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1 P R O C E E D I N G S

2 JUDGE TOREM: It's 9:30 in the morning on
3 Wednesday, August 1st, 2007. This is Administrative
4 Law Judge Adam Torem, and this is Docket TR-070696, a
5 case before the Utilities and Transportation Commission
6 of Washington State. It's captioned BNSF Railway
7 Company as petitioner versus the City of Mount Vernon
8 as respondent.

9 Today we are gathered for a second prehearing
10 conference, and the purpose today is to go over the
11 prehearing conference order that was issued on, I
12 believe, Friday the 20th of July, which was a follow-up
13 to our previous and initial prehearing on July 13th.
14 There were two objections filed in a timely manner on
15 Monday.

16 (Pause in the proceedings.)

17 JUDGE TOREM: The issues today are the two
18 timely objections to the first prehearing conference
19 order, one filed by the Petitioner, BNSF, the other
20 filed by the Respondent, City of Mount Vernon. I will
21 say now that I think both of those will be easily
22 solved in a creation of my own inartful writing, and I
23 think we can easily address those today.

24 The other item for the agenda, as we
25 discussed before going on the record, is Mr. Jones'

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1 client who was denied intervention and getting a
2 further plan of action from Mr. Jones at this point so
3 the parties know procedurally the posture of the case,
4 and finally, I think the only other item is a schedule
5 for briefing and intentions of filing motions such that
6 we can maintain the next session scheduled on
7 Wednesday, September 19th, 2007, and identify an
8 appropriate location in Seattle for us to hold the oral
9 arguments on any motions that come in as necessary.

10 Let me take appearances at this time. On the
11 bridge line, I believe we have the attorney for BNSF?

12 MR. SCARP: This is Bradley Scarp on behalf
13 of BNSF Railway Company. I think that our contact
14 information was provided in the previous hearing.

15 JUDGE TOREM: It was, and for each attorney
16 making their appearance today, unless there is a
17 change, you can just reference what's in the record.
18 From the Respondent, City of Mount Vernon?

19 MR. ROGERSON: Good morning, Your Honor.
20 This is Kevin Rogerson, legal counsel for the City of
21 Mount Vernon, and we have no changes to our contact
22 information submitted previously.

23 JUDGE TOREM: And for Skagit County?

24 MR. FALLQUIST: Good morning, Your Honor.
25 This is Steve Fallquist, deputy prosecuting attorney

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1 for Skagit County, and I would like to actually make
2 one minor correction to my contact information. My
3 e-mail address is stephenf. I guess that was omitted,
4 but I previously notified the parties of that error,
5 but I might as well just make sure that's clarified
6 now, so it's stephenf@co.skagit.wa.us.

7 JUDGE TOREM: I will make an update to the
8 representatives list, Mr. Fallquist, and include that
9 in the next prehearing conference order so that
10 everyone has a corrected version.

11 MR. FALLQUIST: Thank you, sir.

12 JUDGE TOREM: For the Department of
13 Transportation?

14 MR. LOCKWOOD: Scott Lockwood, assistant
15 attorney general for the Department of Transportation.
16 My contact information is the same as was submitted
17 previously.

18 JUDGE TOREM: Mr. Jones, are you able to hear
19 us pretty well still?

20 MR. JONES: Yes. My name is Gary Jones of
21 the law firm Jones and Smith representing Dave and
22 Yvonne Boone and their limited liability company that
23 has been admitted as an intervenor, and I am monitoring
24 today's hearing on behalf of the S&B Land, LLC, and
25 Robert Burkeland and Richard Smith and each of their

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1 wives, but for the primary purpose of letting you know
2 their further participation will be as support for the
3 City of Mount Vernon and the Boones in their opposition
4 to the Hickox Road closure.

5 JUDGE TOREM: Excellent. Brian Snure, are
6 you on the line?

7 MR. SNURE: Yes, Your Honor. Brian Snure on
8 behalf of Skagit County Fire Protection District No. 3,
9 and my contact information of record is correct.

10 JUDGE TOREM: Commission staff is here.

11 MR. THOMPSON: Jonathan Thompson, assistant
12 attorney general, representing the WUTC staff.

13 JUDGE TOREM: Let me turn, Mr. Jones, since
14 you've raised it in your appearance today, as to the
15 S&B Land Company, which was denied intervention in my
16 initial prehearing conference order, it's my
17 understanding from what you've said now and what you
18 told me before we went on the record that there won't
19 be an appeal of that decision.

20 However, and I think I encouraged this in a
21 footnote, your clients for the S&B Land Company might
22 very well fit as witnesses to support one of the
23 opposing intervenors in this matter. That's how you
24 intend to proceed with them; is that correct?

25 MR. JONES: That's correct.

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1 JUDGE TOREM: For the record, it appears that
2 once we deal with the objections from BNSF and the City
3 of Mount Vernon as to the scope of the issues, we can
4 move on quickly to the other item on our agenda, the
5 scheduling of motion practice.

6 Let's take up, Mr. Scarp, your objection
7 first, and when I look at Paragraph's 4 and 5 of your
8 objection, if I'm correct in summing this up, the order
9 is allowing consideration of the impact of the closure
10 of the crossing on regional transportation planning,
11 and the crux of your objection was to Paragraph 10 of
12 the prehearing conference order, the second main bullet
13 of points that under convenience and necessity of use
14 of the Hickox Road crossing, I had a subbullet of
15 impact of closure on regional transportation planning,
16 and your argument, pointing to a previous docket with
17 the City of Ferndale, was UTC Docket TR-940330, denied
18 future planning as a criteria. Is that an accurate
19 summation, that you were objecting to any future
20 transportation planning?

