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1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION

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4 In the Matter of the Petition    ) Docket No. TR-940288  
5 of the                               ) Volume 1  
6                                       ) Pages 1-29  
7 WASHINGTON STATE DEPARTMENT OF )  
8 TRANSPORTATION, BURLINGTON     )  
9 NORTHERN RAILROAD COMPANY and   )  
10 THE NATIONAL RAILROAD PASSENGER)  
11 CORPORATION for Modification of)  
12 Order Regulating the Speed of    )  
13 Passenger and Freight Trains in)  
14 Edmonds, Washington.            )  
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13                               A prehearing in the above matter  
14 was held on October 26, 2000, at 1:41 p.m., at 1300  
15 Evergreen Park Drive Southwest, Olympia, Washington,  
16 before Administrative Law Judge ROBERT WALLIS.

17                               The parties were present as  
18 follows:

19                               CITY OF EDMONDS, by W. Scott  
20 Snyder, Attorney at Law, Ogden, Murphy, Wallace, 1601  
21 Fifth Avenue, Seattle, Washington, 98101.

22                               BURLINGTON NORTHERN SANTA FE, by  
23 Robert E. Walkley, Attorney at Law, 20349 N.E. 34th  
24 Court, Sammamish, Washington, 98074.

25                               TERESA VERHEY, by Bradford N.  
Cattle, Attorney at Law, 2707 Colby Avenue, #1001,  
Everett, Washington 98201.

Barbara L. Nelson, CSR  
Court Reporter

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2 THE COMMISSION, by Jonathan  
3 Thompson, Assistant Attorney General, 1400 Evergreen  
4 Park Drive, S.W., P.O. Box 40128, Olympia, Washington  
5 98504-0128.

6 WASHINGTON STATE DEPARTMENT OF  
7 TRANSPORTATION, by Jeff Stier, Assistant Attorney  
8 General, 5035 Laura Street, S.E., Olympia, Washington  
9 98501.

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JUDGE WALLIS: Let's be on the record, please. This is a prehearing conference in the matter of the petition of the Washington State Department of Transportation, Burlington Northern Railroad Company and National Railroad Passenger Corporation for modification of order regulating the speed of passenger freight trains in Edmonds, Washington.

This matter is being heard on October 26th of the year 2000, before Administrative Law Judge Robert Wallis in Olympia, Washington, pursuant to due and proper notice to all interested persons.

What I'm going to do is ask for appearances at this point. I'm going to begin with the petitioner, and then ask others to state your name, the name of your client, and your office address for our record.

MR. WALKLEY: Your Honor, my name is Robert E. Walkley, Attorney at Law, 20349 N.E. 34th Court, Sammamish, Washington, 98074-4319. Telephone and fax number, 425-868-4846. E-mail, rewalkley@msn.com. And I'm appearing for the Burlington Northern and Santa Fe Railway Company, the Petitioner in this matter.

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1 MR. SNYDER: W. Scott Snyder, appearing for  
2 the City of Edmonds. I'm with Ogden, Murphy, Wallis,  
3 1601 Fifth Avenue, Suite 2100, Seattle, Washington,  
4 98101. Telephone number 206-447-7000. E-mail,  
5 ssnyder@omw.law.com.

6 MR. STIER: Jeff Stier, Assistant Attorney  
7 General, representing the Washington State Department  
8 of Transportation. My address is Post Office Box  
9 40113, Olympia, Washington, 98504-0113. Fax number,  
10 753 -- or excuse me, 586-6847. Telephone number,  
11 753-1623. And my e-mail number is  
12 jeffreys@atg.wa.gov.

13 MR. THOMPSON: Jonathan Thompson, Assistant  
14 Attorney General, representing the Commission Staff.  
15 My address is 1400 South Evergreen Park Drive, S.W.,  
16 Olympia, 98504. My phone number is 360-664-1225.  
17 Fax is 586-5522. And my e-mail is  
18 jthomps@wutc.wa.gov.

19 JUDGE WALLIS: And I understand there's  
20 also a pending petition for intervention, and the  
21 petitioner is represented.

