

0001

1

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2

COMMISSION

3

WASHINGTON STATE DEPARTMENT)

4

OF TRANSPORTATION,)

5

Petitioner,)

6

vs.)

DOCKET NO. TR-100127

7

CENTRAL PUGET SOUND REGIONAL)

DOCKET NO. TR-100128

TRANSPORTATION AUTHORITY AND)

DOCKET NO. TR-100129

8

THE CITY OF LAKEWOOD,)

Volume I

9

Respondents.)

Pages 1 - 34

10

11

A prehearing conference in the above matter

12

was held on March 16, 2010, at 2:34 p.m., at 1300 South

13

Evergreen Park Drive Southwest, Olympia, Washington,

14

before Administrative Law Judge ADAM TOREM.

15

The parties were present as follows:

16

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

17

18

19

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, by L. SCOTT LOCKWOOD, Assistant
Attorney General, 7141 Cleanwater Drive Southwest, Post
Office Box 40113, Olympia, Washington 98504;
telephone, (360) 753-1620.

20

21

22

CITY OF DUPONT, by PETER ZAHN, Public Works
Director, 1700 Civic Drive, Dupont, Washington 98327;
telephone, (253) 912-5380.

23

24

Kathryn T. Wilson, CCR

25

Court Reporter

0002

1 CITY OF LAKEWOOD, by HEIDI M. WACHTER, City
Attorney, Lakewood City Hall, 6000 Main Street
2 Southwest, Third Floor, Lakewood, Washington 98499;
telephone, (253) 589-2489.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

0003

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

2 JUDGE TOREM: I'm Adam Torem. I'm the
3 administrative law judge presiding over this matter as
4 assigned by the Washington Utilities and Transportation
5 Commission. It's a little after 2:30 in the afternoon.
6 It's Tuesday, March the 16th, 2010.

7 This is the prehearing conference regarding
8 the Washington State Department of Transportation's
9 consolidated petitions to modify three separate
10 railroad crossings. Each of them is in the City of
11 Lakewood, and they are as follows: Under Docket
12 TR-100127, the Clover Creek Drive Southwest crossing;
13 TR-100128, the Berkeley Southwest crossing, and
14 TR-100129, the North Thorne Lane Southwest crossing.

15 Today we are going to take appearances from
16 the various parties, clarify as we can the issues that
17 we will need to address at hearing. We will take some
18 time off the record to set up a schedule for these
19 petitions and whatever procedural matters we want to go
20 over.

21 I know for several people this is the first
22 time they've dealt with the Commission and are not
23 necessarily fully familiar with our procedural rules,
24 and involved with that, this may be the first time
25 dealing with a railroad petition case. So if there are

0004

1 procedural questions while we are here that I can share
2 of my experience, or I know Mr. Lockwood has been
3 involved in this for a couple of years, we can discuss
4 those things and where to find the RCW's and Washington
5 Administrative Codes that will be necessary, I'm more
6 than happy to spend some time on that as well.

7 Let me take appearances and start with the
8 Department of Transportation.

9 MR. LOCKWOOD: Good afternoon, Your Honor.
10 I'm Scott Lockwood. I'm an assistant attorney general
11 appearing on behalf of the Washington State Department
12 of Transportation. With me is Kevin Jeffers, project
13 engineer.

14 JUDGE TOREM: If you will give us your
15 address, telephone, and fax number and an e-mail
16 address, we will get that all into the record.

17 MR. LOCKWOOD: 7141 Cleanwater Drive
18 Southwest, Olympia, Washington, 98504-0113, Post Office
19 Box 40113. Telephone number, (360) 753-1620, and my
20 e-mail address is scottl@atg.wa.gov.

21 JUDGE TOREM: Ms. Wachter for the City of
22 Lakewood?

23 MS. WACHTER: I'm Heidi M. Wachter. I'm the
24 city attorney for the City of Lakewood, Washington;
25 address, 6000 Main Street Southwest, Lakewood,

0005

1 Washington, 98499. Direct line by phone,
2 (253) 983-7704; fax, (253) 512-2268; e-mail address,
3 hwachter@cityoflakewood.us. With me here today is
4 David Bugher. He is our assistant city manager,
5 community development for the City of Lakewood.

6 JUDGE TOREM: Commission staff?

7 MS. WOODS: Good afternoon, Your Honor. I'm
8 Fronda Woods, assistant attorney general representing
9 the Washington Utilities and Transportation Commission
10 staff. My address is 1400 South Evergreen Park Drive
11 Southwest, PO Box 40128, Olympia, Washington,
12 98504-0128. My telephone is area code (360) 664-1225.
13 Fax is area code (360) 586-5522, and my e-mail address
14 is fwoods@utc.wa.gov.

