance Committee	8/5/99	Discussion/Possible Action to Recommend Board Approval		
Board of Directors	8/26/99	Approval		

**ACTION:**

Approval of Resolution No. R99-22, authorizing the execution of two contracts with The Burlington Northern and Santa Fe Railway (BNSF) substantially in accordance with the terms described below -- one for the operation of the Seattle-to-Tacoma *Sounder* (commuter rail) system (Operating Agreement) and one for the construction of the necessary capital improvements for those operations (Construction Agreement). The staffs of BNSF and Sound Transit have agreed upon significant elements of these two agreements, although they are subject to continuing negotiations and final agreement.

The Operating Agreement will be a long-term contract for the operation of 18 weekday trains between Seattle and Tacoma. (All references to trains herein are to one-way movements with Seattle and Tacoma as trip end points.) Staff anticipates that the final negotiated payment by Sound Transit to BNSF for operation of these commuter trains and use of BNSF's right-of-way and facilities will be approximately \$4.6 million per year, and that the term of the agreement will be forty (40) years. Sound Transit's payments would be based on BNSF's operating costs, including an allocation of maintenance-of-way costs, and a management fee.

The phases of commuter rail operations under the Operating Agreement would be subject to the completion of corresponding phases of necessary capital improvements provided for under the Construction Agreement. In April 1999, staff informed the Board of Directors of an agreement in principle (among Sound Transit, the State of Washington, the Ports, BNSF, and Union Pacific Railroad Company (UP)) to fund the necessary capital improvements to the Seattle-Tacoma rail corridor. The preliminary cost estimate for the necessary improvements was \$322 million. Through additional engineering work and as a result of Sound Transit's negotiation of significant concessions by the railroads (such as their forgoing certain improvements, accepting more cost effective approaches, and agreeing to reduced labor charges), staff expects the estimated \$322

million cost to be reduced to a level that can be fully funded through a \$200 million contribution by Sound Transit, \$70 million from other public sector partners, primarily the Washington State Department of Transportation (WSDOT), and a commitment by BNSF and Union Pacific Railroad Company (UP) to cover a total of \$11 million in costs. The WSDOT contribution is expected to be the subject of separate funding agreement with Sound Transit. That and the other public sector contributions are not yet fully committed.

**BACKGROUND:**

Work To Date:

As described in Sound Move, Sound Transit expects the Seattle-to-Tacoma commuter rail service to operate on BNSF railroad right-of-way. In order to provide adequate capacity for both freight and Sound Transit’s passenger trains, certain track, signal, and structure additions and modifications need to be made. These rail corridor additions and modifications comprise the capital improvements to be made under the Construction Agreement.

The Executive Committee of the Board approved a contract with BNSF for advanced planning for capital improvements on November 7, 1997 (Motion No. 49). This work was completed in April 1998. The Preliminary Engineering Agreement with BNSF was approved by the Finance Committee on April 16, 1998 and by the Board on April 23, 1998. This work was completed in January 1999. A Final Engineering Agreement with BNSF, which will provide final design and cost estimates for the improvements, was approved by the Finance Committee on November 5, 1998 and by the Board on November 12, 1998.

Operating Agreement - General Terms

The Operating Agreement will be a 40-year contract between Sound Transit and BNSF for BNSF to provide commuter rail service on its railroad, utilizing BNSF crews. The Agreement will call for BNSF to provide train crews, train dispatching, management of the crews, and maintenance-of-way (including track, signal, right-of-way, structures, and grade crossings). Although final agreement has not been reached, negotiations have narrowed the issues and staff anticipates that BNSF’s compensation for operating 18 weekday commuter trains between Seattle and Tacoma (as provided for in the Sound Move Plan) will be approximately \$4.6 million annually (in year 2000 dollars). BNSF compensation under the agreement will vary depending upon the service levels desired by the Board, fluctuations in labor and material costs, and traffic levels of other corridor users (the higher the freight tonnage, the less cost to Sound Transit).

