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P R O C E E D I N G S

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(Proceedings went on the record at

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1:33 p.m.)

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JUDGE DENNIS MOSS: We'll go on the record. Good

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afternoon, everyone. My name is Dennis Moss, I'm an

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Administrative Law Judge to Washington Utilities &

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Transportation Commission. We are convened this afternoon

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in the Commission's hearing room in connection with five

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matters that have been consolidated for purposes of

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disposition. The lead docket appears to be the -- styled

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Benton County against BNSF Railway, Docket TR-100572. There

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are altogether five matters that are numbered sequentially

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through TR-100576. And the transcript will be able to note

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the full captions of the proceedings as appropriate without

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my going through that now.

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The first order of business will be to take

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appearances. We have a representative from BNSF in the

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hearing room. Ms. Woods is here for the Commission. And I

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understand there is at least one representative on the

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conference Bridge line, perhaps more, but we'll start with

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those in the hearing room first.

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So if you would proceed to give me -- and this is

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the first prehearing conference, so we'll need to have your

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full information, address, phone number, fax number, your

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email. Thank you.

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1 MS. ENDRES: Kelsey Endres on behalf of BNSF  
2 Railway Company from Montgomery Scarp MacDougall. 1218  
3 Third Avenue, Suite 2700, Seattle, Washington 98101.  
4 206-625-1801.

5 JUDGE DENNIS MOSS: Thank you. Ms. Woods, go  
6 ahead.

7 MS. WOODS: Good afternoon, Your Honor. I'm  
8 Fronda Woods, Assistant Attorney General on behalf of the  
9 Commission Staff. My address is 1400 South Evergreen Park  
10 Drive Southwest, P.O. Box 40128, Olympia, Washington  
11 98504-0128. My telephone number is area code 360-664-1225.  
12 The fax number is area code 360-586-5522. My e-mail address  
13 is fwoods@utc.wa.gov. And I would also like to point out  
14 that with me in the hearing room today are Kathy Hunter and  
15 Paul Curl from the Commission Staff.

16 JUDGE DENNIS MOSS: Thank you. Is there anyone  
17 else appearing today for BNSF?

18 MS. ENDRES: No. For the record, Bradley Scarp  
19 also represents BNSF, but he will not be here today.

20 JUDGE DENNIS MOSS: Okay. And he previously  
21 entered an appearance?

22 MS. ENDRES: I believe so.

23 JUDGE DENNIS MOSS: All right. I see that another  
24 railroad is involved, Union Pacific Railroad Company, is  
25 there a representative on the Bridge line?

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1 MS. LARSON: Yes, Your Honor. I'm Carolyn Larson.  
2 I'm with the law firm of Dunn, Carney, Allen, Higgins &  
3 Tongue. The address is 851 Southwest 6th Avenue, Suite  
4 1500, Portland, Oregon 97204. My phone number is  
5 503-417-5462. My fax is 503-224-7324. And my e-mail  
6 address is clarson@dunncarney.com.

7 JUDGE DENNIS MOSS: All right, thank you. And as  
8 I previewed the papers it appears that Benton County has  
9 been involved through the office of its prosecuting  
10 attorney. Is there someone present for Benton County?

11 MR. HAY: Yes. Thank you, Your Honor. My name is  
12 Reid Hay, last name spelled H-a-y. My address is 7122 West  
13 Okanogan Place, Kennewick, Washington 99336. My phone  
14 number is area code 509-735-3591. My fax number is area  
15 code 509-736-3066. And my e-mail address is  
16 reid.hay@co.benton.wa.us. I also have present on the Bridge  
17 line with me the Benton County engineer, his name is  
18 Mr. Malcolm Bowie.

19 JUDGE DENNIS MOSS: All right. Thank you very  
20 much, Mr. Hay. And I take it that you were a deputy  
21 prosecuting attorney?

22 MR. HAY: Yes, Your Honor.

23 JUDGE DENNIS MOSS: Okay, fine. Anybody else wish  
24 to enter an appearance today? Hearing nothing we will  
25 assume not.

