

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3	BNSF RAILWAY COMPANY,	)	
		)	
4	Petitioner,	)	
		)	
5	vs.	)	DOCKET NO. TR-070696
		)	Volume I
6	THE COUNTY OF SKAGIT,	)	Pages 1 - 57
	WASHINGTON	)	
7		)	
	Respondent.	)	
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10 A prehearing conference in the above matter  
 11 was held on July 13, 2007, at 10:02 a.m., at 1300 South  
 12 Evergreen Park Drive Southwest, Olympia, Washington,  
 13 before Administrative Law Judge ADAM TOREM.

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15 The parties were present as follows:

16 BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,  
 by BRADLEY P. SCARP, Attorney at Law, Montgomery, Scarp  
 17 & McDougall, 1218 Third Avenue, 27th Floor, Seattle,  
 Washington 98101; telephone, (206) 625-1801.

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SKAGIT COUNTY, by STEPHEN R. FALLQUIST,  
 19 Deputy Prosecuting Attorney, Civil Division, 605 South  
 Third Street, Mount Vernon, Washington 98273;  
 20 telephone, (360) 336-9460.

21 WASHINGTON UTILITIES AND TRANSPORTATION  
 COMMISSION, by JONATHAN THOMPSON, Assistant Attorney  
 22 General, 1400 South Evergreen Park Drive Southwest,  
 Post Office Box 40128, Olympia, Washington 98504;

23 telephone, (360) 664-1225.

24 Kathryn T. Wilson, CCR

25 Court Reporter

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1 SKAGIT COUNTY FIRE DISTRICT #3, by BRIAN K.

SNURE, Attorney at Law, 612 South 227th Street, Des

2 Moines, Washington 98198; telephone, (206) 824-5630.

3 S&B, LLC; WESTERN VALLEY FARMS, by GARY T.

JONES, Attorney at Law, Jones & Smith, 415 Pine Street,

4 Post Office Box 1245, Mount Vernon, Washington 98273;

telephone, (360) 336-6608.

5

CITY OF MOUNT VERNON, by KEVIN ROGERSON, City

6 Attorney, 910 Cleveland Avenue, Post Office Box 809,

Mount Vernon, Washington 98273; telephone, (360)

7 336-6203.

8 WASHINGTON STATE DEPARTMENT OF

TRANSPORTATION, by SCOTT LOCKWOOD, Assistant Attorney

9 General, 7141 Cleanwater, Tumwater, Washington 98501,

(Post Office Box 40113, Olympia); telephone, (360)

10 753-1620.

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P R O C E E D I N G S

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JUDGE TOREM: We will be on the record in

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Docket TR-070696. This is the BNSF Railway Company,

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Petitioner, versus Skagit County, Respondent, filed by

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the railroad company to close a grade crossing at

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Hickox Road in the City of Mount Vernon in Skagit

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County.

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My name is Adam Torem. It's T-o-r-e-m. I'm

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an administrative law judge with the Washington

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Utilities and Transportation Commission. We are

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meeting on Friday, July 13th, 2007. It is now a little

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bit after ten o'clock in the morning, and this is a

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scheduled prehearing conference.

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This came about when BNSF filed a petition on

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April 11th of 2007. The Washington Utilities and

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Transportation Commission, according to statute and

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administrative rule, gave notice of the petition to

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file and abandon and close the crossing through

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posting. That was done April 20th through May 17th of

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this year. There was also a letter that went out on

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May 7th to Skagit County as the effective governmental

22 body, and then another letter that went on out on May  
23 11th to the members of the public asking for their  
24 input. I believe there was also notice given in the  
25 Skagit Valley Herald April 20th and 21st, and today is  
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1 the prehearing conference where we are going to discuss  
2 procedural matters and get a formal hearing as required  
3 by RCW 81.53.060 and 070. We will get that matter  
4 scheduled as well as a public comment session that will  
5 take place up in Mount Vernon, I believe.

6 Notice of today's prehearing conference went  
7 out June 13th, 2007, and it invited petitions to  
8 formally intervene in the case. Public comment, of  
9 course, is also welcome throughout the case on this  
10 issue, and we anticipated a great response based on the  
11 initial items that came in, and we sent out a separate  
12 letter to folks indicating that today wasn't the day  
13 for public comment, and apparently, that was successful  
14 in communicating it. As far as I know, no one is on  
15 the bridge line this morning, and I don't see any other  
16 members of the public that want to be recognized for  
17 comment or other participation today. If I'm wrong  
18 about that, someone let me know.

19 At this time, let me take appearances, and we  
20 will start with Burlington Northern Santa Fe.

21 MR. SCARP: Bradley Scarp representing BNSF  
22 Railway Company. Also present is John Li, L-i, and  
23 he's the manager of public projects.

24 JUDGE TOREM: Mr. Scarp, if you can give us

25 the name of the firm, mailing address, telephone, fax,  
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1 and e-mail, and then we will all follow suit.

2 MR. SCARP: Bradley P. Scarp. Firm is  
3 Montgomery, Scarp, MacDougall, PLLC. Our address is  
4 1218 Third Avenue, 27th Floor, Seattle, Washington,  
5 98101. Telephone is area code (206) 625-1801. The fax  
6 is (206) 625-1807.

7 JUDGE TOREM: Thank you. Commission staff?

8 MR. THOMPSON: Jonathan Thompson, assistant  
9 attorney general. My mailing address is PO Box 40128.  
10 The street address is 1400 South Evergreen Park Drive  
11 Southwest, 98504. My telephone number is  
12 (360) 664-1225. Fax is 586-5522, and my e-mail is  
13 jonat@atg.wa.gov.

14 JUDGE TOREM: The Respondent in this case is  
15 Skagit County.

16 MR. FALLQUIST: Good morning. Steve  
17 Fallquist, deputy prosecuting attorney for Skagit  
18 County. I guess you want my information as well. My  
19 name is Stephen R. Fallquist, 605 South Third Street,  
20 Mount Vernon, Washington, 98273. Phone number is (360)  
21 336-9460, and fax number is (360) 336-9497.

22 JUDGE TOREM: Our petitions for intervention  
23 came in this week. Let me start with that for the City  
24 of Mount Vernon, Kevin Rogerson.

25 MR. ROGERSON: My name is Kevin Rogerson.

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1 I'm counsel for the City of Mount Vernon. Our mailing

2 address is PO Box 809, Mount Vernon, Washington, 98273.  
3 Physical address is 910 Cleveland Avenue. Phone number  
4 is area code (360) 336-6203; fax, (360) 336-6267;  
5 e-mail address, kevinr@ci.mount-vernon.wa.us.

6 JUDGE TOREM: The Washington State Department  
7 of Transportation filed a petition to intervene as  
8 well?

9 MR. LOCKWOOD: My name is Scott Lockwood,  
10 office of the attorney general, transportation and  
11 public construction division. I represent the  
12 Washington State Department of Transportation.  
13 Physical address is 7141 Cleanwater Drive Southwest.  
14 That's Tumwater, 98501-06503. My phone number is (360)  
15 753-1620. E-mail address, scottl@atg.wa.gov, and I  
16 don't have a fax number.

17 JUDGE TOREM: The Skagit County Fire  
18 Protection District No. 3?

19 MR. SNURE: My name is Brian Snure with the  
20 Snure Law Office. Address is 612 South 227th Street,  
21 Des Moines, Washington, 98198. Phone number is (206)  
22 824-5630; fax, (206) 824-9096; e-mail  
23 brian@snurelaw.com.

24 JUDGE TOREM: Gary Jones is here representing  
25 a variety of concerned citizens. Mr. Jones?

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1 MR. JONES: My name is Gary T. Jones, and our  
2 firm name is Jones and Smith. Our physical address is  
3 415 Pine Street, Mount Vernon, Washington, Post Office  
4 Box 1245 for mailing. Fax number is (360) 336-2094,

5 and my e-mail address is gjones@jonesandsmith.com.

6 Our office has filed two independent  
7 petitions to intervene, one on behalf of landowner S&B  
8 Land, LLC. That's inside the City of Mount Vernon, and  
9 one on behalf of Dave and Devon Boone and their  
10 company, Western Valley, LLC. That's an agriculture  
11 landowner who is outside the city limits, but both of  
12 these parties want to intervene and be represented by  
13 our office.