Annual operating costs of \$4.6 million would be within the operating budget established by the Board in Sound Move and within the Business Plan reviewed by the Board in 1998. Sound Move provides an annual Sounder operating budget of \$22.6 million (expressed in year 2000 dollars). The Business Plan estimate of operating costs *for the entire Everett-to-Lakewood system* includes:

Direct BNSF operations	\$8.0 million
Vehicle maintenance	\$7.0 million
Direct Sound Transit expenses	\$7.5 million

Direct Sound Transit expenses include staff, insurance, security, station maintenance, marketing, fare machines, and agency administration.

Staff expects the final vehicle maintenance contract with Amtrak to carry a base price to Sound Transit of \$5.9 million per year. Fuel costs and major overhauls will be billed to Sound Transit as extra costs, resulting in total estimated annual vehicle maintenance costs of approximately \$7 million.

Paying BNSF about \$4.6 million for operating commuter rail service between Seattle and Tacoma would leave another \$3.4 million from the Business Plan to cover the extension of train service to Everett and to Lakewood. A contract for the capital improvements and the operation of those extensions will be negotiated as the design work progresses on those segments.

As noted above, a portion of Sound Transit's annual payment to the railroad (that portion directed toward maintenance-of-way) will be calculated based on two components: (1) the commuter rail operation's share of ton miles operating over the railroad corridor and (2) the number of trains moves occurring per day. The first component, the share of ton miles, recognizes that commuter trains are very light compared to an average freight train and therefore submit the railroad infrastructure to far less wear and tear per train. This component works to Sound Transit's advantage in estimating the commuter operation's share of the railroad's maintenance-of-way cost. The second component, total number of commuter train moves, recognizes that while commuter trains are short and light, their impact on the operations and maintenance of certain systems (e.g., dispatching and signals) is largely a function of the number of train movements through segments of the railroad mainline.

#### Operating Agreement - Service Levels:

The Operating Agreement will provide for a limited level of start-up service approximately four (4) months after the signing of the Agreement. It will then allow for the automatic addition of trains in phases, up to the planned 18-weekday train schedule, as the construction of improvements progresses.

It is important to note that the capital improvements expected to be included as part of the Construction Agreement should provide sufficient capacity to permit the operation of more than the 18 weekday commuter trips between Seattle and Tacoma. Depending on train schedules, the improvements required under that agreement will support the operation of as many as 28-32 trains daily, without further Sound Transit capital investment. Accordingly, staff anticipates that the final agreement will permit Sound Transit to add additional trains up to the final agreed upon maximum number, subject only to further agreement with BNSF on the specific operating parameters for those trains and a revised operating budget.

Should the Board desire to add service to the base schedule between Tacoma and Seattle (18 trains per day, or nine round-trips), it is currently estimated that an additional daily round-trip would increase the cost of the BNSF operating agreement by between \$250,000 and \$500,000

per round-trip per year. The lower range is attributable to the assumption of utilizing railroad crews (engineers, conductors) already available. The high range represents a worst case assumption of an additional round-trip outside of available crew hours, requiring an additional crew. For example, an additional mid-day round-trip would be likely to utilize available crews, while an additional evening round-trip might require calling in an additional crew. To the incremental costs of the BNSF agreement must also be added a payment to Amtrak for performing maintenance services on an additional round-trip. The incremental Amtrak costs are estimated to be \$130,000 per round-trip per year, plus fuel costs of \$16,000 per year.

The Operating Agreement will impose specific audit and reporting requirements on BNSF, including reports concerning on-time performance.

#### Construction Agreement - General Terms:

The Final Engineering Report is largely complete, with delivery expected around September 1, 1999. The major design and cost components have been sufficiently determined, however, to allow the parties to negotiate the basic terms of the Construction Agreement. The Construction Agreement is expected to require Sound Transit to contribute \$200 million. WSDOT is expected to commit \$60 million, recognizing that the State intercity trains (the Talgo trains to Portland and Vancouver) benefit significantly from the capital improvements to this rail corridor. Another \$10 million would have to come from other federal, state and local funds (e.g., grade crossings safety improvement grant, FAST corridor grants, and Port access improvement capital funds).

