

## SOUND TRANSIT STAFF REPORT

### RESOLUTION Nos. R2003-22, R2003-23, R2003-24, R2003-25 and MOTION Nos. M2003-130, M2003-131, M2003-135, M2003-136

#### Agreements with BNSF for Sounder Commuter Rail Service

Meeting:	Date:	Type of Action:	Staff Contact:	Phone:
Board Meeting	12/17/03	Action	<b>Martin Minkoff, Sounder Commuter Rail Director</b> Jordan Wagner, Legal Counsel	(206) 398-5111  (206) 398-5224

Contract/Agreement Type:	✓	Requested Action:	✓
Competitive Procurement		Execute New Contract/Agreement	✓
Sole Source		Amend Existing Contract/Agreement	✓
Interlocal Agreement		Contingency Funds Required	
Purchase/Sale Agreement	✓	Budget Amendment Required	

*3Applicable to proposed transaction.*

### **OBJECTIVE OF ACTIONS**

To authorize the execution of eight agreements covering the purchase and sale of right-of-way and right-of-way interests, joint use conditions and services between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company (BNSF) for Sounder in the Everett to Seattle and Lakewood to Tacoma corridors.

### **ACTIONS**

Authorize the Chief Executive Officer to execute the following agreements with the Burlington Northern Santa Fe Railway Company, as generally agreed to in the May 2003 Term Sheet, Memorandum of Understanding, for the Everett to Seattle corridor and the Lakeview subdivision line (Tacoma to Nisqually):

- |                           |  |
|---------------------------|--|
| • Resolution No. R2003-22 | Purchase and Sale Agreement (Everett to Seattle)     |
| • Motion No. M2003-130    | Joint Use Agreement for Everett to Seattle           |
| • Motion No. M2003-131    | Service Agreement for Everett to Seattle             |
| • Resolution No. R2003-23 | Purchase and Sale Agreement (Station parcels)        |
| • Resolution No. R2003-24 | Purchase and Sale Agreement (Lakewood to Tacoma)     |
| • Resolution No. R2003-25 | Purchase and Sale Agreement (Nisqually to Lakewood)  |
| • Motion No. M2003-135    | Joint Use Agreement for Tacoma to Nisqually          |
| • Motion No. M2003-136    | Amendment to Service Agreement for Seattle to Tacoma |

### **KEY FEATURES**

- Purchases four perpetual property easements from Seattle to Everett from BNSF for Sounder services.
- Purchases property from BNSF in the Tacoma to Nisqually corridor for service and station improvements.

- Provides for the conditions of joint use in each corridor; Sound Transit's commuter services use in the Everett to Seattle corridor and BNSF continued freight use in the Nisqually to Tacoma corridor.
- Purchases operations services from the BNSF to operate service in both corridors.

## **OVERVIEW OF PRINCIPAL AGREEMENTS**

The principal agreements described below provide the basis to proceed with Commuter Rail Service between Everett and Seattle and between Lakewood and Tacoma. The agreements are the product of several years of discussion with BNSF and, more recently, 12 months of intensive negotiations to define mutually agreeable terms upon which Sound Transit would obtain from BNSF the necessary access to BNSF tracks and rights-of-way. The agreements below are based upon the principles embodied in the non-binding Term Sheet, Memorandum of Understanding between Sound Transit and BNSF dated May 28, 2003.

The Everett to Seattle and Lakewood to Tacoma transactions would be enabled by the following actions for the Board's consideration.

### **Everett to Seattle Corridor Transactions**

**Resolution No. R2003-22** - Authorizing the Chief Executive Officer to execute a Purchase and Sale Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for the purchase of real property interests required for Everett to Seattle Commuter Rail Service.