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1           All right. Well, as I mentioned, this is our  
2 first prehearing conference. I'm not quite sure what we  
3 require in the way of process in this case at this juncture.  
4 We once continued this prehearing conference today with the  
5 idea that the parties would figure out who owned what and  
6 also have an opportunity to continue apparently some  
7 settlement discussions that were going on at the time of the  
8 request for continuance. So perhaps I should hear first  
9 from the people here in the hearing room, or others on the  
10 Bridge line, with respect to what progress you may have made  
11 or where we stand today in terms of what process we need  
12 going forward. Ms. Woods, do you want to take the initial  
13 cut at that?

14           MS. WOODS: Thank you, Your Honor. Yes, I  
15 understand that ownership has been cleared up. I also  
16 understand that Benton County has been working on an  
17 alternate route for the road that would have been the  
18 subject of these five dockets. And that this morning, as I  
19 understand it, the Benton County Board of County  
20 Commissioners approved this alternate route which, as I  
21 understand it, takes two of the crossings out of the case  
22 because they won't be needed anymore. And I defer to the  
23 deputy prosecutor for more information about that.

24           JUDGE DENNIS MOSS: All right. Let's hear from  
25 Mr. Hay then.

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1           MR. HAY: Certainly, Your Honor. As Ms. Woods  
2 already addressed the Board of Commissioners has voted on an  
3 alternative route that takes TR-100574 and 575 and renders  
4 them effectively moot. The alternative route would run  
5 slightly to the east of the route that had formerly been  
6 chosen, and as a result there's no actual need to make  
7 either of those crossings at all.

8           In addition to that, since those were the primary  
9 points of contention between the County and Union Pacific  
10 Railroad, we've reached an accommodation with Union Pacific  
11 Railroad wherein we would continue to ask for the closure of  
12 Cochran Road which is TR-100576, and Union Pacific has  
13 agreed--and I'll let her address that herself--but Union  
14 Pacific has agreed to withdraw any objection to the proposed  
15 crossing that is discussed in petition TR-100573 leaving  
16 only the question of the BNSF crossing to the far south at  
17 TR-100572.

18           JUDGE DENNIS MOSS: All right. And, Ms. Larson,  
19 do you want to comment on that?

20           MS. LARSON: I agree with what Reid Hay has said,  
21 Your Honor.

22           JUDGE DENNIS MOSS: All right. Good. So it  
23 appears that we have already boiled things down to the point  
24 where we have remaining perhaps, or perhaps not, some  
25 controversy with respect to only one of the five

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1 applications, if I understand what I have just been told.  
2 And that would be Docket TR-100572, which I identified as  
3 the lead docket, maybe the only docket. All right. So let  
4 me hear from Ms. Endres, if you could tell me where the  
5 parties are on this?

6 MS. ENDRES: At this point, Your Honor, BNSF needs  
7 more information about the planned road, the level of  
8 traffic. We certainly will need to exchange some data  
9 requests and discovery on those issues. But as a typical  
10 stance BNSF is opposed to opening new railroad crossings  
11 generally. BNSF is amenable to discussing whether the  
12 County is willing to install active warning devices at its  
13 own cost as perhaps a way to settle this issue without  
14 having to have a full hearing. But at this point we simply  
15 need more information to determine what the County is  
16 proposing and the impact that a new railroad crossing would  
17 have. Additionally, it is my understanding when BNSF does  
18 open new crossings it's always interested in closing an  
19 existing public crossing, and that is something that BNSF  
20 would like to explore, as well.

21 JUDGE DENNIS MOSS: All right. And, frankly, I  
22 don't have the details of the application sufficiently in  
23 mind. I do recall that there was some closing and some  
24 opening, and one thing or another, but I won't try to get  
25 into those details here today, this just being a prehearing

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1 conference.

2           So it sounds to me as if the useful inquiry here  
3 to you, Mr. Hay, would be if the County is willing to  
4 cooperate in the process of exchanging information and  
5 perhaps discussing some ways to resolve this matter  
6 informally, is that something the County is willing to do on  
7 a going forward basis?