14 JUDGE TOREM: We will deal with their  
15 petitions for intervention in turn, but you are the  
16 representative for both?

17 MR. JONES: For both.

18 JUDGE TOREM: And I take it that they have  
19 similar interests that have no conflict to present?

20 MR. JONES: We have thoroughly explored the  
21 conflicts, and everyone is on board without any  
22 limitations on disclosure of confidences or  
23 representations to be made on behalf of these two  
24 different interests by our firm.

25 JUDGE TOREM: Excellent. Any other parties

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1 present that wish to petition to intervene at this  
2 time? So those are our appearances for today.

3 I wanted to turn next to the issues in the  
4 case and see if I can get some consensus from the  
5 Petitioner and the Respondent as well as Commission  
6 staff and any input from other petitioners to intervene  
7 as to exactly what it is we will be doing in the course

8 of this proceeding and what statutes, administrative  
9 code provisions, and other standards of law apply and  
10 who carries the burden of proof.

11 Mr. Scarp, you filed the Petition, and so  
12 typically, that burden of proof falls on petitioners to  
13 demonstrate items. When I looked at RCW 81.53.060 and  
14 the rest of that statutory provisions, it appears that  
15 this is sort of a reciprocal situation. Typically,  
16 there is someone that's filing to change the way a  
17 particular crossing is done. It doesn't particularly  
18 address a railroad petition to close a crossing.

19 Our WAC provisions do address the situation  
20 and answer back. The WAC provision in question that  
21 I'm thinking of is 480-62-150, and Paragraph 1(b) talks  
22 about closing railroad highway crossings, and it does  
23 mention when a railroad company makes a petition and  
24 cites back to those statutes. So in my reading of it,  
25 the statute itself talks about anybody but a railroad

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1 crossing taking action, but you had implied that this  
2 falls underneath that. What's your interpretation?

3 MR. SCARP: We will submit that those are  
4 revenue, if that's your question to me, and that is the  
5 framework, yes.

6 JUDGE TOREM: What's the criteria by which  
7 the Petition is to be judged? As filing it, what is it  
8 you expect to have to prove up?

9 MR. SCARP: The benefit to public safety is  
10 first and foremost standard.



11                   JUDGE TOREM: Let me ask that you use your  
12 microphone as well.

13                   MR. SCARP: If that was unclear, the benefit  
14 to public safety is the criteria by which the  
15 determination would be made.

16                   JUDGE TOREM: Mr. Thompson?

17                   MR. THOMPSON: I would generally agree with  
18 that. I think the operative language from the statute  
19 is that the public safety requires the closure, so I  
20 think it's generally true that there is some case law  
21 from the Washington State Supreme Court that's a few  
22 decades old now, but seemed to approve of the notion  
23 that the Commission weighs sort of the hazard of the  
24 crossing versus the public convenience and necessity of  
25 maintaining a grade crossing from the road authorities'

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1     standpoint.

2                   JUDGE TOREM: All right. Skagit County as  
3 the Respondent, do you agree with that general  
4 description of the issues?

5                   MR. FALLQUIST: Yes. I would generally  
6 concur that public safety is the primary criteria.  
7 Although, there are several other issues here at hand  
8 that may be ancillary to that, but I don't know if we  
9 wanted to talk about some of the things.

10                   JUDGE TOREM: Let's lay them out now so we  
11 can frame out what the issues will be, and if there are  
12 any that are a surprise or should be dealt with in  
13 another forum, we can identify that, or if it expands

14 the scope of the issues for the hearing itself. That's  
15 the purpose for today.

16 MR. FALLQUIST: It certainly is Skagit  
17 County's position that the closing of the crossing does  
18 not promote a public safety factor. In fact, it is  
19 detrimental to public safety for many reasons, and I  
20 don't know if this isn't argument.

21 JUDGE TOREM: I really don't want to hear the  
22 position so much as just issues that you expect to have  
23 fleshed out.

24 MR. FALLQUIST: SEPA compliance. Another  
25 issue that I would like to explore is the adequacy of

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1 the WSDOT study, and while not formally the criteria,  
2 but I do think that this crossing proposed closure has  
3 some social and negative economic impacts, and I'm not  
4 sure if it's in compliance with the Growth Management  
5 Act.

6 JUDGE TOREM: There may be some GMA issues  
7 raised.

8 MR. FALLQUIST: Possibly, yes.

9 JUDGE TOREM: Other intervenors to my right?

10 MR. JONES: With regard to the farm  
11 intervenors, particularly the Boone Farm has 700 cows  
12 that are within a quarter of a mile of the railroad  
13 tracks here. This is a high hazard area for flood  
14 purposes, and one of the impacts that this closure  
15 could have would be to slowing down the ability to move  
16 700 cows out of a flood area that is identified as very

17 vulnerable to flooding at a depth of somewhere between  
18 seven and fifteen feet, and we would like to have the  
19 opportunity to present that hazard through testimony  
20 and reports that have been generated by Skagit County  
21 through its hazard mitigation planning.

22 JUDGE TOREM: This would come under the  
23 greater rubric of public safety?

24 MR. JONES: We think it does. I want to make  
25 sure that's understood by the other parties and by Your

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1 Honor so there is not a question later about that.

2 JUDGE TOREM: I want to ask Mr. Scarp to  
3 respond to some of these other issues and how he sees  
4 that they fit or don't fit, because when we get to the  
5 granting of petitions for intervention, it will help  
6 him to decide what objections or limitations he wants  
7 placed so that the scope of the hearing is proper under  
8 the authorities we have.

9 It would appear to me though that this is  
10 part of the greater farming issue and the animal  
11 husbandry and the responsibility of those farm owners  
12 is what you are getting at under public safety.

13 MR. JONES: That's correct. We also believe  
14 that under the general heading mentioned by  
15 Mr. Fallquist there are several subheadings, including  
16 the agencies, such at the Skagit County of Governments  
17 and their participation in the regional transportation  
18 planning organization.

19 This organization, or these two organizations

20 working together with Skagit County and Mount Vernon  
21 have developed comprehensive plans for transportation,  
22 and this petition and the opinion of the intervenors  
23 insufficiently accounts for the service transportation  
24 needs and the safety of the public using the nonrail  
25 surface transportation.

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1 I guess what I'm getting at here is that we  
2 have reason to think that the Washington State  
3 Department of Transportation has two very different  
4 agendas in its rail closure representations in this  
5 proceeding and its plans for Interstate 5, which is a  
6 major interchange, we believe is scheduled within the  
7 reasonably foreseeable future for expansion, and that  
8 there would be a clear conflict between the  
9 availability of this overpass at Interstate 5 for  
10 agriculture users particularly but also for heavier  
11 trucks and that sort of transportation use, which is  
12 typical of this south Mount Vernon area, and that there  
13 would be a clear conflict between closing this crossing  
14 and achieving the public benefits from expanding the  
15 Hickox Road interchange and using the existing  
16 infrastructure with the Department of Transportation  
17 will cost millions of dollars.

18 JUDGE TOREM: So part of that growth  
19 management and socioeconomic issues deal with  
20 potentially declines in levels of service of those  
21 roads in the area.

22 MR. JONES: I think the levels of service I

23 understand is an issue, but I think what's really at  
24 stake here is continued viability of agriculture land  
25 that's in the corridor bounded by the Skagit River and

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1 the upland and is cut by Interstate 5, the rail line,  
2 Old Highway 99 South, and so what you have here is  
3 really the only practical place for farm equipment and  
4 animal transport and harvest of crops to get over the  
5 freeway to maintain the commercial viability of ag land  
6 that is on the east side and west side of Interstate 5.

7           If you don't maintain this particular  
8 crossing, it's going to have a very serious adverse  
9 effect on the commercially significant ag interests  
10 that are in this immediate area, and so we want that  
11 issue to be presented to the Washington Utilities and  
12 Transportation Commission, and we believe that it has  
13 relevance to safety, but it may go beyond the strict  
14 interpretation of the word "safety," but it certainly  
15 does include the safety of agriculture equipment, such  
16 as big trucks full of cattle, harvested potatoes,  
17 getting equipment to and from two sides of the freeway  
18 for spring cultivation.

