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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 BNSF RAILWAY COMPANY, )  
Petitioner, )  
4 vs. ) DOCKET NO. TR-070696  
Volume III  
5 THE COUNTY OF SKAGIT, ) Page 101 - 171  
WASHINGTON, )  
6 Respondent. )  
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8 An oral argument hearing in the above matter  
9 was held on September 19, 2007, at 1:52 p.m., at 401  
10 Second Avenue South, Seattle, Washington, before  
Administrative Law Judge ADAM TOREM.

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The parties were present as follows:

11

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

14

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

17

18 CITY OF MOUNT VERNON, by KEVIN ROGERSON, City  
Attorney, 910 Cleveland Avenue, Post Office Box 809,  
Mount Vernon, Washington 98273; telephone,  
19 (360) 336-6203.

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21 WASHINGTON STATE DEPARTMENT OF  
TRANSPORTATION, by SCOTT LOCKWOOD, Assistant Attorney  
General, 7141 Cleanwater Drive Southwest, Post Office  
Box 40113, Tumwater, Washington 98501; telephone  
22 (360) 753-1620.

23

24 Emi-Enria Y. McLaughlin

25 Digital Reporter

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1 SKAGIT COUNTY FIRE PROTECTION DISTRICT NO. 3,  
2 by BRIAN K. SNURE, Attorney at Law, Snure Law Office, PSC,  
3 612 South 227th Street, Des Moines, Washington 98198;  
4 telephone (206) 824-5630.

5 WESTERN VALLEY FARMS, LLC, and DAVID &  
6 YVONNE BOON, by GARY JONES, Attorney at Law, Jones &  
7 Smith, 415 Pine Street, Post Office Box 1245, Mount  
8 Vernon, Washington 98273; telephone (360) 336-6608.

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

2                   JUDGE TOREM: All right. We're ready to go  
3 on the record. My name is Adam Torem. I'm the  
4 Administrative Law Judge from the Utilities and  
5 Transportation Commission. This is Docket TR-070696,  
6 and today is Wednesday, September the 19th. We were  
7 scheduled at 1:45. It is now about 1:52. We are in  
8 the Goldsmith Building in Seattle, Washington, being  
9 hosted by Washington State Department of  
10 Transportation.

11                   Today, we are having oral argument on the  
12 hearing -- or oral argument hearing on the motions that  
13 have been filed over the last four to five weeks, and  
14 the responses and replies that came in over the last 10  
15 days or so.

16                   Our court reporter today is Emi McLaughlin  
17 from Continental Reporting Services.

18                   And I want to go around the table and take  
19 appearances, and then we'll make an on-the-record  
20 schedule as to what we've previously agreed. So I'll  
21 start going around the table from my left, and we'll  
22 come back around.

23                   MR. SCARP: Bradley Scarp, S-c-a-r-p is the  
24 spelling of my last name, and I believe my contact  
25 information has been provided in previous hearings.

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1                   MR. LOCKWOOD: Scott Lockwood, Assistant  
2 Attorney General for the State Department of  
3 Transportation, and my information is also current.

4                   MS. MCINTYRE: Megan McIntyre, BNSF Railway,  
5 and you have my contact information.

6                   MR. SCHULTZ: Jeff Schultz, Washington State  
7 Department of Transportation, and I believe you have my  
8 contact information, as well.

9                   MR. SNURE: Brian Snure, attorney for the  
10 Skagit County Fire Protection District No. 3, and you  
11 have my contact information.

12                   MS. HUNTER: I'm Katharine Hunter, staff at  
13 WUTC.

14                   MR. THOMPSON: And I'm Jonathan Thompson,  
15 Assistant Attorney General representing the Commission  
16 Staff.

17                   MR. ROGERSON: Kevin Rogerson,  
18 R-o-g-e-r-s-o-n, I'm a City attorney for the City of  
19 Mount Vernon, Washington.

20                   MR. JONES: My name is Gary Jones. I'm an  
21 attorney from Mount Vernon representing the Boone  
22 family and Western Valley Farms, LLC. The spelling of  
23 Jones should be pretty conventional, and the  
24 information I provided as contact information is good.

25                   JUDGE TOREM: All right. Thank you all.

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1                   I know your clients are here with you today,  
2 Mr. Johnson, as well.

3                   MR. JONES: Yes. I should introduce Yvonne  
4 and David Boone are here on my left.

5                   JUDGE TOREM: All right. Skagit County  
6 apparently has waived its right to make an appearance  
7 today. Mr. Rogerson, you were confirming that  
8 Mr. Fallquist was not able to be here. So that's all  
9 the parties.

10                  I confirmed with everybody here that, in one  
11 way shape or form, folks are filing preliminary witness  
12 lists, according to the schedule today. After today's  
13 oral argument, I'll be taking the matter under  
14 advisement on the motions that were filed. There's no  
15 set date for a ruling, but I think it would help all of  
16 you knowing that the next item in the procedural  
17 schedule is that, I believe, Burlington Northern Santa  
18 Fe, as well as the Washington State Department of  
19 Transportation plan on filing their direct -- prefile  
20 direct testimony on Monday, the 8th of October. My  
21 hope is that at least a week ahead of that, you'll have  
22 my ruling.

23                  So I don't know how much it will effect one  
24 way or the other what BNSF and Wash DOT do, but I want  
25 to make sure they have at least a week to make sure, if

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1 they needed any further testimony, or something could  
2 be cut from what they submit on the October 8th  
3 deadline, to have that courtesy.

4           So my hope is that I think the Monday is  
5 October the 1st, that I be issuing something on or --  
6 on 1st or on the 2nd at the latest, that you'd have my  
7 ruling on this in writing, and be able to go forward  
8 with the rest of the matter from there.

9           Today, the schedule we've agreed to, noting  
10 that BNSF filed one motion to limit the scope of  
11 issues, and a variety of parties responded; and that  
12 there was a second motion that came from Mr. Rogerson's  
13 office as to a little bit of the scope of the issues,  
14 but mainly the question of the State Environmental  
15 Policy Act, or SEPA, that whether or not Mr. Thompson's  
16 letter indicating what UTC had done and intended to do  
17 with SEPA would be sufficient for this matter. That  
18 will be the second main motion.

19           What we've agreed to, then, is that  
20 Mr. Scarp will go ahead and open with the highlights of  
21 the BNSF presentation, and Mr. Rogerson will have the  
22 ability to respond to that, and then Mr. Jones and  
23 Mr. Snure will give their supporting comments as to the  
24 City's response. At some point, when it's appropriate,  
25 in Mr. Rogerson's presentation, Mr. Rogerson may choose

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1 to delve into not only the response to BNSF, but go  
2 right into the City's main motion about the SEPA  
3 issues, as well. But when all of the supporters of the  
4 City have had their say, then we'll turn back to  
5 Mr. Lockwood, and he will give the response sort of  
6 jointly on behalf of WSDOT and BNSF, as to the SEPA  
7 issues. And then we'll turn to Mr. Thompson and hear  
8 Staff's position on all of the above. That will be the  
9 order of argument.

10 I'm not setting any hard time limits, but  
11 it's now almost 2:00 o'clock. I'm hoping within the  
12 next hour, hour and a half, we'll be done with not only  
13 the arguments, but also any questions and responses  
14 that are necessary. If we need to go longer, we need  
15 to go longer, but I'm hoping that will be sufficient.

16 And Emi, if you need a break at any one time  
17 or anyone to slow down, including me, please let us  
18 know.

19 Any questions before we get started?

20 Anything else we need to put on the record  
21 today before we get to the arguments?

22 MR. SCARP: Your Honor, with regard to your  
23 comments about the witness -- the witness list, and  
24 depending on what your decision is here today, I would  
25 only submit that our witness list does not include

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1 witnesses who would discuss broader issues of SEPA  
2 compliance or Growth Management Act. However, we  
3 reserve the right to provide any rebuttal testimony, so  
4 I leave it at that.

5 I wouldn't think within a week I might be  
6 able -- I don't know that I would come up with anybody,  
7 so my position is, inconsistent with the rules or  
8 something, I would ask that somebody mention that to  
9 me, because I'm going with what the Court's -- or,  
10 excuse me, what your August 20th order of what the  
11 parameters are that I know of today.

12 JUDGE TOREM: And you're correct, Mr. Scarp.  
13 We had a preliminary witness list, so that everyone, as  
14 a courtesy, after the motion practice, would  
15 essentially know what they intended to bring, best case  
16 scenario, if all of their issues were going to be  
17 allowed, and then the prefiling of direct testimony  
18 takes a lot more work to put together. So this witness  
19 list is a guide to the other parties for preparation.

20 What I'm trying to make sure is, if for some  
21 reason I ruled against a particular line of argument at  
22 hearing, that that direct testimony not be prepared and  
23 the expense gone to, unless for some reason my  
24 Commissioners were to overturn my ruling at some point  
25 in between.



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1                   But certainly, if there's a surprise in the  
2 ruling that requires amendments of testimony, I take it  
3 there will be a motion coming in to let me know how  
4 long it would be, and the other parties -- there's  
5 enough time built into the schedule to allow  
6 supplemental testimony as needed to come in on a  
7 nonprejudicial schedule to everybody.

8                   Okay?

9                   MR. SCARP: Thank you.

10                  JUDGE TOREM: Anything else for the record  
11 before we get to Mr. Scarp's argument?

12                  All right. Mr. Scarp, it's now about 2:00  
13 o'clock. So I'll note that, and we'll see how long it  
14 takes.

15                  MR. SCARP: Thank you, Your Honor.

16                  And on behalf of the BNSF Railway Company,  
17 the motion that we filed was for clarification and to  
18 reiterate what we understood your order from -- dated  
19 July 20th of 2007, regarding the parameters of what  
20 constitutes the review in this matter regarding public  
21 safety, which I think we have agreed that the  
22 parties -- or the parties have agreed that there is a  
23 component of public use and necessity.