21 MR. SCARP: I think that's a reasonably
22 accurate statement.

23 JUDGE TOREM: When I read that, Mr. Scarp, as
24 I hinted earlier, I think it was the unintended
25 consequence of using the bulleted format to lay out

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1 what I thought were issues under a larger umbrella.
2 When I reread the order, I could understand the reason
3 you wanted to be clear and file an objection.

4 What I propose to do is reissue the list of
5 applicable issues and make it clear that it is only to
6 present or current planning issues, not the future
7 planning issues which are more appropriate, in my view,
8 as to a Growth Management Act sort of issue. What I
9 wanted to do is let both you and Mr. Rogerson, because
10 this applies to his objection as well, indicate that
11 perhaps the words "including but not limited to" would
12 follow after each of the main bullets so you would see
13 that these are the general areas, like public safety,
14 convenience and necessity of use, and alternatives to
15 closure.

16 Those are the general areas, and there are
17 any number of issues that could fit within those and
18 the scope of appropriate witness testimony. The reason
19 for the specific listing was based on the discussion we
20 had in July as to what folks thought the specific
21 interests of their clients was, and here, the impact on
22 the regional transportation planning, I propose,
23 Mr. Scarp, to modify the language to say "impact of the
24 closure on existing regional transportation planning."
25 I hope that will address your objection such that it

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1 can be agreeably withdrawn and there won't be a further
2 objection to the second prehearing conference order.

3 For the other parties, my rationale on
4 putting the word "existing" is because I do think the
5 public, necessity, and convenience can be reasonably
6 thought of as announced plans that the County or City
7 may have had for transportation, levies that may
8 already be in effect on property owners to pay for
9 projects and improvements. The impact of a closure on
10 the existing process that's well down the road already,
11 so to speak, certainly could be, I think, and tell me
12 if I'm wrong, Mr. Scarp, a reasonable topic, but those
13 long-range future plans, somewhere in there is a bright
14 line that can be drawn to keep those out as irrelevant.
15 Those may be dealt with as objections that can be filed
16 to prefiled testimony or a line of questioning at the
17 hearing itself. Mr. Scarp, what do you think?

18 MR. SCARP: I think that your summation, your
19 proposal is probably a reasonable approach. However, I
20 will only say on the record that we will reserve
21 because further objection, if you will, for filing at
22 the time of written testimony or at the hearing itself,
23 what the relevance is and whether the criteria as
24 defined should be part of the consideration.

25 I believe what you are saying is that there

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1 is a correlation to the public benefit, which is
2 certainly the criteria that will be considered, but I
3 can't say as I sit here that you've hit the nail on the
4 head on where that line is that we would agree with. I
5 hope I've made myself clear.

6 JUDGE TOREM: I think that's a fair
7 statement. It's not often that I can hammer a nail
8 straight anyway.

9 Other parties, let me start with the City or
10 the County. I know this isn't their objection
11 necessarily, but it leads into their questions of the
12 growth management issues. Any comment, Mr. Rogerson?

13 MR. ROGERSON: I have a couple of comments to
14 make on from what I interpret your revisions are, and
15 this is including the worse "existing" to the impacts
16 of closure on regional transportation planning, and
17 this would be identified in Paragraph 10 of the
18 existing order, or Bullet 2.

19 I think as a first threshold issue,
20 convenience and necessity in which you've written, I
21 would think that may be more accurately stated would be
22 public convenience and public necessity of use of
23 Hickox Road crossing is maybe a more accurate statement
24 of the legal issue that's presented consistent with the
25 Washington Supreme Court case in, I think it was, 1949,

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1 and with the transportation Commission's rulings.

2 The subissue which you've listed to, we have
3 no objection to including the language, "including but
4 not limited to," and I think that's really what the
5 basis of a lot of the City's objections on your first
6 two bulleted issues. On the narrow issue of whether or
7 not it's appropriate to list as a subissue future
8 planning, it's the City's position that existing
9 codified policy considerations have been used by the
10 Commission and have been actually used in the Ferndale
11 opinion to support a closure, and that would be a
12 policy considerations related to future planning goals.

13 So in terms of the fact those are in
14 existence because they have been set forth either by
15 the state legislature or the local jurisdiction
16 planning under state legislature's mandate under the
17 Growth Management Act, I would have no objection to the
18 inclusion of "existing" with that clarification.
19 However, we would ask that that be considered in motion
20 practice with full briefing on that issue. I think
21 it's a valid legal issue, especially in light of the
22 fact that public convenience and public necessity is
23 not defined by state law, nor have I seen a real clear
24 definition in any authority through Washington courts
25 or the utility commission, and I think we definitely

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1 want to reserve that issue for motion practice.

2 JUDGE TOREM: Certainly. So let me hear from
3 Mr. Fallquist, and then we will see if we can sum up on
4 the BNSF objection and then move on to the City's
5 objections. Mr. Fallquist, if you will identify your
6 voice for the record.

7 MR. FALLQUIST: Steve Fallquist. Your Honor,
8 I have really no additional comment except that the
9 County supports the City's argument in this respect.

10 MR. JONES: Gary Jones for Boone intervenors.
11 We would observe that BNSF and the Utility and
12 Transportation Commission have committed themselves to
13 a long-term plan for closing crossings, up to 25
14 percent of crossings. This appears to be a long-term
15 planning issue for the Utilities and Transportation
16 Commission, and particularly for the petitioner.

17 It seems strange to me that there would be a
18 limitation on what can be presented by those opposing a
19 crossing that doesn't, at least, inquire into the
20 future plans of BNSF and the parallel future planning
21 that the State Department of Transportation would have
22 for its Interstate 5 corridor and for the County and
23 City to coordinate their obligations to long-term
24 commercial agriculture and urban growth in south Mount
25 Vernon, all of which intersect where the crossing of

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1 Hickox Road goes straight to the freeway and the
2 railroad line cuts across that road.