19           JUDGE TOREM: Mr. Scarp?

20           MR. SCARP: In response to Mr. Jones and also  
21 to Skagit County, I believe that the Respondent county  
22 agreed that public safety is the primary criteria, and  
23 as I would only echo Mr. Thompson's comments that is,  
24 and the case law will hold, and that will be the focus  
25 of, I would say, not only the discovery of the hearings

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1 and the determination, and I don't want to lead into  
2 the arguments themselves. With regard to SEPA  
3 compliance, if they are talking about the broader  
4 siding track project, that's something that's not  
5 before the Commission on this petition. What we are  
6 talking about here is the criteria base for the closure  
7 itself.

8           As for alternatives, I would agree with the  
9 County that that's part of the debate, and that's  
10 certainly among the criteria that will be discussed.  
11 Although I'm not certain exactly how far that scope was  
12 that he was alluding to. Certainly we've put in our  
13 materials that the alternatives include a road that's a  
14 mile south and another one a mile and a half north and  
15 what those crossings and what will be involved. If the  
16 scope of that issue is beyond that, then I'm not  
17 exactly certain what it entails, but we would concur  
18 that that would be part of this determination.

19           Negative social and economic impacts, to a  
20 limited extent, there has been some materials that  
21 have been somewhat perspective in their outlook, and  
22 again, what's the existing public benefit, I think, is  
23 part of the equation and part of the determination, but  
24 insofar as it gets into other things. The Growth  
25 Management Act, I would say that insofar as they are

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1 trying to bring that in as a competing policy, I would  
2 only say that it is part and parcel of the public of

3 benefit, and that will be part of the discussion and  
4 part of the hearing.

5           With regard to the flood plain hazard, there  
6 has been a fair amount in the materials regarding  
7 public safety. To the extent that that contemplates  
8 cattle and removal in the instance of a flood, I guess  
9 I'm hard-pressed to say that it wouldn't be part of the  
10 discussion. However, I think it's cumulative of the  
11 overall access issue with regard to public safety and  
12 what that issue is in general in the studies that are  
13 implicated.

14           The larger question of Interstate 5  
15 expansion, I'm not sure how that's relevant to --  
16 that's a perspective agenda that has been asserted that  
17 is part of the WSDOT competing agenda. I wouldn't say  
18 that for purposes here what's perspective and what's  
19 politically likely, I think is speculative, and we  
20 would certainly characterize that as outside what we  
21 are trying to do here in the issue of public safety.  
22 Again, we are not talking about a broader siding issue.  
23 We are talking about the closing of a crossing. I  
24 guess that's the most important point I would make.

25           JUDGE TOREM: Perhaps the obvious public

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1 safety intervenor we have is the fire district. Let's  
2 hear from them as to their view. What I'm looking  
3 today is to get all these issues out, consider them,  
4 and maybe we have some consensus on how big the  
5 umbrella is. I recognize that the socioeconomic issues

6 and what we have now is what we like issue has  
7 characterized some of the petitions that have come in,  
8 and there is a variety of reasons why the stakeholders  
9 and landholders have come to like that crossing, but if  
10 our statutory mandate is public safety as the main one,  
11 then we will have to restrict testimony in some way,  
12 shape, or form, and I appreciate the concessions where  
13 the Petitioner sees that there are arguably directly  
14 tangential relationships between the flooding issues  
15 and the public safety issue, the SEPA issue, is a bit  
16 intriguing to me whether or not there is some SEPA  
17 documentation that has to be undertaken. I'm not aware  
18 there is necessarily. There may be or there may not  
19 be. I haven't done the direct research into that to  
20 look, but I looked at the issue and thought, let's  
21 flush it out today.

22 And as for some of the responses, Mr. Scarp,  
23 that you've made, if the petitions to intervene are  
24 granted later today, then I would entertain requests  
25 for filing of motions to show how these competing

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1 statutory schemes are thought by intervening parties to  
2 be relevant and necessary for this proceeding at this  
3 forum and give legal briefing a chance to come back on  
4 that.

5 We may say that today we will set up a  
6 schedule for saying this is the basic bounds of the  
7 issues, entertain some motions and briefing on the rest  
8 and get that together in a second prehearing conference



9 to finally determine and have a ruling from me as to  
10 what we will or will not take up at the hearing on the  
11 merits, but I want to at least say that's the purpose  
12 of this discussion, and I don't know. Perhaps we will  
13 come to some consensus and close that discussion today  
14 and the Prehearing Conference Order will set it  
15 finally, and perhaps we will have motions to say that  
16 the GMA or other SEPA issues require further expansion  
17 of that, but I'm not sure that I'm prepared to rule on  
18 that today without some further dispositive case law or  
19 other preparation, and perhaps I could have done  
20 earlier.

21 MR. FALLQUIST: If you would like, I could  
22 respond a bit to Mr. Scarp.

23 JUDGE TOREM: Just briefly, and then I want  
24 to get back to Mr. Snure.

25 MR. FALLQUIST: Thank you. Skagit County has

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1 no objection to any of the intervenors, Mr. Jones'  
2 clients, Fire Protection District No. 3, or the City of  
3 Mount Vernon. We are supportive of their intervention.

4 It also raises a question. I'm not exactly  
5 sure why Skagit County was named as the Respondent.  
6 This crossing is, in fact within the City of Mount  
7 Vernon city limits, so there is some jurisdictional  
8 issues there, and that in part is why the Growth  
9 Management Act is relevant.

10 JUDGE TOREM: Commission staff may have some  
11 insight as to how the naming of the parties was done,

12 and I know there was some in-house discussion about  
13 locating an appropriate representative for both  
14 governmental agencies. It may have been you were  
15 easier to find at the time.

16 MR. FALLQUIST: Insofar as public safety, the  
17 County certainly supports the City and the Fire  
18 Protection Districts' efforts with respect to emergency  
19 response times, and the closure would impair County  
20 flood-fighting response capability in that area, so  
21 that's a concern of the County.

22 JUDGE TOREM: Mr. Snure, for the Fire  
23 Protection District?

24 MR. SNURE: Thank you. Certainly the Fire  
25 District's primary issues are tied up in the public

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1 safety concept. I would just reemphasize that the  
2 flood plain issue is a big issue to the fire district  
3 both in relation to their response times from their  
4 testing stations -- I think that will be covered in the  
5 public safety issue.

6 In regards to the SEPA, although I have not  
7 looked at how SEPA applies to a railroad crossing, I do  
8 believe that SEPA is directly relevant to the public  
9 safety issue in respect that under most SEPA processes,  
10 whether it be a building development, a city  
11 annexation, a fire district annexation, part of the  
12 SEPA process addresses public safety ability of service  
13 levels to be maintained and response times, so from the  
14 fire district's perspective, I think SEPA is an

15 appropriate issue as it relates directly to the public  
16 safety.

17 JUDGE TOREM: From the Department of  
18 Transportation's perspective, which I know is joining  
19 in support of the Petition to close and has its own  
20 perceived competing interests in what it's doing on the  
21 roads and the rails.

22 MR. LOCKWOOD: Thank you, Your Honor. I  
23 would simply echo what Mr. Thompson and Mr. Scarp have  
24 said with respect to the more focused issues in this  
25 tribunal. I frankly have a difficult time seeing how

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1 SEPA or the Growth Management Act issues, which would  
2 in my mind perhaps address the greater project of the  
3 construction of the siding but would not address the  
4 more narrow issue before this Commission, which is  
5 really limited to the public safety issues regarding  
6 the closure of the crossing. Again, I'm very skeptical  
7 at this stage that those issues are really relevant.

8 JUDGE TOREM: Mr. Thompson, first with the  
9 SEPA issue, has there been any documentation taken up  
10 with DNS or anyone in response to the Petition?

11 MR. THOMPSON: Staff is signaling no to me.  
12 I do know in the past it was thought necessary that  
13 there should at least be some process. If the Petition  
14 called for, for example, the removal of pavement from  
15 the crossing surface and, say, the construction of two  
16 cul de sacs at the end of dead-end streets that that  
17 might at least require -- I don't know if the right

18 term is a determination of nonsignificance or something  
19 along those lines. That's one SEPA issue.

