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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 BNSF RAILWAY COMPANY,)
4)
5) Petitioner,)
6 vs.) DOCKET NO. TR-070696
7) Volume IV
8 THE CITY OF MOUNT VERNON,) Pages 172 - 240
9)
10 Respondent.)

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14 A prehearing conference in the above matter
15 was held on December 20, 2007, at 10:02 a.m., at 1300
16 South Evergreen Park Drive Southwest, Olympia,
17 Washington, before Administrative Law Judge ADAM TOREM.
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20 The parties were present as follows:
21
22 BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
23 by BRADLEY P. SCARP and KELSEY E. ENDRES, Attorneys at
24 Law, Montgomery, Scarp & McDougall, 1218 Third Avenue,
25 27th Floor, Seattle, Washington 98101; telephone,
(206) 625-1801.

SKAGIT COUNTY, by STEPHEN R. FALLQUIST (via
bridge), Deputy Prosecuting Attorney, Civil Division,
605 South Third Street, Mount Vernon, Washington
98273; telephone, (360) 336-9460.

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

Kathryn T. Wilson, CCR

Court Reporter

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1 SKAGIT COUNTY FIRE PROTECTION DISTRICT #3, by
2 BRIAN K. SNURE and THOMAS G. BURKE (via bridge),
3 Attorneys at Law, 612 South 227th Street, Des Moines,
4 Washington 98198; telephone, (206) 824-5630.

5 DAVID and YVONNE BOON; WESTERN VALLEY FARMS,
6 LLC, by GARY T. JONES (via bridge), Attorney at Law,
7 Jones & Smith, 415 Pine Street, Post Office Box 1245,
8 Mount Vernon, Washington 98273; telephone, (360)
9 336-6608.

10 CITY OF MOUNT VERNON, by KEVIN ROGERSON (via
11 bridge), City Attorney, 910 Cleveland Avenue, Post
12 Office Box 809, Mount Vernon, Washington 98273;
13 telephone, (360) 336-6203.

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

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

2 JUDGE TOREM: Good morning. This is
3 Administrative Law Judge Adam Torem. Today is
4 Thursday, December 20th, 2007, and it's now about five
5 minutes after ten. Today is a prehearing conference to
6 get ready for the hearing on the BNSF Railway versus
7 the City of Mount Vernon case, which is scheduled to
8 begin January 7th. This is Docket TR-070696.

9 The purpose for today's prehearing conference
10 is to take care of any prehearing issues and
11 specifically review the prefiled exhibits, including
12 those that were filed yesterday, supporting parties'
13 requests for cross-examination, and then we will sort
14 out a witness schedule together and figure out which
15 witnesses testify on which day, or days as the case may
16 be, how we schedule that around the public hearings
17 that have been noticed, and I think there was one
18 request to accommodate a witness who could not
19 participate except for Monday because, sadness of all
20 things, they must go to Hawaii that night. I'm sure we
21 can accommodate that.

22 Before we get any further, let's take
23 appearances, and because we have a number of parties
24 appearing by phone today, I'll call out the name of the
25 party and then you can tell me who is appearing on

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1 their behalf, and when you are on the telephone because
2 our court reporter cannot see you, please identify who
3 you are when you speak. Starting with BNSF?

4 MR. SCARP: Bradley Scarp for BNSF.

5 MS. ENDRES: Kelsey Endres for BNSF.

6 JUDGE TOREM: For Department of
7 Transportation?

8 MR. LOCKWOOD: Scott Lockwood.

9 JUDGE TOREM: Commission staff?

10 MR. THOMPSON: Jonathan Thompson.

11 JUDGE TOREM: City of Mount Vernon?

12 MR. ROGERSON: Kevin Rogerson.

13 JUDGE TOREM: Skagit County?

14 MR. FALLQUIST: Steve Fallquist.

15 JUDGE TOREM: The Skagit County Fire District
16 No. 3?

17 MR. BURKE: Thomas Burke and Brian Snure.

18 JUDGE TOREM: Mr. Jones, are you out there as
19 well?

20 MR. JONES: Yes. Gary Jones from Mount
21 Vernon on behalf of Western Valley Farms, LLC, and
22 David Boon and Yvonne Boon, intervenors.

23 JUDGE TOREM: Let's turn to the witness list,
24 our e-mail exhibit list that I sent around. You will
25 see that I tried to capture for each party's witnesses

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1 the number of prefiled exhibits that were submitted, so
2 I want to make sure I didn't miss any witnesses or
3 exhibits as we go through. What I wanted to do,
4 because it looked like the number of proposed exhibits
5 was about 92 or 93, somewhere in that range, label the
6 cross-examination exhibits starting with 101 so that we
7 can tell is it a prefiled exhibit, a cross-exhibit just
8 by the numbering sequence. I'm sure there are a
9 hundred different ways to do this and that's what I've
10 selected for this time.

11 So let me review with BNSF first. There was
12 one exhibit for Stuart Gordon. It was just prefiled
13 testimony. It looked like there were three exhibits
14 for Megan McIntyre; her prefiled direct, her prefiled
15 rebuttal, and some videotapes that were not submitted
16 because I understand the CD is on proprietary software,
17 but that would be shown to the other parties. Were
18 there any other exhibits for those two witnesses?