3 I would like to reinforce what Mr. Rogerson
4 said. We think that there is a place for future as
5 well as current planning in this hearing unless
6 Burlington Northern Santa Fe can be allowed, and I
7 think it would be very inappropriate to allow them not
8 to disclose and not to defend whatever their long-term
9 plans are. This is cumulative if you start closing
10 intersections, where to stop and what are we really
11 dealing with here.

12 JUDGE TOREM: Mr. Jones, let me ask that when
13 you make your comments to slow down just a little bit
14 more, and in response suggest to you that my proposed
15 rewrite on the clarification of the issues would have
16 each of those main bullet points saying, "including but
17 not limited to," and then list the subbullets.

18 Your concerns as to a cumulative impact are
19 certainly looked at, I would think, most appropriately
20 under alternatives to closure, and that the alternative
21 to closing this one may be some of the other closures
22 that are planned, perhaps even have been publicly
23 announced. One could look and say, Why not close some
24 of these other ones, or perhaps you have a different
25 crossing in mind. That would be reasonable lines of

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1 cross-examination or perhaps a separate witness that
2 your clients or another with similar interests would
3 want to present.

4 So the question here truly was the impact on
5 regional transportation planning and adding the word
6 "existing" to modify that phrase as a solution,
7 perhaps, to the BNSF objection, and it sounds as
8 though, well, no one is 100 percent on line with that,
9 no one else is intending to file a separate objection
10 to this order if that's what I do. Certainly, the City
11 is planning on filing some motions to further expand
12 the issues, but those will need further briefing, as
13 Mr. Rogerson put it.

14 Let me ask if there are other folks here that
15 want to offer comments this morning. Mr. Lockwood in
16 the room has his hand up, and then I will ask if
17 Mr. Thompson has any further input on the BNSF
18 objection, and perhaps Mr. Snure.

19 MR. LOCKWOOD: Scott Lockwood for DOT. I am
20 a little concerned about your proposal to indicate that
21 the issues are including but not limited to, because
22 frankly, I think that might have a tendency to confuse
23 issues with evidence. I think that the issues that are
24 relevant to this type of a closure hearing are very
25 clearly defined in a long line of precedent and include

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1 your main bullet points.

2 All of these other proposed, quote, "issues,"
3 are really just proposed evidence that are only
4 relevant if they tend to advance the inquiry towards
5 those primary issues, and so I really think that your
6 first cut at this in identifying three issues and then
7 subbulleting some potential evidence that might be
8 relevant to those issues would better serve the
9 efficient briefing and efficient presentation of the
10 case.

11 JUDGE TOREM: Mr. Lockwood, if I got the word
12 just "including," because I wanted to be clear that I
13 think the misreading that led to what the City's
14 objections were was that it seemed as though those were
15 the only bits of evidence that would come in underneath
16 those three main bullets, so maybe if I had the words
17 "requirements of public safety including," and then
18 have the subbullet as opposed to "not limited to." If
19 I'm hearing your concern, how can you have a limitation
20 on evidence and then say it's not limited to.

21 MR. LOCKWOOD: I believe that would address
22 my concern. We didn't have a finite set of issues.
23 That doesn't necessarily preclude presenting a lot of
24 the facts that we are hearing would be relevant, but
25 that doesn't make comprehensive planning an issue.

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1 That's evidence that would go to convenience and
2 necessity.

3 MR. ROGERSON: Kevin Rogerson for the City of
4 Mount Vernon. I think Mr. Lockwood has succinctly
5 identified what I've stated in my brief and that our
6 concern is in your bulleted issues in the prehearing
7 order on Paragraph 10, you had included the language
8 "generally limited to" and included after these
9 bullets, for lack of a better term, subbullets. In my
10 brief, I think I stated that I want to preserve the
11 ability to present all evidence that would tend to make
12 the existence of any fact of consequence to the factual
13 issues, for example, of public safety or convenience
14 and necessity, preserved, and the "including but not
15 limited to" language, I think, would be a substantial
16 step in preserving our ability to do that.

17 JUDGE TOREM: Mr. Rogerson, as to just having
18 the word including, comma, "including" and a colon at
19 the end of each of those main bullets, would that also
20 take that same step?

21 MR. ROGERSON: I believe so. I think the
22 record from this discussion is clear, that that would
23 be the intent to allow all of those other evidence that
24 a court would obviously preserve its right to make a
25 ruling on relevance to the factual issues of whether or

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1 not the crossing is required under public safety to be
2 closed and whether or not convenience and necessity
3 outweighs.

4 JUDGE TOREM: Okay. Commission staff, any
5 further guidance in this collaboration?

6 MR. THOMPSON: I guess at this phase where we
7 don't know entirely where parties are coming from, what
8 their story is going to be, what their theme is going
9 to be, it's kind of hard to know how they are going to
10 present things and how they might be relevant, so I
11 would counsel erring on the side of leaving it
12 relatively open with "including but not limited to"
13 sort of language at this point, and then we do have the
14 prefiled testimony. We will see what people present in
15 that testimony. Then we will have the
16 cross-examination hearing, and then we will have briefs
17 where people can make their legal arguments about how
18 much weight is to be given to a particular piece of
19 evidence. So I don't really see it's that critical at
20 this point to have something like a motion in limine
21 that says you cannot talk about X. I think it would be
22 better to leave it more kind of open at this point.

23 JUDGE TOREM: Mr. Snure, any input?

24 MR. SNURE: Generally, we would support the
25 City of Mount Vernon's position. I do believe, based

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1 on listening to the conversation that just occurred,
2 that the language "including but not limited to" is the
3 clearest statement that would provide for all parties
4 the ability to present broad as possible evidence, and
5 when that evidence is presented at that time, specific
6 rulings could be made as to its relevance.