20 I think another one, and if this is what  
21 parties are talking about, the environmental review for  
22 actually the construction of a new siding, I think that  
23 that would be outside the scope of what would be  
24 properly before the Commission in this case. Actually,  
25 I think it's necessary to determine a lead agency for

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1 purposes of the other SEPA review, which is any  
2 construction that would be necessary as a result of  
3 whatever the Commission orders under the Petition.

4 JUDGE TOREM: With the extent of research I  
5 did was to pull a copy of our WAC, which is Chapter  
6 480-11, which is simply incorporated the regular SEPA  
7 rules and designated our director of regulatory  
8 services as our responsible official. So I would  
9 imagine that it would be worth seeking out a letter  
10 from that person and getting it into the record as to  
11 his or her opinion from the UTC as to the distinction  
12 between those two chicken-and-egg issues and how  
13 related they might be to this and taking at least the  
14 UTC position, so if they are declining to take any  
15 action as a Commission that that could be appealed by  
16 the other parties that take issue with that in setting  
17 up some final agency action as to SEPA does or do not  
18 apply to which of these two interrelated or linked the  
19 building of the crossing siding and the closing of the  
20 crossing in turn. Mr. Scarp, is the building of the

21 siding to occur only after the closing was done?

22 MR. SCARP: A portion of that is done. It's  
23 a WSDOT funded project, much broader project than what  
24 we are addressing here. There are some concerns about  
25 getting the ducks in a row to make sure of various

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1 things from a safety standpoint of how that will  
2 proceed, but to answer your question, my understanding  
3 is permits are being finalized.

4 JUDGE TOREM: Mr. Lockwood, is there SEPA  
5 proceedings and documentation involved in that separate  
6 process?

7 MR. LOCKWOOD: The Department is confident  
8 that it has complied with SEPA with respect to the  
9 bigger project, which would include the closing.  
10 Compliance with SEPA, obviously, we have to comply with  
11 SEPA and we have complied with SEPA.

12 The concern I have here is that we not  
13 litigate to SEPA compliance with a forum that doesn't  
14 have jurisdiction over SEPA. Obviously, there is a  
15 risk that we would have inconsistent decisions. It is  
16 important to draw the distinction between the siding  
17 project as a bigger project, which is really, I don't  
18 think, before the Commission, and the narrower issue of  
19 the crossing closing, which is the proper issue here.

20 JUDGE TOREM: Please don't let me give an  
21 impression that I'm trying to take a broader roll here.  
22 I just want to sort it out so that all the parties that  
23 are here that will be reporting back to various members

24 of the community can see the diversity of the issues,  
25 but that we can clarify what we will be presiding over

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1 and the correct topics for discussion and our public  
2 comment discussion as well as for litigation here, and  
3 if there is an alternate issue with what SEPA has  
4 covered that sound correct from my experience, but  
5 again, I haven't done the research, so I don't want to  
6 foreclose --

7           What I'm looking at from the judicial  
8 standpoint is I don't want to overlook SEPA and find  
9 out down the road after we've issued a decision that an  
10 appeal comes up and sends us back to where we should  
11 have been today and finds out now we have to do SEPA  
12 and start over. That doesn't serve our agency nor  
13 Mr. Scarp's client or the rest of us. I don't want to  
14 waste anyone's time by doing this twice. That's why  
15 I'm taking this approach.

16           MR. LOCKWOOD: You did ask Mr. Scarp about  
17 whether the department -- I think the Department's  
18 preference is to have the issue of the crossing decided  
19 before it proceeds to that portion of the project, but  
20 I suppose that would depend on how long it take.

21           JUDGE TOREM: Understood, and we will talk  
22 about a schedule later this morning as well and a  
23 likely idea of how this proceeding will go and the time  
24 lines on how long the discovery will take and such.

25           From the City, I did not get any further

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1 inputs. Have the other issues that the City would be  
2 interested in been adequately covered?

3 MR. ROGERSON: I think the City would like to  
4 make a record of this, Your Honor. First off, the City  
5 filed a petition to intervene in writing on Monday,  
6 July 9th. In that petition, we raised several issues I  
7 think have been reflected here. I think in the sake of  
8 clarity, I want to make it clear that under the inquiry  
9 of whether or not we wish to broaden the issues, I  
10 responded in the negative, but it was a  
11 counterintuitive response because no issues were yet  
12 ordered, so I was awaiting here to orally amend that  
13 petition, and we would make that motion at this point.

14 Factually, several years ago, the crossing  
15 was incorporated within the City limits with annexation  
16 that occurred in 2003 or 2004. I can give you an exact  
17 date later. The issues we believe obviously a large  
18 authority under RCW 81.53.060 would control, and that  
19 identifies what the state legislature and the public  
20 safety requires the closure.

21 Under that issue, the Commission has  
22 previously made a factor test that included the amount  
23 and character of travel, availability of alternative  
24 crossings, whether the alternative crossings are less  
25 hazardous, the ability of alternative crossings to

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1 handle any additional traffic that resulted from  
2 closure, and the effect of closing and crossing on  
3 public safety factors, such as fire and police control.

4           As a factor test, it's not exclusive of other  
5 factors as long as they are relevant to that standard  
6 that was set forth in the statute. However, there are  
7 other state authorities at play here. The state  
8 Environmental Policy Act mandates that any action  
9 characterized that is not categorically exempt by  
10 government has to go through a SEPA process.

11           I think the first threshold issue is whether  
12 or not this is an action that is categorically exempt.  
13 It is the City's position that it is not, and previous  
14 rulings by this commission have required a SEPA  
15 threshold determination for rural closures. There was  
16 one case, if the Court would like a citation, in Skagit  
17 County, in which a mitigated determination of  
18 nonsignificance was issued, and that would be  
19 TR-940282, and there were a multitude of crossings that  
20 were petitioned by Burlington Northern Railroad.

21           Furthermore, SEPA requires should the  
22 threshold determination of whether or not SEPA is  
23 triggered would require that any project and the  
24 determination be linked. It can not be separated under  
25 that state authority. Therefore, any action by closure

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1 or by the creation of a side channel or side track  
2 would have to go with the SEPA process together. You  
3 are not allowed to split the process, in other words.

4           I think another issue would be what is the  
5 action, and it's worthy to note that in the petition  
6 that not only closure was indicated as an action but



7 the creation of side channels, and that is the petition  
8 to the Commission, and that is the action potentially  
9 that we have to explore what environmental impacts.

10           There is a further issue, and that is the  
11 Growth Management Act. Cities and counties, Skagit  
12 County and the City of Mount Vernon, is required under  
13 RCW 36.70(A) to plan under the Growth Management Act,  
14 and there are policies set forth, and any type of  
15 action needs to be consistent with the Growth  
16 Management Act. The City has to as a condition of  
17 planning under that authority create a transportation  
18 element to its comprehensive plan. Any action that's  
19 inconsistent with the City's comprehensive planned  
20 transportation element may be characterized as a  
21 violation of the Growth Management Act, and I think  
22 that issue needs to be presented.

23           JUDGE TOREM: I've recently through my work  
24 with the energy facility site evaluation counsel in  
25 Kittitas County have had similar arguments from the

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1 County and the State, in this case the City, County,  
2 and State, as to what impact the State decision might  
3 have on the Growth Management Act and whether or not  
4 these statutes that came about in the last few decades  
5 and how they read or planning with statutes that have  
6 preceded them in origin, whether they've overruled, and  
7 I appreciate the concerns that local governmental  
8 bodies have when the State seems to act without regard  
9 for other directions that its given.

10 I would be interested in further discussion  
11 on that at an appropriate time. Here I'm not certain  
12 that we are the right forum, and I'm not certain that  
13 the Growth Management hearing board would have any  
14 jurisdiction to take up an alleged violation of a plan  
15 that you adopted, whether in county or city, a  
16 violation that's caused by another government agency.  
17 It's an act taken by the city or the county in  
18 violation of its own. Clearly citizens can appeal  
19 that, but here, I'm not certain that it could give rise  
20 to a cause of action that could cause trouble legally  
21 for the County or City.