8           MR. HAY: Absolutely, Your Honor.

9           JUDGE DENNIS MOSS: Okay. I'm throwing this out  
10 as a proposition, and I'm not wedded to it by any stretch of  
11 the imagination, but it seems to me that the best way to  
12 proceed under the circumstances described is to simply set a  
13 status conference maybe, I don't know, two or three weeks  
14 out, something like that, and you all can continue your  
15 discussions and report back; does that sound like an  
16 appropriate process, Ms. Endres?

17           MS. ENDRES: It does in terms of moving forward to  
18 determine the extent to which active warning devices would  
19 be appropriate. It's my understanding that that would have  
20 to be a recommendation from the diagnostic team existing at  
21 the railroad. I know UTC representatives have been involved  
22 before, the County engineer. So I don't have the authority  
23 to say yea or nay to any specific device, but that is  
24 something that would have to be looked into based on, of  
25 course, railroad engineering's professional opinion as to



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1 what would be adequate.

2 JUDGE DENNIS MOSS: From your perspective do you  
3 have a sense of what sort of time frame would be involved?  
4 I mentioned two or three weeks; is that sufficient?

5 MS. ENDRES: No, I don't --

6 JUDGE DENNIS MOSS: Okay.

7 MS. ENDRES: I don't know if Ms. Hunter or  
8 Mr. Curl can weigh in on how long that process typically  
9 takes. I know they're experts.

10 JUDGE DENNIS MOSS: We can be informal, you all  
11 let us know if you know.

12 (Discussion between parties and Staff  
13 representatives.)

14 JUDGE DENNIS MOSS: Ms. Woods, I didn't mean to  
15 cut around you like that, but I just wanted to get to the  
16 information I needed, so 30 to 45 days is what we're hearing  
17 from Staff representatives. Is that something that works  
18 with your calendar?

19 MS. WOODS: That's fine, Your Honor.

20 JUDGE DENNIS MOSS: Mr. Hay?

21 MR. HAY: I hate to disappoint you, the difficulty  
22 we're having is we're under a bit of some time constraints  
23 in order to be able to take advantage of the State funding  
24 that are running the project.

25 Consequently -- actually, I apologize, the County

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1 engineer is wishing to speak to me. Do you mind if I take a  
2 moment?

3 JUDGE DENNIS MOSS: Sure.

4 (Brief break.)

5 MR. HAY: Thank you very much for permitting me to  
6 have that discussion on the side. The County would be  
7 amenable to a relatively short period of time of 30 days or  
8 so if that can be done to put together a diagnostic team  
9 that was being discussed, am I understanding that correctly?

10 JUDGE DENNIS MOSS: That's correct.

11 MR. HAY: That would be fine with the County. We  
12 remain dedicated to trying to get some sort of resolution  
13 out of this as quickly as possible because of the relatively  
14 short time frames available to be able to still take  
15 advantage of the State funding that's making this possible.  
16 But if it's going to be -- if there's a reasonable chance  
17 this will assist in resolving it the County is amenable to  
18 that.

19 JUDGE DENNIS MOSS: Okay. It seems that the 30  
20 days will work for everybody. And, of course, the  
21 Commission has an interest in expeditiously resolving the  
22 matters before it, as well. In a situation such as this one  
23 I think it's in everyone's best interest to try to get as  
24 much exchange of information as we can and understand, as it  
25 were, the lay of the land before proceeding on to some

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1 hearing or what have you.

2 With that in mind what I propose to do then is set  
3 a status conference, let's see, what is today, the 27th?

4 MR. HAY: Yes, Your Honor.

5 JUDGE DENNIS MOSS: So maybe just set that out on  
6 the 25th of October, it's about 30 days, a little less. So  
7 I'll ask that the parties -- I suppose we can do that in the  
8 same fashion. We'll put out a notice of the status  
9 conference and those that wish to be here to participate in  
10 person can do so, and those who wish to participate by phone  
11 can do so. Now if the parties -- I would expect, of course,  
12 the parties to work cooperatively together and proceed with  
13 dispatch, don't wait until the last minute. So if this can  
14 be done earlier then you all just let me know and we'll have  
15 our little status conference earlier and move things along.  
16 So that's the best way to proceed, I think, unless someone  
17 has an objection.