19 MR. SCARP: I'm trying to find the list here
20 first.

21 JUDGE TOREM: Then Foster Peterson had a
22 revised prefiled direct testimony and his curriculum
23 vitae, and Danniell MacDonald had a prefiled direct
24 testimony. So those were BNSF's prefiled exhibits; is
25 that correct?

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1 MS. ENDRES: Correct.

2 JUDGE TOREM: Moving on to the Department of
3 Transportation, Jeffrey Schultz had three exhibits; his
4 prefiled direct, his resume, and a CD-ROM that
5 contained a variety of files regarding the long-range
6 plan for Amtrak Cascades, and then Gary Norris,
7 Mr. Lockwood, you filed his prefiled direct, a CV for
8 him, a Hickox Road study that was on a CD-ROM, a CV of
9 Lesley Struthers, and also prefiled rebuttal testimony
10 of Gary Norris.

11 MR. LOCKWOOD: I believe that's correct, Your
12 Honor.

13 JUDGE TOREM: Mr. Rogerson, your witnesses
14 included Albert Liou, and he had a prefiled direct
15 testimony and a CV. Edward Esco Bell had prefiled
16 direct testimony, a resume, several photographs of the
17 Hickox Road Crossing, another exhibit with several
18 photographs of the Stackpole Road Crossing, and another
19 separate exhibit with the Second Street Crossing. Any
20 others for him?

21 MR. ROGERSON: No, Your Honor. That's all of
22 the exhibits attached to Mr. Bell's testimony.

23 JUDGE TOREM: Glenn Brautaset had his
24 prefiled direct testimony, a resume, a flood evacuation
25 map and what I believe are a flood flight elements map.

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1 Your mayor, Bud Norris, had prefiled direct testimony.
2 Mikael Love has prefiled direct testimony and a resume,
3 and Jana Hanson had her prefiled direct testimony, her
4 curriculum vitae, a 2005 buildable lands analysis, and
5 then a September 2006 commercial and industrial land
6 needs analysis, and I think that was all the exhibits
7 from the City.

8 MR. ROGERSON: I believe you are right.

9 JUDGE TOREM: For the County, Mr. Fallquist,
10 you had Mark Watkinson and Rick Boge. For
11 Mr. Watkinson, there was prefiled direct testimony, a
12 resume, his job description as emergency management
13 coordinator, a two-page graph about the Skagit River
14 discharges.

15 MR. FALLQUIST: Yes, Your Honor, maybe it was
16 two pages. We might have provided a larger copy just
17 for ease of reading.

18 JUDGE TOREM: It may be that the cover sheet
19 has been labeled as a page for the exhibits. Then I
20 have the annual flood risk brochures, and finally, a
21 map of evacuation routes for the County.

22 MR. FALLQUIST: Yes, Your Honor.

23 JUDGE TOREM: For Mr. Boge, there was his
24 prefiled testimony, his resume, his job description as
25 the surface water manager, photographs from 1951 in the

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1 vicinity of Hickox Road during a flood, photographs
2 from 1951 in the vicinity of Hickox Road showing the
3 present approximate location of I-5, and then there was
4 a map of the major levee failures in the Lower Skagit
5 River Basin, another map with possible future levee
6 failures, and finally, a map of the Skagit River
7 floodplain.

8 MR. FALLQUIST: Yes, Your Honor.

9 JUDGE TOREM: For Commission staff, for
10 Mr. Curl, there was just his prefiled direct. For
11 Mr. Zeinz, there was a prefiled direct and a biography.
12 For Mr. Johnston, he had his prefiled direct, and then
13 I've labeled as you saw on the draft exhibit list a
14 variety of different photographs. Without me reciting
15 all of them, can you check that list to make sure it's
16 accurate and complete?

17 MR. THOMPSON: I had Staff look at it, and
18 that looks like all of the exhibits for his testimony.

19 JUDGE TOREM: Mr. Jones, you submitted
20 several witnesses with testimony. First David Boon,
21 his prefiled direct. Then you had a map that showed
22 the family business. Then you had a map for the
23 railroad siding extension, and then several pictures of
24 farm equipment. For Jeffrey Boon, presumably his
25 brother, you had his own prefiled direct testimony, and

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1 then it looked like although I've marked them as
2 separate exhibits that they are the same exhibit; is
3 that correct?

4 MR. JONES: There could be some overlap
5 between David Boon and Jeffrey Boon because they did
6 testify about harvesting corn and harvesting different
7 things that had equipment requirements for that. I
8 don't recall that we doubled up but maybe...

9 JUDGE TOREM: I can't say I compared the
10 photographs side-by-side or the maps, but perhaps there
11 is some degree of overlap. So each of them had the
12 same four individual exhibits; is that correct?

13 MR. JONES: I'm just looking in my file here.

14 JUDGE TOREM: While you are finding that, I'm
15 going to pick up with the rest of your witnesses. If
16 you find an error, you can let me know.

