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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION

3	BNSF RAILWAY COMPANY,	)	
		)	
4	Petitioner,	)	
	vs.	)	DOCKET NO. TR-090121
5		)	Volume III
	SNOHOMISH COUNTY,	)	Pages 60 - 86
6		)	
	Respondent.	)	
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9           A prehearing conference in the above matter  
10 was held on March 24, 2009, at 2:31 p.m., at 1300  
11 South Evergreen Park Drive Southwest, Olympia,  
12 Washington, before Administrative Law Judge ADAM E.

13 TOREM.

          The parties were present as follows:

14

          BNSF RAILWAY COMPANY, by BRADLEY P. SCARP and  
15 KELSEY E. ENDRES (via bridge line), Attorneys at Law,  
Montgomery, Scarp, MacDougall, 1218 Third Avenue, Suite  
16 2700, Seattle, Washington 98101; telephone, (206)  
625-1801.

17

          SNOHOMISH COUNTY, by JUSTIN W. KASTING (via  
18 bridge line), Deputy Prosecuting Attorney, 3000  
Rockefeller Avenue, M/S 504, Everett, Washington  
19 98201; telephone, (425) 388-6337.

20           WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION, by JONATHAN THOMPSON, Assistant Attorney  
21 General, 1400 South Evergreen Park Drive Southwest,  
Post Office Box 40128, Olympia, Washington 98504;  
22 telephone, (360) 664-1225.

23           LYNN F. LOGEN, Intervenor, by LYNN F. LOGEN  
(via bridge line) (pro se), 15017 Southeast 43rd Place,  
24 Bellevue, Washington 98006; telephone, (425) 641-1692.

25 Kathryn T. Wilson, CCR, Court Reporter

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

2 JUDGE TOREM: We are ready to be on the  
3 record. This is Docket TR-090121. This is the BNSF  
4 petition to close the Logen Road railway grade crossing  
5 in Snohomish County. Today is Tuesday, March 24th,  
6 2009, a little after 2:30 in the afternoon, and this is  
7 Judge Torem. Quickly going to take short-form  
8 appearances, first from BNSF.

9 MS. ENDRES: Kelsey Endres and Bradley Scarp.

10 MR. SCARP: And Richard Wagner on behalf of  
11 BNSF.

12 MR. KASTING: Justin Kasting, Jim Bloodgood,  
13 and Matt Otten.

14 JUDGE TOREM: Mr. Logen?

15 MR. LOGEN: Yes. This is Lynn Logen.

16 JUDGE TOREM: Commission staff?

17 MR. THOMPSON: Jonathan Thompson here for  
18 Commission staff.

19 JUDGE TOREM: We talked on Friday last week,  
20 and I issued an order denying the request for  
21 continuance. As part of that order, there was a  
22 question of outstanding data requests, so we will talk  
23 about the status of discovery today, and then I want to  
24 inquire as to whether the parties have reached or think  
25 they are going to reach some kind of settlement, and

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1 then we will discuss the scope of the hearing, which is  
2 scheduled for a week from yesterday, talk a little bit  
3 about exhibits and perhaps cross-exam exhibits, and  
4 then any other items we need to take up. So let's turn  
5 first to the outstanding discovery matters. Mr. Logen,  
6 have you received responses to all your outstanding  
7 data requests?

8 MR. LOGEN: Yes, I have.

9 JUDGE TOREM: Thank you, Ms. Endres, and to  
10 your clients at BNSF for expediting those responses.  
11 Ms. Endres, are you aware of any other supplemental  
12 responses you think will be forthcoming prior to the  
13 hearing with these data requests?

14 MS. ENDRES: Not at this time, Your Honor.

15 JUDGE TOREM: Mr. Logen, was there any other  
16 discovery issues we need to take up?

17 MR. LOGEN: Not that I recall.

18 JUDGE TOREM: So I just want to make sure  
19 that you are satisfied you've gotten answers to  
20 everything you've put out to all of the other parties.