18 MS. ENDRES: No, Your Honor. A question along  
19 those lines, we can certainly promulgate data requests with  
20 the County, but to the extent that they've already done sort  
21 of an anticipated traffic count projection it may be  
22 beneficial to get that to whoever will participate in the  
23 diagnostic team sooner than later because I'm sure that's  
24 going to be something they want to take into account.

25 JUDGE DENNIS MOSS: Okay. Ms. Woods, you had

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1 something?

2 MS. WOODS: Yes, Your Honor, thank you. Fronda  
3 Woods for Commission Staff. 30 days is perfectly fine for  
4 the next status conference. Commission Staff, however,  
5 would like to set the rest of the schedule at this time, as  
6 well.

7 JUDGE DENNIS MOSS: Okay, we can do that. That  
8 will mean going off the record and letting you all talk  
9 among yourselves a bit because I don't like to do that  
10 without giving you an opportunity to work it out first. So  
11 we can do that.

12 As far as the issue of exchanging information, and  
13 we've heard the word discovery a couple of times. Certainly  
14 we can follow the Commission's discovery rules here;  
15 however, in the spirit that I've been encouraging here, I  
16 would like for you all to be a little less formal, if you  
17 can, in getting the information exchanged as expeditiously  
18 as possible. So if the Railroad can work directly with the  
19 County on that, and with the Staff to the extent it needs  
20 to, that would be good. If you do need to resort to the  
21 formal discovery process of having data requests and  
22 responses and so on and so forth I think you should let --  
23 someone should let me know. And I may impose a shortened  
24 turnaround time for discovery responses if that becomes an  
25 apparent need. So presumably the person propounding

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1 discovery will let me know that. But I'll just indicate now  
2 today, given this 30 day period, which is reasonably short,  
3 I will be inclined to do that.

4 So, all right. And in terms of the remaining  
5 schedule, unless there's something else we can go off the  
6 record. Those of you on the telephone line will remain on  
7 the line and discuss this with other representatives and see  
8 if you can work out an agreed schedule. I will go seat  
9 myself in the Commissioner's waiting area, so somebody come  
10 get me at the appropriate moment and I'll come back in.

11 MS. LARSON: Excuse me, Your Honor?

12 JUDGE DENNIS MOSS: Yes.

13 MS. LARSON: This is Carolyn Larson.

14 JUDGE DENNIS MOSS: Yes, Ms. Larson.

15 MS. LARSON: It seems as though since Union  
16 Pacific will not be involved in this matter anymore I can  
17 just back off the call at this point?

18 JUDGE DENNIS MOSS: Yes, you could, and I don't  
19 know, work with Staff, I guess, I'm not sure if it's  
20 appropriate for some of this stuff to be withdrawn or what  
21 might be the appropriate course of action. But if there's  
22 something along those lines that would be appropriate you  
23 all let me know and we will deal with that, as well. But  
24 you're quite right, there's no need for you to stay on the  
25 line since you all apparently have resolved your issues.

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1           MR. HAY:  If I might break in for a moment, it  
2 might be appropriate for Ms. Larson to stay on temporarily.  
3 There's a procedural process to go through that isn't  
4 entirely clear.  I wanted to see if the Court had any  
5 guidance for us, or preferences, and some of these might  
6 influence Union Pacific or Union Pacific might have a view  
7 on this.

8           I have spoken with Ms. Woods with UTC Staff and  
9 with Ms. Larson with respect to the procedural process.  But  
10 we were thinking that perhaps there could be a motion to  
11 sever each of the petitions, and then the County could move  
12 to withdraw 574 and 575; 576 and 573 could be returned to  
13 Staff for Staff process rather than go through the  
14 continuing adjudicated stage.  And that would just leave  
15 572.  If anybody had any input with respect to the  
16 procedural process, or if the Court has any view or  
17 preferences on that I thought this would be a good time to  
18 bring that up.