17 Dr. Winkes had prefiled testimony and then a
18 letter from he and his wife when this case was
19 originally announced, dated 28 May. Richard Smith had
20 his testimony and a map of the railroad siding
21 extension. Mr. Patrick DeJong had his prefiled
22 testimony, a resume, a job description as a school
23 principal, and another exhibit that showed three
24 different photographs of a school crossing area.

25 Then John DeVlieger had prefiled direct

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1 testimony. Darrin Morrison had prefiled direct
2 testimony, and those are all the witnesses for the
3 Western Valley Farms and the Boon clients.

4 MR. JONES: When I look at the exhibits to
5 the testimony, I get a lot more than four for Jeffrey
6 Boon. We've got pictures showing a truck crossing the
7 Cedar Crossing, and we've got in addition to the two
8 maps, which do overlap, but they are identical because
9 if you are looking at the prefiled testimony, it's
10 helpful to have the maps, but the follow-up photographs
11 I'm showing include both chopping corn and chopping
12 grass and loading it into trucks and then a truck
13 crossing the Hickox Road.

14 JUDGE TOREM: What I've done, Mr. Jones, is
15 group, I believe it's seven pages of pictures into one
16 exhibit, so do you have seven photos for each of them?

17 MR. JONES: I'll count them here. Yes,
18 that's right.

19 JUDGE TOREM: If you look at Jeffrey Boon and
20 David Boon, the photographs are grouped together.

21 MR. JONES: Okay.

22 JUDGE TOREM: Then moving on to the Fire
23 Protection District, Mr. Burke or Mr. Snure, I've got
24 Fire Chief Skrinde, his prefiled direct, and then a
25 response time summary, one page document, regarding the

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1 proposed Hickox Road and study. Fire Commissioner
2 Benson has prefiled direct testimony, and Larry Rabel
3 has his prefiled direct, a graph as I made as a
4 separate exhibit regarding response time on
5 intervention and survival rates, and a second exhibit
6 on a second graph showing fire growth over time and a
7 sequence of events in the event of a fire, and
8 Mr. Rabel also had an article called, "Flashover - A
9 Firefighter's Worst Nightmare." It's an 11-page
10 article.

11 MR. BURKE: That's correct.

12 JUDGE TOREM: Did I miss any witnesses or
13 prefiled exhibits that had not been in as of yesterday?
14 Hearing none, it doesn't sound like I did. So I have
15 to ask Ms. Endres, when I looked at your
16 cross-examination estimates, they listed every other
17 nonproponent witness, but No. 11 had a David Olson, and
18 I just wondered if this was one of those cut-and-paste
19 fatalities where we added Mr. Olson.

20 MS. ENDRES: Mr. Olson didn't file any
21 prefiled testimony in the case.

22 JUDGE TOREM: So I'll strike Mr. Olson off
23 your filing yesterday for the railway, and I wanted to
24 ask because every other witness was listed. Mr. John
25 DeVlieger was not.

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1 MS. ENDRES: I believe he was the school
2 principal.

3 MR. JONES: No, he's not. He's the truck
4 owner. He has a hauling service that's on the Britt
5 Road, and one thing about Olson too that might be
6 pertinent here, if I can interrupt, we are thinking
7 that the testimony of Richard Smith, who was a former
8 dike district commissioner, might make relevant the
9 present chairman of the Dike District No. 3, which is
10 David Olson, and he did submit a couple of letters
11 concerning the environmental impact of the project. So
12 to the extent that any of the environmental impact
13 letters or testimony taken would include Mr. Olson, he
14 would be a very pertinent person it seems to me.

15 JUDGE TOREM: But he's not being offered as a
16 witness in the evidentiary hearing. Certainly his
17 participation as the current chair of the dike district
18 is welcome in the public sessions, and in these
19 proceedings, it's permitted -- I wouldn't say it's
20 encouraged, but it's permitted to cross-examine public
21 witnesses. They do offer their comments and
22 observations under oath, and if it appears to the
23 Railroad that you want to cross-examination Mr. Olson
24 later, we will have to see if he participates verbally
25 at either of the public comment sessions and take that

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1 up at that time.

2 MR. JONES: I understand that.

3 JUDGE TOREM: Mr. DeVlieger's testimony, you
4 said he was a truck hauling service. Did you want to
5 add him to the list for substituting for Olson there?

6 MR. SCARP: I think we would, Your Honor.

7 JUDGE TOREM: So we will deal with the
8 cross-examination time estimates shortly. We got
9 through the prefiled exhibits. I want to turn to the
10 cross-exam exhibits, and Mr. Rogerson, let me start
11 with your packet first. When it came in, it appears
12 that, not unexpected in this case, the City, the Fire
13 Protection District, the County, and Mr. Jones's
14 clients, all of you are filing a joint list of what you
15 intend to do on cross-exam and you filed four
16 supporting exhibits.

17 MR. ROGERSON: That's correct.

18 JUDGE TOREM: While your Paragraph 2,
19 Mr. Rogerson, was very clear as to which of the
20 proponent witnesses you intend to cross-examine as a
21 group and how many minutes that would be each, I didn't
22 know who would be the attorney conducting the
23 cross-examination and I wasn't sure if -- I had
24 suggested earlier that there be a lead counsel for each
25 witness.