Through the **Purchase and Sale Agreement**, Sound Transit would purchase under threat of condemnation four perpetual easements with which to operate four round-trip, peak-direction-only Commuter Trains (one for each easement) between Everett and Seattle:

- Closing of First Easement
  - On December 17, 2003
  - \$79 million payment
- Closing of Second Easement
  - In December 2004
  - \$79 million payment
  - Conditions of the Closing of the Second Easement are:
    - ♦ BNSF providing to Sound Transit on or before March 31, 2004, plans, specifications and design documents completed to 30% level of completion for the Second Easement Improvements (i.e., projects within Seattle), and Third Easement Improvements (i.e., projects between Seattle and Everett—not inclusive), in accordance with the Environmental Impact Statement (EIS) and Record of Decision (ROD).
    - ♦ BNSF providing to Sound Transit on or before January 9, 2004 a preliminary estimate of the wetland impacts resulting from the Second Easement Improvements, Third Easement Improvements, and Fourth Easement Improvements (i.e., projects in Everett: Lowell Siding, Delta Yard, and other project elements in the Everett Loop).
    - ♦ BNSF providing to Sound Transit on or before February 29, 2004 a more precise estimate of the maximum area of wetland impacts resulting from the Second Easement Improvements, Third Easement Improvements and Fourth Easement Improvements in accordance with the EIS and ROD.
    - ♦ BNSF providing to Sound Transit on or before August 31, 2004, plans, specifications and design documents completed to 30% level of completion for the Fourth Easement Improvements in accordance with the EIS and ROD.

- ♦ If the permits for Lowell Siding are denied or deemed unobtainable prior to the closing of the Second Easement, then BNSF will have the option to not close (with no second \$79 million payment by Sound Transit and no trains beyond Train #1).
- Closing of Third Easement
  - In December 2006
  - \$50 million payment
  - Conditions of the Closing of the Third Easement are:
    - ♦ If the permits for the Third Easement Improvements are denied or deemed unobtainable prior to the closing of the Third Easement, then Sound Transit will have the option to not close (with no third \$50 million payment by Sound Transit and no trains beyond Train #1 and Train #2).
- Closing of Fourth Easement
  - December 2007
  - \$50 million payment
  - Conditions of the Closing of the Fourth Easement are:
    - ♦ If the permits for the Fourth Easement Improvements are denied or deemed unobtainable prior to the closing of the Fourth Easement, then Sound Transit will have the option to not close (with no fourth \$50 million payment by Sound Transit and no trains beyond Train #1, Train #2, and Train #3).
- Post Closing Options
  - Resale of Second Easement to BNSF - Following the December 2004 closing and \$79 million payment to BNSF, if the permits for projects within the City of Seattle do not appear to be likely to be obtained, Sound Transit would have the option of “selling back” the easement to BNSF for \$27.5 million without interest. Such a determination would be made no sooner than November 2006 and no later than November 2010.
  - Resale of Third and Fourth Easements to BNSF - If the respective closings for the third and fourth easements do occur, and the \$50 million payments for each respective easement is made to BNSF, and Sound Transit is subsequently unable to obtain said permits (or deemed unlikely to be obtained), then Sound Transit would have the option of “selling back” such easements to BNSF for \$50 million each (without interest). The option for the third easement must be exercised no sooner than December 2008 and no later than December 2012 and for the fourth easement no sooner than December 2009 and no later than December 2013.

**Motion No. M2003-130** - Authorizing the Chief Executive Officer to execute a Joint Use Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for Everett to Seattle Commuter Rail Easements.