24                  And the question becomes, what is the  
25 breadth of that, or how narrow or broad should that be?

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1                   As we've discussed before we got on the  
2 record, I don't intend to go into an in depth  
3 discussion of the Environmental Protection Act and its  
4 relevance to this, this oral argument and these  
5 motions. However, it was part of our motion, and it  
6 was raised. However, it was also raised in a motion by  
7 the City. So I'm not going to -- to delve into that.

8                   But I think our position is pretty clear  
9 that if there were substantive environmental issues, if  
10 that's what we could call them, that, you know, there's  
11 increase in traffic or flood or evacuation, flood  
12 control and evacuation, that those issues can and will  
13 be addressed within a public safety analysis review,  
14 and that they fall under that. But there are no  
15 specific environmental issues or substantive  
16 environmental issues being addressed here, and the  
17 point of our brief was simply to point out that if that  
18 was the case, BNSF's position is that those would be  
19 preempted, and we cited the City of Auburn case in the  
20 Ninth Circuit.

21                   But this, the SEPA issue, is really about  
22 procedure, and it goes to the heart of the Mount Vernon  
23 motion, and our response. So I would let -- I would  
24 defer and let Mr. Lockwood have his say when we get to  
25 that part. But I think it's been briefed, and you know

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1 where the parties, at least, in general.

2           The other primary issue that we sought to  
3 have clarification or confirmation on from your earlier  
4 order is Mount Vernon's intention to have review of the  
5 Growth Management Act brought into this proceeding.  
6 And I think that BNSF and Department of  
7 Transportation's position is pretty clear that the  
8 Growth Management Act is not within the proper scope of  
9 review here. And I think that was outlined in your  
10 earlier order; although, we felt that briefing was  
11 required, just for confirmation, because I think that  
12 Mount Vernon has certainly made clear that they intend  
13 to pursue that.

14           But I would like to respond to one argument  
15 raised by Mount Vernon in their response brief, and I  
16 think it goes pretty much to the crux of this, and that  
17 is the North Pacific Railway versus Department of  
18 Public Works. Citation is 144 Washington Reporter 47.  
19 And that's a 1927 case. Mount Vernon argues that the  
20 North Pacific Railway case requires the Commission to  
21 consider all future public use. And we disagree with  
22 that.

23           I think a careful reading of that case shows  
24 that that was -- in the facts of that case, there was  
25 substantial activity, I think were the words the court

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1 used, relating to the projects at work there, which the  
2 court said needed to be considered, and the fact that  
3 that activity and development was going to necessitate  
4 broader future use was within the review of the court.  
5 We agree with that. And I think the distinction is  
6 that there was significant activity toward the  
7 development, and it was in -- in progress, if you will,  
8 and that that fact that it was going to change the  
9 amount of transportation required was a -- was a  
10 reasonable conclusion from the activity taking place.

11           But we say that it's a huge leap to invoke  
12 the policy of the Growth Management Act to a broader  
13 plan or a broader -- I will use the word "policy," and  
14 broad-based plans for growth, as opposed to actual  
15 projects for development that's in place. And that's  
16 our distinction of the Northern Pacific Railway case.

17           In short, the case does not support -- we  
18 contend does not support Mount Vernon's intention to  
19 have a review of the Growth Management Act policy here,  
20 and that this is simply not the forum for that, as set  
21 forth in your earlier order, July 20th.

22           I would finally add, and, again, this is in  
23 our brief, the City of Ferndale case from the  
24 Commission sets forth what we think are the parameters  
25 when that issue is raised. I wouldn't take a lot of

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1 time going into that. I think it was all set forth in  
2 our brief.

3 I would like to address a couple of issues.  
4 The Western Valley Farm's brief has asked that  
5 RCW 43.21C.030 regarding a broad-based environmental  
6 compliance should be invoked here or govern. We --  
7 BNSF's response is I think that's a creative argument,  
8 but I think it's broad to the point where it -- it's  
9 sort of like my analysis I just gave with regard to the  
10 Growth Management Act, as opposed to specific activity  
11 of development. It's -- it's so broad that it --  
12 there's no -- there's no reasonably applicable way that  
13 I could determine that it would apply to specific  
14 environmental review. And more importantly, the  
15 specific, the environmental review, when that's called  
16 for, is very specific. And I think to try to make an  
17 end run around it using that is not something that --  
18 that should be accepted.

19 And I guess there was one other argument by  
20 Mount Vernon as it related to preemption, and that was  
21 that the preemption does not apply, because this is a  
22 grade crossing, and that would not -- that would not  
23 require preemption as set forth in the City of Auburn  
24 case, because this is a grade crossing, and there is  
25 State authority for what happens.

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1                   Well, I think this goes back to the broader  
2 question. The environmental review was for the larger  
3 siting project. And I don't want to, you know, go  
4 sideways into that, but this is not about a grade  
5 crossing and what measures are being taken for purposes  
6 of environmental review. Grade crossing has -- there  
7 is -- there is local authority. There is joint  
8 authority, if you will, for purposes of warning devices  
9 and safety measures and all that. But to say that the  
10 preemption would not apply because this is a grade  
11 crossing takes it out of the category with which we  
12 were discussing environmental review, and that was  
13 whether the procedures of SEPA had been followed.

14                   And so if I didn't make that clear, I'll be  
15 happy to answer a question or two to do so, but I don't  
16 think that the approach that Mount Vernon took is  
17 accurate in characterizing this as a grade crossing for  
18 purposes that preemption would not apply. We raised  
19 that issue in terms of environmental, substantive  
20 environmental review, which we have also said is, for  
21 the sake of argument, if there were substantive  
22 environmental issues, we would contend that they're  
23 preemptive.

24                   I think that your initial order was  
25 accurate. And I say again that we felt compelled

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1 because of the way discussion went to bring that out in  
2 formal briefing.

3 And those are the issues that I have at this  
4 time.

5 JUDGE TOREM: And when you refer back to the  
6 initial order, you mean the second prehearing  
7 conference order that addressed the exceptions?

8 MR. SCARP: It is your order dated service  
9 date July 20 -- oh, I'm sorry.

10 July 20, 2000 --

11 JUDGE TOREM: The August 14th?

12 Because I know both you and another party  
13 file exceptions to the one. We had another meeting,  
14 and it was, should be, Order 02.

15 MR. SCARP: Right. Well, it's because of  
16 the exceptions, and I was simply referring to your July  
17 20th order. Anyway, that's the one I was referring  
18 to --

19 JUDGE TOREM: Okay.

20 MR. SCARP: -- when you referenced that  
21 the -- and I'm looking at page four, where you said  
22 that the -- well, it's page three and four, paragraph  
23 nine, "However, despite the tangential relevance of the  
24 potential impacts of closure of this grade crossing on  
25 regional land use planning efforts under the Growth

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1 Management Act, expanding the issues to be litigated  
2 before the Commission on the matter to include those  
3 best taken up by a Growth Management Hearings Board  
4 cannot be justified under the governing statute or  
5 under prior Commission actions."

6 JUDGE TOREM: Okay. Now, I understand.  
7 Because when you said I agreed with the first order, it  
8 begged the question, well, I get an exception from you.  
9 But that was to a separate paragraph.

10 But as to the GMA issue, that's where the  
11 agreement is?

12 MR. SCARP: Yes.

13 JUDGE TOREM: All right. Understood.

14 Anything else from BNSF?

15 MR. SCARP: Not at this time. Thank you.

16 JUDGE TOREM: All right. So that was, with  
17 my question, running on 12 minutes.

18 So, Kevin, let me turn to you, and see  
19 whether the City wants to respond to the issues raised  
20 by the Railroad, and also, then, turn to those SEPA  
21 issues as you choose.

22 MR. ROGERSON: Thank you, Your Honor.

23 And for the record, again, Kevin Rogerson,  
24 representing the City of Mount Vernon, who is the named  
25 Respondent after the issue hearing, in light of the



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1 fact that the petition for closure geographically is  
2 located within the jurisdiction of the City limits of  
3 the City of Mount Vernon.

4           The City has filed a motion and has asked  
5 for two things. One is a motion in limine, which I  
6 think is essentially the same issue in which counsel  
7 for Burlington Northern has identified, and that issue  
8 is how does the court define the test that's been  
9 identified in common law, specifically the Department  
10 of Transportation versus Snohomish County, 351 2d 247,  
11 1949, when they have identified that, in addition to  
12 public safety, if it is found to be satisfied that  
13 public safety warrants closure, the court has to do or  
14 conduct a further additional analysis, which is  
15 essentially a balancing test between public safety and  
16 that of public convenience and necessity.

17           This is a standard identified by the Supreme  
18 Court in 1949 and cited throughout Commission's  
19 previous opinions to that case. It is noteworthy and  
20 identified in the City's brief that no state  
21 legislature has defined this test specifically as it  
22 applies to petitions for closure, nor has it explicitly  
23 identified that test. This is a test found in common  
24 law, and it is where -- and it is in common law where  
25 we have to find the definition for such a measure or a

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1 legal test.

2           The Department of Transportation, which is  
3 commonly cited, is, if you look at the specific  
4 language there, the Supreme Court in 1949 had to deal  
5 with an issue of a controversy over a petition for  
6 closure on Mukilteo, in which parties objecting to such  
7 closure asked the court to review the findings of the  
8 administrative agency at the time, which I believe was  
9 the Department of Transportation, to the best of my  
10 recollection. And the majority of the opinion on that  
11 decision was we will not second guess the agency's  
12 decision unless that agency's decision is one in which  
13 they did not fully consider testimony or honestly  
14 exercise judgment, and it's a decision which is  
15 arbitrary or capricious, which was the standard back  
16 then. I'm unclear if that is exactly the same standard  
17 that applies today, over 50 years of jurisprudence  
18 later. However, it's noteworthy that that standard is  
19 what the court was applying in that case, when public  
20 convenience and necessity was identified. And that, I  
21 submit to the Court, is for the proposition that the  
22 agencies are to be given the widest latitude in  
23 exercising their judgment, and allowing evidence to  
24 determine public convenience and necessity.