22 MR. CATTLE: Thank you, Your Honor.  
23 Bradford Cattle, C-a-t-t-l-e, representing Teresa  
24 Verhey, who has a pending petition for intervention.  
25 My office address is 2707 Colby, C-o-l-b-y, Avenue,

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1 Suite 1001, Everett, Washington, 98201. Phone number  
2 425-252-5161. Fax 425-258-3345. E-mail,  
3 bcattle@andersonhunterlaw.com.

4 JUDGE WALLIS: Let's take up the petition  
5 for intervention first. I'm going to ask counsel for  
6 petitioner to state the interest of your client in  
7 this proceeding and the nature of the participation  
8 that you propose.

9 MR. CATTLE: Your Honor, the petitioner for  
10 intervention resides immediately across a street in  
11 Edmonds, Washington, known as Ocean Avenue, from the  
12 location of a proposed fence that was the subject of  
13 a shoreline substantial development permit initiated  
14 because of a condition in the Commission's order.

15 The fence would affect the view of the  
16 petition for -- excuse me, the petitioner for  
17 intervention's view of Puget Sound. Her desire in  
18 participating in these proceedings is to support a  
19 component of Burlington Northern-Santa Fe's petition,  
20 and that is a change in the condition from requiring  
21 fencing to allowing an alternative to fencing, which  
22 is a vegetative restrictive barrier to accessing the  
23 railroad area.

24 JUDGE WALLIS: Is there any objection to  
25 the petition for intervention?

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1                   MR. WALKLEY:  If I may, Your Honor, Robert  
2 Walkley.  I would only ask that, in allowing the  
3 intervention, the Commission does see that, in the  
4 relief requested by the Railroad, we are asking that  
5 if the Commission does not agree with us that it has  
6 no jurisdiction, that it modify to allow either a  
7 structural fence or planting and maintenance of  
8 natural barriers.

9                   The reason that's important is that we do  
10 intend, if the conditions changed, to construct --  
11 well, not to construct the tubular fence, but instead  
12 to construct or plant through the city the natural  
13 shrubs.  But there are some remaining issues that we  
14 want to work out with the City and with Mrs. Verhey  
15 regarding the money that's already been spent on  
16 fabrication of the fence.  But assuming that that  
17 goes smoothly and is resolved, we would intend to  
18 plant the natural barrier as quickly as possible.

19                   The other thing I would ask is that the  
20 Commission also bear in mind another comment that was  
21 made in our memorandum, and that is that the planting  
22 season for shrubbery is going to be ended fairly  
23 soon, due to the rains and so on, and so we would ask  
24 that this matter be handled in an expeditious manner.  
25 But other than that, we have no objection to the

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1 intervention.

2 JUDGE WALLIS: Very well. Other parties?

3 MR. SNYDER: From the City of Edmonds'  
4 perspective, we don't object to the intervention of  
5 Mrs. Verhey, so long as the proceeding can proceed  
6 expeditiously. We're into, I think, Bob, year six or  
7 seven at this point?

8 MR. WALKLEY: Six.

9 MR. SNYDER: The initial fence or whatever  
10 barrier is approved is intended to be installed for  
11 safety purposes, so time is of the essence, with the  
12 understanding that Ms. Verhey's concerns will be  
13 expressed on the record today and go to the  
14 Commission in an open hearing -- or meeting, I'm  
15 sorry, we have no objection to that intervention for  
16 that purpose.

17 JUDGE WALLIS: For clarification, I think  
18 we can talk about process a little bit later, if  
19 you'll remind me if I don't hit on that.

20 MR. SNYDER: Thank you.

21 JUDGE WALLIS: Mr. Thompson.

22 MR. THOMPSON: We're discussing the request  
23 for intervention?

24 JUDGE WALLIS: Yes.

25 MR. THOMPSON: My view is that staff has no

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1 objection to the intervention.

2 JUDGE WALLIS: Mr. Stier.

3 MR. STIER: No objection, subject to  
4 reserving rights on the jurisdictional arguments  
5 we'll be discussing later, I assume.

6 JUDGE WALLIS: I believe that the  
7 petitioner for intervention has no position on that,  
8 on the jurisdictional issue; is that correct?