The **Joint Use Agreement** contains the long-term provisions and compensation for operation of commuter service on the BNSF line, including requirements for a commuter operator on behalf of Sound Transit if it is ever other than BNSF. The term of the Joint Use Agreement is perpetual, linked in conjunction with the four easements. Some key elements include:

- In conjunction with the Joint Use Agreement, the Easements define the time “windows” during which up to four commuter trains (one for each easement) in each direction can operate. The windows state the overall time period during which the trains can operate in the morning and evening peak hours, together with parameters for the specific operation of the four trains in relation to each other. All four trains must arrive at King Street Station within the hours of 6:00 a.m. and 9:00 a.m., and depart within the hours of 3:30 p.m. and 6:30 p.m. As each new easement/train becomes operational, there are maximum “windows” within which trains must be scheduled. That is, when there are two trains, they cannot arrive/depart King Street Station (KSS) more than 40 minutes apart. When three trains are

operational, the departure and arrival of the first and last train must be spaced no more than 70 minutes apart. When four trains are operational, the departure and arrival of the first and last train must be spaced no more than 105 minutes apart.

- The Joint Use Agreement also defines Sound Transit's responsibility for the permitting process that links to the time periods for operation of trains described below. Sound Transit will "certify" to BNSF that all required permits have been obtained for a given stage, and time periods during which construction activity is precluded by governmental action thereafter will toll the time periods for construction activity before which BNSF is required to operate commuter trains. Permit restrictions would not be acceptable that impose conditions on the operation of the railroad (e.g., train speed restrictions after construction). The schedule for commencing train operations is as follows:

<b>Trainset Pursuant to First Easement</b> -----	December 22, 2003
<b>Trainset Pursuant to Second Easement</b> -----	Six months after ST certifies permits necessary for improvements within City of Seattle
<b>Trainset Pursuant to Third Easement</b> -----	Twenty-four months after ST certifies permits necessary for improvements between Seattle and Everett (not inclusive) (including the "marine" permits)
<b>Trainset Pursuant to Fourth Easement</b> -----	Twenty months after ST certifies permits for Everett area improvements (including Lowell Siding)

**Motion No. M2003-131** - Authorizing the Chief Executive Officer to execute a Commuter Rail Service Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for Everett to Seattle Commuter Rail Services

The **Commuter Rail Service Agreement** describes the terms for the actual operation of commuter trains by BNSF (including liability and risk provisions similar to the Seattle to Tacoma agreement), and the compensation paid to BNSF for train crews, maintenance-of-way, and other expenses incurred in the operation of Sounder Service North. The compensation structure is simplified to include flat rates for maintenance and crews with inflation adjusters plus performance incentives after the initial pre-construction time period.

The key elements of the compensation paid to BNSF to operate the four round-trips include:

- For the operation of Train #1: \$30.00 per train mile (to be adjusted annually by agreed upon indexes starting in January 2005). This interim rate would remain in effect until three trains are operational. At that time the "Standard Rate" will apply: \$25.00 per train mile base for up to four car trains and increase with train length (\$25.33 for five car trains, 25.66 for six car trains, and 26.00 for seven car trains, \$26.25 for eight, \$26.50 for nine, and \$26.75 for 10 car trains), plus an on-time performance incentive formula. Base and incentives would be adjusted annually by mutually agreed upon indexes.
- For the operation of Train #2: \$60.00 per train mile. The interim rate would also remain in effect until three trains are operational. At that time the "Standard Rate" (plus on-time performance incentives) would apply as described above. Base and incentives would be adjusted annually by mutually agreed upon indexes.
- For the operation of Trains #3 and #4: "Standard Rate" with incentives as defined above.
- Special Event Service as provided under the agreement would be billed at \$45 per train mile during the interim period and \$35 per train mile once three weekday trains are operational. (Note: A special event "Seahawks" train would operate on Sunday, December 21, 2003.)

The term of the Commuter Service Agreement would be for 12 Years, with an option of 5 additional years (that must be agreed to by both parties), for a maximum term of 17 years. It is important to note that following the term of the service agreement; Sound Transit still has the perpetual right to operate trains with another service provider under the Joint Use Agreement summarized above. Sound Transit would then pay BNSF only for the on-going costs of maintenance-of-way, dispatch, and applicable incentives, in proportion to commuter use on the line.