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1 MR. ROGERSON: That's correct.

2 JUDGE TOREM: And I wasn't sure who would be
3 designated. When I looked at Paragraph 3, you had four
4 proposed exhibits. I had no idea which exhibits would
5 go with which witness, so could you provide some
6 guidance to us?

7 MR. ROGERSON: Sure. I've conferred with
8 counsel for the Fire District, counsel for Skagit
9 County and the Intervenors, the Western Valley Farms
10 counsel, Gary Jones's clients, and we've agreed that
11 these estimated times for cross-examination as set
12 forth in Paragraph 2 of our joint filing, we would
13 designate a lead counsel to represent the Intervenors
14 and Respondents for the cross-examination of each one.
15 In addition, the exhibits and the table of exhibits
16 attached to the filing would be exhibits that we would
17 potentially use to cross each of these witnesses.

18 JUDGE TOREM: When I prepared what I'll
19 circulate later today or tomorrow, the rest of the
20 exhibit list, that's what I did is list all four of
21 them under all six of those potential witnesses.

22 MR. ROGERSON: That's correct.

23 JUDGE TOREM: You may have not decided yet
24 which counsel will stand up for cross-examination, but
25 I do want to make it clear today that once you've

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1 agreed and have selected one counsel, I'll want that
2 one counsel to be the speaker for that full witness,
3 and I expect there will be a lot of going back to the
4 table and handing of notes and
5 Can-I-have-a-minute,-Your-Honor moments, but I'm hoping
6 we will deal with one counsel for clarity for the
7 witness and for the record.

8 MR. ROGERSON: That was our intention. I
9 think that's what the previous prehearing orders had
10 suggested and that's the way we are preparing the case
11 and to proceed with.

12 JUDGE TOREM: Any questions from any of the
13 parties on the joint filing from the opponents of the
14 road closure? Seeing none, I'll set that stack aside
15 and take up Commission staff's because I have hard
16 copies --

17 MR. JONES: There is one thing out there
18 still. I had expected to have some photographic
19 evidence concerning a subject that I have brought up
20 and was mentioned in the testimony relating to the
21 Hickox Road overpass, and I realize we've kind of
22 missed the deadline there, but it might be helpful to
23 the witness and to you as a judge and to others to have
24 a picture, and I would like to at least mention the
25 possibility of having for illustrative purposes a

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1 photograph or photographs related to the Hickox Road
2 freeway overpass, particularly the west side of that
3 overpass, as a possible addition for purposes of
4 cross-examination, possibly for admission as an
5 exhibit, but I did not have it, and I guess I would
6 acknowledge that it's rather late to be bringing this
7 up, but that is something that I'm still concerned
8 about in terms of closing the record on exhibits.

9 JUDGE TOREM: As far as the evidentiary
10 hearing is concerned, the deadline has passed for that.
11 If you would like to circulate something to the parties
12 and there is an agreement that it is useful and helpful
13 for the record and the finder of fact in this case,
14 whether it be me or this commission, feel free to
15 submit it, and if you can get an agreement, I will
16 allow it, if they stipulate its admission. If there is
17 not an agreement and there is an objection, I don't
18 know how, particularly with your acknowledgment today,
19 that it's subject to such an objection, it would come
20 into the evidentiary portion of the hearing.

21 Knowing though that there are many back doors
22 to such things because you have variety of public
23 witnesses that you are adjacent to, I would encourage
24 counsel to take a look at it in that regard, and let's
25 not play evidence games, because a public witness could

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1 easily walk up and offer something. They are not
2 subject to these deadlines. We all know that, so let's
3 just put that out there.

4 And finally, we have to schedule or determine
5 what the nature of a site visit might be. I understand
6 all of you recall, even if I don't without reviewing
7 the transcript, that we had discussed to have a site
8 visit the week of January 7th, so if there is anything
9 you want me to see and there is any way to document
10 that for the record, whether we need to create a
11 transcript of that or if there is going to be a guided
12 tour where we stop at point A and B. I've done this
13 with the Energy Facility Site Counsel. The parties
14 develop a view place and said, Stop the car here. Look
15 at the horizon. There is a good narrative that the
16 person read to understand what they were looking at.
17 All parties agreed, and that became part of the record
18 as in that case, a counsel of members went out and
19 observed this.

20 So if we are doing to do a site visit, keep
21 that in mind. There may be some issues with flooding
22 because we are going to be there in flood season, so
23 let's keep in mind what's accessible and not accessible
24 and have appropriate plans and go on an appropriate day
25 once we know what the weather forecast might be. I

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1 don't think anybody in this room wants to venture a
2 guess as to the week of January 7th; although rain is a
3 good guess; right?

4 So Mr. Jones, I hope that answers your
5 question. Work with counsel. I do hope that if it's a
6 helpful exhibit, even though it's late, it doesn't seem
7 like this will be the sort of the thing that we are
8 trying to prevent a trial by ambush, that appearance of
9 that overpass probably won't change over time, and I
10 don't think the angle of the photograph would
11 disadvantage anybody, but convince me if I'm wrong
12 about that. If it's just one or two photographs, I'm
13 sure you can work out an agreement, okay?