22 I do see where it would be frustrating for  
23 the best laid plans of the City or the County to be  
24 trumped by another governmental agency; in this case a  
25 railroad company that's working with the Department of  
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1 Transportation at odds with the City's planning. That  
2 may just be a social factor that comes under "welcome  
3 to the government," but I do recognize the concern.

4 I'm not sure that I have any jurisdiction or  
5 that this is the forum to knock that whole issue out in  
6 a way that can be decided. It can be aired and a  
7 record created, but I'm not sure a decision can come  
8 from the Commission. If it's not under 81.53,  
9 Commission may not be able to do anything.

10 MR. ROGERSON: I recognize that there might  
11 be definite motion practice later on in responding to  
12 those issues, but the City would like to preserve the

13 issues so we can litigate them later on in a motion  
14 practice is appropriate. To find out where the  
15 appropriate jurisdiction may lie, should we find that  
16 the action could be a violation of the Growth  
17 Management Act.

18           There are several other elements to the  
19 Growth Management Act that the City has further  
20 concerns with and would like to raise issues as. One  
21 is there is a policy sets forth in the Growth  
22 Management Act to preserve that property characterized  
23 as agriculture property of long-term commercial  
24 significance. Mr. Jones represents clients who are  
25 actually engaged currently in providing agriculture

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1 activity. If the issue would be does the closure or  
2 the creation of the side channels and the closure then  
3 violate the preservation of that natural research  
4 facility Growth Management Act identifies as a policy  
5 to promote. Third, it's also been identified that  
6 there is a policy to prefer critical areas. Flood  
7 plains are identified as a critical area under the  
8 Growth Management Act.

9           JUDGE TOREM: Is this particular flood plain  
10 identified by a critical area ordinance by either the  
11 County or the City?

12           MR. ROGERSON: I can't testify to that today.  
13 My belief is that this is within at least a  
14 hundred-year flood plain. We have flood plain maps in  
15 the City and zoning designations, what's the nature of

16 the critical area. We would like to preserve that  
17 issue to further litigate whether the closure of this  
18 would prevent us from preserving the critical area,  
19 which is the flood plain.

20 I believe the last issue would be what is the  
21 action under SEPA. Is it either closure or when a  
22 petition is filed by Burlington Northern that includes  
23 within the petition action of the creation of a  
24 project. Does SEPA require that the lead agency  
25 explore the probable adverse environmental impacts

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1 potentially, cumulatively? That would occur from that  
2 action.

3 JUDGE TOREM: I appreciate the full airing of  
4 the issues, and I think we've heard from all parties  
5 and petitioners to intervene today as to the potential  
6 issues. It appears that there is consensus at the very  
7 least that the standard set out in 81.53.060 talks  
8 about allegations that have to be approved. The words  
9 are "public safety requires," and in this case, it's  
10 the closing of a crossing.

11 So that appears to be the primary issue.  
12 Whether it's the only issue that we have jurisdiction  
13 of here at the Commission I guess remains to be  
14 decided. That's the only one directly mentioned in the  
15 statute, so there is a strong indication that that will  
16 be the focus.

17 The other items I'm intrigued as to whether  
18 or not SEPA, particularly with your provision of a UTC

19 docket number that did this in apparently 1994. It was  
20 a TR-94. So somewhere in the last few decades, SEPA  
21 has been held applicable or the Commission acted as  
22 such. Mr. Thompson, I won't put you on the spot today,  
23 but I'll ask at some point that we get the Commission's  
24 input as to whether it intends to do anything with  
25 this, and I know it hasn't been thought of yet today,

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1 and we will have to come back at another session with  
2 the Commission's response.

3           What I'm thinking is that it's probably  
4 likely to be helpful for us to shift gears now to the  
5 petitions for intervention and sorting out whether  
6 there are any objections to intervenors that have filed  
7 with the Commission and from the petitioner and  
8 granting them in one form or another or denying them  
9 today, and then setting up perhaps a meeting between  
10 all parties to sort out the SEPA issue and then come  
11 back and give a report to me within the next couple of  
12 weeks as to where we are so that if there is a need for  
13 a briefing schedule, that can be determined.

14           It may very well be that the Commission will  
15 look at its previous history in this, determine that  
16 SEPA does or does not apply or look to the Department  
17 of Transportation and suggest that they be the lead  
18 agency and their existing SEPA process should guide and  
19 rule this process, and I don't know what the County or  
20 City have been involved with in SEPA, whether  
21 jurisdictionally asking to be the lead agency in some

22 way, shape, or form, or if they have participated  
23 already in the SEPA process that exists.

24 That's one subissue, and, Mr. Scarp, I'll  
25 entertain any guidance that you would like as the  
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1 petitioner how this best serves at least a more  
2 streamlined approach to get to that issue. If you  
3 think I'm off base, please tell me.

4 MR. SCARP: Not at all, Your Honor. What I  
5 would like to say first and foremost is that the larger  
6 issue, and this is to address Mount Vernon's position  
7 to intervene, and I don't know that this is shared  
8 throughout, but to the extent that it is, then it would  
9 be considered duplicative, but assuming that Mount  
10 Vernon is the voice, what I heard a couple of times was  
11 that this petition somehow invokes the siding project,  
12 and I heard "side channels" referred to, and I would  
13 assume that Mr. Rogerson is referring to the reference  
14 in the Petition that talks about the siding project  
15 benefiting passenger rail and would suggest to the  
16 Court that that is only by reference to understand the  
17 context by which this closure, the petition for  
18 closure, has been made. There is not a petition before  
19 this commission for a siding track, and I just want to  
20 make that point clear because it invokes countless  
21 issues, apparently, so I just want to make sure we are  
22 on the record.

23 With regard to the requirement and  
24 understanding your comments to Mr. Thompson to make

25 inquiry, to the extent that SEPA is invoked or there

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1 are requirements with regarding to the construction  
2 that would be required for closure itself, guardrails  
3 and such, or if it's a determination of  
4 nonsignificance, I think that could be addressed rather  
5 directly and simply.

6           The issues of the intervenors represented by  
7 Mr. Jones, our suggestion and our position would be  
8 that it's under the rubric, the broader rubric, and I  
9 think Mr. Jones said as much, of public safety, and it  
10 would seem to me his clients may be witnesses as  
11 opposed to intervenors, and they may add to the  
12 commentary and provide evidence and testimony regarding  
13 what those issues are, but I'm just concerned that we  
14 are cumulative here to have another party. That's my  
15 position with regard to Mr. Jones' clients.

16           With regard to Mr. Snure and the fire  
17 department, I think that fairly invokes, and I'm trying  
18 to be reasonable here, but I'm going to say we object  
19 to all the interventions, as a practical matter, it  
20 invokes emergency response, and I think those issues  
21 are invariably going to be part of this determination,  
22 so I'm not going to stand here and make a longer speech  
23 about it.

24           I think that you've hit the nail on the head  
25 regarding Growth Management Act, and to the extent that

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1 we are invoking something that's far outside what we

2 consider the narrow limits of this petition, I don't  
3 know if the County is not in a position to raise that,  
4 then if Mount Vernon has a standing. Then again, it's  
5 our position is it's not there, but for purposes of  
6 intervention, I would only make the same pitch that  
7 that could come with regard to witnesses brought in by  
8 the existing respondent.

9 JUDGE TOREM: The standard set out by WAC  
10 480-07-355(3) is simply that petitioners to intervene  
11 demonstrate a substantial interest in the subject  
12 matter of the hearing, which we are sorting out today,  
13 or if their participation is in the public interest.

14 MR. SCARP: Your Honor, I won't go so far as  
15 to say. I'm only talking about time and duplication.

16 JUDGE TOREM: I understand. It may be a  
17 number of the petitioners have overlapping issues, but  
18 I don't want to be so quick as to say the individual  
19 interests that are before us today and petitioning to  
20 become a part, certainly, it doesn't appear that any of  
21 them are pro se and will slow down the proceedings by  
22 not being sophisticated enough to participate at the  
23 right level. That becomes an issue at times.