7 JUDGE TOREM: Let me sum up then on
8 Mr. Scarp's objection for BNSF. His concern was on
9 distinguishing what I meant by the inclusion of the
10 language, "regional transportation planning." I think
11 I've been relatively clear, and there seems to be
12 agreement that it's existing regional transportation
13 planning, not some far-off future regional
14 transportation planning that might be required by
15 growth management laws and regulations, so I'm going to
16 modify that item there and deal with the objection in
17 that way, Mr. Scarp, and I'll only ask you and then we
18 will move on to the City, Mr. Scarp, does that address
19 your objection?

20 MR. SCARP: Your Honor, I'll just stick with
21 what I said earlier in response to a similar question
22 that I'm not going to file another objection because I
23 anticipate -- we've made our point about wanting to
24 limit the scope of the proceeding to issues that
25 directly bear on the statutory language.

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1 I guess to sum up, I think this will probably
2 be dealt with thoroughly in briefing, and so I don't
3 want to argue more about your language. I think that
4 the proposed insertion of "existing" is helpful, but I
5 will reserve further, depending on where this goes. I
6 somewhat share Mr. Thompson's thoughts about it's hard
7 to anticipate exactly what the parties are going to
8 present and how far this will go, but I guess my last
9 comment would be, it's not just existing, but when you
10 say "regional," that contemplates geographic boundaries
11 that I can't anticipate necessarily.

12 So I'm not going to worry more about the
13 language that you've used or the modification that
14 you've proposed. It sounds acceptable, but I'm only
15 saying that I think the parties will probably address
16 this, and your decision will come after the briefing
17 round.

18 JUDGE TOREM: I appreciate that, and again,
19 offer with much humility. This is my first of these
20 type of cases, and I think we are making a lot of
21 progress from where we were on July 13th when we all
22 got together and everybody just dumped a bucket of
23 issues on the table. I hope this practice today will
24 at least give everybody some guidance when they do put
25 in their prefiled testimony, and when I'm actually at a

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1 point when I'm making decisions that will impact what
2 you can present at hearings when there are motions to
3 strike and I have to be much more decisive, I'll move
4 into that role.

5 For today, I'm trying to be more facilitator
6 and make sure all the parties, whether proponents or
7 opponents of this proposed closing, can discuss what's
8 going to be out there, anticipate where they are going
9 to file something and run into an objection or motion
10 to strike it, and realize that the more I talk now, the
11 more you can guess how I might lean when the day comes
12 for a decision, and if you think I'm wrong on the law
13 or otherwise need to get more firmly grounded in it,
14 you will know what I do and don't know, so I hope it's
15 more like an open page for the rest of you as to what
16 and who you are dealing with. With that said,
17 Mr. Scarp, I appreciate it. Let's move on to the
18 City's objections.

19 Mr. Rogerson, the objection in your
20 Paragraph 4 was as to what I'll call a perceived
21 limitation in my order language of limiting the public
22 safety to the subbullet points, and I think we've
23 already said that by putting the language "including"
24 and making it clear from the context of the discussion
25 today, the language was simply inartfully drafted and

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1 had the unintended consequence of being read, and
2 again, it could be read either way as limiting that.
3 That wasn't the intent, and simply those were examples
4 of things that come under the statutory and
5 precedential topics that were specific to this case,
6 but it wasn't meant to be a firm limitation that those
7 would be the only public safety topics, and as I told
8 you earlier, my intention is to change the language,
9 modify it to "requirements of public safety including"
10 and list those other ones below. I may put "including
11 but not limited to" on that line, we'll see, but you
12 know from the intent, I hope that will address the
13 City's objection in Paragraph 4.

14 MR. ROGERSON: I believe, Your Honor, that
15 the inclusion of the clarifying word "including but not
16 limited to" would address the City's concern that those
17 items listed under your order requirements for public
18 safety do not preclude the offer of evidence that would
19 otherwise be relevant to the proposition that public
20 safety either requires closure or does not require
21 closure.

22 JUDGE TOREM: Then moving on to Paragraph 7,
23 your next boldfaced and underlined paragraph, was, I
24 think, a similar themed objection, and I think that's
25 also addressed by the same language; is that correct?

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1 MR. ROGERSON: That's correct, with one other
2 clarification that I think is substantively different,
3 and that is that I would suggest, respectfully perhaps,
4 when you use the term "convenience and necessity of use
5 of Hickox Road crossing," that is perhaps more
6 accurately stated as "public convenience and public
7 necessity of use of Hickox Road crossing."

8 JUDGE TOREM: Mr. Rogerson, what I had
9 intended was to add the word "public" at the beginning,
10 meaning that would modify that phrase, so we will just
11 put it in once, and then add the word "including," and
12 then the "impact of closure on existing regional
13 transportation planning," that would be how that would
14 read in the second order.

15 MR. ROGERSON: Again, the City reserves its
16 right to raise argument in motion that existing
17 regional transportation planning would include those
18 future plans that have been either codified by the
19 Washington State legislature or put forth through the
20 appropriate legislative planning authorities, be it a
21 city council, a county council, in terms of how they
22 wish regional transportation planning to occur, but I
23 think, again, that could be litigated in the future.

24 JUDGE TOREM: Those were all the objections
25 that I thought needed to be fleshed out today. There

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1 were some other reservations expressed in your brief.
2 I think you've already addressed those today. Was
3 there anything else in the City's objections that
4 needed further potential modifications to the issue
5 language?

6 MR. ROGERSON: Just one, Your Honor, and this
7 is perhaps more of a reservation of rights so we don't
8 have an argument of waiver later on, and that is at the
9 first hearing on July 13th, the City had raised the
10 issue that I think must be attached to any project, and
11 that is compliance of the State Environmental Policy
12 Act. We argue it has to be attached to the project of
13 substantive authority unless an exception can be shown
14 suggest that any project or any action that is not
15 categorically exempt must be attached a SEPA, action
16 must be attached to it. Therefore, we are reserving
17 our right to further raise and to continue to raise
18 objections to violations of SEPA.