15 JUDGE TOREM: Are there any other parties on
16 the bridge line wishing to make an appearance,
17 particularly Sound Transit, Tacoma Rail, and I'm
18 wondering if anyone from the City of Dupont was joining
19 us by phone today. Hearing none of those parties, is
20 there anyone else, interested persons or parties that
21 want to make an appearance today? Hearing none, thank
22 you.

23 Let me note for the record the petitions in
24 this case were filed on the 19th of January, and we got
25 back from a letter sent out February 2nd a waiver from

0006

1 Tacoma Rail, their right to a hearing on February the
2 16th. Sound Transit filed a similar waiver on February
3 the 19th, and the City of Lakewood was the only
4 respondent that filed in opposition, and we had a
5 formal answer filed shortly thereafter when we set the
6 matter for a prehearing conference.

7 So those other parties have waived their
8 appearance, but I wondered if they would be here today
9 given the opposition of the city. Since there is no
10 one else to move to intervene, I think we will skip any
11 indications of intervention, but I will note for the
12 record we do have an additional case in this matter set
13 in Docket TR-100131. That is a crossing -- I'm trying
14 to remember the exact name of it. It's Barksdale
15 Avenue, and that's in the City of Dupont. That's been
16 noticed as of yesterday for a prehearing conference
17 that's going to occur on April 1st.

18 Hello, sir. Joining us perhaps from the City
19 of Dupont?

20 MR. ZAHN: I am.

21 JUDGE TOREM: Please have a seat at the
22 table, and I'm not sure if you are here to observe or
23 considering intervening in this matter?

24 MR. ZAHN: Yes to both.

25 JUDGE TOREM: Go ahead and give us your name,

0007

1 address, phone, and fax as well as e-mail.

2 MR. ZAHN: Peter Zahn, City of Dupont public
3 works director, and I'm here representing the city in
4 part for an observation. The city is also considering
5 our option to join with Lakewood for similar concerns.
6 The city attorney is not present with us today. My
7 address at the City of Dupont is 1700 Civic Drive,
8 Dupont, Washington, 98327, and you wanted phone
9 numbers? Phone number direct for myself is (253)
10 912-5380.

11 City's attorney is Steve Victor with Kenyon
12 Diesen, and their address is 11 Front Street South,
13 Issaquah, Washington, 98027. Contact phone number is
14 (425) 392-7090, extension 154.

15 JUDGE TOREM: Thank you, Mr. Zahn. Are you
16 prepared today to say if the city is wishing to
17 formally intervene in this proceeding? We were just
18 noticing that your city has the case at Barksdale
19 Avenue scheduled for a prehearing conference of its own
20 on April 1st.

21 MR. ZAHN: We are not prepared to intervene
22 formally at this meeting. However, we are leaning that
23 direction to again join with Lakewood for similar
24 concerns.

25 JUDGE TOREM: Let me ask first the

0008

1 petitioner. Mr. Lockwood, what is the Department of
2 Transportation's preferred option to handle these two
3 currently separate proceedings?

4 MR. LOCKWOOD: It seems to us that there is
5 substantial overlap with respect to the legal issues
6 and factual issues that it would make a great deal of
7 sense in terms of efficiency for the entities involved
8 to address those simultaneously by way of
9 consolidation, but perhaps I'll save for a little
10 later, the Department is very concerned that this
11 matter be resolved as expeditiously as possible, and
12 counsel for the parties that are currently part of this
13 have some tentative dates that I think works for the
14 Department, so the only caveat we would have with
15 respect to either joining them or consolidating or
16 however, it makes sense to do that as long as it
17 doesn't protract the resolution of the matter.

18 JUDGE TOREM: I understand. The filing
19 that's the reason the dates are different for the
20 record is simply because the City of Dupont asked for
21 an extension of time and was granted one. They had a
22 city counsel meeting from the filing in that docket
23 which occurred, and then they passed a resolution
24 stating the opposition, and that was the formal
25 document filed to set up the hearing in their case.

0009

1 So we are a little bit behind with the
2 syncing of Lakewood and the City of Dupont filing its
3 opposition, but depending on what the calendar dates
4 that are suggested for today are, perhaps I'll suggest,
5 Mr. Zahn, that you take the news back and make sure a
6 copy of this prehearing conference order is -- I'll
7 mail it to you at the city as an interested person, and
8 if we can get from Mr. Victor the city attorney a
9 request to either strike the prehearing conference and
10 consolidate your city's case with this one and agree to
11 the dates, that would be fantastic, or if he wishes to
12 informally suggest other changes to the dates that he
13 can work out with the other parties in advance, and
14 maybe we can modify the prehearing conference order,
15 and I can make myself available for an proposed dates
16 that would need to be proposed at that time.