21 MR. LOGEN: I got responses, yes.

22 JUDGE TOREM: I hope you will be able to take  
23 whatever information is there and prepare yourself for  
24 hearing. Mr. Logen, maybe I'll ask you because one of  
25 the items was a potential for settlement. Do you think

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1 there is going to be a possibility of settlement  
2 between now and early next week on your part?

3 MR. LOGEN: I'm willing to discuss it, but  
4 what's been discussed so far wasn't at all  
5 satisfactory.

6 JUDGE TOREM: Okay. I encourage you and the  
7 other parties to continue the discussions so that you  
8 can craft something that would be in your own hands  
9 rather than necessarily in the Commission's. It sounds  
10 as though we are going to go forward with the hearing.  
11 Let me review very quickly what was in the first order,  
12 prehearing conference order as to the scope of the  
13 hearing.

14 In Paragraph 7, which is on Page 3 of that  
15 order, I ruled that the hearing on the merits, the  
16 evidentiary hearing, is generally going to be limited  
17 to what are the requirements of public safety, any  
18 topics regarding the convenience and necessity of the  
19 use of the Logen Road crossing, and alternatives to  
20 closure, if there are any, and those topics are the  
21 ones that are set out by statute and by previous  
22 Commission orders and practice.

23 Mr. Scarp, first from the Railway, was there  
24 any need to expand those topics?

25 MR. SCARP: None from our perspective, Your

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1 Honor.

2 JUDGE TOREM: Commission staff?

3 MR. THOMPSON: No. I think that's a complete  
4 list.

5 JUDGE TOREM: From the County?

6 MR. KASTING: The County would agree.

7 JUDGE TOREM: Mr. Logen, was there any need  
8 that you thought after your discovery to expand those  
9 topics that were in Paragraph 7 of Order 1?

10 MR. LOGEN: Not before the Commission.

11 JUDGE TOREM: There was some question at our  
12 conference last Friday as to whether some of those  
13 discovery requests you had put out suggested a desire  
14 to expand the hearing, and I wanted to entertain that  
15 today, if at all possible, but otherwise then, I'm not  
16 going to entertain any surprises next Monday or Tuesday  
17 on the topics. If there are going to be any expansion,  
18 let's discuss it today.

19 Hearing none, I sent out maybe 45 minutes ago  
20 a draft of an exhibit list trying to put together what  
21 the parties had sent in. Only BNSF and Commission  
22 staff had submitted actual exhibits. The County was  
23 not planning on putting forth any of its own witnesses  
24 or any exhibits, and Mr. Logen, at the time, you had  
25 not submitted any exhibits, and you indicated you

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1 yourself would be your only witness.

2 MR. LOGEN: That's correct.

3 JUDGE TOREM: Since you've gotten a chance to  
4 review all of your data requests, I think your initial  
5 submission said you might have some of those pages or  
6 some of that information to submit as an exhibit. Do  
7 you know whether that's what you intend to do?

8 MR. LOGEN: Yes, it is, along with  
9 information off the Internet.

10 JUDGE TOREM: When do you think you would be  
11 able to have that ready to submit?

12 MR. LOGEN: I was planning on bringing it on  
13 Monday.

14 JUDGE TOREM: We are going to need to have  
15 some advance notice for the other parties to review,  
16 just as you've had the courtesy of having advance  
17 notice of their exhibits, and I'm willing to give you a  
18 couple of days before the hearing to get that done, but  
19 I'm thinking Thursday of this week gives the parties  
20 the full workday on Friday and myself as well to review  
21 any exhibits and get prepared for Monday's hearing.

22 So I would like to extend you the courtesy,  
23 unless other parties think they will be prejudiced  
24 somehow, to submit exhibits, but I would like you to  
25 describe in general what they would be today so the

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1 parties would know just what volume you might be  
2 submitting by Thursday.

3 MR. LOGEN: I think there will be exhibits  
4 regarding the safety of the various alternatives, about  
5 the convenience, and those will come from the responses  
6 that I've received on my data requests for the most  
7 part. The requirements on safety and alternatives to  
8 closing, some of those will come from the Internet.