19           JUDGE DENNIS MOSS:  Okay.  It might very well be.  
20 Ms. Woods, anything on that?

21           MS. WOODS:  I agree with Mr. Hay.

22           JUDGE DENNIS MOSS:  You think they need to be  
23 severed?

24           MS. WOODS:  Correct, yes.

25           JUDGE DENNIS MOSS:  Well, we can do that easily

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1 enough.

2 I would like then for someone, I'm indifferent as  
3 to whom, provide me with something in the way of just a  
4 brief motion, or even some sort of a letter motion would be  
5 sufficient, to let me know exactly what you want me to do,  
6 and I can proceed accordingly.

7 As far as the Bench's preference on this, we are  
8 in an adjudication mode here, what that means is that we can  
9 either resolve the matters by stipulation and dispose of it  
10 in that way. Or the applicants can seek leave to withdraw  
11 and the Commission can act on that request for leave to  
12 withdraw, and then they can work informally with Staff as if  
13 it was a new matter with Staff to the extent there needs to  
14 be any further interaction. So those options are both  
15 available.

16 Is there any third option, Ms. Woods, that I'm  
17 missing here? I think that's -- we do have to take some  
18 formal action because we're in the adjudication framework,  
19 and those are the two that come to my mind.

20 MS. WOODS: I had some discussion with Staff about  
21 whether we needed to have the two 574 -- or 573 and 576  
22 formally withdrawn and have new petitions submitted or  
23 whether we could just have them returned to UTC Staff. I  
24 understand that UTC Staff's preference would be simply to  
25 have those returned to UTC Staff and taken out of the

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1 adjudicative process.

2 JUDGE DENNIS MOSS: Okay.

3 MS. WOODS: I wasn't able to find a WAC that  
4 actually addressed that process, however.

5 JUDGE DENNIS MOSS: I don't recall that there's a  
6 WAC that specifically addresses it or not, but I'm familiar  
7 with the practice of having the parties seek leave to  
8 withdraw, and I do not have any problem granting that sort  
9 of a request in this instance based on what I've heard  
10 today. And once that's done then the Railroad can come back  
11 and work with Staff as a new matter; is that agreeable?

12 MS. WOODS: Yes, it is, Your Honor.

13 JUDGE DENNIS MOSS: I'm fine with that process.  
14 Probably saves me writing an order, I think. Okay.  
15 Anything else before we go off the record then?

16 Mr. Hay, does that satisfy your need to have  
17 Ms. Larson remain on the line?

18 MR. HAY: Yes, that's -- I'm satisfied now. Thank  
19 you, Your Honor.

20 JUDGE DENNIS MOSS: Ms. Larson, it sounds like  
21 you're free to go have some lunch or whatever.

22 MS. LARSON: Okay. Thanks.

23 JUDGE DENNIS MOSS: And we'll go off the record  
24 and let the parties discuss among themselves further  
25 scheduling so that we have that in place. And as I said,



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1 you know where I'll be. We're off the record.

2 (Discussion held off the record from  
3 1:55 to 2:16 p.m.)

4 JUDGE DENNIS MOSS: Let's be back on the record  
5 then. All right. I gather you all have something to  
6 report, so whoever wishes to do so may proceed.

7 MS. WOODS: Your Honor, this is Fronda Woods for  
8 Commission Staff. We discussed a potential schedule, the  
9 first date of which would be a slightly different date from  
10 the date that Your Honor has suggested for a status  
11 conference.

12 JUDGE DENNIS MOSS: All right.

13 MS. WOODS: Because of the need to have the BNSF  
14 representative here we would like to propose October 22nd as  
15 the date for the status conference.

16 JUDGE DENNIS MOSS: October 22nd, okay. I had  
17 said the 25th, that's right. All right, that works for me,  
18 October 22nd.

19 MS. WOODS: Then we would have prefiled testimony  
20 with the County's testimony being due November 1st.

21 JUDGE DENNIS MOSS: Okay.

22 MS. WOODS: BNSF and UTC Staff testimony due  
23 November 29th.

24 JUDGE DENNIS MOSS: Okay.

25 MS. WOODS: Rebuttal or cross answering testimony,

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1 if any, due December 6th.