14 MR. JONES: Thank you, and by the way, I
15 would reinforce the request for a site visit. It would
16 be very helpful on this particular thing. It's hard to
17 grasp without going there.

18 JUDGE TOREM: I don't think there is a lot of
19 objection to it. I think both sides would agree, and I
20 would have to review the transcript that said we were
21 going to do this, but if there is objection to a site
22 visit or people think it's not appropriate, we will
23 talk about it a little bit later today.

24 MR. SCARP: On the same vain as Mr. Jones's
25 inquiry about an exhibit, and we would only point out

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1 that we may run into the same issue with regard to data
2 request responses that are not yet filed or not yet
3 returned, some of which we have propounded, some of the
4 which the Commission propounded to us, and there are
5 some still outstanding responses. I can't remember
6 when they are due, but we are compiling that
7 information, and I believe there are responses that are
8 owed to the Department of Transportation, and so we
9 just want to put on the record here that we anticipate
10 using some of those, but we don't have them to
11 identify. I think we've categorically represented that
12 they would likely be used for cross-examination
13 purposes, so I would just bring that to your attention.

14 MR. ROGERSON: If I can briefly respond on
15 the issue of discovery, the City last night at 4:57
16 p.m. received a set of data requests from Burlington
17 Northern Santa Fe. Previous requests, I think, perhaps
18 can be separated from the requests that were received
19 last night and that the City would want to respond to
20 these new requests received just yesterday. Obviously,
21 a ten-business-day response time to those would be a
22 response into the time of the actual hearing, so I just
23 want to bring that to the attention, and maybe we can
24 deal with that later on.

25 JUDGE TOREM: There aren't any real business

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1 days in the next ten days.

2 MR. FALLQUIST: Skagit County is encountering
3 the same difficulty with the data requests also
4 received from BNSF about the same time yesterday
5 evening.

6 JUDGE TOREM: Respond as you can, and if
7 there are motions, because clearly, the exhibits that
8 might be offered by noon yesterday aren't available as
9 of noon yesterday, the same thing I said to Mr. Jones
10 about the photographs, work together with counsel, and
11 again, if the witness has time to not be surprised by
12 them or be prejudiced, then I will be inclined to make
13 a fuller record. If there is a good objection that
14 demonstrates that this was done with the intent to
15 surprise the witness, then perhaps those exhibits will
16 be excluded.

17 So work hard to make sure that this later
18 timing of the request, as soon as you know what it is,
19 can be made available and you let those counsel know so
20 that when you make your motion for the late admission
21 of those that we have some indication that there is a
22 fairness to the witness and we don't need to delay the
23 hearing to let the witness review something they've
24 never seen before.

25 MS. ENDRES: We do believe, Your Honor, that

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1 they are due the business day before the hearing, not
2 actually during the week of.

3 MR. FALLQUIST: Ric Boge, the primary
4 individual who would be able to respond to these
5 requests, is out of the office until December 26th, so
6 along with the holidays and the holiday schedules -- my
7 calendar had indicated there had been previous
8 deadlines, I believe, for the submission of data
9 requests. Although I didn't see that in your previous
10 orders, maybe that was something on the record.

11 JUDGE TOREM: Anybody want to enlighten me
12 that I set a deadline that I don't recall?

13 MR. FALLQUIST: I had something on my
14 calendar, but maybe that was just my own notation.

15 JUDGE TOREM: I know the indications were we
16 would have prefiled direct and there may be an
17 implication that discovery is to be over by the filing
18 of all of this, but I don't remember setting a formal
19 discovery cutoff in this case.

20 MS. ENDRES: We looked pretty closely, and we
21 had received something from the Commission last week.

22 MR. LOCKWOOD: And, Your Honor, we do have
23 outstanding data requests that we submitted initially
24 on November 27th. We did a clarification on
25 December 4 -- this was to the Fire District -- and we

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1 haven't received those, and there are some pretty key
2 questions within those data requests, so if there is
3 any prejudice here, that prejudice is shared equally by
4 both sides.

5 MR. SCARP: It is not our intention to
6 shorten anybody's holiday season to answer data
7 requests, but I would echo that there are some pretty
8 key issues, and it is just our intention to get answers
9 to those questions, which I think without them would
10 significantly lengthen and potentially complicate the
11 proceeding if we were trying to do so under
12 cross-examination, and it is not our intention to
13 surprise anyone because it would simply be those
14 responses in cross-examination. That's all.

15 JUDGE TOREM: I understand people have been
16 working hard not only to try to settle issues in this
17 case but also to comply with all the deadlines. In my
18 quick review of previously issued orders, I don't see
19 anywhere where we addressed discovery, per se, so I
20 don't know that there are any deadlines, but I know the
21 spirit of things is let's not have any of these
22 surprises or traps on witnesses when we are up in Mount
23 Vernon.