25           In light of the fact that this is the

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1 perennial case in 1949 that identified this public  
2 convenience and necessity test, more importantly it  
3 cited to the cases that relied on such a test and  
4 relied on what evidence they would allow when an agency  
5 has to make a determination and finding of such public  
6 convenience or necessity outweighing public safety  
7 issues.

8           And Burlington Northern, counsel for  
9 Burlington Northern, has suggested that, while there is  
10 substantial activity within the case that was enough to  
11 consider that future impact, that it has to be some  
12 type of measure beyond something other than  
13 substantial. And I think if you look at the case,  
14 clearly, and by the facts that they weighed, and read  
15 the ruling explicitly, you'll see that standard set  
16 forth.

17           Northern Pacific Railroad versus Department  
18 of Public Works, the court looked at several different  
19 factors in which the agency at that time was weighing.  
20 And these were all related to future need. This case  
21 involved a petition for a railway which wished to  
22 extend its railway service to Cle Ellum and Easton. It  
23 already had service provided between Yakima,  
24 Ellensburg, and Wenatchee.

25           And the court specifically found that the

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1 present route service in the area was adequate and  
2 sufficient for the public needs of the community.  
3 However, the Department of Public Works then looked at  
4 future infrastructure projects, determined the future  
5 need was justified. Specifically, they looked at the  
6 construction project which was a diversion down in  
7 Kittitas in the area, which they projected would employ  
8 more than 200 men. Additionally, they looked that  
9 there was a future bridge project that was scheduled at  
10 the Vantage Ferry area. They looked at potential  
11 infrastructure improvements of a hydroelectric plant in  
12 Chelan, a tunnel through the Cascades for a railway  
13 west of Wenatchee, and they specifically made a finding  
14 of a future need of connecting population centers with  
15 Cle Ellum, Roslyn, and to the rest of the Ellensburg  
16 district that this area would serve.

17           Now, in 1927, there wasn't a Growth  
18 Management Act, but I would submit to the Court that  
19 that agency did what we would consider de facto  
20 planning, which we now are required to formally  
21 incorporate within the structure of the Growth  
22 Management Act into comprehensive plans based on  
23 studies submitted to show need of where the urban  
24 growth area is to be.

25           After looking at those different future

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1 needs, the Supreme Court at that point made a ruling,  
2 and that ruling was, verbatim, "The Commission has a  
3 right to, and should, look to the future as well as to  
4 the present situation. Public utilities are expected  
5 to provide for the public necessities not only today,  
6 but to anticipate for all future developments  
7 reasonably to be foreseen." And that is the standard  
8 that's set forth by the Supreme Court that I will  
9 submit is binding on this agency, that all future  
10 developments reasonably to be foreseen should be  
11 allowed as evidence to determine public convenience and  
12 necessity.

13           The court further opines on what that is.  
14 "The necessity to be provided for is not only the  
15 existing urgent need, but the need to be expected in  
16 the future, so far as it may be anticipated from the  
17 development of the community, the growth of industry,  
18 the increase in wealth and population, and all the  
19 elements to be expected in the progress of community.".

20           This is a broad standard. And in light of  
21 the fact that this was a case the Department of  
22 Transportation versus Snohomish County relied on to  
23 show that agencies have the widest latitude in making  
24 its determination, it's the City's position that the  
25 binding precedent is clear that, when weighing public

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1 convenience and necessity to determine whether or not  
2 this outweighs any issue should public safety be  
3 considered satisfied, that future need not only should  
4 be allowed, as long as its reasonably to be foreseen,  
5 but it should be looked to.

6           There is another case that I submitted,  
7 which is a federal case, which I wouldn't get into on  
8 brief, because I think is maybe persuasive, but what I  
9 would just say is that I think looking at that case,  
10 and that's from the old Interstate Commerce Commission  
11 which is now, I believe, the Surface Transportation  
12 Board, it was very similar in its facts, and that is  
13 this agency was left to determine what this term meant,  
14 which is public convenience and necessity. It was not  
15 defined in state or in any federal legislation, and it  
16 was not defined in any previously existing case law.  
17 So the court recognized that agency had an issue to  
18 deal with, and they had to make sure they had a legal  
19 framework to work with so it wasn't an arbitrary  
20 standard. And because it was similar in the facts, I  
21 submitted it to -- to the Court here.

22           And interestingly, the federal court stated,  
23 "The Commission must always consider the future needs  
24 of the public in commerce." And that's because when  
25 you're dealing with utilities, you always are not

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1 dealing with the present conditions, but you're dealing  
2 with planning issues and the needs for that utilities  
3 of the future.

4 Involving the SEPA issue, and that's the  
5 City's motion, it's a motion for summary judgment, and  
6 it's a motion in light of the fact that the Washington  
7 Utilities Transportation Commission has the authority  
8 and is an agency under state law which has to apply  
9 SEPA, should it not be categorically exempt under the  
10 action that's being proposed.

11 And I think the issue before the Commission  
12 at this point is the Commission has to take action on a  
13 petition, and whether that Commission should rely on a  
14 previous environmental review and environmental  
15 documents which, as the City and the parties allege, is  
16 a product of fundamental procedural error, and the  
17 parties have presented new and additional information  
18 suggesting that the closure would have significant  
19 adverse environmental impacts.

20 State statute, in several instances, has  
21 provided this agency clear substantive authority to  
22 apply SEPA. And that's been consistently upheld as  
23 substantive authority by the Supreme Court. And SEPA  
24 has always been considered an overlay of authority, in  
25 which, while the court is given authority directly

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1 through RCW Title 81, Chapter 53, to hear this  
2 petition, because it's necessary that any action that's  
3 not categorically exempt receive full environmental  
4 review, subject to full environmental disclosure, that  
5 the WUTC also has this overlay supplemental authority  
6 to make sure that the State Environmental Policy Act  
7 has been complied with. The general rule is any action  
8 taken in violation of SEPA is considered ultra vires,  
9 or beyond the authority of the agency, and it's  
10 considered void.

11 So at that point, the Commission is left  
12 with a decision. Obviously, it has substantive  
13 authority to apply SEPA. And I think it's undisputed  
14 at this point that some environmental review was done  
15 by the Washington State Department of Transportation,  
16 and I believe it's undisputed that grade crossings are  
17 not categorically exempt and require SEPA review.

18 So at that point, the question arises, what  
19 is the effect of Wash DOT's determination of  
20 nonsignificance?

21 And the City has submitted to the Court  
22 through a Supreme Court case, Department of Natural  
23 Resources versus Thurston County, the Supreme Court  
24 decided clearly that another agency's determination of  
25 environmental -- under environmental review does not



0125

1 preempt this agency from making a different  
2 determination. And the SEPA regulations support that  
3 interpretation.

4           Looking specifically at Department of  
5 Ecology's Administrative Code, which has been  
6 incorporated and adopted by the Washington Utilities  
7 and Transportation Commission, 197-11-600, it provides  
8 this Commission the framework that would make this  
9 mandatory upon showing of further evidence or of  
10 nondisclosure of that environmental -- that significant  
11 adverse impacts would occur. And the City has alleged  
12 we meet both of that criteria.

13           If you look at that exact language of that  
14 regulation, the scope of this regulation deals with an  
15 agency who is subject to SEPA and retains substantive  
16 authority, and in what manner and then what degree they  
17 are to use existing environmental documents, which I  
18 believe applies in this instant manner.

19           And it says, in Subsection 3, "any agency  
20 acting on the same proposal shall use an environmental  
21 document unchanged except for the following cases," and  
22 I would emphasize that this is any agency, in light of  
23 the fact that the scope of this regulation applies to  
24 agencies using previous determinations.

25           Subsection B of this says, "For

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1 determinations of nonsignificance in environmental  
2 impact statements, preparation of a new threshold  
3 determination or supplemental environmental impact  
4 statement is required if there are new information  
5 indicating a proposal has probable significant adverse  
6 environmental impacts which would include discovery of  
7 misrepresentation or lack of material disclosure. A  
8 new threshold determination or SEIS is not required if  
9 probable significant adverse environmental impacts are  
10 covered by the range of alternatives and impacts  
11 analyzed in the existing environmental documents."

12           Clearly, in light of the Supreme Court case  
13 in Thurston County, and clearly in light of the  
14 existing environmental regulations which this  
15 Commission has adopted by the Department of Ecology,  
16 that are promulgated, there is authority here to  
17 exercise your substantive SEPA authority upon a showing  
18 that there was either new information or that there was  
19 a lack of material disclosure.

20           Looking specifically at the instant matter  
21 and reviewing Washington State Department of  
22 Transportation's environmental review, the City has  
23 indicated that the notice that was required by  
24 Wash DOT's own rules, which is set forth in the  
25 Administrative Code 468-12-510(1)(a) have not been

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1 followed. These are mandatory notice requirements set  
2 forth by the Department of Ecology. The Department of  
3 Ecology is an administrative agency in which  
4 substantial deference is given to by courts when  
5 evaluating how these rules are to be applied.

6           Specifically, when a determination of  
7 nonsignificance resulting in a requirement for a 14-day  
8 comment period is issued by any agency, and  
9 specifically Washington State Department of  
10 Transportation, it requires notice to the general  
11 public via newspaper of general circulation, to any  
12 agency with jurisdiction, or an agency whose public  
13 services would be affected.