24 What I looked at, Mr. Scarp, is if they meet  
25 the definitions here, substantial interest in the

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1 subject matter of the hearing, if there is duplication,  
2 then I may direct that one intervenor become the lead  
3 on a particular aspect of the issue or direct that they  
4 work together and pool their witnesses together so that



5 there is not that sort of duplication. I'm not sure  
6 that just because six parties, each distinct in their  
7 own, share the same interests that they have to be  
8 disclosed one at the expense of the other. I don't  
9 interpret the Administrative Procedure Act or our own  
10 rules to require such a ruling.

11 I'm also respectful of the fact that I don't  
12 want to waste my commissioners' time with an appeal if  
13 I were to deny intervention. Certainly I think the  
14 Commission's direction and most government agencies is  
15 to expand participation as much as possible so that the  
16 public process is whole and complete and thorough, and  
17 if it's cumulative, they will leave it to me to govern  
18 the way the proceeding is run to keep it efficient.  
19 I've done that successfully in the past in other large  
20 proceedings. I'm hoping to do that as well. I just  
21 want to make sure the intervenors recognize that I  
22 don't concur if one has a similar issue that one could  
23 adequately represent all the diverse issues at the  
24 table, so I don't want to suggest that I'm not hearing  
25 your concerns, but I think there are other ways to

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1 address them than denying the petitions to intervene.

2 Do you feel from your client's perspective  
3 that any of these folks don't have a substantial  
4 interest in the public safety requirements of this  
5 proceeding?

6 MR. SCARP: With regard to Mr. Jones' client,  
7 the LLC, and I apologize, Your Honor, the intervention

8 came in recently.

9 MR. JONES: S&B Land, LLC, is on the east  
10 side of the railroad between Old 99 and the railroad  
11 tracks. That would be one. The other one is the  
12 farmer, who is also an LLC. I don't know which one you  
13 have in mind.

14 JUDGE TOREM: I think he was just trying to  
15 remember the names.

16 MR. SCARP: S&B, I believe, is the name, and  
17 yes, Your Honor, we do take the position that they do  
18 not have an interest that is characterized within the  
19 criteria of public safety. That will be the  
20 determining factor or primary factor here. Mindful of  
21 your comments, Your Honor, we've stated our position,  
22 and I'm not going to make the same pitch again with  
23 regard to the Boones.

24 JUDGE TOREM: I think it's the same position  
25 that these individuals are not appropriate to intervene

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1 on the public safety issue. I just want to be clear I  
2 understand. You stated you are opposed to all of the  
3 petitions to intervene, but with particularity on S&B,  
4 you don't find that they have a substantial interest.  
5 Is that the same opinion as to the Western Valley Farm,  
6 LLC?

7 MR. SCARP: Mindful of your comments, Your  
8 Honor, in not wanting to take more time, people on the  
9 west side who arguably raise issues of flood evacuation  
10 and such, I won't make that argument further.

11                   JUDGE TOREM: Now I understand. Let me hear  
12 from Commission staff as to the issue on petitions for  
13 intervention if there is any position one way or the  
14 other.

15                   MR. THOMPSON: Staff would not object to any  
16 of the petitions for intervention, and I think they  
17 have stated a substantial interest in the petition. I  
18 would like to clarify that I think the consideration  
19 before the Commission is not strictly public safety.  
20 If it were solely a matter of showing the grade  
21 crossing is dangerous and that were the end of the  
22 story, then every grade crossing would be closed as a  
23 result, and that's clearly not what was intended by the  
24 statute.

25                   So I think what you have is a weighing of the

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1 hazard of having a grade crossing against the  
2 community's need for the crossing, and I think that  
3 that need brings in things other than public safety  
4 needs. It might include public safety needs from the  
5 standpoint of emergency responses and the need to  
6 evacuate in the event of a flood, for example, but I  
7 think it would also include potentially, if they  
8 weren't too speculative, it would include  
9 transportation planning-type questions within the  
10 Growth Management Act, which is not to say the Growth  
11 Management Act would trump the Commission's  
12 considerations, but those sorts of things are all  
13 relevant, so Staff has no objection to any of the

14 petitioners for intervention.

15 JUDGE TOREM: I've looked at each of the  
16 petitions for intervention, other than that of the City  
17 of Mount Vernon, which I had not yet seen today, and I  
18 was glad to see them represented today.

19 My intention is to issue a Prehearing  
20 Conference Order that's going to grant the petition to  
21 intervene certainly for the County and for the City,  
22 who both filed similar petitions. Whether the caption  
23 in this case should change so that the Respondent is  
24 there, I'll have to sort out, and at this point, it's  
25 pro forma, but if the County has a suggestion?

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1 MR. FALLQUIST: Yes, Your Honor. If you  
2 would like me to make an oral motion to bring the  
3 City -- as the crossing is, in fact, within the City's  
4 limits, jurisdiction.

5 JUDGE TOREM: I'll note that motion, and if  
6 the City wants it to be named as the Respondents.

7 MR. ROGERSON: As long as the City's motion  
8 to intervene as a party is granted, how we are named,  
9 we have no objection being named as a Respondent, as  
10 long as we are entitled procedurally to all of the  
11 discovery and witness and cross-examination as any  
12 other party.

13 JUDGE TOREM: That's my intention by now  
14 orally granting the County's and City's motions to  
15 intervene, I consider it pro forma as in the caption.  
16 It's the Railroad's petition and they are the

17 petitioner, and that's what's really important here.  
18 Certainly Commission staff is a party of right, and  
19 I'll grant the Department of Transportation's petition  
20 to intervene as well as they've fleshed out very well  
21 in their documents.

22           As to that brought by Fire Protection  
23 District No, 3, that, I believe, is a direct  
24 substantial interest in the public safety here, and  
25 given the nature of the governmental representation we

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1 have in the State of Washington to create fire  
2 protection districts, I don't believe that your client,  
3 Mr. Snure, could be adequately represented by the  
4 County or the City. They have different dogs in this  
5 fight, so that will be granted as will. Mr. Jones, as  
6 to your two clients, it appears there is no opposition  
7 to that of Mr. Boone and the West Valley Farm, and I'll  
8 grant that petition today.

9           I want to reserve a ruling that I'll issue in  
10 writing once I have a chance to review more the S&B,  
11 LLC, but I will issue a ruling on it in the Prehearing  
12 Conference Order, and if you disagree or if the  
13 petitioner disagrees, that can be appealed further or I  
14 can be asked to reconsider, but I will try to  
15 articulate on that one because it's at issue between  
16 the Petitioner and yourself, so I will make it  
17 reference back as to what those issues are, that I  
18 believe it should or shouldn't have that granted. The  
19 rest of the petitions are orally granted today, and

20 that of Smith's and Burkland's I will take up in the  
21 written order.

22 As to the issues that need to be taken up,  
23 I'm going to focus on what the statutory language is,  
24 but I'm also going to take a look prior to issuing a  
25 Prehearing Conference Order with a conditional

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1 statement of the issues at previous Commission  
2 decisions and see exactly whether the factors cited by  
3 the City that are based in statute but also in prior  
4 court rulings can be better fleshed out as applied to  
5 this situation and get a better statement of that, for  
6 you now having heard all the interested parties'  
7 concerns, and again, if there is anything that I put  
8 into the statement of the issues that's disagreed with,  
9 the standard in our prehearing conference orders is to  
10 allow folks to file a motion for clarification or  
11 change. It's the formal way of saying, "Judge, you  
12 fouled it up." I don't come with a big ego into this  
13 not having been at the Commission long enough, so I  
14 would welcome any corrections that are cast in the  
15 right light to keep us all going down the right  
16 direction here.

17 So we've taken care of the petitions to  
18 intervene as much as we can today. We've taken care of  
19 the issues as much as we can today. Let's turn to the  
20 question of discovery, and I doubt the applicability of  
21 a protective order, but let's dispense with that  
22 quickly and then turn to the scheduling matters, at

23 which point we might want to go off the record, compare  
24 calendars, come back on the record and restate our  
25 agreements.

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1 As to a protective order, Mr. Thompson,  
2 Mr. Scarp, is there any thought that there be issues  
3 that would be subject to the Commission's protective  
4 order in nondisclosure items in this case?

5 MR. THOMPSON: Typically, the types of the  
6 issues that require protective order would be  
7 competitively sensitive information, which I can't  
8 imagine there would be in this case, but I can't speak  
9 for the parties that might have that kind of interest.