19 JUDGE TOREM: That was going to be my next
20 topic. What I was looking for is on the issue
21 clarification, I think the objections have been
22 addressed. Mr. Thompson's letter went out, I think,
23 the same day as the prehearing conference order and
24 indicated -- well, Mr. Thompson, why don't I let you
25 sum up what it indicated.

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1 MR. THOMPSON: Well, in this instance, the
2 way that this agency handles this SEPA compliance
3 matters is that the responsible official is on the
4 Staff side of the ex parte wall, if you will. In other
5 words, the official is not on the commissioners' side
6 of the adjudicative process, in other words, not with
7 the judges but with the advocate side.

8 So the conclusion we came to was that the
9 recommendation should come at the point at which the
10 decision is presented to the decision makers of the
11 agency, and the first instance where that would occur
12 is when the record is complete and before the
13 administrative law judge. That was one part of the
14 decision.

15 The other part was that WSDOT appears to be
16 the logical and appropriate lead agency for the project
17 as a whole, which includes the extension of the siding
18 as well as the closing of the crossing, and there is a
19 policy in SEPA to include all aspects of a project
20 that are related to one another, so it seemed that that
21 was the appropriate thing to do is to have the impacts
22 of the closure considered along with the impacts of the
23 extension of the siding in general, so --

24 JUDGE TOREM: Do you, Mr. Thompson, or maybe
25 Mr. Lockwood could better answer, do you know the

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1 status of the scope of the existing SEPA documents that
2 I believe you mentioned in our last prehearing
3 conference, Mr. Lockwood?

4 MR. LOCKWOOD: The Department doesn't
5 contemplate expanding the scope of this project at this
6 point beyond that originally proposed at the time it
7 submitted its environmental checklist to the Department
8 of Ecology back in February, open it up for a public
9 comment. At the time public comment was closed, I
10 think they issued the DNS, so the Department considers
11 that it has complied with SEPA, and that compliance
12 would be sufficient for this entire project unless at
13 some point in time there is a significant change that
14 would require some additional SEPA work.

15 JUDGE TOREM: Mr. Rogerson certainly has
16 indicated a question of the sufficiency of this SEPA
17 work and may file motions to that effect. What I'm
18 asking more is the substance of that DNS and the
19 environmental checklist. Was the public given comment
20 ability not only on the siding but also on the closure?

21 MR. LOCKWOOD: The fact that the closure was
22 contemplated as part of a bigger project was included
23 in the checklist. The traffic study was included or
24 referenced in the checklist, so it's my understanding
25 that that opportunity to comment was provided.

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1 JUDGE TOREM: Does your client intend to
2 submit the SEPA record, from what you've described, as
3 an exhibit for this case?

4 MR. LOCKWOOD: I haven't strategized to that
5 point, Your Honor. It's certainly something we can do
6 and may have to do.

7 JUDGE TOREM: For the convenience of the
8 parties, where could they best find copies of that
9 through WSDOT or another place in Skagit County?

10 MR. LOCKWOOD: I'm not sufficiently familiar
11 to point at an existing thing. I believe Ecology
12 publishes it, and I assume it's available on Ecology's
13 Web site. However, the Department of Transportation
14 would be happy to provide that to any of the parties.

15 JUDGE TOREM: So if any of the parties have
16 not seen the existing DNS and other SEPA documentation,
17 they can contact your office and you will ensure they
18 are directed to those copies?

19 MR. LOCKWOOD: Absolutely.

20 JUDGE TOREM: I would anticipate that at
21 least for those parties that are in Mount Vernon or
22 Skagit County that the local libraries typically have a
23 copy of those and hopefully would still have one. You
24 are saying it was closed in May of this year?

25 MR. LOCKWOOD: I believe so. February, 21

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1 days.

2 JUDGE TOREM: So somewhere in the late
3 winter, early spring of 2007?

4 MR. LOCKWOOD: That's correct.

5 JUDGE TOREM: Mr. Thompson, anything further
6 on the position paper you sent out on the UTC's SEPA
7 compliance?

8 MR. THOMPSON: No, I don't think so.

9 JUDGE TOREM: So, Mr. Rogerson, I don't think
10 we need to discuss it any further today, but if there
11 is going to be a motion, I think that that brings
12 everybody up to speed on what exists, and we'll leave
13 the question of sufficiency for another day.

14 MR. ROGERSON: Correct. I wanted to make a
15 quick statement on that. The City is absolutely
16 reserving its right to raise violations of SEPA. We
17 have not to date seen any SEPA review from the petition
18 for foreclosure, and I just would note that staff's
19 responsible SEPA official, Chris Rose, has indicated in
20 a letter to Your Honor that WSDOT's checklist is
21 insufficient to the extent it does not address the
22 environmental impact of all potential construction
23 activities that might be required if the Commission
24 orders the closure of the crossing, and she cites --

25 JUDGE TOREM: It's actually "he cites."

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1 MR. ROGERSON: Mr. Rose. I have not met this
2 Mr. Rose. And there are some issues there, and without
3 seeing the original SEPA documents, I'm reserving the
4 ability to raise those at a later time.

5 JUDGE TOREM: It shall be reserved. Any
6 other issues before we move on to scheduling the motion
7 practice? I don't see any hear in the room in Olympia.

8 MR. ROGERSON: None from the City of Mount
9 Vernon.

10 JUDGE TOREM: Hearing nothing more from the
11 bridge line, let's turn to our calendars and work
12 backwards from September 19th. It appears the first
13 thing we have to figure out, Mr. Rogerson, is when your
14 client might be ready to file motions, and if there are
15 any other intervenors or parties choosing to file a
16 motion of some sort, when can those be ready.