14           And the City has submitted in the form of  
15 declaration that, regardless of the issue of preemption  
16 on jurisdiction, on this specific matter it's obvious  
17 that the closure of the Hickox Railroad closing changes  
18 the way the City, the County, and the Fire District  
19 would provide public services, specifically fire,  
20 emergency, potentially police, and flood fighting and  
21 flood fleeing activities, when we exercise our police  
22 powers to protect the general health, safety, and  
23 welfare of our community.

24           I think at this point, from reviewing the  
25 environmental file of Wash DOT, looking at the

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1 responses and their declarations, and the responses of  
2 the -- or the replies of the parties and the  
3 declarations attached thereto, that at this point it's  
4 clear that no such notice has occurred. Attempts to  
5 find or locate in the Skagit Valley Herald, which is  
6 this community's local newspaper of general  
7 circulation, a notice of this determination on or about  
8 February 16th, and the declaration submitted by  
9 Christie Strauss, who is a paralegal at my office,  
10 there was no such notice that could be located in that  
11 newspaper. And staff did several searches under  
12 several different parameters looking for such notice.

13           Looking to see if any formal notice was  
14 given into the right hands, which is those people  
15 listed as contact people by the Department of Ecology,  
16 generally the SEPA-responsible official for their local  
17 agencies, and the declaration attached of Jana Hansen,  
18 no such formal notice was given. Declaration attached  
19 by Brandon Black, I believe, for the County is not  
20 aware of any such formal notice being given. Moreover,  
21 the declaration attached by the Fire Protection  
22 District's secretary, no such formal notice was given.

23           It's paramount that this notice being given  
24 in a timely fashion, because the rules under SEPA say  
25 that when you have a comment period you have two weeks

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1 to submit your information so that the responsible  
2 official making this determination can reconsider this  
3 based on that new information.

4           At best that can be said by Wash DOT is that  
5 they had given oral and perhaps electronic notice to  
6 the City of Mount Vernon in this particular instance to  
7 a lower-level staff person by the name of Rebecca  
8 Bradley-Lowell, and that had occurred approximately 14  
9 days after their determination was registered with the  
10 SEPA, or the Department of Ecology. In light of the  
11 fact that Ms. Bradley-Lowell is not the responsible  
12 official, in light of the fact that this occurred  
13 approximately 14 days after the notice was issued, one  
14 would have to presume that Ms. Lowell would have leapt  
15 to the conclusion that Wash DOT did not accurately or  
16 comply with the regulations and inquire further to them  
17 whether or not this determination was put in the right  
18 hands, which would be Jana Hansen or a SEPA-responsible  
19 official.

20           At this point, noticing that this  
21 requirement is mandatory under the SEPA regulations,  
22 looking at the declarations submitted by Jana Hansen  
23 that she did not receive notice of this determination  
24 until informed by the City attorney, it's quite easy to  
25 reach the conclusion and a finding that prejudice has

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1 occurred.

2           Looking at the history before this  
3 determination was made of the comments received to  
4 Washington State Department of Transportation by City  
5 officials, and the County, and the Fire Protection  
6 District, that we have serious concerns on the impacts  
7 to public safety, on the impacts to public services, on  
8 the natural and built environment, that at the time  
9 they make a determination that it's not significant  
10 that we would be silent within those two weeks defies  
11 the rule of reason at this point.

12           Looking at the fact that this agency, when  
13 submitting public notice of the petition for the  
14 closure and the comments received around the local  
15 community, once public notice was sufficiently given,  
16 that the failure of Wash DOT to provide public notice  
17 in the paper of their determination that this closure  
18 is not going to have a significant environmental  
19 impact, and that that would not have -- and that if we  
20 had appropriate notice comments would have been given,  
21 I think it's clear that comments would have been given  
22 if appropriate notice was submitted.

23           This procedural defect results in material  
24 nondisclosure of the environmental review to the local  
25 agencies. I think fundamentally this petition for

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1 closure, in terms of a local community perspective,  
2 could be characterized as highly controversial.  
3 Failure to provide notice to the general public to the  
4 agencies who are responsible under their police powers  
5 to provide emergency services and public services is a  
6 fundamental and a fatal procedural error resulting in  
7 material nondisclosure. On that criteria alone, this  
8 Court can exert its substantive SEPA authority and  
9 require that your responsible official, upon such  
10 finding, make a new threshold determination.

11           Additionally, the second criteria which we  
12 have submitted, which is new information to the  
13 Washington Utilities Transportation Commission, not  
14 before received by Wash DOT, and we would allege in  
15 light of the fact that we were prevented by lack of  
16 notice, would give further justification for the  
17 Commission making a finding that a new threshold  
18 determination needs to be conducted. The information  
19 in outline form that was submitted were information on  
20 probable significant adverse environmental impacts on  
21 both the natural and built environment.

22           SEPA recognizes as an element to the natural  
23 environment in which an agency responsible for SEPA  
24 review must analyze or consider are floods, and surface  
25 water movement, quantity, and quality. The parties

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1 have submitted that the crossing has been identified as  
2 a route to be utilized in the event evacuation is  
3 necessary to those residents during a flood flight. In  
4 declaration, Dike District 3 has identified the  
5 importance of the crossing in order to provide its  
6 services of maintaining and repairing the dikes in  
7 which it is responsible in staging successful emergency  
8 operations during a flood event.

9 In declarations submitted to the Commission,  
10 flooding has been shown on the Skagit River as a  
11 frequent and consistent threat to the City of Mount  
12 Vernon, the residents in the area, threatening both  
13 life and property, giving us standing to allege any  
14 injury, in fact, should any arise.

15 Furthermore, Diking District 3 and the  
16 landowners both rely on the crossing as a potential  
17 evacuation route, and rely on the crossing as a  
18 potential transportation service to not only ferry  
19 materials in, but to provide the appropriate emergency  
20 services, should the need arises.

21 And that would dovetail into the second  
22 showing by the City, which is the built environment,  
23 which is recognized under SEPA, that elements that  
24 impact existing land use plans and to estimated  
25 population, agricultural crops, transportation systems,



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1 vehicular traffic, movement/circulation of people or  
2 goods, and the impacts to public services and  
3 utilities, including fire, maintenance, water, storm  
4 water, sewer, solid waste, and any other governmental  
5 services or utilities are all elements of the built  
6 environment; which, if showing that probable  
7 significant adverse environmental impacts exist, this  
8 Court -- this Commission should make a new  
9 determination of nonsignificance.

10           The City has submitted new data, along with  
11 Fire Protection District 3, that the closure would  
12 adversely impact the ability to provide fire and  
13 medical services to the area west of the closure.

14           Previous comments to this Commission and  
15 newly submitted information provided by declaration  
16 from landowners to the surrounding area indicate an  
17 adverse impact to the agricultural crops and  
18 agricultural activity.

19           Previous comments to this Commission, not  
20 included in Wash DOT's determination of  
21 nonsignificance, were submitted by the City, that the  
22 proposed closure is inconsistent with land use plans of  
23 the City and would adversely affect its transportation  
24 system and grid, all elements of the built environment  
25 which this Commission has, as overlay substantive

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1 authority through SEPA, to determine whether or not  
2 mitigation of those adverse impacts are necessary.

3           There's been discussion along the lines of  
4 whether or not preemption occurs in the event that the  
5 Utilities and Transportation Commission would wish to  
6 exert its substantive SEPA authority. Auburn has been  
7 distinguished on its facts that the field of preemption  
8 does not extend to grade closures. Auburn was a case  
9 involving purely the reopening of a rail line, without  
10 any direct impact on the state's highways.

11           There is authority that's persuasive from  
12 North Dakota and Pennsylvania, and this is in light of  
13 the fact that this is an issue of first impression with  
14 our courts, and the courts haven't dealt with the  
15 specific issue of whether or not a grade crossing  
16 extends -- the field of preemption extends to grade  
17 crossings. However, it's similar on its facts, Home  
18 Economy in North Dakota, in which the court took notice  
19 that that state has previously and historically exerted  
20 their traditional and essential police powers over such  
21 crossing. This is exactly the same facts in which we  
22 have here.

23           Under the RCW Title 81.53, we have a long  
24 history of exerting our police powers, essential and  
25 traditional police powers, over crossings of state

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1 roads, and the impacts to the state roads is not  
2 preempted by a field that includes railroad regulation.

3           Looking at the case in Wheeler, it's not a  
4 grade crossing. However, it is a bridge crossing of a  
5 railroad. And while the actual at-grade or above-grade  
6 crossing is -- is dissimilar, the court found, on the  
7 same principle, that the fact that states have reserved  
8 their ability to exert their traditional and essential  
9 police powers have been exerted through statute, and  
10 that it is unclear that the federal statute preempts --  
11 the field of preemption extends to this, the general  
12 rule is that it does not. And that at that point, the  
13 court in Wheeler in Pennsylvania stated that the  
14 preemption argument that extends to grade crossings  
15 would not be accepted.

16           There is an additional response that  
17 occurred in California to this preemption argument  
18 that's been raised by the railroads, that, from my  
19 research, seems to indicate nationally, and that is the  
20 legislative intent by the federal statute which puts  
21 the preemption language in there. And the legislative  
22 intent from the legislative record indicates that this  
23 preemption was not to extend to the traditional police  
24 powers of a state. Rather, it extends to the economic  
25 regulatory powers of the state. And in situations

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1 where the state exerts its police power but does not  
2 have a direct and substantial impact on the economic  
3 regulatory power of the federal government, the case in  
4 California, which is cited in my brief, stated that  
5 that use of authority by the state is not preempted by  
6 the federal statute.

7           It's clear at this point that a grade  
8 crossing will have a direct impact on the state's  
9 public highways, and that there is case law and  
10 statutes that have been on the books for a very, very  
11 long time, in which the State has historically  
12 recognized that it's going to enact its traditional and  
13 essential police powers to regulate such closures.

14           The City would ask that the Commission  
15 acknowledge and follow the persuasive authority of Home  
16 Economy and Wheeler in Pennsylvania, similar on its  
17 facts.