2 JUDGE DENNIS MOSS: Okay.

3 MS. WOODS: And a one day hearing on or about  
4 December 14th.

5 JUDGE DENNIS MOSS: Okay. Let me check that last  
6 one since that one will require my presence. December 16th  
7 you said?

8 MS. WOODS: 14th.

9 JUDGE DENNIS MOSS: Oh, 14th, I'm sorry. Well, it  
10 appears that I am available that day. So we will set that  
11 for 9:00; is that agreeable?

12 MR. HAY: Yes, Your Honor.

13 JUDGE DENNIS MOSS: All right. Anything else?  
14 I'm not going to -- I don't think there's any real need to  
15 set a date for settlement conference since the parties are  
16 continuing discussions that have been going on now for  
17 sometime. Is that okay with everybody? We normally include  
18 that, but in this instance I don't think it's necessary.

19 MS. ENDRES: That's fine with BNSF.

20 JUDGE DENNIS MOSS: Parties are going to proceed  
21 in good faith, I'm confident of it. Anything else we need  
22 to do? In terms of post-hearing process we'll set that at  
23 the hearing as appropriate. Okay. All right, do we have  
24 any other business we need to conduct today?

25 MS. ENDRES: Your Honor, the only other issue that

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1 came up that's potentially unresolved at this point is  
2 whether the industry who UTC has told me owns the tracks  
3 that will potentially have a new crossing on them needs to  
4 be joined as a party or should be part of the process. I'm  
5 going to get my hands on a copy of the industrial track  
6 agreement and see if that sheds light here. My  
7 understanding is that nobody has said they need to be a  
8 party at this point, but potentially they could be. I'll  
9 have to look at the ITA to see if we think they need to be.

10 JUDGE DENNIS MOSS: Okay. I'm sure you'll let me  
11 know by appropriate means if that comes to light, and we'll  
12 deal with it as needed.

13 All right. I will enter a prehearing order so  
14 that all these dates set forth can be memorialized  
15 appropriately. I did not check with the records center  
16 before I came down today to see how many copies you'll have  
17 to file if there is to be testimony filed, but I'll include  
18 that information in the order.

19 Nobody has mentioned the subject of protective  
20 order, so I'll simply state in the prehearing that there's  
21 no need for it apparent at this time. Of course, if it  
22 should become apparent then you will ask for it, and we'll  
23 deal with it.

24 As far as discovery is concerned, my personal view  
25 is that discovery rules are always there, so if you need to

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1 use them, use them. We'll say something about that in the  
2 order, but there's no reason to get too formal about it at  
3 this juncture at least. Okay. I think that pretty well  
4 covers all the sanctions.

5 MS. ENDRES: The only other thing we discussed,  
6 Your Honor, is assuming that the hearing itself would take  
7 place in Kennewick, I think, was floated.

8 JUDGE DENNIS MOSS: I guess that's fairly typical  
9 for these railroad things, isn't it, to do it in the locale?  
10 I haven't done one of these in a long time, I apologize.  
11 But, yes, we will schedule it in an appropriate location in  
12 what did you say, Kennewick?

13 MS. ENDRES: I think, yes, Kennewick.

14 JUDGE DENNIS MOSS: Our staff will see if they can  
15 locate an appropriate facility there, we try to keep a list.

16 All right. Then with that I thank you all very  
17 much for being present today whether in the hearing room or  
18 by telephone. And our prehearing conference is adjourned.

19 (Off the record at 2:21 p.m.)

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C E R T I F I C A T E

I, TAMI LYNN VONDRAN, a Certified Court Reporter,  
do hereby certify that I reported in machine shorthand the  
foregoing proceedings in the above-entitled cause; that the  
foregoing transcript was prepared under my personal  
supervision and constitutes a true record of the testimony  
of the said witness.

I further certify that I am not an attorney or  
counsel of any parties, nor a relative or employee of any  
attorney or counsel connected with the action, nor  
financially interested in the action.

DATED at Edgewood, Washington this 3rd day of  
October, 2010.

---

Tami Lynn Vondran, CCR  
Official Court Reporter  
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