17 So we will just for right now keep the City
18 of Dupont as an interested person in this case, and I
19 think, unless the other parties object, Commission
20 staff has any concerns, attempt to hear all of these
21 related matters together. Ms. Woods, any objection?

22 MS. WOODS: No objection, Your Honor.

23 JUDGE TOREM: Ms. Wachter?

24 MS. WACHTER: No objection.

25 JUDGE TOREM: Then I'm going to ask

0010

1 Mr. Lockwood to briefly summarize his client's proposed
2 modifications at the three existing grade crossings
3 that are part of the case, and from the information
4 that's contained there, it looks like two of the three
5 crossings already have some form of an active safety
6 device, meaning something more than just a little sign
7 that says railroad crossing, and the aim of these
8 petitions is to upgrade all the safety features,
9 whether they are passive or active at these crossings
10 with the goal of allowing higher train speed traffic
11 and more railroad traffic in the corridor. Mr.
12 Lockwood, I don't know if you want to defer to
13 Mr. Jeffers.

14 MR. LOCKWOOD: I think you will get more
15 accurate and complete information from Mr. Jeffers than
16 I can provide.

17 JUDGE TOREM: This won't be in the form of
18 testimony but an informal summary. Mr. Jeffers, if you
19 could go ahead and explain the background of the
20 overall project, which I think I understand to be
21 called the Point Defiance bypass project, and how these
22 individual crossings fit into the role of the project.

23 MR. JEFFERS: Your Honor, it is called the
24 Point Defiance bypass project. We have been developing
25 this project for some time. The aim of the project is

0011

1 to reroute passenger service from the existing water
2 level route, which goes around and under Point Defiance
3 through a tunnel to this alignment, which is lightly
4 used today.

5 The improvements are designed to provide
6 safety upgrades to accommodate the passenger rail
7 service. The service speeds are no more than 79 miles
8 an hour, and we've gone to great lengths to design as
9 safe a crossing as we feel is warranted, considering
10 the conditions. Do you want me to go into a little
11 more detail about what those different improvements
12 are?

13 JUDGE TOREM: Yes, please.

14 MR. JEFFERS: The track would be completely
15 rebuilt from the subgrade upward, including concrete
16 ties, new ballast and sub ballast, new continuously
17 welded rail. The crossing surfaces would be concrete
18 surfaces. Today, most of them are asphalt or older
19 concrete, and the warning devices would be, which in
20 the case of North Thorne Lane and Berkeley, those are
21 flashing light only. The gates would be included as
22 well as improved overhead flashing lights.

23 In the case of Barksdale, that crossing
24 already has flashing lights and gates, but the surface
25 would be upgraded. In the case of Clover Creek Drive,

0012

1 as you noted, that is a passive crossing today, that
2 would also get flashing lights and gates. In all
3 cases, a median in the middle of the roadway to deter
4 drivers from going around the gates would be added, and
5 then also in the case of Barksdale, Berkeley, and North
6 Thorne, there are roadway traffic signals for
7 intersections, on and off ramps for I-5 as well as
8 adjacent city streets, and those would be put under a
9 single controller, which will limit the possibility of
10 traffic backing up or queuing onto the tracks, which
11 was a main concern when we observed traffic out there
12 at the beginning of the project.

13 In the case of Barksdale and Berkeley, that
14 traffic light exists today. It would be simply
15 reprogrammed, and in the case of North Thorne Lane at
16 the intersection of Union Avenue, a new traffic light
17 would be installed. Today it is a stop sign control,
18 and in all of these cases, a wayside horn would be
19 added. The wayside horn is a horn mounted as part of
20 the warning device that is aimed directly at the
21 traffic approaching the crossing, and rather than being
22 a quarter mile away and having the locomotive blow its
23 horn, the warning device will say the train will be
24 here in so many seconds and begin the sequence of the
25 standard horn sound.

0013

1 We also would improve the throughput of many
2 of those intersections by widening the lanes or
3 improving the turning radius so that larger trucks or
4 other vehicles can more easily maneuver through the
5 crossing and over the crossing and not restrict
6 movement. I believe that covers everything I can think
7 of off the top of my head.

8 JUDGE TOREM: Mr. Jeffers, do you know this
9 rerouting of the passenger train traffic, is that going
10 to be a permanent or a temporary change from the water
11 surface route?