18           Other than the preemption argument, I  
19 believe I've exhausted my opening statement.

20           JUDGE TOREM: All right. Thank you,  
21 Mr. Rogerson.

22           Let me turn to Mr. Jones and see what  
23 arguments he wishes to forward and support, and then to  
24 Mr. Snure, and then we'll come back to Mr. Lockwood on,  
25 I believe, mainly, the SEPA issues, perhaps the

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1 preemption, as well.

2 MR. JONES: I would just like to support  
3 what Mr. Rogerson has said, and then particularly -- in  
4 particular, reference the reliance by Burlington  
5 Northern Santa Fe on the Auburn case. We believe that  
6 that case is appropriately distinguished from the facts  
7 in this case, and that the more appropriate standard  
8 and the -- and the right legal conclusion was reached  
9 in another case, Iowa Chicago and Eastern Railroad  
10 versus Washington County, a case that was -- is  
11 internal to the North Dakota case cited by  
12 Mr. Rogerson. And essentially, what it -- what that  
13 case said was that the railroad failed to establish  
14 that the ICCTA preempted state administrative  
15 proceedings for a railroad to replace highway railroad  
16 bridges. And this has to do with this crossing issue.

17 I think it's also interesting that in a 2007  
18 decision in Chelan the Commission upheld a duty on the  
19 part of Burlington Northern Santa Fe to deal with some  
20 Chumstick highway rail crossings that were unsafe. I  
21 think this is a clear indication that the Commission  
22 has previously addressed this question about to what  
23 extent rail crossings, whether they be at grade or  
24 whether they not be at grade, are something that are  
25 particularly reserved or left within the jurisdiction

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1 of the State of Washington, and that is a jurisdiction  
2 exercised primarily by the Utilities and Transportation  
3 Commission; and that the argument made, while it  
4 certainly is true about the Auburn facts, is not true  
5 about railroad crossing cases in particular; and that  
6 line of authority that's being relied upon in the  
7 argument of the City is the correct one, and is  
8 consistent with UTC's previous rulings, is consistent  
9 with the body of law that is interpreting the exclusive  
10 jurisdiction of the Safety and Transportation Board and  
11 the allocation of responsibility between states and the  
12 federal government where railroads are concerned.

13 I think it's interesting that under NEPA,  
14 the National Environmental Policy Act, there is a  
15 categorical exemption for rail crossings. That means  
16 that there is no federal consideration of the factors  
17 that would go into making a proper decision on  
18 environmental grounds. Rather, there is an explicit  
19 understanding written into the regulations of the State  
20 of Washington that rail crossings are not categorically  
21 exempt. I think this is an expression of the very  
22 principle that I was just mentioning, that where  
23 railroad grade crossings are concerned that there is a  
24 state interest, that both the federal government and  
25 the state government have long recognized, and that

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1 they are -- that you are, as a decision-maker, applying  
2 the state statute under an obligation to consider all  
3 of the State Environmental Policy Act issues, and that  
4 you are not foreclosed by federal law from taking  
5 evidence and weighing that evidence where railroad  
6 crossing cases are concerned.

7           And we would ask you to reject the argument  
8 based on the Auburn case.

9           JUDGE TOREM: All right. Thank you,  
10 Mr. Jones.

11           Mr. Snure?

12           MR. SNURE: Thank you. Brian Snure on  
13 behalf of the Skagit County Fire District 3.

14           In the interest of economy, I fully support  
15 Mr. Rogerson, has prepared written materials, and his  
16 oral argument today, as well as the comments added by  
17 Mr. Jones.

18           Just emphasize that the Fire District  
19 strongly believes that this Commission needs to  
20 interpret public convenience and necessity very  
21 broadly, in the way Mr. Rogerson commented. That's  
22 critical for fire districts in planning and in dealing  
23 with response issues in this area, involving future  
24 planning, growth, and relocations of their stations,  
25 and then just emphasize the Fire District did not

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1 receive the notice of determination of nonsignificance,  
2 and very likely would have submitted comments had it  
3 received that, because I'd been in discussions with  
4 Department of Transportation for over a year and a half  
5 on this matter. Lack of that opportunity was, in our  
6 view, a rather fatal flaw in the process to date. I  
7 believe that supports Mr. Rogerson's arguments.

8 JUDGE TOREM: All right. Thank you,  
9 Mr. Snure.

10 Mr. Jones?

11 MR. JONES: Your Honor, I did think of one  
12 other thing that's very important to my clients  
13 directly, and that is that in cases where there is a  
14 determination of nonsignificance, and I don't think  
15 that this was mentioned by Mr. Rogerson, but there is  
16 also authority for requiring direct notice to the  
17 people who live in the vicinity, including the Boones,  
18 who have property right next to this intersection; and  
19 also Smith & Burkeland, who were interveners, and who  
20 previously presented evidence about the impact which  
21 they see. Based on the submissions that they have  
22 made, there's nothing to indicate that they received  
23 direct notice as they should have of the determination  
24 of nonsignificance.

25 JUDGE TOREM: All right. Thank you for that



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1 addition.

2 Mr. Thompson, the Commission is -- oh, I got  
3 to go to Mr. Lockwood first, and then to you.

4 Sorry.

5 We had worked our way down to that end of  
6 the table. He's ready.

7 Mr. Lockwood.

8 MR. LOCKWOOD: Thank you. Thank you, Your  
9 Honor. Scott Lockwood, Washington State Department of  
10 Transportation.

11 I'm addressing the City's motion for summary  
12 judgment. That motion, in effect, asks the Commission  
13 to sit in an appellate capacity and to determine, first  
14 of all, whether or not DOT met -- and again, I want to  
15 emphasize, met the procedural requirements of SEPA, and  
16 of course the City says that it didn't. And then,  
17 based on that assumption, asks the UTC to then  
18 affirmatively assume lead status and to then,  
19 apparently, unilaterally and independently, issue its  
20 own threshold determination.

21 Your Honor, I know you did read the briefs.  
22 And, frankly, I think this issue has been quite  
23 thoroughly briefed by both sides, and I'm not going to  
24 take a lot of time going through that.

25 But simply, suffice it to say, WSDOT did

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1 comply with the procedural requirements of SEPA.  
2 Only -- the Ecology rules defer to the agency's notice  
3 provisions, and there -- and Ecology rules provide a  
4 certain amount of latitude. Most significantly, only  
5 agencies with jurisdiction, as that's defined by the  
6 rules, are required to notice, and these parties,  
7 pursuant to the preemption, are not agencies for  
8 jurisdiction, so any procedural lack of notice would be  
9 of no moment in this case with respect to those  
10 parties.

11 But more importantly, even with that, I have  
12 yet to review any concerns expressed by any of these  
13 parties that the Department didn't, in fact, take into  
14 consideration prior to issuing its DNS. There's  
15 nothing new in terms of the built environment or any  
16 other factor relative to this project that hadn't been  
17 considered by the Department. And that's what SEPA  
18 procedural requirements are all about. Environmental  
19 factors have to be considered.

20 Now, the Ecology rules and the statute are  
21 very clear that SEPA does not encourage, in fact it  
22 precludes, a piecemeal approach to documenting SEPA  
23 compliance. And it does not allow multiple agencies to  
24 do multiple DNS. The rules require, as related to this  
25 project, the agency that sponsors the project be lead

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1 status and issue a DNS.

2           There are occasions when other agencies can  
3 seek to assert lead status. There are some  
4 interesting -- potential interesting preemption issues  
5 that go to that, but, you know, the rules require that  
6 a single environmental document be done for the entire  
7 project.

8           This project was a siting project. The  
9 rules wouldn't allow a SEPA document for the siting  
10 project, and then, you know, a different SEPA document  
11 be done for the closing. It's pretty clear to me that  
12 even if you assume the UTC has jurisdiction under SEPA  
13 to do the closing project, it's hard for me to imagine  
14 how the UTC would have the appropriate jurisdiction  
15 in this case for the bigger project, the siting  
16 project. There's some real preemption issues there,  
17 and it's clearly outside the scope of the UTC's area.

18           You know, WSDOT assumed lead status. WSDOT  
19 completed its DNS. The issue with respect to the role  
20 of the UTC in this case is, did they assume lead  
21 status? Yes, they did. Did the UTC -- or did WSDOT  
22 assume lead agency status? It did. Chris Rose  
23 addressed those issues in his letter. And it is our  
24 position that that is all that the UTC was required to  
25 do. The UTC did it. And the UTC really doesn't have

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1 jurisdiction with respect to procedural compliance with  
2 SEPA beyond that.

3           Now, the City did raise a couple of  
4 questions -- or cite to a couple of cases for the  
5 proposition that WSDOT's final SEPA determination  
6 wasn't binding on other agencies. In order to  
7 understand that body of cases, you do have to  
8 understand the distinction between the procedural  
9 requirements of SEPA and the substantive requirements  
10 of SEPA. Those cases, the, like, Lawrence case, for  
11 example, do, in fact, stand for the proposition that  
12 simply because one agency has done a DNS that wouldn't  
13 preclude another agency with jurisdiction from  
14 entertaining substantive evidence that might relate to  
15 environmental impacts.

16           Again, that raises some -- you know, if we  
17 had purely environmental concerns being raised that  
18 aren't -- wouldn't also be relevant to public safety,  
19 then there's some jurisdictional questions relating to  
20 preemption.

21           In this case, though, the concerns that  
22 we've heard with respect to environmental impacts are  
23 the built environmental impacts, specifically impacts  
24 on traffic, impacts on emergency response times. Those  
25 are all issues that are relevant in this case. I don't

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1 hear anybody suggesting that the Commission shouldn't  
2 be entertaining those issues. They're relevant to  
3 public safety, and they're relevant to convenience and  
4 need. They will be part of the case.