9 MR. CATTLE: That's correct.

10 JUDGE WALLIS: All right. Let's move on to  
11 the principal matter at issue, which is the petition.  
12 And I'm going to ask Mr. Walkley to use this  
13 opportunity to state, for a record that will be  
14 presented to the Commissioners in conjunction with  
15 the review of this matter, the comments that you have  
16 in support of your petition. I would share with you  
17 that the Commissioners are very diligent about  
18 reading documentation, so you need not repeat matters  
19 that you have already presented in your  
20 documentation.

21 MR. WALKLEY: Thank you, Your Honor. Of  
22 course, I would commend to the Commissioners our  
23 petition and the memorandum of law that I filed in  
24 asking for this relief. I would also simply remind  
25 the Commission that if it reviews the voluminous



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1 record of the past, it will find that the only  
2 concern that was ever voiced out of the ordinary or  
3 essentially local had to do with trespassing.

4           The trespassing problem is a -- is hardly  
5 an essentially local safety condition under the  
6 federal act. It exists everywhere. Even the  
7 Commission's own Web site talks about the problem of  
8 trespassing. If that is the only basis for the  
9 Commission's restriction of what is otherwise a  
10 Federal Railroad Administration-mandated rule, then  
11 we would submit that the Commission does not have  
12 jurisdiction or the right to impose either lower  
13 speed limits or conditions on those speed limits, and  
14 I think we'll let the record on that speak for itself  
15 in that case.

16           The only other thing I would say is that if  
17 the Commission, for some reason, decides that it does  
18 wish to exert its jurisdiction in this case or does  
19 wish to modify the order, that it modify the order to  
20 permit the parties to go ahead with the resolution of  
21 the case that all of us here seem to support, and  
22 that is a flexible natural barrier proposal, which  
23 has been carefully worked out with the Commission's  
24 Staff, Mr. Michael Roswell, and frankly, also with  
25 the various protesters, appellants, and so on, and

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1 the various hearings in Edmonds and elsewhere. So we  
2 commend this solution.

3           We suggest that this is a fine example of  
4 cooperation among parties that have, after all, been  
5 in some sort of litigation over the conditions for  
6 over six years. And we would only commend this case  
7 to the Commission as an example of what unintended  
8 consequences can flow from laying unnecessary  
9 conditions on railroad speed increases.

10           So we ask for the Commission's attention to  
11 our petition and to grant the relief requested either  
12 to determine that indeed it does not have  
13 jurisdiction in this case because, subject only to  
14 trespassing, and because it's been preempted, and  
15 also because -- and also that it pay attention to the  
16 possibility of modifying the order in the event that  
17 it does not agree on the jurisdictional issue. The  
18 Railroad will, however, reserve its right, of course,  
19 to ask the Commission to reconsider or to appeal the  
20 decision, if that is appropriate. Thank you.

21           JUDGE WALLIS: Thank you, Mr. Walkley. Let  
22 me ask if the law reserving to the federal agency  
23 aspects of the authority to set speeds is new since  
24 the final order in this docket or if it existed at  
25 the time of the final order?

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1           MR. WALKLEY: Your Honor, the primary case  
2 that came down is cited in the brief. It's CSX  
3 versus Easterwood. And that case, from the U.S.  
4 Supreme Court, was handed down in 1993. This  
5 particular proceeding in Edmonds, if memory serves me  
6 correctly, took place in 1994. At the time, the  
7 matter of jurisdiction was not argued and, rather,  
8 much of the testimony and much of the arguments were  
9 over the appropriateness of the conditions.

10           So the conditions have always been  
11 contested, although the jurisdictional issue has only  
12 become clear, frankly, to the industry and to the  
13 Commission itself, I believe, at a time after this  
14 order was entered, although, technically, the Supreme  
15 Court case came before the order.