12 MR. JEFFERS: That would be a permanent
13 change; the purpose being that it creates capacity
14 within the rail system which would allow the addition
15 of more passenger trains between Seattle and Portland.
16 That's the primary purpose.

17 JUDGE TOREM: In the general description,
18 Ms. Wood, do you have any other questions about exactly
19 what's been proposed for the purpose of today's
20 discussion?

21 MS. WOODS: No, I don't.

22 JUDGE TOREM: Ms. Wachter, any
23 clarifications?

24 MS. WACHTER: No.

25 JUDGE TOREM: Mr. Zahn, is that essentially

0014

1 what the City of Dupont understands the project to
2 involve as well?

3 MR. ZAHN: Yes.

4 JUDGE TOREM: The issues typically in this
5 case are set by RCW 81.53.060, and we have a petition
6 to alter a crossing. This commission has to determine
7 whether or not the public safety requires the
8 alterations and what other issues might be taken up for
9 alternative areas for diversion of traffic. This is
10 not a closure petition but just simply arranging for
11 what looks to be more often the crossing will be
12 blocked by a train passing for some period of time.
13 That may be an issue that we will expect some testimony
14 on at hearing as to how long and how often, but under
15 81.53.060, our jurisdiction is typically to look at
16 what does the public safety require and to weigh that
17 with the public need for the crossing prosecutor.

18 There are other statutes that may be of
19 interest here to look at, depending on what the cities
20 want to look at. RCW 81.53.020 is the legislative
21 determination that a grade separation is always
22 required where practicable. The statute says that in
23 no instance can we have when it's practical any
24 railroad or highway to be crossing at grade without the
25 Commission first giving authority.

0015

1 Clearly, these are existing grade crossings,
2 but I anticipate there will be arguments that the
3 change and the use of these crossings as indicated by
4 the frequency and rail traffic that there is an
5 argument that grade separation should be required, we
6 could take that up in this petition as well, but it's
7 going to require a showing of some sort that that would
8 be justified based on expense. There are a number of
9 precedential cases that talk about this.

10 So whether or not that sort of evidence will
11 be necessary or required depends on what the
12 Commission's position is going to be and what the
13 nature of the city's opposition is going to be. If the
14 opposition is that these crossings need to be upgraded
15 for safety given the proposed new traffic, that's one
16 thing. If these proposed safety improvements that
17 Mr. Jeffers just described are not sufficient and there
18 is something else requested, we will deal with that at
19 hearing.

20 There are a variety of different active and
21 passive safety devices that could be mounted on any of
22 these crossings and whether they are sufficient or the
23 cities think they've overlooked something, could be an
24 issue in the case. Road capacity and traffic studies,
25 I don't know if there has been one done or if the

0016

1 Department plans on introducing one at hearing, and we
2 haven't heard anything yet in the record from any of
3 the local emergency responders of the cities or, for
4 that matter, Joint Base Lewis-McChord, if they are
5 responding to anything with their fire departments,
6 through cooperative agreements, or their law
7 enforcement agencies whether they are going to take a
8 position or be part of your case as witnesses.

9 So I understand we are looking to see if we
10 can consolidate a fourth crossing into this with the
11 City of Dupont. The City of Lakewood indicated there
12 were four other crossings that they had filed waivers
13 on and thought to take up. Those are not before this
14 case now. The procedural way to do that will be to
15 file some sort of motion with the Commission, not
16 necessarily with me because it's not my case until the
17 Commission assigns them, to see about withdrawing or
18 changing them and having them reassigned would be if
19 they were granted to consolidate with this case.

20 Those are some of the issues that just based
21 on the prehearing correspondence I've been able to
22 point out. It makes for quite a busy docket, but
23 that's what I've been able to predict. Starting with
24 Commission staff, based on what the city's response has
25 been I think last Tuesday, does the Commission staff

0017

1 knows what its position might be, whether it will be
2 opposing these modifications or taking them under
3 advisement and coming back with it's own
4 recommendation; Ms. Woods?

5 MS. WOODS: My understanding at this time is
6 that Commission staff favored the modifications as
7 proposed by the Department of Transportation.

8 JUDGE TOREM: So the rail staff, as far as
9 you know, Ms. Woods, has taken a look at the petitions
10 and the details of what Mr. Jeffers has proposed, and
11 the preliminary view is that these appear to be
12 sufficient?

13 MS. WOODS: That's correct, Your Honor.

14 JUDGE TOREM: Ms. Wachter, I know that we had
15 your answer. It didn't give me all of the why, but let
16 me give you a few moments now to go through what you
17 see as other additional issues, and maybe we will add
18 or expand from my list.