### **Nisqually to Tacoma Corridor Transactions**

**Resolution No. R2003-23** - Authorizing the Chief Executive Officer to execute a Purchase and Sale Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for the purchase of real property interests required for Sounder Commuter Rail Lakewood and South Tacoma station parcels.

**Resolution No. R2003-24** - Authorizing the Chief Executive Officer to execute a Purchase and Sale Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for the purchase of real property interests required for Sounder Commuter Rail service from Lakewood to Tacoma.

**Resolution No. R2003-25** - Authorizing the Chief Executive Officer to execute a Purchase and Sale Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for the purchase of real property interests required for Sounder Commuter Rail service from Nisqually to Lakewood.

Through the three **Purchase and Sale Agreements**, Sound Transit would purchase Tacoma to Lakewood properties under threat of condemnation. The first sale (to close in 2003) is composed of defined parcels of land at the Lakewood and South Tacoma Station sites. The next two agreements provide for Sound Transit's purchase of the BNSF Lakeview Subdivision from Tacoma (at approximately M Street) to Nisqually, subject to Sound Transit's satisfactory completion of due diligence on the properties. These purchases are divided into two distinct property sales: a north sale for right-of-way between Lakewood and Tacoma (to close in 2004); and a south sale for right-of-way between Lakewood and Nisqually (to close in 2005). BNSF would retain the right-of-way property north of the D to M Street Connector. BNSF would retain its common carrier obligations and the perpetual right to continue to operate its freight service.

In the event Sound Transit is not satisfied with the results of due diligence investigations on the north and south line properties, the agency may decline to go forward with the purchases of those properties and terminate the applicable purchase agreements. In doing so, it would forfeit certain non-refundable earnest money payments described below. If Sound Transit proceeds with the purchases, consistent with the May 2003 Term Sheet, Memorandum of Understanding, Sound Transit would pay BNSF \$31,948,500 over a four-year period for the entire acquisition.

The payments would be made as follows: \$8 million in 2003 (\$1.4 million would be non-refundable earnest money for the north line and \$3 million would be non-refundable earnest money for the south line); \$6 million in 2004, together with a Promissory Note for \$6 million, due in 2006 (for the north line); \$6 million in 2005, together with a Promissory Note for \$6 million due in 2007 (for the south line).

**Motion No. M2003-135** - Authorizing the Chief Executive Officer to execute a Joint Use Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company for Tacoma to Nisqually Railroad right-of-way and properties.

A long-term **Joint Use Agreement** would define the terms for long-term use of the line for Sound Transit commuter rail and BNSF rail freight purposes. Under this agreement (and the purchase agreements), Sound Transit is responsible for construction of the Lakewood to Tacoma track and signal and related improvements needed to implement the Sounder extension from Freighthouse Square to Lakewood (including the D to M Street Connector).

Until Sound Transit construction and rehabilitation of the line commenced, BNSF would perform all maintenance-of-way activities and rehabilitation, including track, signals, and related structures (non-station), and general right-of-way maintenance on the Lakeview Subdivision at BNSF expense. At such time that Sound Transit began construction on the Lakewood commuter section, Sound Transit would thereafter be responsible for all such maintenance activities on the line, and BNSF would then reimburse Sound Transit for the cost of regular and capital maintenance attributable to its freight use of the line.

BNSF would retain liability for freight related activity on the entire Lakeview Subdivision (except for the Lakewood and South Tacoma Station Parcels) and all liability for that section that BNSF maintains. Sound Transit would be responsible for incidents and occurrences stemming from the operation of the Sounder commuter service, and apportioned liability for that joint-use section that Sound Transit maintains.

BNSF would indemnify Sound Transit for environmental/hazardous waste liability stemming from prior BNSF activity on the property (and on-site activity of prior BNSF tenants) and future freight related activity, with Sound Transit responsible for that which may be caused in the future by Sounder commuter operations.