16           JUDGE WALLIS: Were there not circumstances  
17 in the geography of the location in question that led  
18 to this condition that do not exist commonly  
19 throughout the line of the railroad? Do I recall  
20 correctly that there's a blind curve and --

21           MR. WALKLEY: Your Honor, I think the  
22 record --

23           JUDGE WALLIS: -- a park.

24           MR. WALKLEY: -- probably ought to speak  
25 for itself, but, frankly, this is a situation where

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1 there is a bluff at Sunset Avenue, and there is a  
2 flatter area at Ocean. Neither one of them, in our  
3 view, is unique. Both of those situations exist at  
4 numerous places on the railroad and on -- all over  
5 the nation.

6           So our fundamental position, however, is  
7 that this area of speed regulation has been totally  
8 subsumed by the FRA, that the regulations issued, as  
9 I cite them in the brief, are complete, and I've also  
10 cited in the brief and given a copy of the FRA's  
11 comments on the issue of local speed regulation.  
12 They simply do not believe, and neither does  
13 Burlington Northern, that there is state jurisdiction  
14 to set speed limits as this area of law is unfolding.  
15 Regardless of the issue of essentially local safety  
16 conditions.

17           But if I might, we do not believe that  
18 there's any showing whatsoever in the voluminous file  
19 of any essentially local safety condition in Edmonds.

20           JUDGE WALLIS: Thank you for clarifying.  
21 The City.

22           MR. SNYDER: Your Honor, I'll try and be  
23 brief on point one, because I think your questions  
24 indicate both of the City's concerns. Again, we're  
25 here for a modification of a final order. The record

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1 on the initial proceeding does speak for itself. The  
2 Railroad did not contest the fines, did not raise the  
3 jurisdictional issue in a timely fashion.

4           And the record itself, just very briefly,  
5 the railroad, at this point, the points under  
6 discussion in the record, parallel Puget Sound,  
7 divide recreational facilities of the city, an  
8 underwater dive park, the state ferry system, Marina  
9 Beach, extensive public and private tidelands from  
10 the residential portions of the city which it serve.  
11 It's a prototypical local safety situation.

12           With regard to aspect number two, the  
13 Railroad has come up with a solution which, very much  
14 to their credit, does a much better job of addressing  
15 safety concerns. The tubular fence that was ordered  
16 is a compromise, a design created by a committee,  
17 that gives warning of a safety hazard, but does very  
18 little to actually deter trespassing.

19           The vegetative barriers that are proposed  
20 are much more effective, do not have visual impacts,  
21 and very nicely balance the concerns of citizens, the  
22 Railroad, and the city. And again, the Railroad  
23 should be commended for that sort of proactive  
24 solution, those being the bases why the City has not  
25 concurred with ground one, we think that's an issue

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1 long since decided, but very much commends and joins  
2 the Railroad in point two.

3 JUDGE WALLIS: Thank you. Department of  
4 Transportation.

5 MR. STIER: Yes, thank you. Once again, as  
6 I stated earlier, fairly fresh in this proceeding,  
7 and I certainly do not have the familiarity with the  
8 record to comment as to Mr. Walkley's assertion that  
9 no local circumstances were raised at the original  
10 hearing.

11 However, I can go this far and say that I  
12 think there's a serious question here at least as to  
13 the WUTC's jurisdiction where there is no showing of  
14 unusual local circumstances. And likewise, I wasn't  
15 a party or involved and I haven't reviewed the record  
16 regarding the original hearing as to whether this  
17 issue was raised, so I must not express an opinion on  
18 that.

19 My concern here is that I do not want to be  
20 prejudiced and do not want to be cited as waiving the  
21 state's position to argue for the preemption issue in  
22 the future. But other than that, I'm not going to  
23 take a position at this time.

24 As for the second point, the alternative  
25 argument of Mr. Walkley, the state has no objection

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1 whatsoever to the resolution suggested.

2 MR. WALKLEY: If I might, Your Honor.

3 JUDGE WALLIS: Just, Mr. Walkley, what I'd  
4 like to do is get through everybody and give you a  
5 chance to respond.

6 MR. WALKLEY: Well, Your Honor, it's not a  
7 response, but there is one other party that was  
8 involved, and that's Amtrak, and perhaps Mr. Stier  
9 can say a word or two about Amtrak.