10 MR. SCARP: Your Honor, I can't think of any  
11 issues, and so we would not entertain -- again, subject  
12 to what the scope of discovery is going to be and what  
13 is possibly involved in discovery, I can't imagine it.

14 JUDGE TOREM: I didn't think so either, but  
15 I've got it on my checklist, and I don't want to  
16 presume to know all about these cases. The Commission  
17 does deal with these utility rate regulations that it  
18 does apply in, clearly, and in some other cases, there  
19 may be financially sensitive information. I could see  
20 potentially discovery, whether it's relevant or not,  
21 into what the railroad's -- whether I would support or  
22 dispute over that, I don't know, but if that sort of  
23 issue and those numbers become something that has to be  
24 requested and/or protected, let's reserve that issue  
25 and not issue a protective order now.

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1           As to the discovery rules before the  
2 Commission, they are found in WAC 480-07-400, I believe  
3 in Paragraph 2(b), if my notes are consistent. Does  
4 the Petitioner want to invoke those discovery  
5 procedures for this case?

6           MR. SCARP: Well, yes, Your Honor, we do.

7           JUDGE TOREM: Does Commission staff concur?

8           MR. THOMPSON: Yes, we would concur with  
9 that. I think there is likely to be a lot of expert  
10 testimony and probably the need to request the  
11 documents' supporting opinions and things of that  
12 nature.

13           JUDGE TOREM: I have to do that formally  
14 because of the requirement that if you find one of the  
15 criteria exist under the rule, then we can invoke the  
16 discovery rule. The one I'm looking to is Paragraph 2,  
17 sub b, sub 4. This is a proceeding where in our  
18 discretion we determine the needs of the case required  
19 methods of discovery specified in this rule. This is  
20 the Commission's way of saying, This is going to be  
21 fairly more complex than a one-day hearing might  
22 normally bring, so we will invoke that rule. Other  
23 parties have any questions or concerns about the  
24 discovery process?

25           MR. ROGERSON: No objection.

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1           MR. JONES: Your Honor, I have a question  
2 about some of these issues that we've covered on GMA



3 and also related to the flood hazard. I know there are  
4 published documents that may or may not be -- they are  
5 available, but it might be useful if we could assemble  
6 those documents or the relevant portions of the  
7 documents so they could be considered by everyone as a  
8 way of speeding up the discovery or determining the  
9 relevance of things like some of these comprehensive  
10 plan policies, issues in the GMA transportation  
11 element, portion of the flood hazard mitigation plan  
12 for Skagit County that would be relevant to this  
13 proceeding, and try to get some agreement about what  
14 these public documents are and how they might relate to  
15 the evidence to be presented in the hearing. I would  
16 be willing to work on something like that, and I think  
17 it would be useful to identify issues and evidence.

18 JUDGE TOREM: It sounds to me, Mr. Jones,  
19 that you are asking that we come up with sort of a  
20 reference library or a list of officially published  
21 government documents that you are asking the Commission  
22 to take official notice of as relevant to this  
23 proceeding.

24 Whether it makes sense for our records center  
25 to electronically put those all available when they are

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1 readily available from the agencies that already  
2 publish them, I don't know. I hesitate to burden our  
3 records center here unless it's shown it's inconvenient  
4 to get those within Skagit County or other places. I  
5 think it is a good idea to come up with a list of

6 relevant government documents to be noticed and that  
7 everybody agrees they are there.

8           The question as to the SEPA and to the Growth  
9 Management Act issues and to what role they will  
10 ultimately play on the merits has yet to be sorted out.  
11 It's been aired this morning, and I'm going to craft  
12 that issues list based on the input today. In the  
13 Order, I may, or in the scheduling discussion today,  
14 give myself a deadline on which to issue the Order,  
15 give the parties a chance to come back and invite  
16 response for refinement of that. It may be an initial  
17 issues list, and that the parties will have essentially  
18 a workshop, whether it's telephonic or not, to hammer  
19 those out, and if there is still dispute as to what's  
20 relevant here, we will have a quick motion practice.  
21 I'm guessing it would be September or October. Does  
22 that address what you are looking at with those  
23 documents?

24           MR. JONES: Yes.

25           JUDGE TOREM: For those that are not familiar

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1 with the process in this commission and some others,  
2 very often to streamline the proceeding, we use what's  
3 called "prefiled testimony." So that means that your  
4 witnesses who might present give a deposition like  
5 direct exam, and that's submitted on a schedule. I  
6 think that's going to be necessary in a case like this.  
7 Mr. Thompson is nodding his assent.

8           It would appear to me that we would have

9 Petitioner file its items first, and then you would  
10 have a chance to review those, determine what witnesses  
11 you need, and we would set up a deadline together back  
12 and forth. The motion practice as to refining the  
13 issues would have to be done first, of course, so you  
14 know which witnesses you need, and then we would have a  
15 hearing on the merits, have someone be sworn in to  
16 adopt that testimony, and then open it up from the  
17 intervenors for cross-examination.

18           So if you are not familiar with that  
19 practice, that's generally what would occur here, and  
20 it saves a lot of the time of getting all of the  
21 detailed information out on the record. So it's nice;  
22 you get to create your witness record as you like it to  
23 be in writing before they ever show up here at the  
24 Commission, and everybody knows what cross-examination  
25 questions to bring and can be well-prepared, and

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1 certainly from there, it evolves into the normal  
2 litigation as to redirect and recross. Any questions  
3 about that?

4           MR. JONES: Your Honor, Gary Jones. The  
5 hearing process, it would be our request on behalf of  
6 the two intervenors that I represent that there be some  
7 portion of the proceeding is held at Mount Vernon where  
8 the public has an opportunity to come forward to  
9 testify, and that at the same time or on the same day  
10 or days that the members of the Commission be given an  
11 opportunity to see this area and kind of have a

12 walk-around view of the area that's affected, because  
13 we think that will be much better information than  
14 reading an affidavit on some of these things.

15 JUDGE TOREM: I concur. I didn't mean to  
16 exclude the idea of a public comment session, the part  
17 of the hearing process will probably be transcribed and  
18 become part of the illustrative record if not part of  
19 the adjudicatory record. That's what we've done in  
20 Ellensburg with these wind farms, and our rules there  
21 were drawn up by my predecessor here who knew that from  
22 UTC practice, so certainly that would occur.

23 A site visit I think may be in the best  
24 interest of the finder of fact. I'm amenable to it if  
25 it turns out I'm sitting alone on this and making a

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1 recommendation to the commissioners. I'm not fully  
2 certain as to the procedure whether the Commission will  
3 sit as a whole. I'm going to ask the AG here if he has  
4 an idea if the commissioners intend on this particular  
5 case to be sitting and hearing the testimony at the  
6 hearing, or if it's simply going to be an  
7 administrative law judge hearing.

8 MR. THOMPSON: Typically, Staff is not  
9 involved in that decision.

10 JUDGE TOREM: I'm asking for your advice and  
11 input.

12 MR. THOMPSON: In previous grade crossing  
13 cases that I've been involved in, it's just been  
14 handled by an administrative law judge who issues an

15 initial order, and then that would be subject to  
16 administrative review in the event one of the parties  
17 wanted to seek that, and then the record would be  
18 reviewed by the commissioners. So it would be sort of  
19 a typical administrative agency, administrative law  
20 judge proceeding with the opportunity for  
21 administrative review.

22 JUDGE TOREM: I would indicate my own  
23 amenability to do a site visit so I have better eyes  
24 on, and certainly as to whether or not a hearing should  
25 be held fully in Skagit County or partially in Skagit

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1 County, we will discuss shortly.

2 MR. ROGERSON: May I speak for the City of  
3 Mount Vernon? This is an issue of large public  
4 concern --

5 JUDGE TOREM: I'm aware.

6 MR. ROGERSON: We would provide facilities  
7 should you wish to convene the hearing in the City of  
8 Mount Vernon. We can actually provide you a courtroom  
9 if you so desire, and feel free to contact my office to  
10 arrange for that. We would echo Mr. Jones' request  
11 that any public comment be provided in the area which  
12 would be affected by this action.