The staff is working with WSDOT to develop a funding agreement between WSDOT and Sound Transit. With regard to the \$60 million in WSDOT funds, the State legislature has appropriated \$35 million in this biennium and has approved the remaining \$25 million, which would have to be appropriated in the next biennium. However, the availability of these funds could be affected by general voter initiatives, such as Initiative 695, which would eliminate elements of state taxing authority.

Recognizing these and other risks concerning these other sources of funds, the staff is working to minimize the impact of any funding shortfall in the agreements with BNSF:

First, staff from the WSDOT, the BNSF, and Sound Transit have agreed that if the \$25 million of WSDOT funds is not appropriated by the next legislature, then a particular improvement that the capacity analysis has shown is necessary only for WSDOT's trains and not for freight or commuter rail capacity (a third main track through Auburn) will not be built.

Second, staff from BNSF and Sound Transit have agreed to negotiate to permit a level of commuter rail service based on Sound Transit's commitment of \$200 million, even in the unlikely event that no additional funds are ultimately contributed from other sources.

### Environmental:

The Federal Transit Administration completed environmental analysis of the project and issued a Finding of No Significant Impact (FONSI) in May 1998. Sound Transit adopted this FONSI to comply with the State Environmental Policy Act (SEPA), thereby permitting Sound Transit to start final engineering work on the BNSF track and signal improvements. The completion of this environmental process was required to preserve *Sounder* eligibility for federal funding and to comply with state law.

Sound Transit will be responsible for obtaining all other environmental permits and authorizations required for the construction of the improvements under the Construction Agreement. Furthermore, Sound Transit will be responsible for all environmental mitigation issues and costs relating to such construction.

### Risks:

There are eight (8) major risks in this contract, which can be broadly identified in the areas discussed below:

1. Property Acquisition Costs: The Final Engineering Report will identify expected property acquisition costs for purposes of the Construction Agreement. If actual property acquisition costs exceed budgeted costs resulting in an overall budget shortfall, BNSF and Sound Transit would have to agree to reduce other areas of the budget or Sound Transit would have to pay for the additional costs. Otherwise, BNSF will have the right to suspend and eventually terminate the Construction Agreement. Staff believes the risk of a significant property acquisition cost overrun is low because relatively little property is to be acquired and reasonable funds have been allocated in the budget for such acquisitions. Property acquisition requirements are small because virtually all of the planned capital improvements are within existing railroad right-of-way.
2. Environmental Mitigation Costs and Risks Related To Environmental Permitting: As discussed in the Environmental section, above, Sound Transit will be solely responsible for environmental mitigation and for obtaining all other environmental permits and authorizations necessary for the construction of the capital improvements provided for under the Construction Agreement. Given the modest takings required for purposes of constructing the improvements, and the fact that most of the improvements are within the existing railroad right-of-way, staff believes there will not be significant environmental mitigation costs. Accordingly, no such costs have been or are expected to be included within Sound Transit's construction budget. To the extent there are such costs, they will be the responsibility of Sound Transit. Under the Construction Agreement, Sound Transit will be responsible for increased costs caused by delays in obtaining the necessary permits.

3. Taxes: BNSF's position is that it will bear the cost only of its own income taxes. Other federal, state, and possibly local taxes that the parties agree will be applicable still need to be fully accounted for in the Operating Agreement and Construction Agreement. More importantly, should a taxing authority or court determine that additional taxes apply that the parties believed to be inapplicable, Sound Transit will likely bear the risk of payment of such taxes. If additional taxes were held to apply to activities under either agreement, the amount of potential liability could be significant.
4. Major Unforeseen Events or Costs: Additional costs or delays could be caused by circumstances beyond the control of either party. If a party were prevented from performing under either agreement due to such circumstances, it would be excused under a standard force majeure provision until such time as the party could reasonably be expected to perform. Thus, circumstances beyond the control of the parties could result in delays and additional costs that might ultimately have to be borne by Sound Transit.