24 If there are ways to get these data requests
25 answered, get them answered, and if you intend to use

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1 the information, let's have some indications, and then
2 come prepared on Monday morning, January 7th, to
3 discuss any additional exhibits as necessary that we
4 want to put into the record, and maybe we can reserve
5 that for Monday afternoon. After the public comment
6 session, we will probably have some slack time before
7 we close for the day, but this morning, I would like to
8 figure out what the first morning of the hearing is
9 going to be. If these potential new exhibits affect
10 any of those witnesses, we will have to schedule around
11 it, but we really only have a half day of hearing to
12 begin and then we have a public comment session
13 directly that afternoon. The first full day of hearing
14 is going to be on Tuesday and will be a reasonably long
15 one if you are coming for the public comment session
16 that night.

17 On staff's exhibits, what I saw,
18 Mr. Thompson, was the listing of cross-exam estimates
19 was clear and the assignment of which exhibits went to
20 each witness was clear. What I was going to try to do
21 then is just assign -- for example, Staff Data Request
22 No. 2 and BNSF's response and exhibit number, and that
23 same exhibit would be used for multiple witnesses and
24 follow that fashion. I've done that with your request.

25 For some of the witnesses, and just to be

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1 clear for me, you don't have cross-examination exhibits
2 but you have just a request to cross-examine them on
3 their own prefiled testimony or exhibits; is that
4 correct?

5 MR. THOMPSON: That's right, and although I
6 did try to assign cross-examination exhibits to
7 particular witnesses, I would hope I wouldn't be
8 limited to only talking about those items with that
9 witness because it may be that I'll find out that, for
10 example, there is -- I haven't got the right person for
11 BNSF, who knows about the facts for the particular data
12 request response that I might want to discuss. For
13 example, it might not be Mr. MacDonald; it might be
14 Ms. McIntyre, but this is my best guess. It seems
15 consistent with what others are doing as well.

16 JUDGE TOREM: Again, I want to make sure that
17 the counsel preparing each witness for hearing can give
18 the appropriate exhibits to them, and if you find then
19 in your preparation for hearing there is an existing
20 prefiled cross-exam exhibit that applies to a witness
21 that hasn't yet been indicated, let them know so that
22 witness can over their holiday break read that
23 additional exhibit in preparation.

24 So I think if that stays within the spirit of
25 it, my rulings will be accordingly to allow the exhibit

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1 in and used for that witness. My goal is that the
2 times we set up for the witness scheduled not be unduly
3 delayed by saying, "Your Honor, I haven't seen this.
4 Can I have 15 minutes?" Those tend to string a hearing
5 out and cause the witness at the end of the day to now
6 have to make unplanned overnight accommodations,
7 etcetera, and lawyers get less and less popular as the
8 hearing goes on.

9 Any other items about Commission staff's
10 cross-exam exhibits? Hearing none, I'll set that
11 aside, and I don't have a printed stack, Ms. Endres, of
12 the Railway company's cross-exam exhibits, so please
13 help me come up with a list of those.

14 MS. ENDRES: How do you wish to proceed with
15 this? You just want me to give a title for each
16 document, and I don't have them organized by how we had
17 indicated we would use them for witnesses,
18 unfortunately.

19 JUDGE TOREM: If you speak up and give me an
20 title and the estimate number of pages, if that's
21 readily available.

22 MS. ENDRES: It looks like we have a Skagit
23 County natural hazard mitigation plan. There are
24 several pages of it, approximately ten pages. We have
25 Skagit County public bulletins for the 2006 flood,

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1 approximately 19 pages. We have projected flooding
2 maps from the Army Corps of Engineers. This looks like
3 approximately 10 or 12 pages. We have the Mount Vernon
4 Fire Department flood handbook. I'm going to guess --

5 JUDGE TOREM: That's all right. It's a big
6 one?

7 MS. ENDRES: It's a big one; 40 pages, maybe?

8 JUDGE TOREM: But that's the entirety of that
9 book?

10 MS. ENDRES: It does look like it has an
11 appendix, so it does look like it's the entire. We
12 have the Army Corps of Engineers' draft report,
13 approximately 15 pages.

14 JUDGE TOREM: For that Corps of Engineers
15 draft report, is it a particular subject?

16 MS. ENDRES: Hydraulic Skagit River flood
17 damage reduction feasibility study.

18 JUDGE TOREM: Okay.

19 MS. ENDRES: We have some floodplain maps,
20 two. We have three pages of MapQuest routing map. We
21 have Mount Vernon commercial development maps, two;
22 Mount Vernon boundary maps, approximately eight to ten
23 pages. We have what appears to be Skagit County
24 Ordinance, Chapter 11.20. It's titled, "Road Closures
25 and Restrictions." It's four pages, and we have aerial

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1 maps of the Hickox Road area, three pages, and that's
2 all, Your Honor.

3 JUDGE TOREM: So as you've grouped them,
4 that's 11 cross-exam exhibits, and I know I got the
5 electronic filing yesterday, but our records center --
6 we had a holiday employee recognition party, and I set
7 the deadline smack in the middle of it and asked them
8 to give me what they could download quickly, so I'm
9 sure the zip file is in. I don't have the hard copies.
10 Do you know then, following up on that, which of those
11 go with which witness?