19 MS. WACHTER: As a point of clarification,
20 what I hear you saying about four other crossings
21 mentioned in my answer is if I want you to consider
22 those, I have some other work to do to get them brought
23 back to you from the WUTC.

24 JUDGE TOREM: It's my understanding, and I
25 looked today in our records management system to see if

0018

1 there was a docket number assigned to any of those
2 other four crossings, and I didn't see any. I looked
3 for all of the 100 docket numbers, and those didn't
4 come up with any additional crossings, so you will have
5 to find out what the response was.

6 MS. WACHTER: I won't spend any time with you
7 on those unless and until I've gone back and brought it
8 back to you.

9 JUDGE TOREM: If you want to state for the
10 record the intent --

11 MS. WACHTER: My intent would be to pursue
12 those, and that may not go anywhere, but I will be
13 pursuing those in another channel until they are
14 brought back here.

15 JUDGE TOREM: Once we have a procedural
16 schedule today, I will allow the Department of
17 Transportation to file its responses to that. I would
18 ask as a courtesy whatever you send to the Commission
19 with the request you send directly to Mr. Lockwood and
20 Ms. Woods so they can weigh in as need be, and not only
21 explain their position on whether those crossings
22 should be reconsidered and set for hearing but also
23 what the impact might be on this case and the
24 procedural schedule we will look at today.

25 MS. WACHTER: That's understandable. With

0019

1 regard to the position of the city, it is our position,
2 as you have pointed out, that these are at-grade
3 crossings. These are also passenger trains, and while
4 they don't necessarily meet all of the definitions of a
5 high-speed train, we know that passenger trains are
6 higher speed than, for example, freight trains.

7 We also know this is a permanent change which
8 addresses capacity issues in transporting people by
9 train, but it does forever change traffic in Lakewood,
10 and the crossings we are talking about are dealing with
11 increasing amounts of traffic. The traffic counts and
12 the nature of the train transportation we believe
13 creates a serious safety concern, and we believe what
14 is happening here is that in the interest of the amount
15 of money available, we are being shortchanged on the
16 safety basis. We understand that if that's the case,
17 there has to be a justification based on expense, and
18 we don't believe that justification can be met for
19 what's being proposed here.

20 JUDGE TOREM: Has the city had an opportunity
21 to review what other safety features might result in
22 the city feeling that it wasn't being shortchanged,
23 that sufficient safety features could be added beyond
24 and above what Mr. Jeffers described?

25 MS. WACHTER: We have ongoing conversations

0020

1 with the Department of Transportation, and we are
2 interested in further conversations about ways to
3 insure some safety for the citizens. We understand
4 that the convenience of the people driving in the city
5 isn't necessarily going to carry the day. That's
6 obviously also of interest to us, but we believe in our
7 conversations DOT has been trying to work with us to
8 see if there is some other way to address this. I
9 think the communication has been good in that regard
10 and will continue.

11 JUDGE TOREM: Mr. Zahn, do you have anything
12 specific to add to the issues that I've addressed as an
13 interested party at this point?

14 MR. ZAHN: I'll note that a confirmation of
15 existing at-grade crossings with existing functional
16 crossings, additional impact from the proposal that
17 exacerbates existing long-term anticipated impacts of
18 area growth, base growth. I think the City of Dupont
19 and Lakewood are very similar in those issues, and the
20 proposal would again exacerbate some existing problems,
21 make a permanent change, and also potentially impact
22 the ability in the future for that, whether that be
23 short-term or long-term to address those issues.

24 JUDGE TOREM: Ms. Wachter, from what you said
25 from the ongoing discussions and Mr. Lockwood, when we

0021

1 get to talking about the procedural schedule shortly, I
2 wonder whether or not having a mediation of some sort
3 or a settlement judge assigned might be something the
4 parties are interested in, as long as that doesn't
5 string out the procedural schedule unnecessarily, but
6 if there is a way to have the parties reach an accord,
7 certainly that keeps things all on your side of the
8 table and predictable as to upgrades that might be
9 negotiated, so I offer that as something the Commission
10 can do, has tried to mediate cases in the past with
11 mixed success on some of the issues, but we do have
12 other judges that have experience. Our chief judge,
13 Judge Rendahl, mediated a case like this not long ago,
14 and I know she made progress, but it still went to
15 hearing, but I offer that for your consideration.

16 So I'm hearing, Ms. Wachter and Mr. Zahn,
17 that the question of whether the crossing sure should
18 be left at grade is something you want to look at in
19 the hearing.