10 MR. STIER: Well, I don't have anything to  
11 say about Amtrak. I haven't been in contact with  
12 them on this issue, and I certainly am not in a  
13 position to speak for them.

14 MR. WALKLEY: Okay.

15 MR. STIER: I will say that Mr. Walkley, at  
16 one point last week, I think, mentioned that I  
17 contact Amtrak. I did talk to my client, and my  
18 client felt that, essentially, that Mr. Walkley was  
19 equally capable of contacting them, and under the  
20 circumstance of this case, that Mr. Walkley's  
21 somewhat taken the lead in this matter for seven  
22 years, certainly did not see at this late date that  
23 it would be appropriate for the State Department of  
24 Transportation to be assuming more of a preeminent  
25 position.

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1           JUDGE WALLIS: You are not expressing an  
2 opinion on the jurisdictional issue. Have you not  
3 had the opportunity to review the record or to  
4 research that question? Is that the basis for not  
5 expressing an opinion?

6           MR. STIER: My position is -- essentially,  
7 that's correct. I do not even have the record. I  
8 have some smatterings of the record, but not much,  
9 except for the most recent filings, and I'm not even  
10 sure they're complete. I have reviewed the  
11 Easterwood case. Is that Easterwood.

12           MR. WALKLEY: That's correct.

13           MR. STIER: Easterwood. And recognize the  
14 arguments that have been raised. Essentially, my  
15 preliminary research indicates that there is a  
16 significant question here regarding the preemption  
17 of the area, and the only exception to that that  
18 could complicate matters would be the local  
19 circumstances situation, and that situation appears  
20 to me not to be present here.

21           However, I also recognize the point that  
22 you have made earlier regarding the -- and Mr. Snyder  
23 has likewise made that point -- regarding the  
24 longstanding exercise of jurisdiction in this matter.  
25 And that appears to be somewhat meaningful in this



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1 case, as well, to me.

2 But essentially, it's a question of Mr.  
3 Walkley has taken the lead. I need to establish a  
4 position with my client on the matter, and in the  
5 process of doing that, and I haven't had'n't an  
6 opportunity to do that, I want to preserve my rights  
7 to argue for or even against the preemption, once our  
8 position has been finally established.

9 JUDGE WALLIS: My preference would be that  
10 the Commission have the opportunity to hear all of  
11 the parties' positions before it makes a decision,  
12 and that the record, complete record is available in  
13 the Commission offices. I was able to get it on  
14 about three minutes' notice on my way up to the  
15 hearing. And if you wish to state a position, I  
16 would like you to state that to the Commission,  
17 rather than to state no position now and then  
18 formulate one that the Commission later would have no  
19 opportunity to evaluate or respond to.

20 MR. STIER: Should I submit that by letter?

21 JUDGE WALLIS: Yes, you may do that, and  
22 we'll talk about the timing.

23 MR. STIER: Okay, excellent.

24 JUDGE WALLIS: Now, for the other state,  
25 Mr. Thompson.

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1                   MR. THOMPSON: First thing I'd note is that  
2 Staff does not agree that the Commission is generally  
3 preempted on the issue of train speed regulation. It  
4 strikes me Burlington Northern-Santa Fe's arguments  
5 on jurisdiction strike me as more like an untimely  
6 motion for reconsideration on that issue, and I don't  
7 really think they're properly raised here.

8                   On the issue of the Easterwood case, you  
9 know, certainly that -- first of all, that was a tort  
10 case and didn't deal with an effort by a state to  
11 regulate through its Public Service Commission the  
12 speed of a train under circumstances such as this.

13                   And secondly, it's not new law, in a sense,  
14 since it really interprets a law that was initially  
15 passed in 1970, I guess. So it doesn't strike me as  
16 necessarily changing the legal setting of this case  
17 in any way.

18                   Secondly, I would state that Staff does  
19 agree that it's appropriate to modify the order  
20 substantially, as requested. I'm not sure Staff  
21 agrees that it's exactly appropriate. Let me put it  
22 this way. It might be better stated with respect to  
23 the role of the City. While I think Staff would  
24 generally agree that it doesn't have authority to  
25 order the City to perform a condition in mitigation

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1 of the request for speed increase, that those are new  
2 commitments that the City has made that are  
3 conditions precedent, if you will, to the  
4 modification that's requested.