9 JUDGE TOREM: Do you know --

10 MR. LOGEN: I wouldn't expect over a dozen.

11 JUDGE TOREM: What about the number of pages,  
12 particularly those that are coming from, as you say,  
13 the Internet?

14 MR. LOGEN: I've been taking excerpts from  
15 documents rather than the entire document, and so those  
16 are rather short, a page or two. My total number of  
17 pages, 20 maybe.

18 JUDGE TOREM: That sounds like a reasonable  
19 and manageable number for folks to digest. The other  
20 parties have heard that I'm going to be extending you a  
21 courtesy of some sort unless they object, so let me  
22 first hear from the Railway as to a Thursday afternoon  
23 deadline for a final set of exhibits, apparently some  
24 of which are coming out of the data request responses.  
25 Any concern on what Mr. Logen has just described and

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1 your ability to prepare yourselves and your witnesses  
2 for hearing?

3 MR. SCARP: It's sort of a close call. We  
4 understand the need for Mr. Logen to properly prepare,  
5 but without knowing anything beyond the, I guess I  
6 would say, somewhat vague characterization to date, we  
7 will do our very best, Your Honor.

8 If it's possible, I might ask if Mr. Logen  
9 could provide the Internet, at least the articles. So  
10 that if he's already got these, I would ask that  
11 perhaps they could be provided tomorrow, and then he  
12 can tell us what excerpts, but I think as Your Honor  
13 probably recognizes, we would want to know the article  
14 and not just the page, so if he knows them already,  
15 maybe he could just provide those.

16 As for the data requests, if he identifies  
17 the ones that he is going to use by Thursday, I'm sure  
18 we could adequately or properly prepare.

19 JUDGE TOREM: Commission staff, any concerns  
20 that you want to add to that?

21 MR. THOMPSON: Nothing to add. Even with  
22 respect to the items that have already been listed, we  
23 reserve our right to object, I guess, at the hearing.

24 JUDGE TOREM: I have no concern. This was  
25 just a list of what's been submitted, and I haven't



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1 numbered any of them, except for the first two which  
2 are essentially part of the record already.

3 Mr. Kasting, any additional concerns?

4 MR. KASTING: No, nothing.

5 JUDGE TOREM: Mr. Logen, go ahead.

6 MR. LOGEN: As far as a couple of the items  
7 I'm looking at here in front of me, the Federal Transit  
8 Administration Reports and Publication, titled "Lesson  
9 38, Four-Quadrant Gated Crossing," dated September  
10 13th, 2000, four pages.

11 MR. SCARP: What was the title again?

12 MR. LOGEN: "Lesson 38, Four-Quadrant Gated  
13 Crossing." It's available at [www.fta.dot.gov](http://www.fta.dot.gov).

14 MR. SCARP: Federal Transit what?

15 MR. LOGEN: Administration.

16 JUDGE TOREM: Mr. Logen, I think for best  
17 form, it might be easiest for you to type those up,  
18 including the Web site that has the documents, and  
19 perhaps e-mail that out to the parties. If you want to  
20 include me on the copy, that's fine for this sort of  
21 transmission, but then let's make sure if you can send  
22 that listing out of your source documents and perhaps  
23 indicate the page numbers or which pages today or  
24 tomorrow morning, that would be great, but if you can  
25 get in all of those documents by, say, two p.m. on

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1 Thursday, that will give folks a few hours on Thursday  
2 to put them together and ship them out to their other  
3 witnesses that will have a chance to review them  
4 overnight and discuss and prepare on Friday for the  
5 hearing on Monday.

6 MR. LOGEN: All right.

7 JUDGE TOREM: Again, if you will do the  
8 courtesy, as Mr. Scarp indicated, of getting those  
9 source document citations out as soon as possible in  
10 advance of the actual excerpts and exhibits that you  
11 send in, that will be quite helpful.