5           However, the Commission simply does not have  
6 subject matter jurisdiction to sit as an appellate body  
7 to decide WSDOT's procedural compliance with SEPA. I  
8 would submit that's also true of the procedural  
9 requirements of the Growth Management Act. There are  
10 overlapping issues that relate to comprehensive  
11 planning, and that would relate to public convenience  
12 and necessity, but that overlap, while it might provide  
13 for the submission of similar evidence, to the extent  
14 that the City's request that the Commission entertain  
15 Growth Management policy, if that means procedural  
16 requirements within the Growth Management Act as  
17 opposed to some of this overlapping evidence, WSDOT  
18 would join in BNSF's motion to exclude that, as well.

19           Thank you.

20           JUDGE TOREM: All right. Now, Mr. Thompson.

21           MR. THOMPSON: Okay. I'm going to try to  
22 keep this very brief.

23           The -- I guess the bottom line from Staff's  
24 point of view is that -- with respect to the SEPA  
25 issues is that the City and the various proponent

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1 parties' request, with respect to SEPA, which I take to  
2 have two parts, one either that the Commission do its  
3 own environmental review, or, two, that it dismiss the  
4 petition, and this would effectively require, I guess,  
5 Wash DOT to come back with another petition once it's  
6 done environmental review, both of these requests are  
7 not properly made to you, to the Administrative Law  
8 Judge or the Commissioners in this case.

9           The determination of lead agency status is  
10 one that is assigned to the agency's SEPA-responsible  
11 official. And that is the Director of Regulatory  
12 Services who oversees the Commission's Investigative  
13 Staff. And it's properly so, because the person who  
14 makes these kinds of initial procedural determinations  
15 with respect to SEPA has to get his hands dirty with  
16 looking at facts before a case has come before the  
17 Commission for adjudication. That's not something that  
18 the Commissioners or the ALJ can do. You have to --  
19 your knowledge of the facts is supposed to come to you  
20 through the record of the case and through the  
21 protections, ex parte protections, and so forth. So on  
22 that basis alone, the -- the Commission, ALJ, should  
23 reject these requests on behalf of the moving parties  
24 on the SEPA matter.

25           The -- I don't think -- as a matter of fact,

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1 I don't think that that particular issue is even in  
2 dispute. I see that in the reply of the various  
3 parties to -- to Staff's filing in this, sort of takes  
4 the approach that, well, if this is properly directed  
5 toward the SEPA-responsible official, then so be it.  
6 Here's our -- here's our documentation. Please take it  
7 into consideration.

8           The -- when you get into the substantive  
9 issues, and these are the issues that the  
10 SEPA-responsible official would consider, you get into  
11 things likes was the notice provided by Wash DOT  
12 adequate. You know, is there -- maybe there's a  
13 constructive notice doctrine that would apply here.  
14 You know, if the -- if the technical requirements of  
15 notice of requirements aren't met, well, did the  
16 parties have, basically, constructive notice that was  
17 sufficient? There are a lot of threads to follow out  
18 and to try to figure out the right answer to this  
19 question.

20           But the -- but SEPA doesn't require --  
21 there's some argument presented that SEPA requires a  
22 second agency with jurisdiction, if it finds that the  
23 initial agency's review was -- was insufficient or  
24 didn't consider all of the information, that it has to  
25 do itself its own environmental review. And the rule

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1 cited for that proposition is in the Department of  
2 Ecology rules, and it is WAC 197-11-600. I think if  
3 you look at it carefully you'll find that it does not  
4 preclude the WUTC-responsible official in this case  
5 looking at this matter, deciding for himself whether --  
6 whether he thinks that the procedural requirements were  
7 met. If he doesn't, at that point, he has the option  
8 of trying to, for example, persuade Wash DOT that what  
9 they ought to do is go back and remedy those failings,  
10 if, in fact, they exist.

11           And there is no -- there is no affirmative  
12 requirement that the second agency actually do it  
13 itself. It's stated in the passive voice. It doesn't  
14 say -- it doesn't say -- it says an -- if there is new  
15 evidence that was ignored in the first instance, it  
16 basically states that a supplemental review shall be --  
17 shall be done. It doesn't say by which agency.

18           So it is Staff's preference that if we -- if  
19 we do find, and the responsible official is convinced  
20 that there was error in notice, that there be an  
21 opportunity to work with Wash DOT to see whether that  
22 agency would be willing to go back and remedy whatever  
23 problems may exist.

24           You know, and as I sit here, frankly, I  
25 don't know if Staff has come to any conclusion as to



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1 whether the notice requirements were -- were met or  
2 not.

3           The -- the extent -- the way this comes  
4 before the Commission, ALJ, would be limited to, if it  
5 turned out the parties didn't need more time to figure  
6 out what should be done, whether -- you know, whether  
7 there should be an attempt to go back and meet notice  
8 requirements if they weren't met, or if the responsible  
9 official is convinced that they were met, and we should  
10 just proceed, the only way this would properly come  
11 before the Commission is in a request for additional  
12 time to sort the matter out.

13           I don't think there's any basis for -- I  
14 just think it's sort of -- it would be pretty draconian  
15 to say that what should happen is that the petition  
16 should be dismissed, unclear whether it would be with  
17 or without prejudice. Clearly, with prejudice wouldn't  
18 make sense.

19           So at most, there might be a need for a  
20 continuance or perhaps not. But that's the only way  
21 that -- that the issue should be coming before the  
22 Commission.

23           So I'm going -- and I'm going to limit my  
24 comments to the SEPA. So that's all I have on it.

25           JUDGE TOREM: Mr. Thompson, if I understand

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1 your position, the suggestion is there may be or may  
2 not be merit to the SEPA arguments that have been  
3 presented. However, it's not something that I should  
4 concern myself with under the guise of this hearing,  
5 but it's up to Mr. Rose, the SEPA-responsible official,  
6 to notify Wash DOT and/or the other parties that  
7 something isn't complete or otherwise is lacking in the  
8 existing SEPA documents. And if he does that, on  
9 behalf of the Commission, he's indicating that, by that  
10 conclusion, I guess, that the Commissioners and this  
11 hearing should be ready to pause and draft a new  
12 procedural schedule while any defects are remedied.

13 MR. THOMPSON: Right. I guess, yeah, my  
14 view is if -- you know, if parties -- I think we'd need  
15 a little more information, frankly. These briefs have  
16 gotten us part of the way there, but from my  
17 standpoint, I think in order to advise him, I feel like  
18 I would need additional information.

19 So if after looking at that additional  
20 information Mr. Rose was convinced that, yes, in fact,  
21 there was a fatal procedural defect here, he would then  
22 have to make a choice should we -- should we, can we,  
23 try to assume lead agency status or do our own  
24 environmental review? And those are -- that's another  
25 set of issues, about the 14-day comment period, did

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1 that run already, would the -- would that rule bar the  
2 Commission from trying to assert lead agency status,  
3 even if it wanted to?

4           Anyway, sorting all that out, if we come to  
5 the point that something further needs to be done, at  
6 that point we could ask for additional time for that to  
7 be done.

8           If we conclude that nothing further does  
9 need to be done, then we could let that be known, as  
10 well.

11           JUDGE TOREM: Well, I certainly understand  
12 where Mr. Lockwood and his client are coming from as to  
13 their -- the preemption issue tied with the SEPA issue  
14 and where they believe substantively and procedurally  
15 the documents and the DNS are sufficient.

16           Earlier in the case, we talked about whether  
17 Mr. Rose would send that letter which came out, and  
18 hoped that would address the initial SEPA issues that  
19 came up at our first prehearing conferences. It would  
20 be helpful, I think, independently of the decision I  
21 need to make on the motion that's before this tribunal,  
22 that Mr. Rose, through you, and Ms. Hunter, determine  
23 what if anything the agency's position will be on this.  
24 Because I do see a distinction between what my role on  
25 behalf of the Commissioners is and the petition before

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1 using, versus the SEPA issues that are definitely  
2 within his realm and perhaps have some influence on how  
3 this proceeding can go forward.

4 I don't think that anybody is asking that  
5 the SEPA issues become part of the ultimate hearing,  
6 but they have to be addressed one way or the other.

7 I do think that Mr. Rose taking a position  
8 on the sufficiency of them sooner rather than later,  
9 given our procedural schedule, would be most helpful.

10 And none of the parties, including BNSF and  
11 Wash DOT, want to see this issue not addressed at this  
12 level only to come back at an appropriate appellate  
13 review level against them, so -- and to have to redo a  
14 hearing simply because of an issue that could have been  
15 raised by Mr. Rose earlier on, if there is such an  
16 issue.

17 So I guess I'm encouraging you to go back  
18 through your client to Mr. Rose and have him weigh in,  
19 in some decisive fashion, as to the sufficiency of the  
20 documents.

21 I may be doing that independently, seeing as  
22 what the motions are, and I may choose to defer to him.  
23 I haven't sided that yet, whether your position was  
24 ultimately what I will adopt or not. But there's a lot  
25 of other argument and cases to look to determine what

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1 my role on behalf of the Commissioners might be on  
2 that.

3 But thank you, Mr. Thompson. That's --  
4 Procedurally, that was one of the issues I was most  
5 concerned with as we looked at this.

6 I do see that the parties on the issue of  
7 what scope we should go forward on with the public  
8 safety -- I think we boiled that down in both  
9 prehearing conferences, and it was the parties helping  
10 me get a little bit deeper into the law and more  
11 grounded in that, I think was the words we used,  
12 between July and early August, that the second  
13 prehearing conference order folks are generally in  
14 agreement with, but the main question is how far do --  
15 is it current things on the ground, or is it future  
16 planning needs that come up?

17 And I think, if I understand, Mr. Scarp,  
18 your motion to limit the scope of issues is mainly as  
19 to those transportation planning issues. And that  
20 word, "planning," leaves the wiggle room that you're  
21 trying to close out; is that correct?