5           And I guess it would be Staff's position  
6 that in the event that the City stops performing  
7 those -- stops performing its duties under that, that  
8 Staff would like the Commission to retain its  
9 authority to revisit the issue.

10           And finally, while there has been some  
11 detailed discussion of exactly how the barriers would  
12 be constructed and so forth, I think that it's not  
13 quite down to the level of detail that Staff would  
14 like to ultimately see. I don't know what mechanism  
15 we might ask for to make sure that what ultimately  
16 comes out of this is to Staff's and Commission's  
17 satisfaction, but that I think that needs to be  
18 considered.

19           JUDGE WALLIS: Do you have any proposal as  
20 to the process that we might adopt to assure that all  
21 of the Is are dotted and Ts crossed?

22           MR. THOMPSON: Well, I don't know if the  
23 parties would agree to something like -- that Staff  
24 would -- you know, that something would need to be  
25 submitted to Staff's approval. I think it should be

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1 obvious, from what Mr. Roswell has said so far, that  
2 he agrees generally, I think, with the approach  
3 that's being taken, but as I understand it, there  
4 remain some details to be resolved. So I think we'd  
5 like to keep a hand in that.

6 JUDGE WALLIS: Would it be an unnecessary  
7 or inappropriate burden if the Commission decides to  
8 retain jurisdiction and to approve the proposal to  
9 ask the parties to submit a statement of agreement as  
10 to whatever specifics arise from the further  
11 discussions? I'm asking this not only of Mr.  
12 Thompson, but to all the parties who are here. First  
13 of all, Mr. Thompson.

14 MR. THOMPSON: That's sort of, I think,  
15 what I had imagined might take place.

16 JUDGE WALLIS: The City.

17 MR. SNYDER: The structure, I think,  
18 probably makes -- by the way, to make sure we  
19 understand Mr. Thompson's point, the Railroad's  
20 provided a very detailed proposal with regard to  
21 Sunset Avenue, the primary problem, and I think that  
22 there's sufficient detail to nail that point down.

23 Now, with regard to the condition, because  
24 it does apply to the Railroad, my suggestion is that  
25 the contractual -- that the City and BNSF enter into

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1 a separate contractual arrangement with BNSF to  
2 enforce. To be honest, the City, obviously, is best  
3 placed, through the Parks Department, to maintain the  
4 shrubbery. And the mind of man being what it is,  
5 people will try and evade whatever barriers are put  
6 in over time, so it's going to be somewhat of a  
7 moving target.

8 I think the point that could be helped with  
9 further clarification is the Ocean Avenue crossing,  
10 which is the one Ms. Verhey has an interest in.  
11 Again, there's already a fabricated fence ready to go  
12 in. The question is what do we do with that and how  
13 the -- well, there's a significant difference in  
14 terrain between the two sites. The Verhey site,  
15 Ocean Avenue, is a flat crossing across a city street  
16 where people have parked and a history of  
17 trespassing.

18 The Clemson Avenue location is much more  
19 susceptible to natural vegetative barriers because of  
20 the bluff, because of existing blackberries doing  
21 what blackberries do in our climate. That one is  
22 sort of self-propagating, and it's an area where  
23 natural barriers lend itself.

24 If the Commission, as the request is,  
25 approves an alternative fencing or a vegetative

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1 solution, the vegetative solution needs to be worked  
2 out, we agree by the Staff, to determine whether it  
3 accomplishes the purposes. If it doesn't, at least  
4 as to the Ocean Avenue section, we already have the  
5 fence ready to put in.

6 JUDGE WALLIS: Is there any reason why,  
7 again, if the Commission rejects the jurisdictional  
8 argument and accepts the proposal, is there any  
9 reason why matters could not proceed separately?  
10 There's agreement as to the Sunset Avenue location,  
11 that that could proceed or should not proceed?