12 As for format, if you want to follow either  
13 what Commission staff or what BNSF did in its earlier  
14 submissions as far as an exhibit list went, all you  
15 need to do is give me the name of the document as you  
16 are calling it, and I will put it into the exhibit list  
17 and bring another copy out to the hearing on Monday,  
18 and we will start assigning numbers based on which  
19 witness's testify, and we will get these offered one at  
20 a time.

21 Mr. Scarp and Ms. Endres, I took the liberty  
22 of trying to group these by topic and didn't mean to  
23 indicate whatever order you were going to present them,  
24 so that's why I didn't number these this time around,  
25 and I think also rather than the somewhat hectic

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1 numbering system we had in our previous encounters at  
2 Hickox Road, you will number things as we go along  
3 where we gone don't have prefiled testimony, and I want  
4 to leave room for cross-examination exhibits to just be  
5 numbered in sequence as well, so that's why the numbers  
6 have not been assigned thus far.

7           Now, cross-examination exhibits can be  
8 brought to the hearing on Monday, but if you've already  
9 identified cross-exam exhibits that you are going to be  
10 using for sure, since we are not trying to have any  
11 trial by ambush or surprises next week, I would prefer  
12 that you submit those by Thursday afternoon as well as  
13 a courtesy to your fellow counsel and parties.

14           If there is something you bring that you are  
15 not sure you are going to use, go ahead and err on the  
16 side of submitting cross-exam exhibits on Thursday.

17 Mr. Scarp, I recognize that BNSF won't know what  
18 cross-examination items it might have for Mr. Logen nor  
19 might Staff or the County until he submits his  
20 exhibits. So feel free to submit something to him in  
21 advance notice on Friday, if you know, Oh, this is  
22 something I would like to cross-examine him on based on  
23 what you see on Thursday, but I won't set any firm  
24 deadlines. I do want to make sure that we have as few  
25 as any delays as possible on Monday and Tuesday so that

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1 we can be more efficient with our time at hearing, but  
2 witnesses that have not yet seen an exhibit for  
3 cross-examination will be given time to review it  
4 before they are forced to answer some question based on  
5 that exhibit.

6           So if you can get those out in advance, that  
7 saves time later. There won't be any surprise to  
8 bringing out something or springing something on a  
9 witness, because I will give them time to review it at  
10 the hearing or not admit that if I thought you could  
11 have given it in advance.

12           MR. SCARP: I appreciate that, Your Honor. I  
13 just want to say, and I think this is an outside chance  
14 or not a strong likelihood, but depending on what  
15 Mr. Logen sends us Thursday afternoon, it's conceivable  
16 that we would have to provide something to rebut that  
17 for our witnesses. I don't know because I don't know  
18 what he's going to provide us. I just wanted to sort  
19 of reserve that right. Since he's going to provide  
20 exhibits Thursday afternoon, I don't know if that will  
21 require us to perhaps supplement our record with  
22 perhaps other parts of the documents he's not  
23 submitting out of the materials, if I made that clear.  
24 He's excerpting a few pages out of a study, and I don't  
25 know if we would have to provide other parts of the

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1 study, for example.

2 JUDGE TOREM: Understood, and that is  
3 certainly within the realm of something that can be  
4 cured in the interest of completeness next week. So if  
5 you feel for any reason that something is being taken  
6 out of context or needs a fuller context, then again,  
7 there won't be any adverse rulings from the Bench if  
8 it's in the interest of completeness.

9 MR. SCARP: Fair enough.

10 JUDGE TOREM: There was an item,  
11 Mr. Thompson, that you cited as an exhibit, and I put  
12 it at the bottom of the e-mail that I sent out. This  
13 was the Department of Transportation's grade crossing  
14 protective handbook, and I took a look at our rule for  
15 taking official notice or judicial notice of an item,  
16 and I apologize in advance for the citation, but it's  
17 WAC 480-07-495(2)(a)(1)(c)(3), so it's a lot of "subs,"  
18 but it allows for taking judicial notice of a code or  
19 standard adopted by United States agency, and I thought  
20 that this particular item that, Mr. Thompson, you gave  
21 me just the citation to where it can be found on the  
22 Web is the sort of thing I could take judicial notice  
23 of at the hearing.