12 MS. ENDRES: I know we provided that list. I
13 don't have it here with me.

14 JUDGE TOREM: The list that I got, unless it
15 was something I didn't print out, just indicates a
16 desire to briefly cross-examine every witness to elicit
17 two or three points. By itself -- there may be a
18 supplemental document -- this wasn't real helpful in
19 knowing how long each one would be cross-examined and
20 which of these exhibits would go. Did you provide
21 something that was more helpful?

22 MS. ENDRES: My understanding is we did
23 provide a list of which exhibits went with which
24 witness, and if that didn't get sent, we can certainly
25 get it to all the parties today.

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1 JUDGE TOREM: Any other parties bother to
2 print out everything that came in yesterday afternoon?
3 I know you are all in charge of your own stuff, but do
4 you have a copy of that with you today, Ms. Endres or
5 Mr. Scarp?

6 MS. ENDRES: We should.

7 MR. SCARP: Why don't you look.

8 JUDGE TOREM: If not, we can figure it out.

9 MR. JONES: I do see the Commission staff
10 having done what I think you are asking for, but I
11 haven't counted for everybody else.

12 JUDGE TOREM: It may be the nature of when
13 Ms. Miller sent this down on behalf of BNSF in a zip
14 file that the intimidation factor for me was, I'll wait
15 until the hard copies show up.

16 MS. ENDRES: I don't see it here. I know we
17 made that list and it should have been sent.

18 JUDGE TOREM: Let me now shift to the
19 cross-exam estimates and see where we are. Right now,
20 for the Railroad's witnesses, it looks like the City,
21 and I'll just refer to the four parties that are
22 opponents as the City and Company, essentially, if you
23 will, have 45 minutes for Mr. Gordon, and Commission
24 staff has another ten minutes of proposed cross-exam,
25 so we have a total of 55 minutes, about an hour for

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1 Mr. Gordon.

2 Ms. McIntyre, the City and its colleagues
3 have 45 minutes. Commission staff has a half hour, so
4 we have an hour and a quarter for that witness. For
5 Mr. Peterson, the City and its colleagues have one
6 hour. Commission staff has an hour and a quarter.
7 Mr. MacDonald, it's an hour for the City and only 15
8 minutes for Commission staff, and are there any other
9 desired cross-examinations of the Railroad's witnesses?

10 Depending on how this all pans out, my math
11 shows that this would be about five hours worth of
12 cross-examination of the Railroad's witnesses, so keep
13 that in mind, five hours just on the Railroad's
14 witnesses.

15 For the Department of Transportation,
16 Mr. Schultz is predicted to be cross-examined for 30
17 minutes by the City and the other party opponents and
18 15 minutes by Staff; Mr. Norris for one hour by the
19 City and opponents, and an hour and a quarter by Staff,
20 so there we have another three hours of
21 cross-examination time projected, and I know sometimes
22 these are generous estimates and sometimes they turn
23 out to be not so generous, so it's more of an art than
24 a science. There was one witness I mentioned earlier
25 who needed to testify on Monday. Who was that?

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1 MR. BURKE: Mr. Rabel for the Fire District.

2 JUDGE TOREM: So he's available only on
3 Monday?

4 MR. BURKE: Correct.

5 JUDGE TOREM: Do any parties oppose Mr. Rabel
6 testifying perhaps a little bit out of order on Monday?

7 MS. ENDRES: No, Your Honor, and I would also
8 note Mr. Gordon will not be available Monday.

9 JUDGE TOREM: So Mr. Rabel will be January
10 7th, and as you note, Ms. Endres, Mr. Gordon will be on
11 January 8th.

12 MR. ROGERSON: I just want to bring your
13 attention to maybe deal with this when we get to the
14 City's witnesses. Our expert hydrologist, who is not a
15 city employee, will have a scheduling issue as well for
16 the hearing week of January 7th. Albert Liou is the
17 hydrologist, and he will be in Taiwan starting December
18 27th through January 9th. He will be flying back, if
19 the flight is on time and there are no travel issues,
20 on the 10th, the last day of the hearing, and then he
21 will be traveling to Hawaii on the 12th through the
22 18th. So potentially, he's available on the 10th;
23 however, knowing travel problems around the holidays,
24 my only concern is he may not be.

25 JUDGE TOREM: Let me ask on that issue,

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1 Mr. Rogerson, the parties that could potentially want
2 to cross-examine him would be Commission staff, which
3 has not yet expressed an interest. The Department of
4 Transportation, and Mr. Lockwood, you haven't listed
5 any particular witnesses. I'm not sure if you are
6 relying on the Railroad to make its case and yours is
7 made through direct?

8 MR. LOCKWOOD: As you had indicated, Your
9 Honor, parties whose interests are aligned ought to try
10 to avoid duplication. BNSF will be the lead for cross,
11 and we would consider joining in their
12 cross-examination witnesses and exhibits.

13 JUDGE TOREM: Did you have any independent
14 desire to cross-examine this hydrologist?

15 MR. LOCKWOOD: No. Ours will be done through
16 BNSF.

17 JUDGE TOREM: He's already traveling at this
18 time?

19 MR. ROGERSON: He doesn't leave until next
20 week after Christmas, so I can get in contact with him.

21 MR. THOMPSON: We've been exchanging e-mails,
22 something about the unavailability of Tom Zeinz, our
23 consultant, and so what I had proposed is that there
24 might be a need to set another separate half day or
25 something of hearings at a later date, and so if we can

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1 agree on a date for that, we can pick a date that would
2 also be convenient to have Mr. Liou also.