17 MR. ROGERSON: Your Honor, I took a crack at
18 this last week on trying to get parties to come to an
19 agreement, and I think we've either reached it or close
20 to it. My computer has been down so I'm reading from a
21 stale e-mail, but I believe I sent out on Thursday of
22 last week a proposed schedule that takes into
23 consideration some of the parties' legal counsel's
24 unavailability. I guess it would be a question for
25 everybody on the phone if everybody is agreed to this

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1 proposed schedule or if we need to discuss this
2 further.

3 JUDGE TOREM: Does somebody have a copy of
4 that they can read into the record so everybody knows?

5 MR. ROGERSON: I do have an old copy of it,
6 Your Honor, and working backwards from September 19th
7 that we would have a proposed deadline for filing reply
8 briefs on September 17th; proposed deadline for filing
9 response briefs by September 12th, and a deadline for
10 filing of motions on August 28th.

11 JUDGE TOREM: So let me read that back going
12 forward in time. By Tuesday, the 28th of August,
13 essentially four weeks from yesterday, the motions
14 would come in. You would be allowing for slightly over
15 two weeks until Wednesday, September 12th, for
16 responses to be filed, and replies would be due the
17 following Monday, September 17th, and the oral argument
18 on the motions, unless the parties would move to strike
19 that as unnecessary, would occur on Wednesday morning,
20 the 19th of September.

21 MR. ROGERSON: That's correct.

22 JUDGE TOREM: Are there any parties who are
23 opposed or have a problem with that schedule?

24 MR. LOCKWOOD: No, Your Honor.

25 MR. THOMPSON: No, Your Honor.

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1 MR. SCARP: No, Your Honor.

2 MR. FALLQUIST: No, Your Honor.

3 MR. JONES: No objection.

4 MR. SNURE: No objections, Your Honor.

5 JUDGE TOREM: Thank you, Mr. Rogerson for
6 getting that done in advance. I don't have any
7 objections. It appears that I will be able to review
8 some of those before I come back from Korea and receive
9 the reply briefs when I'm at least quasiconscious and
10 walk in the office on Monday.

11 Are there any other issues for this morning's
12 prehearing conference?

13 MR. JONES: We need to establish a date and
14 time for a hearing in Mount Vernon for those witnesses
15 who wish to testify in that matter.

16 JUDGE TOREM: There are some other dates we
17 can start to look at today if we would like. Perhaps
18 it would be appropriate to ask, and much of this may be
19 influenced by the ruling on the motions, so let me ask,
20 Mr. Scarp, if you have any ideas. I know you wanted to
21 have hearing dates sooner rather than later, and I will
22 anticipate you will tell me you are ready to file your
23 prefiled testimony tomorrow. Enlighten us on the
24 petitioner's plans.

25 MR. SCARP: Well, Your Honor, I don't have a

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1 firm recollection of all of the dates that were
2 discussed at our previous prehearing conference, but we
3 want to accommodate all schedules within a reasonable
4 time frame. Insofar as your question is when would we
5 be ready to file our written testimony, or did you want
6 a broader idea of what we see for scheduling all the
7 way to hearing?

8 JUDGE TOREM: It could be both. I think
9 Mr. Thompson had a proposed schedule the last time
10 around, and you will see the procedural schedule
11 appendix to the prehearing conference order had a lot
12 of "to be determined."

13 We could address those today if it would help
14 people and confirm that schedule on September the 19th
15 when I would be able to give you an idea when I could
16 issue a decision. I'm anticipating a decision will get
17 back to you no later than October, probably right
18 around the week of October 1st, because that would give
19 me a solid 10 days to digest, catch up and get
20 something written.

21 MR. SCARP: Insofar as the petitioner's
22 written testimony, we will be ready at that time. We
23 can move forward with that in anticipation. Once we
24 know what the City's motions are and what we will have
25 to address in any restrictions or broadening of the

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1 criteria that we need to address, I think we can get at
2 that relatively soon and would probably -- we would
3 request that the schedule reflect that.

4 JUDGE TOREM: Let me ask then if it's
5 appropriate to suggest a date of Monday, October the
6 8th. That would give the parties several days with
7 whatever my ruling on motions would be. Certainly,
8 there may be some interlocutory motions appealing that,
9 but I don't know that we want to schedule in wait for
10 that or anticipate, but I would think from the
11 petitioner's side and WSDOT as well, the Monday,
12 October 8th deadline would be the soonest, counting on
13 a ruling the week of October 1st, the week before, and
14 that you could file that testimony and know what I as
15 the assigned judge have said about the motions, and if
16 you need to make any modifications to what you've
17 probably got on the drawing board for your prefiled
18 testimony.

19 MR. SCARP: That proposed date is fine. I
20 guess I would add that BNSF will go forward with the
21 criteria that we think is relevant to the inquiry and
22 provide that testimony. To the extent that we are
23 still debating the issue of the rest of the subject
24 matter, if you will, we will deal with that in
25 rebuttal. I think the state, WSDOT, will deal with

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1 some of that, so I guess for scheduling purposes, I
2 would say that we can get to the crux of our position
3 without too much delay.

4 JUDGE TOREM: So October 8th will be the
5 initial pre-filing date. Mr. Thompson, in your original
6 schedule, you had essentially a four-week break after
7 the proponent's filing.

8 MR. THOMPSON: Right, so the interval between
9 the proponent's filing and the respondents' would be
10 four weeks with the idea that that would allow time for
11 them to take advantage of the Commission's discovery
12 rules, which provide for ten-day turnaround on
13 responses to what we call data requests, but
14 essentially interrogatories and request for production
15 of documents, so it's a pretty expedited kind of
16 discovery that we have, and that's why we had thought
17 that four weeks would be appropriate there.