24 However, if you are going to cite particular  
25 portions of it or excerpts in Ms. Hunter's testimony,

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1 it would probably be helpful to let the folks know  
2 again by Thursday afternoon at two o'clock what page  
3 numbers or perhaps provide hard copies of those  
4 excerpts so that even though it may be something I  
5 could take judicial notice of, everybody knows exactly  
6 what portion of that handbook is being referred to, and  
7 that way when Ms. Hunter testifies regarding it next  
8 week, we will all have a copy in front of us, and that  
9 will help with any cross-examination that might be  
10 necessary.

11           The other item I didn't list before I sent  
12 this out to you was the driving directions that I  
13 received for a site physical inspection. It turns out  
14 that the same rule, 480-07-495, and it's only  
15 subparagraph (2)(b), allows me to take judicial notice  
16 of anything I might see, and I would think the  
17 directions themselves can be officially noticed into  
18 the record as well. So that if I discuss anything as  
19 far as the physical layout of the area based on my  
20 driving tour, those items would be coming in by  
21 official notice.

22           Those are the only other evidentiary notes  
23 that I wanted to make the parties aware of today. Is  
24 there anybody who has concerns about my interpretation  
25 of the procedural rules and official or judicial notice

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1 of this particular protective handbook from DOT?  
2 Hearing none, then I'll allow for a motion in that  
3 regard on the record at the hearing so this can become  
4 part of the record at that time, and I think by then,  
5 we will also have the more specific excerpts and the  
6 context to be provided.

7 Anything else about exhibits or cross-exam  
8 exhibits that we need to discuss today? Then one other  
9 item. I'm going to go party by party and see if there  
10 are any other concerns that we need to take up before  
11 the hearing on Monday at nine o'clock. Because I can  
12 see Mr. Thompson has one here, I'll start with him.

13 MR. THOMPSON: Actually, as to things that  
14 might become exhibits, I think we've collected the  
15 letters received from the public as a result of our  
16 notice that would be bundled up and offered as an  
17 exhibit as well.

18 JUDGE TOREM: So those would become part of a  
19 public comment exhibit. I think they will also be  
20 supplemented by any verbal comments we get Monday night  
21 and the sign-in sheets, so I appreciate the notice that  
22 those are coming in as well. BNSF, any other items for  
23 today?

24 MR. SCARP: None that we can think of, Your  
25 Honor.

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1 JUDGE TOREM: From the County?

2 MR. KASTING: Nothing we can think of either.

3 JUDGE TOREM: Mr. Logen?

4 MR. LOGEN: I don't know if this is the  
5 appropriate place to bring this up, but when I was  
6 discussing possibility of settlement with the Railroad,  
7 I talked about the possibility of closing a portion of  
8 Logen Road, that portion that is west of the railroad  
9 tracks --

10 JUDGE TOREM: Let me say, Mr. Logen, I can't  
11 be involved in the settlement negotiations or their  
12 terms, and if you are looking for the Commission to  
13 take that action, you have to consider the parties may  
14 have greater jurisdictional breadth than I will. So  
15 check with Mr. Thompson as to the Commission's position  
16 as to road closures associated with the proposed  
17 closing of the crossing. If that's a county road, of  
18 course, then the Snohomish County folks would have to  
19 be involved in that.

20 MR. LOGEN: That's why I brought it up now  
21 because Snohomish County is present.

22 JUDGE TOREM: That might be a better  
23 conversation for you folks to have after we go off the  
24 record today, and I can certainly leave you all on the  
25 line and leave the room so you could have a discussion



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1 without worrying whether it's proper for the judge to  
2 hear that or not, so let me have you hold that thought.  
3 Were there any other issues you wanted to bring up,  
4 Mr. Logen?

5 MR. LOGEN: No.

6 JUDGE TOREM: One item from past experience  
7 that hasn't been necessarily the Commission's  
8 balliwick, but because there is a project that involves  
9 construction of a crossing and proposed closure, there  
10 will be some state environmental policy issues that  
11 come up, and I'm not aware yet what agency, if any, has  
12 stepped into the lead on this project.