20 MS. WACHTER: Yes, it is.

21 JUDGE TOREM: So if that's an issue that we
22 have to look at, what are the costs involved, I'm not
23 sure what the best way to get that testimony is,
24 whether the city has an engineering department that has
25 any experience with overcrossings or undercrossings.

0022

1 I know the petitions Mr. Jeffers mentioned
2 some estimates as to cost of raising parts or segments
3 of Interstate 5 and the much, much more inflated costs
4 involved with doing that, so it might be helpful if the
5 Department has already studied that or has cost
6 estimates that are readily available to share those
7 with the other parties through a discovery request or
8 other places where similar crossings have been modified
9 or where a new crossing has been created with an over
10 or undercrossing. I don't want the parties to spend a
11 whole lot of resources obtaining expert witnesses if
12 it's all for just the end result a dollar figure that
13 needs to be in the record. I certainly don't want
14 anyone to go out and hire an engineering firm and spend
15 money on preparing a witness for something that may
16 only be ordered if a certain threshold were met.

17 So I think that certainly is something we are
18 having a new crossing, we might want a more fleshed-out
19 estimate, but because they are existing crossings, it
20 will be a question of a ballpark comparison in cost,
21 and if there is something for the idea of over
22 long-term versus short-term or whether this is a
23 short-term issue with an attempt to reopen this issue
24 down the road, there are some cases out that talk about
25 changing crossings because of a change in

0023

1 circumstances, but there were traffic counts out to, I
2 think, 2020 in the petitions, so I don't know if
3 anybody has studies that go beyond that growth.

4 Let me stress that the key here is going to
5 be a comparison of what does the public safety require,
6 and to that, what is the public need and convenience
7 for these crossings. So until we have evidence as to
8 what the actual timing of the trains is, the actual
9 impact on when those crossings are not available for
10 surface use by other vehicle traffic, I won't be able
11 to have any kind of record that allows me to make
12 findings as to public convenience and necessary until
13 we have that data, so I will expect testimony, maybe
14 joint testimony from the parties on that because it may
15 be that the Department is in the best position to
16 present that testimony. Is it Tacoma Rail that runs
17 the freight trains there?

18 MR. LOCKWOOD: Yes.

19 JUDGE TOREM: Is BNSF involved as well?

20 MR. LOCKWOOD: I think they service the
21 military.

22 JUDGE TOREM: I've already listed for you
23 whether emergency response is an issue. You will have
24 to check with your city departments and see if that
25 crossing is part of their response route and if they

0024

1 are aware of the different schedule of trains and what
2 their rail options are in their emergency response
3 plans. My experience is that police and fire chiefs
4 are well aware that anytime there are train tracks that
5 that route may be blocked, and they have alternatives
6 to use in those cases.

7 Those are the issues that I wanted to put out
8 there. I'm not hearing anybody making a motion to
9 unduly expand issues beyond what they needed to be
10 today, so I don't think other than listing some of
11 these in the prehearing conference order that I'm going
12 to have to worry about motions to limit, but I think if
13 you are well outside the scope of what I list in the
14 prehearing conference order, you might want to file a
15 motion in advance or circulate something to the other
16 parties to give them notice of a witness that you want
17 to call that's outside the scope of these issues, and
18 if you don't have assent of where you spend time
19 developing that, file a motion to that would be outside
20 the scope of what we discussed today.

21 I understand there may have been some dates
22 that were going to be proposed. Do you want to go over
23 those on the record or off the record; Ms. Woods?

24 MS. WOODS: I think we can start at least by
25 putting some dates out. I don't know if we've worked

0025

1 out the details, but I think we have general agreement
2 on the schedule.

3 MR. LOCKWOOD: Let's go off the record.

4 JUDGE TOREM: Off the record.

5 (Discussion off the record.)

6 JUDGE TOREM: We've worked out that we are
7 going to use prefiled testimony in this case, and we've
8 worked out a schedule as well, and it starts with the
9 Department of Transportation filing its witness list,
10 all of its witness testimony and supporting exhibits on
11 Friday, April the 16th. I've clarified for the parties
12 that these filing deadlines will be the electronic
13 filing by mid afternoon with the hard copies being due
14 the next business day by noon.

15 The response testimony from the Commission
16 and the city of Lakewood will be due on Friday, May the
17 7th, and rebuttal and cross-answering testimony is
18 going to be due on Monday, May the 24th from all
19 parties. The hearing itself we are targeting June 7th,
20 which is a Monday, and if necessary, June 8th, which is
21 a Tuesday for the hearing. We would try to hold a
22 public comment hearing on June 7th as well.