18 JUDGE TOREM: The date that projects four
19 weeks after October 8th is Monday, November the 5th,
20 and following up on that same turnaround, you had
21 essentially a three-week turnaround for rebuttal
22 testimony, and three weeks after that would be Monday,
23 November the 26th, which is the Monday following the
24 short week for Thanksgiving, and I hate to put a Monday
25 deadline there.

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1 My proposal would be that the rebuttal
2 testimony be given the full week to Friday, November
3 30th. That way, no one feels pressed on Thanksgiving
4 weekend to do anything but football, turkey, and
5 whatever the individual choices might be, but Hickox
6 Road might be off the table for that week. So my
7 proposal would be October 8th followed by November 5th
8 for the Respondents or opponents, and November the
9 30th, which is a Friday, for the rebuttal. Does
10 anybody have qualms or questions about the deadlines?

11 MR. ROGERSON: Your Honor, I do have some
12 qualms about this aggressive deadline. What we have is
13 a genuine issue of the latitude of the scope of the
14 inquiry that will be decided in motion practice, and in
15 large part, I believe that was framed discovery
16 requests, and it's the City's position that discovery
17 may very well take much longer than an aggressive four
18 weeks to obtain all the relevant evidence from WSDOT
19 regarding the nature of the product, its potential
20 environmental impacts, a complete history of the
21 surrounding closure, and all of those issues that would
22 be related to the hearing. I have a genuine concern
23 that that would be conducted and that we would be
24 prepared within four weeks time of your ruling. I
25 don't know if that's achievable.

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1 JUDGE TOREM: Let me suggest that it would
2 not be four weeks from the ruling, it would be five,
3 and asking you to have your testimony ready by November
4 5th gives you all of August, all of September, and all
5 of October and the first four-and-a-half days of
6 November to do that.

7 Because discovery has already been invoked, I
8 think much of what you probably want is available now
9 and need not wait for the motion practice to occur and
10 need not wait for prefiled testimony. So I hesitate to
11 allow you to characterize it as a four-week turnaround.
12 It's really a 13-week turnaround, which by any
13 standards I think is more than sufficient to
14 accommodate discovery practice.

15 If it turns out not to be and if you find
16 there are surprises in my ruling on the motions or in
17 the prefiled testimony of WSDOT or BNSF, I would
18 entertain at that time a motion to continue or extend a
19 deadline and the hearing schedule, but I don't know
20 that this is unusual for this agency or for any other
21 litigation.

22 MR. ROGERSON: Without knowing exactly the
23 scope, it's hard for me, and I just wanted to express
24 on the record, and obviously, we would seek a
25 continuance if we think we haven't fully vetted out the

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1 evidence that could lead to relevant evidence in the
2 discovery phase.

3 JUDGE TOREM: In further fleshing out the
4 schedule then beyond the prefiled testimony, the next
5 item are settlement discussions. Mr. Thompson's
6 original schedule had gone essentially two weeks after
7 the prefiled testimony was in, so we would be looking
8 at either the second week or third week of December --
9 that would be the week of the 10th or the week of the
10 17th -- to have those settlement discussions, and that
11 would be just the parties, and I could list a two-week
12 period understanding that December becomes a short
13 month after that, and some people take off a little bit
14 early, schools get out.

15 So the weeks of December 10th and December
16 17th, lumping them together and allowing the parties to
17 come up with your own schedule, as, Mr. Rogerson,
18 you've demonstrated, you can get this gaggle of folks
19 together, I encourage you look at those calendars now
20 for those two weeks and pick some days that work for
21 everybody in advance. I won't be any more specific
22 about it in the schedule other than to say those two
23 weeks will be set aside.

24 Now, the evidentiary hearing then was
25 scheduled on the original proposed schedule two weeks

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1 after settlement discussion, which puts us squarely
2 into the New Years week. I don't think we want to do
3 that. The first full week of the new year is January
4 7th. We can pick a date today, although that's pretty
5 far out, or just simply set it for that week, and
6 determine from Commission staff what facilities are
7 available in the Skagit County area and in the City.

8 I know, Mr. Rogerson, you've previously
9 offered the potential use of City facilities, and that
10 may be appropriate, but I don't want to put anyone on
11 the spot today to know what the week of January 7th
12 holds. That's what I will propose, just at this point
13 to issue the schedule for the week of January 7th and
14 do the same with the public comment.

15 I don't know how many days the hearing will
16 need to be yet. It may be that we can know more about
17 that on September the 19th after some discovery has
18 occurred and folks begin to put together at least
19 preliminary witness lists. Maybe it's not a bad idea
20 to add that item to ask folks to file a preliminary
21 witness list and bring it with them on September the
22 19th, and maybe we can have a 15-minute colloquy as to
23 how long it will take to do cross-examination of all
24 the potentially proposed witnesses and nail down how
25 many days we need the week of January the 7th.

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1 Mr. Scarp, how do you feel about the schedule
2 as proposed laying out for a hearing in January other
3 than, of course, the hearing is much later than you
4 would want?

5 MR. SCARP: A couple of things, Your Honor.
6 I don't know if we want to have the public hearing in
7 Skagit County during the flood season. I'm being
8 facetious, of course.

9 I guess in terms of the schedule as it
10 exists, I will say that January 7th seems to be the
11 next available time. I'm certainly not going to
12 advocate in the holidays. It's hard enough to get
13 witnesses, so that's fine. I do have a problem as we
14 move farther down to February and March. I personally
15 have a horrific trial schedule, so that's the only
16 concern I have as we start to move into the end of
17 February and March. I'll be in some trouble when we
18 start talking about a hearing then.