22 MR. SCARP: That is correct.

23 Could I have about two minutes just to  
24 respond to -- and I'll --

25 JUDGE TOREM: I do want to give you that

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1 opportunity.

2 MR. SCARP: Yes.

3 JUDGE TOREM: But I wanted to at least speak  
4 a little bit to what those issues were.

5 That seems to be the genesis of your motion  
6 and the parties' responses.

7 I did want to make it clear, though, that  
8 the indication about the Growth Management issues I  
9 don't believe was challenged as an exception. At least  
10 I don't recall that particularly being taken up. There  
11 is that separate Growth Management Hearing Board item.  
12 And unless my recollection of the second prehearing  
13 conference and the order are incomplete, due to jet lag  
14 today, I still think that that was clear enough, what  
15 you cited to in Order 1, the agreement, and that's  
16 still binding on this proceeding.

17 So I don't want you to think that that needs  
18 to be readdressed.

19 MR. SCARP: Okay.

20 JUDGE TOREM: That's still there.

21 Where I see the potential for issues is that  
22 "planning" word. And I tried to limit it to current  
23 planning rather than to future.

24 MR. SCARP: If I may, and I guess from our  
25 standpoint, that when Mr. Rogerson cites the Northern

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1 Pacific Railway for a broad-based policy considerations  
2 to come in and sort of overlay this public safety and  
3 the future needs are out there in public policy, our  
4 position is just that's simply too broad. You can't  
5 assess that.

6           And I would only note what he said about  
7 that very case. The court noted the construction of  
8 the -- that was already begun of the bridge at Vantage  
9 across the Columbia River. In 1927 that was an  
10 enormous project; the hydroelectric dam at Chelan,  
11 another one; the Great Northern Tunnel at Stevens Pass;  
12 and the Kittitas Reclamation Project, a 27-mile dam.  
13 And it noted that those undertaking, you know, were in  
14 place at that time, and said that there will, and I  
15 quote, "undoubtedly be a continuous movement of workmen  
16 between these construction jobs to and from neighboring  
17 towns." So they're looking at something in place, and  
18 saying, we're going to have a lot of people moving  
19 here, and this is already in the works.

20           That's -- if there's evidence that there's  
21 going to be a school built, and the permit is in place,  
22 and the plans are being put forth that's going to be  
23 effected, I would expect that those would be brought  
24 before, you know, in the hearing, to discuss what those  
25 are and how that will affect the future needs, and that

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1 those will be addressed. But that's very different  
2 than saying we've got to, you know, take into  
3 consideration the broad-based Growth Management Act,  
4 which is --

5 JUDGE TOREM: Now, do you --

6 MR. SCARP: Go ahead.

7 JUDGE TOREM: -- think that projects that  
8 are listed in the City or County's transportation plans  
9 that are typically six or more years out, that are,  
10 let's say, planned but not yet funded --

11 MR. SCARP: Funded. Well, I would -- I  
12 would object, and I would say that those are -- those  
13 are part of -- there's a lot of wish lists. There's a  
14 lot of things going on that I'm sure the Department of  
15 Transportation could talk about that's a wonderful idea  
16 and has been proposed and studied, but without funding  
17 we would say, well, that's great, but what's going on,  
18 and what else will take place before that ever happens.

19 But, again, those -- for purposes of scope,  
20 yes, we would say that these things that that case  
21 stands for talks about something that is -- is in  
22 action, that is taking place, and that the court was  
23 looking at transportation needs directed to those.

24 JUDGE TOREM: If the City or County has a  
25 bond measure even on November's ballot that were to



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1 pass providing funding for a substantive project that  
2 impacted this crossing, would that then become relevant  
3 at the hearing in January?

4 Put you on the spot a little bit.

5 MR. SCARP: Yeah, it does.

6 JUDGE TOREM: Because it's a question of  
7 vested rights as to the time of the petition, and now  
8 the time of this ballot measure.

9 MR. SCARP: Yeah.

10 MR. ROGERSON: Your Honor, if I could  
11 respond?

12 MR. SCARP: Go ahead.

13 JUDGE TOREM: Are you going to tell me there  
14 is such a ballot measure?

15 MR. ROGERSON: I'll have to check with the  
16 school districts and many other people who are -- other  
17 government entities.

18 JUDGE TOREM: I think Mr. Snure's client  
19 might be in the best position to tell us.

20 MR. SNURE: I don't think the district has  
21 any bond measures.

22 MR. ROGERSON: BNSF is obviously trying to  
23 narrow the holding in Northern Pacific. And if you  
24 look at the continuum of cases that allow the widest  
25 latitude, and a Department of Transportation case,

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1 which is cited frequently by the Commission in its own  
2 opinions, that Supreme Court was ringingly clear that  
3 the agency is given the widest latitude in determining  
4 public convenience and necessity.

5           And it goes to weight, what weight you apply  
6 to how far out this planning project is. Rather than  
7 having to divide hairs on whether or not it's  
8 admissible I think is inappropriate at this point, but  
9 weight you should apply, in your own discretion, as  
10 long as it's frankly considered and honestly considered  
11 I think is the appropriate purview that the Supreme  
12 Court has clearly ruled in the Department of  
13 Transportation.

14           Furthermore, Northern Pacific did have  
15 on-the-ground projects, but they also included in their  
16 analysis the transportation system's needs by  
17 connecting population centers. And that is a planning  
18 issue that is not on the ground. They had said that  
19 Cle Ellum and Roslyn are logically a part of the  
20 Ellensburg district. An extension of the Washington  
21 Motor Coach Company's service to these areas at such  
22 point will mean connecting these communities to the  
23 transportation service to Ellensburg, Yakima,  
24 Wenatchee, Chelan, at some point. This was not an  
25 on-the-ground project.

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1                   And it's consistent with your clear holding,  
2    which says all future developments reasonably to be  
3    foreseen. That's the standard that needs to be  
4    applied, reasonably to be foreseen. And that includes,  
5    in terms of its scope, "as far as it may be anticipated  
6    from the development in the community, the growth of  
7    industry, the increase of wealth and population, and  
8    all the elements to be expected in the progress of  
9    community." That's a direct quote from the Supreme  
10   Court in 1927.

11                   It goes to weight.

12                   JUDGE TOREM: So the City's position is more  
13   information in front of the Commissioners is better,  
14   and if they think that something is too speculative in  
15   nature or perhaps not directly impacted by the Hickox  
16   Road closing petition, which is before them, they might  
17   look, and say, these plans may be out there, but the  
18   remaining crossings to the north or south may also be  
19   adapted. That's the weight the Commission --

20                   MR. ROGERSON: Right.

21                   JUDGE TOREM: -- the City would have the  
22   Commission give to that evidence.

23                   MR. ROGERSON: Right. Yeah.

24                   Frankly, and I think the TransAmerican cases  
25   opine on this. To disregard the evidence, and not

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1 approach the analysis, so you limit your findings,  
2 would be subject to error in a review in court. But  
3 allowing the evidence in, and frankly considering that  
4 evidence, and then adding what weight you would put in  
5 determining public convenience and necessity would be  
6 something that would be allowed.

7           And planning documents of the City are not  
8 wish lists, by any stretch of the imagination. Having  
9 litigated in front of the Growth Management Hearing  
10 Board on urban growth area boundaries, there have to be  
11 an evidentiary showing of need of where you're going to  
12 grow, and that that need doesn't justify sprawl. And  
13 that's based on not just policy decisions, but  
14 quantified objective evidence that's incorporated with  
15 your comprehensive plan.

16           The Growth Management Act is not, and the  
17 four corners of that, those planning documents, are not  
18 something that is purely a policy-driven issue.

19           JUDGE TOREM: All right. I do understand  
20 that the varying, competing jurisdictions on cities,  
21 and how, I think we expressed this early on, that the  
22 closure of a railroad crossing by one agency can throw  
23 off medium-, long-range plans of a City or County, and  
24 they may have to reformulate those. And I recognize  
25 that.

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1                   I'm trying to sort out, and I think I made a  
2 good attempt in Order No. 2, to get to that point in  
3 determining whether I would grant the motion to further  
4 limit or clarify the issues on those, how much is in  
5 the future, how much has to be concrete. That's what's  
6 before me now.

7                   And I do appreciate the extensive briefing  
8 that was gone into by both sides. It certainly gave me  
9 quite a different bit of reading than what I was doing  
10 in Korea. So -- I won't say it was definitely a  
11 welcome break, given the volume of it, but definitely  
12 by topic.

13                   Other parties want to say -- I know  
14 Mr. Scarp has a couple more things, but does anyone  
15 else anticipate further comments?

16                   MR. JONES: I may have one.

17                   JUDGE TOREM: All right. Well, I'm going to  
18 have Mr. Scarp, and Mr. Jones, and we'll see where we  
19 were.

20                   MR. SCARP: I'll leave you to the opinion  
21 and what it means, but I do have to disagree with  
22 Mr. Rogerson insofar as his interpretation of that case  
23 without the facts that it's grounded in. And the  
24 language, the broad language that it uses, is in  
25 relation to the facts and those projects that are in

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1 place. And to use that in support for something  
2 grander, I just -- BNSF submits is simply not there.

3           The -- the other issue that he raises of  
4 what this scope is, and what goes to weight, I guess in  
5 terms of specific projects that are there, I can't  
6 determine that. And at some point, you will probably  
7 be required to give weight to specific evidence that  
8 comes in as speculative, at best. But what he has  
9 proposed through briefing is something broader. It's a  
10 policy that's going to collide.

11           And our point is simply once we run into  
12 that, you're being asked to have the Growth Management  
13 Board review you, or vice versa. I guess specifically  
14 you're supposed to weigh in on their considerations  
15 without specificity. And that's what our -- our  
16 objection is to.