13 JUDGE TOREM: And it will be. I think the  
14 Commission has made it clear that it's invited public  
15 comment, and I believe the public notice -- Ms. Hunter,  
16 correct me if I'm wrong -- the public notice to be  
17 drafted for Mr. Cupp to send out indicated there would

18 be local public comment, so we've already made that  
19 commitment on behalf of the Commission thinking that is  
20 what public process should be at its best.

21           So it's certainly not the intention that all  
22 decisions be made blindly here in Olympia but that  
23 there be some on-the-ground viewing it from the people  
24 who will be affected.

25           MR. ROGERSON: I'm not a frequent

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1 practitioner in front of the Washington Utilities and  
2 Transportation Commission. However, if there is any  
3 motion that needs to be made to have the finders of  
4 fact be the actual Commission, the City would be  
5 forthcoming with those motions.

6           JUDGE TOREM: I would invite that you think  
7 that, as Mr. Thompson has laid out, that if you do some  
8 research later and find that there is a way to  
9 essentially get direct review of the Commission, make  
10 that motion if it's supported and possible. If this is  
11 the kind of case that is dictated and is heard by an  
12 ALJ initially and then the Commission can sort out a  
13 record on it in appeal, there may not be that option.  
14 So entertain that at the appropriate time if it's  
15 supported. Let's take a break now at 11:25 and talk  
16 about calendars.

17           (Discussion off the record.)

18           JUDGE TOREM: We are back on the record a few  
19 minutes after noon. What we have done while off the  
20 record is look at Commission staff's proposed schedule

21 and realize we are not ready to go forward with a full  
22 proposed schedule to the hearing. Instead, today being  
23 Friday, July the 13th, I'm committing to issue the  
24 Prehearing Conference Order on or before next Friday,  
25 July the 20th, 2007, and my intention is that

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1 prehearing conference order will lay out the  
2 appearances of the parties today, including the ruling  
3 on petitions for intervention that I have made orally,  
4 as well as the remaining decision to be made on  
5 petition for intervention from Mr. Jones' other  
6 clients, and a written articulation affirming or  
7 denying that petition and allowing him to sort out the  
8 reasons for that, so that will allow for Mr. Scarp's  
9 clients and any other petitioners for intervention that  
10 are now parties to object or file appeals as necessary.

11 Jonathan Thompson on behalf of staff has  
12 agreed that it's appropriate for the Commission to  
13 issue a letter stating its position as to the State  
14 Environmental Policy Act, or SEPA, and determine in the  
15 format of a letter what they believe needs to be done  
16 by the UTC as opposed to other state agencies, and if  
17 Utilities and Transportation Commission is to do  
18 anything, potentially, they might issue their  
19 environmental decision-making documents. He's going to  
20 get that letter out sometime between next Friday, July  
21 20th, and the following week, Wednesday, July 25th.

22 Given the promised date of July 20th for the  
23 Prehearing Conference Order, that gives folks ten days

24 to file any objections or concerns. We are thinking  
25 that date will either be July 30th or the 31st, which

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1 are Monday and Tuesday of that week. In light of that,  
2 we are hoping that folks will get them all filed sooner  
3 rather than later. If there are objections or  
4 clarifications to my prehearing conference order, we  
5 will reassemble for a status conference at 9:30 in the  
6 morning on Wednesday, August the 1st. We will make the  
7 telephone bridge line available that day so parties  
8 that do not wish to come to Olympia for a status  
9 conference that I hope will be half, if not shorter  
10 than today's prehearing conference, they can attend by  
11 telephone as needed.

12           At the status conference, what I'm hoping to  
13 hear is an agreed proposed schedule. Mr. Scarp is  
14 going to work with Commission staff and all of the  
15 other attorneys for the parties to set out a motion  
16 practice schedule that's going to set up a reserved  
17 date on the morning of Wednesday, September the 19th,  
18 2007, at a location to be determined in Seattle, I  
19 believe, and we will sort that out among the parties.  
20 We will sort out an appropriate way to get that on the  
21 record for all arguments, but the motions will you  
22 filed, responded to, and replied to in a fashion that  
23 accommodates the various out-of-town schedules that  
24 were discussed off the record today, particularly those  
25 that involve my own military absence for duty in Korea

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1 and Mr. Fallquist's unavailabilities for a vacation of  
2 his own, and that the arguments will take place around  
3 those absences on September the 19th.

4 I would anticipate a ruling on those motions,  
5 and we anticipate those will involve issues as to the  
6 Growth Management Act, the State Environmental Policy  
7 Act, and any expansion of the issues that are set out  
8 to someone's dismay in the prehearing conference order.  
9 If there is a need to expand those, that motion will be  
10 entertained in this proceeding as well. So those are  
11 the issues I'm thinking will come in on the motions.

12 The ruling on that should be out by the first  
13 week of October. I won't give you an exact date, but  
14 the first week of October or thereabouts, and then I  
15 anticipate the proposed schedule will set out an  
16 October filing date for Petitioner and proponents for  
17 their prefiled testimony, and as expeditiously as  
18 possible, the opponents' prefiled testimony and then a  
19 rebuttal filing deadline as well.

20 We are guessing that the earliest we can get  
21 to a hearing on the merits is going to be late in the  
22 year or early next year, but I will leave that for the  
23 status conference to be firmed up, and the interest is  
24 going to be in having the hearing as soon as possible,  
25 but I don't know that there is any other way to

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1 accommodate everything we need to at this point.

2 Finally, given the unknown status of  
3 Mr. Jones' clients, which is the S&B, LLC, that they

4 will have their fate determined in this prehearing  
5 conference order, at least initially. If it's not to  
6 Mr. Jones' liking and they are denied intervenor  
7 status, he will advise us on August 1st as of his  
8 intention to appeal that ruling and the time frame in  
9 which he thinks it may occur.

10           Also from the City of Mount Vernon, there was  
11 an item that I think if they find there is a reason or  
12 a way to have the commissioners sit as a direct review  
13 here as opposed to the ALJ review followed by a review  
14 on the record of the commissioners, if there is a  
15 methodology and intention to file such a petition, you  
16 will let us know on that date as well. I don't think  
17 it will involve a question of scheduling other than  
18 their availability for the hearing on the merits, which  
19 may be different than mine, so that would be the other  
20 issue I hope you will raise if you can at that time.

21           Mr. Scarp, have I left out anything else we  
22 need to put on the record from our discussions?

23           MR. SCARP: I don't think so, Your Honor,  
24 other than public comment will fit in there, and there  
25 was a discussion about where and how that would be

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1 handled.

2           JUDGE TOREM: And I would ask that the  
3 parties let me know when they propose a date for the  
4 hearing on the merits that there will be a place you  
5 wanted to hold that. If there is any reason not to  
6 hold it in Skagit County or Mount Vernon, then you will

7 let us know that from the Petitioner's standpoint, but  
8 I think I've expressed a willingness to be there.  
9 Commission staff, anything else to add?

10 MR. THOMPSON: There is just the matter of  
11 amending the petition to name the City as the  
12 Respondent.

13 JUDGE TOREM: Mr. Scarp, you were amenable  
14 off the record that we change the Petition to be BNSF  
15 Railway Company versus City of Mount Vernon.

16 MR. SCARP: BNSF has no objection to that.

17 JUDGE TOREM: My prehearing conference order  
18 will reflect that, so hopefully, we will follow that as  
19 a guide. If other parties think I left anything out,  
20 let me know.

21 MR. SCARP: Your Honor, only that you had  
22 also referenced the stature of Skagit County will not  
23 named as Respondents still had the same rights as a  
24 party of record.

25 JUDGE TOREM: Correct. Based on their filing

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1 of petition for intervention, not a named party, and  
2 that was granted today, their procedural rights will be  
3 the same. It's a pro forma change as to the caption of  
4 the case. Other parties, anything else to add,  
5 Mr. Jones, Mr. Snure?

6 MR. JONES: Nothing further at this time.

7 MR. LOCKWOOD: Nothing, Your Honor.

8 JUDGE TOREM: I will get this order out by  
9 the end of next week and keep us on schedule. I will

10 see you all in a couple of weeks on August 1st. It's

11 12 minutes after 12. We are adjourned.

12 (Prehearing conference adjourned at 12:12 p.m.)

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