19 Secondly, insofar as the evidentiary hearing,
20 and I'm not being facetious now, in Skagit County, I
21 know public comment is up there and for valid reason,
22 and BNSF is certainly agreeable to that, but the
23 evidentiary hearing and cross-examination, it seems,
24 and again, depending on what issues are on the table,
25 that we may have WSDOT officials. We may have a number

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1 of people, and I'm not certain if Skagit County is the
2 best location for that, so I'll just throw that out
3 there.

4 JUDGE TOREM: It may be, Mr. Scarp, that I'm
5 leaning toward my prior experience with the energy
6 facility siding counsel and bringing the hearings,
7 substantive and public comment, to where the actual
8 impacts will be felt, and I recognize there are witness
9 convenience issues that occur there. Once we see those
10 witness and exhibit lists, it may be that we schedule
11 multiple days of hearings, some in Olympia and some
12 farther north, depending on the convenience because
13 certainly, Mr. Jones' clients, Mr. Snure's clients, the
14 City and the County's witnesses won't be in Olympia,
15 and I'm not sure that your witnesses are either.

16 So let's hold off on knowing for sure where
17 the location is. I'm more than open to suggestion, and
18 Mr. Thompson may have a comment now about Commission
19 practice and precedent as to where these hearings have
20 been held in the past to put on the table, but I'm just
21 picking the dates, not the locations quite yet, and we
22 will find out if there are multilocations for multiple
23 days, we can work that schedule and be flexible.
24 Mr. Thompson, is there anything to be learned from past
25 practice?

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1 MR. THOMPSON: I think I've been involved in
2 two prior such cases, and they were both located in the
3 community on the thought that it was for the
4 convenience of the witnesses.

5 JUDGE TOREM: Let me ask Mr. Lockwood. Your
6 client is here with you today. Do you have any
7 concerns about sending your witnesses up to the
8 community in Mount Vernon?

9 MR. LOCKWOOD: We could certainly accommodate
10 a hearing in Mount Vernon, Your Honor.

11 JUDGE TOREM: If there is a reason,
12 Mr. Scarp, to have parts of the hearing outside of
13 Mount Vernon, we will address that when we pick the
14 actual location, and I would anticipate we will do that
15 on the 19th of September. At least we will have some
16 discussions, and I'll expect Staff to report back on
17 what facilities are or are not available, and you will
18 work with Mr. Rogerson to find out what municipal
19 facilities can be available at no or low cost to the
20 Commission and can accommodate whatever the public
21 interest may be in this.

22 I know we have a large number of people
23 interested in the original filing and are on the
24 interested parties list. What sort of crowd we will
25 get for the hearing itself I don't know. It will

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1 probably take place during many of their work days, but
2 the public comment hearing, we will need to make sure
3 we have anticipated what size crowd and maybe even plan
4 for an overflow room that might have closed-circuit
5 television or otherwise avoid people being disappointed
6 that they can't see or hear the proceedings. If they
7 are showing up, that will be very important to them.

8 Let me add one other deadline. The hearing
9 on the motions that you see on there in Seattle for
10 Wednesday, September 19th, I'm going to add a filing of
11 preliminary witness list, and that will be that same
12 day, so bring a copy with and sufficient numbers of
13 your witness lists unless you've e-mailed them in
14 advance for all the other parties that will be present
15 if we are holding argument in Seattle. Do I need to
16 review this before we wrap up this morning, or I think
17 we have it all down.

18 MR. LOCKWOOD: Did I hear you rightly
19 indicate you still hadn't identified a facility in
20 Seattle for September 19th?

21 JUDGE TOREM: I have not.

22 MR. LOCKWOOD: WSDOT has a conference room.

23 JUDGE TOREM: Please get in touch with my
24 administrative staff and tell them what the room is,
25 and I may be able to include the WSDOT conference room

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1 as a location in the paragraph setting out the actual
2 next, the third prehearing conference.

3 Anyone have objections to the WSDOT
4 conference room? I don't know that it provides any
5 more home court advantage than anything else. I would
6 imagine the biggest question will be availability of
7 parking, and if you have any hints as to where the
8 closest lot is, what the cost of that lot might be, it
9 would help folks anticipate for planning. I doubt that
10 you validate.

11 MR. SCHULTZ: This is Jeff Schultz with the
12 WSDOT. The conference room is by the Qwest Field lot
13 in that area of downtown by Pioneer Square, and there
14 is lots of parking in the vicinity, and public transit
15 is available. It's near the Amtrak station as well.
16 We would be happy to provide directions and all that
17 information to everybody who is interested.

18 JUDGE TOREM: That would be fantastic, and
19 once we set that as a location, if you would e-mail
20 that to the parties, that would be fantastic. We will
21 make sure our court reporter gets a copy of those
22 directions, whoever that might be. Anything else for
23 consideration this morning? I don't see any here in
24 Olympia. Mr. Scarp, anything else?

25 MR. SCARP: Nothing Your Honor. Thank you.

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1 JUDGE TOREM: Mr. Jones?

2 MR. JONES: Nothing at this time. Thank you.

3 JUDGE TOREM: Mr. Snure?

4 MR. SNURE: Nothing, Your Honor.

5 JUDGE TOREM: Mr. Rogerson.

6 MR. ROGERSON: Nothing, Your Honor. Thank

7 you very much.

8 MR. FALLQUIST: Nothing further. Thank you

9 though.

10 JUDGE TOREM: It's now about 10:40. We've
11 managed to do this in one hour instead of, what was it,
12 three last time? So we are getting better and more
13 efficient, I hope.

14 I'll send you very quickly a second
15 prehearing conference order with the schedule. I will
16 look forward to seeing the motions and the responses
17 while I'm overseas and see you when I get back in the
18 middle of next month. We are adjourned. Thank you.

19 (Prehearing conference adjourned at 10:40 a.m.)

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