**Motion No. M2003-136** - Authorizing the Chief Executive Officer to execute a First Amendment to the Commuter Rail Service Agreement between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company

Under a First Amendment to the existing long-term Seattle to Tacoma **Commuter Rail Service Agreement**, BNSF would extend operation of commuter service from Tacoma to Lakewood, contingent upon closing of the pertinent purchase transactions, completion by Sound Transit of connecting trackage between Freighthouse Square and the Lakeview Subdivision, and rehabilitation of the line. BNSF would be compensated for the additional operating cost to extend commuter service to Lakewood, largely on the basis of the terms of the existing agreement (including reimbursement for actual costs of train crews and management plus performance incentives). Changes to the compensation provisions for the entire Tacoma to Seattle line (plus provision for extended service to Lakewood) reflecting indexed flat rates for maintenance of way, dispatch, administrative overhead and other mutually agreeable changes are being recommended.

## **BUDGET IMPACT SUMMARY**

<b>Action Outside of Adopted Budget:</b>	<b>Y/N</b>	<b>Y Requires Comment</b>
This Line of Business	N	
This Project	N	
Budget amendment required	Y	While sufficient funds are available in the 2003 and the 2004 slice of the budget, additional budget will be required to replenish the lifetime budget.
<b>Key Financial Indicators:</b>	<b>Y/N</b>	<b>Y Requires Comment</b>
Contingency funds required	N	
Subarea impacts	N	
Other party funding required (other than what is assumed in financial plan)	N	

N = Action is assumed in current Board-adopted budget. Requires no budget action or adjustment to financial plan.

## **BUDGET DISCUSSION**

The budget associated with the expenditures in these agreements occur in two general areas: right-of-way costs included in track and facilities capital projects and on-going operations costs which are a part of the transit operations budget.

Based on a thorough review of costs to complete and the completion of the BNSF negotiations, the estimated total lifetime capital budget for the Everett to Seattle track and facilities segment has been identified as \$303,114,343, which includes the budget for the purchase of four easements. The total lifetime capital budget for the Lakewood to Tacoma track and facilities segment has been identified as \$150,335,116, which includes budget to purchase the Lakeview subdivision line and associated station properties.

The estimate at completion figures were discussed with the Finance Committee at the December 3, 2003 meeting as a part of the 2004 Sounder budget process. These figures are also reflected in the Adopted 2004 Budget (Resolution No. R2003-19), adopting the lifetime budget for the Sounder program. The May 2003 Term Sheet, Memorandum of Understanding outlined the basis of negotiating the agreement with BNSF. An additional \$9,948,500 was negotiated to appropriately account for elements of reduced risk to Sound Transit. Additionally, through the negotiations, Sound Transit achieved other gains in value (e.g. receiving a perpetual easement in the Seattle to Everett corridor instead of the initial 97-year term.

While there is sufficient budget authorization to fund the 2003-funding requirement, staff will return to the Board during the first quarter of 2004 to seek a budget amendment to replenish the lifetime project budgets. Staff has committed to complete the cashflow of the projects in the Everett to Seattle and the Lakewood to Tacoma segments, and will also present that information to the Board during the first quarter of 2004.

In addition, staff will seek Board action to increase the 2004 Sounder transit operations budget in the first quarter of 2004 to provide budget authority for expenses related to paying BNSF for purchased transportation services and other costs related to service in the Everett to Seattle segment. As was discussed with the Board during the review of the Proposed 2004 Budget, the amount of these costs were not included in the Proposed 2004 Budget, because they were subject to the service agreements and were not known at the time the proposed budget was developed. Based upon the service agreements those costs are expected to be approximately \$826,000.

The joint use and service agreement costs have been calculated into Sound Transit's financial plan for future transit operations expenditures. These changes are within the agency's current financial plan.

### **REVENUE, SUBAREA, AND FINANCIAL PLAN IMPACTS**

The proposed action is affordable within the agency's current long-term financial plan, which was reviewed by the Board in November 2003, and is within subarea financial capacity. The action will have no new revenue impacts on Sound Transit beyond those identified above.