Additional unforeseen costs of construction or operation not covered by a force majeure clause could also arise. With regard to the anticipated Operating Agreement, Sound Transit is likely to be responsible for some or all of such costs through future adjustments to BNSF compensation. With regard to the Construction Agreement, Sound Transit is likely to be directly responsible for any such added costs, unless those costs result from BNSF's deficient construction management. BNSF is expected to assume the risk of its own mismanagement. This includes the risk of any added costs and may also include a right for Sound Transit to begin or expand commuter rail operations ahead of the construction schedule that would otherwise apply, if that can be done safely and consistent with BNSF's other obligations. If there are cost overruns that are not BNSF's responsibility, there is a 10% general contingency that will be included in the final construction budget that may be available to cover all or part of such overruns.

5. Funding Shortfall: As discussed under the Construction Agreement - General Terms section, above, in addition to the risk of cost overruns, a funding shortfall could arise if anticipated funds from other sources (\$70 million in total) are not ultimately made available for the project. Staff's ongoing efforts to minimize the resulting risks due to such a shortfall are discussed in that section. Those efforts may not succeed in fully protecting Sound Transit from such risks. In particular, there is a risk that Sound Transit may at most receive substantially reduced commuter rail services in exchange for its \$200 million investment in capital improvements. Moreover, to the extent delays are caused or costs increased by reason of

any funding shortfall, Sound Transit will have to bear responsibility under the Construction Agreement.

6. BNSF Default on Service Obligations: BNSF will have the exclusive right to operate commuter rail service over its lines on behalf of Sound Transit and the public. If BNSF defaults on its service obligations, Sound Transit would not have the right to replace BNSF. Staff expects, however, that Sound Transit will have the right to a return of the unamortized value of the improvements to BNSF's lines that it funded. Staff is negotiating in addition for the right for Sound Transit to pursue contract remedies under the law, such as damages or specific performance.
7. Related Amtrak Agreement Lease Issues: Sound Transit intends to contract with Amtrak to provide maintenance for Sound Transit's rolling stock, and for the joint use with Amtrak of the King Street Station. Amtrak leases from BNSF the maintenance facilities that it would use for Sound Transit's rolling stock. That lease permits Amtrak to use that property only for the maintenance of rolling stock used in Amtrak's inter-city passenger service. Amtrak also leases portions of the King Street Station from BNSF. That lease is also solely for Amtrak's use in connection with inter-city passenger service; but acknowledges that Sound Transit may be permitted to use the King Street Station. If Amtrak ceases to use these facilities for such purposes, the respective leases terminate and Amtrak's rights to use the property revert to BNSF. Sound Transit is negotiating for modifications to the BNSF-Amtrak leases to provide authority for those properties to be used by Sound Transit, and also to secure successor rights to these facilities should Amtrak cease to use them for inter-city passenger rail services. Execution of the Operating Agreement and the Construction Agreement would be contingent upon successful resolution of these issues.
8. Indemnification and Liability Related to Commuter Operations: As a new provider of public transit service, the Board would be assuming the significant risk of losses and damages to persons and property as a result of its commuter rail operations. Sound Transit, however, will insure itself against such risks. The draft agreement with BNSF provides for Sound Transit to assume all liability, regardless of fault, arising from accidents or derailments of its trains not involving another train (other than to BNSF employees, agents, and invitees), or relating to its own commuters, employees, agents, and invitees. Sound Transit would be required by the Agreement to obtain \$200 million in insurance covering itself and BNSF against such risks, and also covering most other potential losses to BNSF that might arise under the Operating Agreement. Sound Transit would be permitted to self-insure (not cover) up to the first \$10 million in losses, which would allow the Board some flexibility in balancing risks versus current costs. If Sound Transit chooses not to purchase insurance, Sound

Transit will be responsible for any uninsured liability for injuries to persons or property, including liability that is caused by BNSF's negligent conduct.

Sound Transit would not be liable for losses caused by BNSF's gross negligence, but Sound Transit would cover such losses under its \$200 million of insurance. Sound Transit's Risk Management Division has concluded that doing so is significantly less expensive than the alternative, which is to have BNSF insure itself against this risk and pass the cost of such insurance on to Sound Transit in the Operating Agreement.