23 There is a possibility that the City of
24 Lakewood can host the hearing at its counsel chambers,
25 and we are looking at location in perhaps a community

0026

1 center in Tillicum for the public comment session. We
2 don't want to have that one, as the Department has
3 indicated, in the same place as the hearing if we are
4 in the counsel chambers.

5 We are also going to hold on our calendar the
6 14th and 15th if it's necessary to extend the schedule
7 for any reason having to do with witnesses or
8 anticipating the City of Dupont's city attorney wishing
9 to join his case on behalf of the City of Dupont in
10 Docket 100131. If he's not available the 7th and the
11 8th, we think we can still consolidate and use the same
12 schedule for filings that June 14th and 15th as the
13 hearing dates and Monday the 14th as the public comment
14 night. So until we change tracks on this case with the
15 Dupont hearing being consolidated stick with June 7th
16 and 8th.

17 If that's the schedule, then posthearing
18 briefs would be due Friday, June 25th, and one way or
19 another, we are going to target having the Commission
20 issue an initial order under my signature as the
21 presiding officer on July the 23rd, which is a Friday,
22 and we will try to stick with that even if the hearing
23 dates fall back and the briefing dates back up a little
24 bit into July as well.

25 So by July 23rd, you should have my order as

0027

1 to all of these issues, whatever they turn out to be,
2 and that order, as we discussed on the break, would not
3 become final by operational law until 21 days later.
4 If there was an appeal, then there would be a final
5 order necessitated from the three commissioners
6 appointed by the governor.

7 In between the April 16th and the May 7th
8 filing dates would be the best opportunity for the
9 parties to have a settlement judge review the cases as
10 they stand, at least one filed by DOT, and then the
11 parties to get together. The other opportunity would
12 be to wait until after the response cases come in on
13 May 7th so that the Department of Transportation has at
14 least a better idea of what the nature of the
15 opposition is and will be and use that early part of
16 June to attempt to mediate some or all of the issues to
17 a settlement. That would be one way that the
18 Department would be guaranteed of an expedited result
19 if there is a settlement on all of these issues.

20 I'll leave it up to the parties when to
21 contact our administrative law division and seek a
22 settlement judge as to what the timing might be best.
23 If you want to wait for the majority of both cases in
24 chief to be made and do the mediation only while trying
25 to put together a rebuttal and cross-answering

0028

1 testimony, or if it's to the Department's liking to do
2 it earlier once it files its own testimony. I'll leave
3 that up to you and go from there.

4 While we were off the record, we also talked
5 about the need for discovery. We are hoping it can all
6 be done informally, but I will include in the
7 prehearing conference order an invocation of WAC
8 480-07-400 and say that this is the kind of case where
9 discovery and formal rules can be relied upon, and I'm
10 just reminding the parties to read those rules and
11 understand how we do discovery if that becomes
12 necessary.

13 I indicated in the prehearing conference
14 order I wanted to hear from the Department on what
15 environmental reviews had been done in this case and
16 what additional environmental reviews might be
17 necessary. I understand that from the Department's
18 perspective, it's complied with all of the SEPA and
19 NEPA standards, and if we can hear from Mr. Lockwood on
20 the status, I know that Ms. Wachter has raised that in
21 her answer questioning the sufficiency.

22 I don't have the ability to deal with any of
23 those appeals. That's a different forum, but if you
24 will state for the record what has or has not been
25 done.

0029

1 MR. LOCKWOOD: Certainly, Your Honor. I do
2 know that the Commission is always concerned that the
3 appropriate government agency does comply with the
4 environmental requirements for any project that a
5 commission gets involved in, and I can assure you and
6 the Commission that the Department did pursue its
7 environmental review, and we are confident that we have
8 fully complied with those requirements.

9 The Department retained HDR engineering
10 consultants to do what at that time they anticipated
11 may very well be a full environmental impact statement,
12 prepared all of the disciplinary reports, moving that
13 forward. Once that completed, because there are
14 federal dollars involved in this project, the
15 Department partnered with FHWA to serve as the lead
16 agent under NEPA.

17 JUDGE TOREM: So that's the Federal Highway
18 Administration?

19 MR. LOCKWOOD: Yes. After reviewing the
20 environmental documentation, which is actually
21 available on the Department's project Web site, it's
22 entitled environment summary, FHWA determined that the
23 project qualified as categorically excluded under NEPA
24 pursuant to 40 CFR 1508.4. That determination was
25 signed by representative HWA back in August of 2008.

0030

1 The Department served as lead agency under
2 SEPA and adopted the NEPA determination, and although
3 they did supplement it with some water quality
4 documentation as well, adopted that SEPA determination,
5 again, I think it was in August of 2008, and there has
6 been no appeal to that determination to date, and we
7 believe that our compliance was sufficient and
8 complete.