13 In our prior case regarding this, I learned  
14 that it was not going to be this agency. It was the  
15 State Department of Transportation in their Amtrak  
16 function, but they are not a party to this case as you  
17 heard me inquire back at the prehearing conference in  
18 February. Mr. Thompson, do you have any idea where our  
19 colleagues at Department of Transportation might be on  
20 SEPA, or perhaps the County is in a better position to  
21 answer this.

22 MR. THOMPSON: I guess I will say the  
23 potential candidates for a lead agency because of some  
24 approval required or in the case of DOT funding being  
25 provided would be DOT, Department of Ecology, I guess,

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1 because of some wetlands permitting issues, and I think  
2 a couple of permits are also required from the County,  
3 I understand, but that those may be categorically  
4 exempt on their own, and then of course the WUTC;  
5 although the rules that the Department of Ecology has  
6 for selecting a lead agency for SEPA purposes seems  
7 to -- well, it ranks state agencies as to which ones  
8 are preferred to be lead agency, and I think both DOT  
9 and Department of Ecology would be ahead of the UTC in  
10 any event, so it's not my expectation that the UTC  
11 would be the lead agency for SEPA purposes, but that  
12 said, I don't think it's decided who will be.

13 JUDGE TOREM: Mr. Kasting, any thoughts?

14 MR. KASTING: From the County perspective,  
15 the County doesn't expect nor intend to be the lead  
16 agency either. The only permit that we've been able to  
17 identify that may be required that are associated with  
18 the closure would be potentially a single right-of-way  
19 permit for the improvements that will be constructed at  
20 the crossing and at the crossing to the north. The  
21 County is not aware of any permit that would have to  
22 issue for the siding inspection. Therefore, it does  
23 not intend or think that it is appropriate that the  
24 County would be the lead agency for SEPA.

25 JUDGE TOREM: Mr. Scarp, have you had any

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1 interactions with the proposed candidates for lead  
2 agency status here?

3 MR. SCARP: Indirectly, Your Honor, and my  
4 understanding is that the materials have been prepared  
5 for Department of Ecology, but they are awaiting a  
6 determination by the Corps of Engineers on -- excuse  
7 me, I don't have my notes in front of me. Give me one  
8 split second. I'm sorry, Your Honor. It's wetland  
9 mitigation that the Department of Ecology looks to the  
10 Corps of Engineers for its determination, and once  
11 that's made, the materials will be filed for SEPA  
12 review with the Department of Ecology, but apparently,  
13 the decision from the Corps comes first is my  
14 understanding. So I know that's in the cue from the  
15 Corps and they are waiting on that.

16 JUDGE TOREM: If you would, Mr. Scarp, make  
17 contact with Ecology and see if you can get an answer  
18 before next week as to the status of when they would  
19 intend to get the information from the Corps, and  
20 following that issue, whether it's an environmental  
21 impact statement or a mitigated determination of  
22 nonsignificance or even a determination of  
23 nonsignificance as the case may be, I would be  
24 interested to know the timing on that and what impact,  
25 if any, the comment period might have on my ability to

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1 issue the agency's initial decision in this matter.

2 I don't know for certain, but it just occurs  
3 to me that it's something we should be ready to talk  
4 about before we close the evidentiary record next week,  
5 or at least perhaps give you an opportunity to write  
6 your briefs on the substantive matters that are before  
7 the Commission, and perhaps then have me hold the  
8 record open for any supplemental response to the  
9 comments submitted to Ecology on the DNS or MDNS or  
10 whatever documents they issue and whether or not I need  
11 to make this agency's decision fully informed with the  
12 environmental comments as well. I would rather not  
13 have to come back and reopen the record and take an  
14 initial decision on remand back from the commissioners  
15 because we overlooked this procedural issue, if it's  
16 even an issue at all, but I just want to put that out  
17 there, because last time SEPA was rolling along, and I  
18 believe there was an MDNS or DNS issue and the comment  
19 period had closed in Hickox Road, so those comments  
20 were a matter of record, and they may in this case. I  
21 don't want to prejudge anything. So, Mr. Scarp, do you  
22 understand where I'm coming from on that?