17           One last note regarding the -- I've already  
18 said it, and I'll make it very quick, on the  
19 distinction, where the City and Mr. Jones have tried to  
20 turn the preemption issue into preemption of grade  
21 crossing cases, as I said before, this issue arises  
22 under environmental review and procedure of  
23 environmental review, and the cases such as the  
24 Washington County where that was -- was used to  
25 determine whether the Commission had authority or

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1 jurisdiction to require payment of replacement of  
2 bridges is something entirely different than what we're  
3 being asked to look at within the environmental review.

4 So financially, we would join the Department  
5 of Transportation's arguments, and we would request  
6 that the motion for summary judgment be denied, as well  
7 with the motion in limine.

8 That's all I have.

9 JUDGE TOREM: All right. Thank you.

10 I'll let Mr. Rogerson respond directly, and  
11 then Mr. Jones.

12 MR. ROGERSON: I have yet to respond to the  
13 SEPA arguments by the Attorney Generals.

14 Regarding the issue of preemption and  
15 jurisdiction, the jurisdiction is clearly laid upon  
16 this Commission to discuss the issues involving grade  
17 closure. And that includes the jurisdiction through  
18 its overlay authority to discuss those impacts narrowly  
19 tailored to the issue of grade closure. It is that  
20 action, and that action alone, that the City is seeking  
21 to limit this Commission's review on the inadequacies  
22 both with new information and procedurally. And it's  
23 clear on the cases that when it deals with traditional  
24 exercise of police powers on its effects of state  
25 roads, that that environmental review, which is

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1 inextricably linked to this Commission's jurisdictional  
2 exercise of whether or not a petition for grade closer  
3 should be granted, is not preempted, and it's not  
4 listed in the direct federal statutes that preempt. It  
5 doesn't affect the economic regulation of a railroad.  
6 And it is preserved historically by our traditional  
7 police powers.

8           To fold this into a larger project is fine,  
9 but this Court still reserves its authority directly  
10 through state statute that's historically been  
11 recognized and authority through the overlay authority  
12 of SEPA to do an environmental review.

13           Interestingly, if the proposition of  
14 Burlington Northern counsel saying that this  
15 environmental review is preempted in its entirety, I  
16 would submit that that makes Wash DOT's environmental  
17 review academic, in light of the fact that NEPA would  
18 trump that in the Surface Transportation Board.

19           If preemption occurs, then as submitted by  
20 Burlington Northern, otherwise it doesn't make any  
21 logical reason for that environmental review to even be  
22 conducted.

23           JUDGE TOREM: Well, I certainly understand,  
24 Mr. Rogerson. There's a limitation on this preemption  
25 argument and how it comes up. And if we take it to



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1 that end, it becomes absurd. So I don't think anybody  
2 is pushing that argument to the ends you're  
3 illustrating now. So I certainly don't understand it  
4 that way.

5 MR. ROGERSON: The City has never alleged  
6 for this agency to take lead status, nor does the SEPA  
7 regulations allow for that, or require that.

8 What they allow for is to support the policy  
9 that's identified in case law, which is full  
10 environmental disclosure, which is the underpinning to  
11 create an appropriate environmental review. So should  
12 any agency acting on the same proposal find new  
13 information or make a determination substantively that  
14 there was a lack of material disclosure, that you can  
15 conduct within your jurisdictional limits, which is  
16 related to the petition for closure, which is  
17 consistent with the Thurston County case, which  
18 recognized the Shoreline Board regarding eagles as only  
19 narrowly tailored in their environmental determination  
20 to the shoreline effects.

21 However, a County can make an inconsistent  
22 determination of significance with the planning  
23 statutes in which they have the jurisdictional  
24 authority to use, which is the overlay principle.

25 We submitted new information. We've

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1 identified procedural defects.

2           Regarding the issue of which is the  
3 appropriate official, we've argued in the alternative  
4 that if it is the SEPA-responsible official that we  
5 would find -- we have submitted today this request to  
6 them.

7           I don't think it's -- you know, I think  
8 that's a procedural nicety that I don't have a  
9 significant issue with.

10           What I do think, though, I think the  
11 Attorney General was correct stating that before a case  
12 has come for adjudication that it's the  
13 SEPA-responsible official who's to determine this, but  
14 this case has come for adjudication. And this is a  
15 substantive decision required by the decision-maker.  
16 And that substantive decision is a finding of new  
17 information or a lack of material disclosure.

18           And there's a general rule not to orphan a  
19 SEPA decision from the underlying government action.  
20 And that's why we have brought this forth here today,  
21 as well as we've submitted it to the responsible  
22 agency. We don't want to risk parallel appeal -- an  
23 agency appeal process that's orphaned from the  
24 underlying petition.

25           JUDGE TOREM: When you say that it's come

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1 for adjudication, though, it's not presented by  
2 Mr. Rose or by Kathy Hunter's division for  
3 adjudication. It's presented for adjudication based on  
4 the petition filed by Burlington Northern.

5           So I wonder, in your logic there, whether it  
6 just sets out a real competing question was to whether,  
7 just because it's come in, it falls to the ALJ or the  
8 Commissioners who adhere the ultimate decision on the  
9 crossing and the public safety and related issues, or  
10 whether some -- at some time period, built into these  
11 cases, procedurally, from your perspective, the agency  
12 should have a hurdle for the case to clear prior to the  
13 hearing on the merits, that's outside of that. I think  
14 that's what you're asking for, and you're forcing the  
15 agency to make that decision today through your motion.

16           And whether my ruling is -- again, falls  
17 back onto your position in the alternative, or to what  
18 Mr. Thompson set out saying, we will have a deadline  
19 for a decision from Mr. Rose, or we will acquire that  
20 prior to the adjudication, and at a point that's  
21 logical before the adjudication, so we know whether  
22 we're going forward or it's going to be delayed.

23           I think that's what you're asking for.

24           There's no way that it's not presented for  
25 adjudication, I guess is what I'm trying to get to.

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1                   MR. ROGERSON: Right. Generally, there were  
2 two issues that I've brought up on why it's the opinion  
3 of the City that I think the Administrative Law Judge  
4 at this point in the proceedings should make this  
5 determination. And that's, one, is because it's  
6 substantive. And it's as a necessary predicate to make  
7 a decision on whether or not to prepare a new threshold  
8 determination. It's a substantive decision regarding  
9 whether or not the new information indicates a  
10 proposal's probable significant adverse environmental  
11 impacts and/or discovery of misrepresentation or lack  
12 of material disclosure. That's a substantive  
13 decision-making process.

14                   And the second principle is that, the  
15 principle is, when you have an underlying government  
16 action, which at this point is the petition for  
17 closure, you don't orphan a SEPA determination with  
18 that underlying action, which means that it goes in  
19 front of the same tribunal.

20                   However, as I said, we've submitted it in  
21 the alternative to the responsible official, but my  
22 fear is resulting -- I think you've relayed this much  
23 with your thought process, was having parallel appeals  
24 in an agency of a SEPA determination through a  
25 responsible official, and then we have another

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1 Administrative Law Judge making determinations on the  
2 merit, which is the principle behind not orphaning a  
3 SEPA determination.

4           In light of the issue involving who should  
5 prepare a DNS, should those findings be submitted that  
6 this new information or that there was a lack of  
7 material disclosure, the City would argue that the  
8 Washington Utilities Transportation Commission is a  
9 Commission that specifically delegated the authority  
10 for petitions for grade closures. And you can  
11 recognize as a Commission with special expertise to  
12 discuss those impacts, and you are the appropriate --  
13 either an Administrative Law Judge or the  
14 SEPA-responsible official is the appropriate agency to  
15 discuss those impacts.

16           JUDGE TOREM: All right. Thank you.

17           Mr. Jones.

18           MR. JONES: I guess the other comment that I  
19 had comes out of page two and three of the letter to  
20 you from Chris Rose that was attached to Mr. Lockwood's  
21 submission, and it makes reference to a previous  
22 Burlington Northern that was in the railroad company  
23 case, where Green Road was closed. And I think very  
24 obviously in that decision and in Mr. Rose's assessment  
25 of that decision there is an inherit authority in the

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1 Utilities and Transportation Commission to order  
2 supplemental or additional environmental review. And I  
3 just think that is something that opens the door, at  
4 least seems to allow, for the judge making a decision  
5 about additional environmental review. I thought it  
6 was relevant, because they've brought it up. And it's  
7 a Skagit County matter involving a crossing.

8 JUDGE TOREM: I guess it will be subject to  
9 further analysis as to whether it's more appropriate  
10 for me to directly require that supplemental review, or  
11 simply to require the agency and it's appropriate  
12 official to make a determination as to whether  
13 additional review is needed.

14 All right. I will look at that issue  
15 further, but I think it helps -- it helps me to  
16 clarify, again, what the basis of that SEPA motion is  
17 and how it's tied to your motion for summary judgment  
18 in that regard.

19 Again, I appreciate the thorough briefing  
20 that I got, and the arguments helping to clarify those  
21 points today and bring all the parties together to hash  
22 some of those out.

23 Is there any need for further comments,  
24 rebuttals, or otherwise, of any of the parties?

25 All right. Seeing none, then, it's about

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1 3:34. We will be adjourned.

2           And I will get a ruling out, as I said,  
3 October 1st or 2nd. I may cut this into two different  
4 orders, so that it's the issues are in one, and the  
5 SEPA come out in a second, but I'll just -- rather than  
6 come up with two different ones, it may help our  
7 editing to get one out one day. So if you see one  
8 issue is not there, it will be coming the next day. I  
9 don't want you to think I left something out. But it  
10 may all come out together. I haven't decided. I've  
11 been rolling that matter around. But give you a  
12 heads-up, if you see one order that doesn't address the  
13 other, it will be hot on its heels.

14           All right. Thank you.

15           We are adjourned.

16       (Prehearing conference adjourned at 3:34 p.m.)

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