### **RELEVANT BOARD POLICIES AND PREVIOUS ACTIONS TAKEN:**

- ◆ Adoption of Sound Move, The Ten-Year Regional Transit System Plan: *Sound Move* states that commuter rail service is to be implemented within two to four years of voter approval.
- ◆ Resolution No. 78-1, authorizing non-standard procurements such as sole source and special circumstances procurements.
- ◆ 1999 Adopted Budget.
- ◆ Motion No. 49 authorized a contract with BNSF for Advanced Planning, in an amount not to exceed \$3,711,000. This work has been completed.
- ◆ Resolution No. R98-29 authorized a contract with BNSF, in the amount of \$3,391,910 for Preliminary Engineering. This work has been completed.
- ◆ Resolution No. R98-45 authorized a contract with BNSF in the amount of \$5,746,000, and a contingency of \$1,149,2000, for Final Engineering. The work is currently expected to be completed by September 1, 1999.

### **KEY FEATURES:**

- ◆ Under the Operating Agreement, BNSF will provide train crews, trains dispatching, maintenance of track and signals, and management services.
- ◆ Under the Construction Agreement, BNSF will construct agreed upon capital improvements to its lines that are needed to accommodate present and future freight and commuter rail service.
- ◆ The Operating Agreement should have a 40-year term.
- ◆ The anticipated capital improvement projects under the Construction Agreement will require approximately 36 months for completion.
- ◆ The Operating Agreement will provide for a limited level of start-up service approximately four months after the signing of the agreement.
- ◆ BNSF will perform much of the construction work using its own forces, in accordance with applicable labor union agreements.
- ◆ BNSF will conduct a competitive procurement process for supporting contracting services and will strive to meet both federal and Sound Transit M/W/DBE goals.



## **FUNDING:**

- ◆ As detailed in the Operating Agreement – General Terms section, above, the cost of the Operating Agreement is within the operating budget established by the Board in *Sound Move* and within the Business Plan reviewed by the Board in 1998.
- ◆ Agreeing to a contract with BNSF for about \$4.6 million for the Seattle-to-Tacoma service would leave another \$3.4 million from the Business Plan to cover an extension of train service to Everett and to Lakewood.
- ◆ The cost and funding for the Construction Agreement are detailed in the Capital Budget Review outlined in the attached Exhibit 1.

## **ALTERNATIVES:**

1. Staff recommendation: Execute agreements, with the basic terms described above, providing for BNSF (i) to operate Sound Transit commuter rail service between Seattle and Tacoma, and (ii) to construct agreed-upon capital improvements on BNSF's right-of-way to accommodate such services.
2. Approve the basic structure of the relationships between Sound Transit and BNSF (i.e., BNSF to operate the service and oversee construction of the improvements), but order staff to change the direction of its negotiations regarding one or more significant terms outlined above.
3. Renegotiate the agreements with BNSF to allow other contract operators (Amtrak, Herzog, etc.) to develop an RFP for providing portions of the operation. Absent litigation, this would require BNSF's consent as the owner of the right-of-way, which it has consistently refused to give, and would still require an agreement with BNSF for track and signal improvements and ongoing maintenance, and for train dispatching.
4. Attempt to acquire through purchase or litigation the independent rights to use or own BNSF's right-of-way between Seattle and Tacoma for Sound Transit operations. Any such attempt would have a high risk of failure and would, in any event, require significant time and right-of-way expense. Ownership of the right-of-way would also be a significant expansion of Sound Transit's mission.
5. Terminate negotiations and attempt to negotiate a deal primarily relying upon UP's right-of-way and infrastructure. UP has far less infrastructure available for use by commuter operations, however, with the likely result that, absent BNSF's agreement to the joint use of some of its trackage, total costs for initial capital investments would be higher and/or the number of commuter trains and service quality would be reduced.
6. Terminate the project.

**LEGAL REVIEW:**

The Legal Department has reviewed and approved the Background and Discussion and the Resolution as to form.