12 MR. SNYDER: Not from the City's point of  
13 view.

14 MR. WALKLEY: Your Honor, the discussion  
15 here is yet additional evidence of why it is not  
16 wise, even, for the Commission, to attempt to --

17 JUDGE WALLIS: Mr. Walkley, I would like to  
18 hear from all of the others before you respond to the  
19 arguments.

20 MR. WALKLEY: Okay.

21 JUDGE WALLIS: Mr. Thompson, did you have  
22 anything further?

23 MR. THOMPSON: On the idea of -- I would  
24 generally agree, just first of all, with the City,  
25 that I think the details are worked out with respect

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1 to Sunset, is it?

2 MR. SNYDER: Correct.

3 MR. WALKLEY: Actually, both. Actually,  
4 both. We, in our petition, we also include the same  
5 kind of information for Ocean, and it was submitted  
6 to Mr. Roswell. So they've both been documented.  
7 You can see that in the submission we made.

8 MR. SNYDER: And I do stand corrected, Bob.  
9 I apologize. It's just I'm far more familiar with  
10 the Sunset.

11 MR. WALKLEY: Right. The Sunset was a  
12 rather cantankerous large public hearing. Ocean,  
13 though, is documented by a letter sent to Mr. Roswell  
14 on August 21, 2000, by a Burlington Northern-Santa Fe  
15 engineer.

16 So we believe, Mr. Thompson, that if you  
17 check with Mr. Roswell, you'll probably find that he  
18 is satisfied, and after all, he did walk the ground  
19 here during the development of both of these  
20 proposals.

21 MR. THOMPSON: Okay. It may be a failure  
22 of communication on my part. If it is, I apologize  
23 for that, but I still need to have that conversation  
24 with him.

25 JUDGE WALLIS: Very well.

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1           MR. SNYDER:  If I might, sir, I think the  
2 problem is this has been kind of a two-stage process.  
3 Sunset Avenue is solutions of longstanding, well  
4 reviewed, everyone concurs.  The other's a more  
5 recent vintage, and I apologize for confusing it.

6           JUDGE WALLIS:  Very well.

7           MR. WALKLEY:  The problem, Your Honor, as  
8 you can see in the file and the record, these two  
9 locations have been whipsawed against each other.  
10 You'll see in the pleadings that we obtained  
11 authority to put up the Sunset, we did not obtain the  
12 authority to put up the Ocean fence.  We finally did,  
13 after years of litigation, get authority to put up  
14 the Ocean fence, and we could do that tomorrow.  But  
15 in the meantime, the Sunset fence permit expired.

16           I would just plead with everyone concerned  
17 that if this is going to work, it work smoothly and  
18 with some good faith cooperation that's already been  
19 shown between the City and the Railroad and the  
20 Commission and Ms. Verhey and the other Appellant,  
21 for that matter.

22           So we would plead that there be a little  
23 bit of room here where the Commission makes the major  
24 decision, do we have authority or jurisdiction or  
25 not, but if the Commission decides that it does wish



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1 to exert authority, that it make the condition broad  
2 enough and liberal enough to permit the parties to do  
3 the very best, knowing that Mr. Roswell, of course,  
4 does have inspection jurisdiction and authority and  
5 will be watching and will be consulted if there's a  
6 problem.

7 JUDGE WALLIS: Very well. Mr. Cattle, do  
8 you have anything to add at this point?

9 MR. CATTLE: Just if I could, very briefly,  
10 a couple of comments. One of the things that I think  
11 Teresa Verhey would like the Commission to consider,  
12 and it's echoing what Mr. Snyder said earlier, and  
13 that is the vegetative barrier, the parties, or at  
14 least I think the City and Ms. Verhey, as parties,  
15 would say is probably a more effective safety  
16 barrier.

17 So whether they conclude there's a local  
18 safety condition or not, in terms of adding safety to  
19 the Sunset and Ocean locations, we would submit that  
20 that vegetative barrier offers more than a tubular  
21 fence that does little more than create a visual  
22 statement.