### **BUDGET TABLE**

Not applicable for these actions.

### **M/W/DBE – SMALL BUSINESS PARTICIPATION**

Not applicable for these actions.

### **PRIOR BOARD ACTIONS**

<b>Motion or Resolution</b>	<b>Summary of Action</b>	<b>Date of Action</b>
R2003-17	Authorization to acquire, dispose, lease, and transfer certain real property interests by negotiated agreement, negotiated purchase, by condemnation (including settlement), condemnation litigation, or entering administrative settlements, and to pay eligible relocation and re-establishment benefits to affected owners and tenants as necessary for the acquisition of various properties owned by BNSF and required for the Everett-Seattle Segment, the Lakewood-Tacoma Segment, and its possible extension.	09/25 /03
R99-22	Authorization to execute two contracts with BNSF - a long-term contract that will provide for BNSF to operate Sounder commuter rail service between Seattle and Tacoma (Operating Agreement) and 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).	08/26/99

### **CONSEQUENCES OF DELAY**

The above agreements are in keeping with the May 2003 Term Sheet, Memorandum of Understanding between Sound Transit and BNSF. That Term Sheet was made with the understanding that final agreements would be completed by year-end 2003.

### **PUBLIC INVOLVEMENT**

Not applicable to these actions.

### **LEGAL REVIEW**

JDW 12/15/03



## **SOUND TRANSIT**

### **RESOLUTION NO. R2003-23**

A RESOLUTION of the Board of the Central Puget Sound Regional Transit Authority authorizing the Chief Executive Officer to execute a Purchase and Sale Agreement between the Central Puget Sound Transit Authority and the Burlington Northern Santa Fe Railway Company for the purchase of real property interests required for Sounder Commuter Rail Lakewood and South Tacoma station parcels.

WHEREAS, a Regional Transit Authority, hereinafter referred to as 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, at a general election held within the Central Puget Sound Regional Transit Authority district, the voters approved local funding for Sound Move, the ten-year plan for high capacity transit in the Central Puget Sound Region; and

WHEREAS, the Sound Transit Board adopted Resolution R2003-17 authorizing the acquisition by negotiated agreement, negotiated purchase, by condemnation (including settlement), condemnation litigation, or entering administrative settlements of various property interests required for Sounder Commuter Rail service between Everett and Seattle and between Tacoma and Nisqually; and

WHEREAS, Sound Transit has negotiated in good faith with the owners of the property and reached agreement on the purchase price and other terms and conditions of the conveyance of such property interests; and

WHEREAS, in lieu of performing fair market value appraisal of the property interests Sound Transit has developed negotiation memoranda supporting the purchase price for the property interests; and

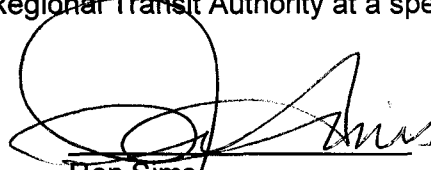
WHEREAS, Sound Transit intends to seek federal financial participation for the acquisition of the property interests and has submitted such negotiation memoranda to FTA for approval; and

WHEREAS, R2003-17 required further Board authorization before executing purchase agreements for the Everett-to-Seattle Corridor and Lakeview Subdivision properties; and

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

The Chief Executive Officer is hereby authorized to execute the Purchase and Sale Agreement for Lakewood and South Tacoma station parcels between the Central Puget Sound Regional Transit Authority and the Burlington Northern Santa Fe Railway Company and to take such actions as are necessary to close the contemplated transactions.

ADOPTED by the Board of the Central Puget Sound Regional Transit Authority at a special meeting thereof held on December 17, 2003.



Ron Sims  
Board Chair

ATTEST:



Marcia Walker  
Board Administrator