23 MR. SCARP: I do, Your Honor.

24 JUDGE TOREM: So if you could let me know on  
25 Monday or Tuesday what the Railroad's position is. I

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1 think the comment period for documents is only 30 days,  
2 so hopefully if they are ready to move forward. It  
3 could be that the timing for your briefs and the timing  
4 foreclosing the comment period could be fairly in close  
5 order.

6 MR. SCARP: Okay.

7 JUDGE TOREM: If they are not, I would like  
8 to hear before what the alternative courses might be.

9 MR. SCARP: That's understood.

10 JUDGE TOREM: We've worked really hard to get  
11 this matter expedited, and I wouldn't want Department  
12 of Ecology to unnecessarily hold us up, but if we have  
13 to wait for them for an initial decision, such is the  
14 law and we will have to do that.

15 MR. KASTING: This is Justin Kasting. Just  
16 for clarification ask if it's Burlington Northern's  
17 position that DOE will take lead agency status. There  
18 have been some confusion in e-mails going back and  
19 forth.

20 MR. SCARP: That's correct.

21 MR. KASTING: Thank you.

22 JUDGE TOREM: Are there any other issues we  
23 need to take up this afternoon, or is that about it?

24 MR. SCARP: From the Railroad, that's all we  
25 have, Your Honor.

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1           MR. THOMPSON: From Staff, I wonder if the  
2 parties could just give an estimate of the amount of  
3 time they think they would have for direct examination.

4           JUDGE TOREM: I think that's only a question  
5 then to Mr. Scarp.

6           MR. THOMPSON: And Mr. Logen, actually, too.

7           JUDGE TOREM: Mr. Logen, do you know how long  
8 it might take you to testify? I know you won't be  
9 asking yourself questions and answering, but do you  
10 know how long you might speak to your position next  
11 week?

12          MR. LOGEN: I would think not over 10  
13 minutes.

14          JUDGE TOREM: Mr. Scarp, how about your  
15 witnesses? I'll ask you the names and you can tell me  
16 how long you think their direct will be. First off, is  
17 it going to be Rick Wagner?

18          MR. SCARP: Rick Wagner.

19          JUDGE TOREM: How long do you think for  
20 Mr. Wagner?

21          MR. SCARP: 20 minutes, and for purposes of  
22 scheduling, say 30.

23          JUDGE TOREM: And then you will call Danniell  
24 MacDonald or Ms. McIntyre?

25          MR. SCARP: Dan MacDonald.

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1 JUDGE TOREM: 20 minutes or 30 minutes?

2 MR. SCARP: I would say 20 to 30 minutes.

3 JUDGE TOREM: Do you have David Agee?

4 MR. SCARP: There is no more than that, 20  
5 minutes. Might as well say 20 to 30 for scheduling  
6 purposes.

7 JUDGE TOREM: Kevin Jeffers?

8 MS. ENDRES: Ten or 15.

9 MR. SCARP: No more than 15 minutes.

10 JUDGE TOREM: Ms. Hunter is going to testify  
11 already. Did you intend to call Mr. Curl in additional  
12 to her?

13 MR. SCARP: No, Your Honor.

14 JUDGE TOREM: We will get a direct  
15 examination estimate from Mr. Thompson on that. Gary  
16 Norris?

17 MR. SCARP: For scheduling purposes, I would  
18 say 20 to 30.

19 JUDGE TOREM: Foster Peterson.

20 MR. SCARP: That's conditional right now  
21 depending on what comes from Mr. MacDonald, Mr. Agee,  
22 and we anticipate that Mr. Peterson would have to  
23 testify by phone if he does, but again, 20 to 30  
24 minutes at the outside.

25 JUDGE TOREM: Finally, you have Mr. Jim

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1 Bloodgood from Snohomish County listed.