23 Secondarily, echoing what Mr. Walkley has  
24 said about the effort at Ocean Avenue to evaluate the  
25 vegetative barrier at that location, we did have a

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1 meeting on site. Mr. Roswell was there. I believe  
2 the documentation submitted by Mr. Walkley indicates  
3 that that plan, hopefully, is sufficiently specific  
4 that the condition can be modified in the fashion  
5 that Mr. Walkley has proposed, giving a vegetative  
6 barrier as an alternative. And with those two  
7 comments, that would be all we would have to offer.

8 JUDGE WALLIS: Thank you, Mr. Cattle. Mr.  
9 Walkley, do you have anything to add at this point in  
10 response to any of the others' earlier comments?

11 MR. WALKLEY: Only very briefly, Your  
12 Honor. Again, I would stress that this case, even  
13 from the discussion today, this case is a capital  
14 example, Exhibit A, if you will, of a situation that  
15 the Commission got into with all good intentions in  
16 1994, but has created an incredible amount of  
17 difficulty and stress for all concerned.

18 Therefore, I think one of the lessons of  
19 this case is to, if the Commission is going to exert  
20 any authority, that it make -- I repeat, I guess --  
21 that it make every effort to make the conditions as  
22 flexible as possible, so that the parties can work  
23 out and bring this thing to a conclusion.

24 So the other thing I would add is that if  
25 you get -- if you attempt to draft an order in a case

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1 like this that gets down to how to build the fence,  
2 you know, that level of incredible detail, we're  
3 going to be back here every time some shrub is not  
4 available at a nursery, and nobody wants to do that.

5           So there's a measure of good faith here, I  
6 think, that's called for on everybody's part and has  
7 been exhibited by virtually everyone at the table to  
8 attempt to bring this matter to a conclusion and,  
9 more importantly, to satisfy the need to do whatever  
10 we can as a group to improve safety in a reasonable  
11 fashion.

12           JUDGE WALLIS: Very well. Is there  
13 anything further that the parties would like to add  
14 on the issues that we've discussed? Let's be off the  
15 record for a scheduling discussion.

16           (Recess taken.)

17           JUDGE WALLIS: Let's be back on the record,  
18 please. During off-the-record discussions, the  
19 parties have agreed upon a time schedule for further  
20 proceedings. Within ten days from today, Mr. Stier  
21 will the formulate a position on the jurisdictional  
22 issue on behalf of the Department of Transportation  
23 and will present that, and parties may respond to  
24 that within five days after he presents it. That is  
25 an outside deadline. If Mr. Stier accomplishes that

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1 more quickly, then things can be concluded more  
2 quickly.

3           The parties have agreed to consult among  
4 themselves as to whether they can reach a stipulation  
5 to recommend to the Commission as to exactly how to  
6 phrase the result if the Commission decides to reject  
7 the jurisdictional argument and if it further decides  
8 to accept the substitution of a natural vegetative  
9 barrier for a fence, or to consider that the term  
10 fence in the order, in fact, includes a natural  
11 vegetative barrier.

12           Parties have agreed to arrange a conference  
13 call among themselves on this issue, and the parties  
14 are free to request that the Commission reconvene  
15 this prehearing conference or convene an additional  
16 conference for the purpose of conducting such  
17 additional discussions as may be necessary.

18           Is there anything that I have omitted or  
19 that parties would like to comment on?

20           MR. SNYDER: No, Your Honor.

21           MR. WALKLEY: No, Your Honor.

22           MR. CATTLE: No.

23           JUDGE WALLIS: Very well. I want to thank  
24 you all very much. Certainly wish to commend you, on  
25 behalf of the Commission, for your efforts to address

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1 what was the problem that the Commission originally  
2 saw and to resolve it in a way that appears to  
3 satisfy all of the affected interests. So thank you  
4 very much, and we will, by agreement of the parties,  
5 submit the documentation, the pleadings, and the  
6 post-order motion and the transcript of today's  
7 conference to the Commissioners for decision, along  
8 with access to the record of the prior proceeding, as  
9 necessary, so that the Commissioners have a full  
10 opportunity to review the parties' positions before  
11 making the decision, and the Commissioners will then  
12 directly make the decision and will enter an order  
13 forthwith. Thank you all very much.

14 (Proceedings adjourned at 2:46 p.m.)

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