**ATTACHMENTS:**

1. *Sounder* Commuter Rail Capital Budget Review – by Segment (1 page)
2. *Sounder* Commuter Rail Capital Budget Review – by Equity Area (1 page)
3. *Sounder* Commuter Rail Operations Cost Comparison – Seattle to Tacoma (1 page)
4. *Sounder* Contract Contingency Status (1 page)

## **SOUND TRANSIT**

### **RESOLUTION NO. R99-22**

A RESOLUTION of the Board of the Central Puget Sound Regional Transit Authority authorizing the Executive Director to execute two contracts with The Burlington Northern and Santa Fe Railway (BNSF), each to be substantially in accordance with the basic terms for such agreements set forth in the Background and Comments attached hereto as Exhibit A. The first is a long-term contract that will provide for BNSF to operate *Sounder* commuter rail service between Seattle and Tacoma (Operating Agreement). The second is a contract that will specify agreed-upon capital improvements on and around BNSF's existing railroad right-of-way, and provide for BNSF to construct those improvements and for Sound Transit to contribute approximately \$200 million and other public authorities to contribute approximately \$70 million to the cost of such construction (Construction Agreement).

WHEREAS, a Regional Transit Authority (Sound Transit) has been created for the Pierce, King, and Snohomish County region by action of their respective county councils pursuant to RCW 81.112.030; and

WHEREAS, on November 5, 1996, Central Puget Sound area voters approved local funding for Sound Move, the ten-year plan for regional high-capacity transit in the Central Puget Sound Region; and

WHEREAS, Sound Move included funding for the implementation of Seattle-Tacoma commuter rail service; and

WHEREAS, the commuter rail service will largely be provided within existing BNSF right-of-way and will utilize existing BNSF freight lines; and

WHEREAS, certain civil, track, signal, and structural work within BNSF's railroad right-of-way is required to be completed in order for Sound Transit to run commuter rail trains on the BNSF freight lines; and

WHEREAS, pursuant to the Advanced Planning, Preliminary Engineering, and Final Engineering Agreements between the BNSF and Sound Transit certain design work has been performed and continues to be performed; and

WHEREAS, the Operating Agreement and the Construction Agreement are now required to complete the civil, track, signal and structural work required to implement the Seattle-Tacoma commuter rail line; and

WHEREAS, Sound Transit has determined that the BNSF is the only practically available party to perform the construction work required for commuter rail operations because that work will be performed within BNSF's right-of-way where it conducts and is expected to continue conducting railroad freight operations; and

WHEREAS, it is in Sound Transit's best interest to contract with BNSF for the construction of the track and signal improvements necessary for commuter rail operations and to contract with BNSF for the operation of commuter rail service within BNSF right-of-way for a forty-year period; and

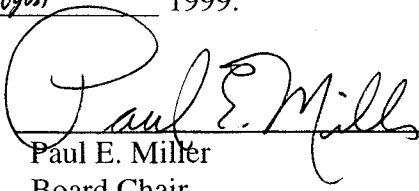
WHEREAS, the Federal Transit Administration (FTA) has issued a Finding of No Significant Impact (FONSI) under the National Environmental Policy Act on the Tacoma to Seattle commuter rail line based on the Environmental Assessment prepared by Sound Transit; and

WHEREAS, Sound Transit has adopted the Environmental Assessment in compliance with the State Environmental Policy Act.


NOW, THEREFORE, BE IT RESOLVED by the Board of the Central Puget Sound Regional Transit Authority as follows:

The Executive Director of Sound Transit is hereby authorized to execute an Operating Agreement for commuter rail services with BNSF for an annual cost not to exceed \$4.6 million (in year 2000 dollars) over a forty (40) year period, and to execute a Capital Agreement for capital improvements with BNSF requiring Sound Transit to contribute an amount not to exceed \$200 million. The Construction Agreement may also provide for additional funding contributions of approximately \$70 million from other public sources upon such terms as may agreed to by Sound Transit and BNSF. The terms and conditions of the Construction Agreement and the Operating Agreement shall be substantially in accordance with the basic terms for such agreements as set forth in the Background and Comments attached hereto as Exhibit A .

ADOPTED by the Board of the Central Puget Sound Regional Transit Authority at a regular meeting thereof held on the 26th day of August 1999.

  
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Paul E. Miller  
Board Chair

ATTEST:

  
\_\_\_\_\_  
Marcia Walker  
Board Administrator