9 JUDGE TOREM: In the last case we hadn't even
10 had an environmental assessment done before the hearing
11 was completed, so I'm happy to know that the process
12 was engaged in, and whether it's sufficient or not I
13 have to leave for another arbiter to sort out, but for
14 my purposes then, those documents have been made part
15 of the record. I'll leave that to you. Maybe it's
16 something you want me to take judicial notice of later
17 that helps fill out the record and what analysis was
18 done on the environmental side of the house.

19 MR. LOCKWOOD: Certainly.

20 JUDGE TOREM: The key is to have the public
21 safety issues, but because NEPA and SEPA both have
22 changes to the human environment, occasionally in those
23 documents we find out about safety concerns, and I want
24 to make sure we are not making safety determinations
25 without respect for those environmental process

0031

1 documents.

2 MR. LOCKWOOD: In light of that, Your Honor,
3 while we do not think that SEPA compliance is properly
4 part of this case, what I will do is include a short
5 portion of our testimony to make the primary documents
6 part of the record.

7 JUDGE TOREM: I think if nothing else then if
8 there is subject matter appropriate appeals for any of
9 what went on there, if there is something to the
10 commissioners or beyond, that there will be at least
11 reference in one place for any reviewing body, and that
12 procedurally sets up a fair table.

13 From the other parties then having noted the
14 status of SEPA and NEPA, I've also been assured that
15 any traffic studies that the Department's conducted
16 some, maybe not to the same level as other cases, but
17 the Commission staff intends to rely on what the
18 Department has provided already; is that correct,
19 Ms. Woods?

20 MS. WOODS: That's correct, Your Honor.

21 JUDGE TOREM: From your perspective,
22 Ms. Wachter, the city is going to present any traffic
23 study and impact data is going to be able to provide
24 that on or before May 7th, which is the date for your
25 witness testimony.

0032

1 MS. WACHTER: Yes, Your Honor.

2 JUDGE TOREM: Are there any other procedural
3 points that we haven't talked about off the record and
4 now rehashed on the record? Anything else we need to
5 go over this afternoon?

6 MR. LOCKWOOD: Nothing from the Department,
7 Your Honor.

8 JUDGE TOREM: How about just procedure going
9 forward. Are there questions we need to cover on the
10 record, or shall we have some informal discussion after
11 we close the prehearing conference today about
12 questions about how we do things at the Commission or
13 questions about how this sort of litigation should be
14 expected to develop? I want to offer that.

15 If we need to, I still think that the parties
16 can certainly get all together and work things out.
17 I'm usually in the office most days, so if it needs to
18 be an informal prehearing conference, not on the record
19 but just a phone call, to sort things out and apprise
20 me of something or ask a question about how the
21 Commission might handle something, please don't
22 hesitate. I don't want any of these questions to linger
23 and cause your prehearing preparation to be more
24 stressful than it already will be, but if there is a
25 how-do-you-do-that question, please don't be

0033

1 embarrassed. We can work it out so everyone knows what
2 to expect.

3 Mr. Zahn has returned and we've gone through
4 the dates. Have you had any other contact from the
5 City of Dupont's attorney?

6 MR. ZAHN: There is no absolute conflict with
7 what has been discussed.

8 JUDGE TOREM: Again, I'll issue a prehearing
9 conference order in these consolidated dockets.
10 Mr. Zahn, if you can talk to Mr. Victor, if he sees
11 that what's been discussed today will fit with the City
12 of Dupont's need and they wish to join and adopt this
13 schedule for their own and he wants to file a motion to
14 consolidate his case with this schedule and you can get
15 the other parties to give you their informal assurances
16 that they are happy with that, we can strike that April
17 1st prehearing conference in the other docket, and I
18 can simply issue an addendum order consolidating it in
19 here. Anything else for the record today?

20 MR. ZAHN: Just a question on that matter.
21 I'll have our representative confer with Lakewood. Are
22 you available for comment to that question?

23 JUDGE TOREM: If Mr. Victor wants to talk to
24 me about procedural niceties, our rules on ex parte
25 communication allow for procedural issues to be

0034

1 discussed. I think we are a lot easier to get ahold of
2 and more available than a superior court judge would
3 be. We won't talk about the substance of the case.

4 If it turns out that Mr. Victor's question
5 requires the rest of the parties to be on the line, we
6 will arrange a conference call so it's not ex parte.
7 Seeing nothing else, we will adjourn and be off the
8 record. Thank you all.

9 (Prehearing adjourned at 4:09 p.m.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25