2 MR. SCARP: Fifteen minutes.

3 JUDGE TOREM: Mr. Scarp, let me ask you to  
4 make sure you are in contact with the facility or at  
5 least talk to our assistant to make sure that a  
6 telephone witness can be supported so that there are no  
7 surprises in case you want Mr. Peterson to appear from  
8 Georgia and that he really can do that.

9 MR. SCARP: Actually, he won't be appearing  
10 from Georgia. He's traveling in this area, and it's a  
11 question of timing is one of the problems. He's en  
12 route to Alaska at the beginning of the week, and there  
13 is some of the vagaries of travel, I guess is the  
14 problem at the moment.

15 Your Honor, I'm not trying to be anything  
16 less than specific. At this point, depending on  
17 testimony on concluding Mr. Agee and Mr. MacDonald,  
18 there is a very strong chance that we wouldn't need to  
19 call Mr. Peterson.

20 JUDGE TOREM: I appreciate that.  
21 Mr. Thompson, did you have an estimate for how long on  
22 your calling of Ms. Hunter?

23 MR. THOMPSON: I'll say no more than 20  
24 minutes.

25 JUDGE TOREM: I'll leave the parties to sort



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1 out the order of the witnesses and how they will be  
2 presented. I would suggest that BNSF who does carry  
3 the burden here make their case first, and if you want  
4 to have Ms. Hunter's testimony worked in between your  
5 witnesses, I'll let you work that out with  
6 Mr. Thompson, and then Mr. Logen, I imagine unless  
7 there is a witness availability issue, you will be the  
8 last witness to testify and then be cross-examined  
9 thereafter so you will have heard and had the benefit  
10 of all the other testimony that goes before, and in  
11 your case in chief be able to respond directly to those  
12 items that you deem worthy of a response as opposed to  
13 simply having cross-examined witnesses up to that  
14 point.

15 MR. LOGEN: All right.

16 JUDGE TOREM: Anything else before we convene  
17 again on Monday morning at nine o'clock?

18 MR. SCARP: I was sort of looking at the  
19 witnesses and realizing that there might be various  
20 administrative and evidentiary issues to resolve, but I  
21 was certainly going to do everything to make sure that  
22 our witnesses and testimony is easily provided within  
23 one day.

24 JUDGE TOREM: Excellent.

25 MR. SCARP: That's our goal.

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1           JUDGE TOREM: And we will see where we go and  
2 what time we need to stop in order to accommodate  
3 changing the room up for the public hearing that  
4 evening and where we can pick up the next morning, or  
5 if we need to. We will see how the flow goes, but we  
6 have Tuesday to wrap up with whatever number of  
7 witnesses, but it sounds like we will be done by lunch  
8 time on Tuesday.

9           Anything else? Then I'm not going to issue a  
10 separate notice or order, but it's on the record that  
11 by two o'clock on Tuesday, Mr. Logen, you will submit  
12 your exhibits, and if there are any known cross-exam  
13 exhibits at this time that they be submitted as well.  
14 Mr. Logen, you are also going to send out an informal  
15 listing of the Web sites as soon as you can and we will  
16 go from there.

17           As I'm looking at the list, I have one  
18 question left, Mr. Scarp. The responses to Mr. Logen's  
19 data requests you said would become an exhibit, but I  
20 don't have any idea which ones you are going to plan on  
21 submitting or if you are waiting to see which ones  
22 Mr. Logen calls out, so if you could submit those on  
23 Thursday afternoon by two o'clock that you intend to  
24 rely upon or if there is a question of waiting to see  
25 what Mr. Logen submits, submit something on Friday,

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1 that would be sufficient.

2 MR. SCARP: Fair enough, Your Honor.

3 JUDGE TOREM: Anything else, Mr. Logen, that  
4 you might have questions on?

5 MR. LOGEN: No.

6 JUDGE TOREM: I'm going to leave the line up,  
7 but we are off the record here at about ten after  
8 three.

9 (Prehearing adjourned at 3:10 p.m.)

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