3 MR. ROGERSON: That's agreeable with the
4 City.

5 MR. SCARP: Same with BNSF.

6 MR. ROGERSON: And Mr. Liou's offices are in
7 Edmonds. If that helps in terms of travel, we could
8 probably not have that. I don't have an issue of not
9 having that special setting in Mount Vernon if it
10 assists.

11 JUDGE TOREM: Where are Mr. Zeinz's offices
12 located?

13 MR. THOMPSON: He is out of Ohio, so I think
14 Seattle would probably be convenient.

15 JUDGE TOREM: The only other question with
16 Mr. Liou leaves it to the Railroad. If you want to ask
17 him questions, if there is to be no cross-exam, then we
18 don't need a separate day. If there is another way to
19 get your cross-examination evidence in without
20 convening the entire group again, because it may not be
21 relevant what the Railway thinks of the hydrology
22 testimony but simply wants to get him to answer some
23 questions about it, that may be done by agreement of
24 the parties by simply deposing him separately on his
25 testimony and then submitting that as a written

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1 posthearing exhibit. That can be done for Mr. Zeinz as
2 well. That disadvantages me if I have questions from
3 the Bench. I'm willing to take that disadvantage, but
4 if the parties want to do that as well, I offer it up
5 as another way that we don't need to convene this large
6 group again and potentially have the appearance, I
7 think -- the public may better notice, Mr. Rogerson and
8 Mr. Fallquist, a separate hearing held outside their
9 jurisdiction than simply a procedural tool to allow
10 submission of this testimony that they may not be
11 particularly interested in. I don't want to prejudge
12 the average citizen and their interests, but I don't
13 know that hydrology tends to go within the scope of
14 what they are thinking when we have a grade-crossing
15 closure, so I think that may be an option that doesn't
16 have the appearance of upsetting the citizenry that we
17 are not in their backyard for the whole thing.

18 So think about it. It's up to the parties.
19 I'll go with whatever. If we need another hearing date
20 later in January, my schedule is reasonably open after
21 this case up until the very last couple of days of the
22 month, so if there is a mutually agreeable date, you
23 can propose it to me. We will arrange a court
24 reporter, and if we can be in Seattle, if that makes
25 sense, we will find the appropriate room or facility to

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1 use and close the record at that date instead of on the
2 9th or 10th of January. So for Mr. Zeinz and for
3 Mr. Liou, we won't see them at the hearing. Are there
4 any other witnesses with availability issues the week
5 of January 7th?

6 MR. SCARP: I would just say that finalizing
7 some of the issues, there is some overlap between Megan
8 McIntyre and Dan MacDonald, so as I look here at the
9 five hours that are planned for cross-examination,
10 there is some overlap, and whether the parties intend
11 to go through that and what dates of availability they
12 can be there sort of remains to be seen, and I will
13 have to advise them. I don't know their precise
14 schedules. We will make them available, but they can't
15 necessarily sit through both of them at the same time.

16 JUDGE TOREM: I was going to propose exactly
17 that, but perhaps their cross-examination, since there
18 is an overlap, be done jointly, but that's up to the
19 witnesses, but it would also require some artful
20 direction of questions and making sure the record is
21 not confusing, but if it's easier and less repetitive
22 to have Ms. McIntyre and Mr. MacDonald consecutively
23 adopt their testimony and then be jointly made
24 available to the Commission staff and the party
25 opponents. What do you think, Mr. Thompson?

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1 MR. THOMPSON: I think that is a good idea,
2 actually, because what sometimes happens when you have
3 people testifying about the same thing, they have holes
4 in their knowledge and refer to the other person, so it
5 might be convenient to have them both sitting there.

6 JUDGE TOREM: If you can manage it as counsel
7 cross-examining two witnesses and not feel overwhelmed
8 or particularly challenged with the organization that
9 you need to do that, that would work. Mr. Rogerson,
10 I'm not sure who is designated or if we had separate
11 counsel for these witnesses. I don't know if that
12 complicates things.

13 MR. ROGERSON: My understanding is you are
14 proposing to have both witnesses sworn in on the stand
15 and then questions directed jointly to both as experts?

16 JUDGE TOREM: Either individually or jointly.
17 It depends on how the counsel poses the question. It's
18 a little unorthodox --

19 MR. ROGERSON: As a trial prosecutor, I've
20 never had to approach something like that. We have two
21 experts who both have opinions regarding road crossing.
22 Both may have opinions of that overlap in terms of the
23 basis, but also might be distinguishable to have them
24 both answering questions jointly. It would seem
25 problematic at this point, but I'll reserve and try to

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1 put my mind around it a bit further. I would like the
2 opportunity to individually question each expert I
3 guess is my opinion at this point.

4 JUDGE TOREM: What I'm suggesting would allow
5 that, Mr. Rogerson, if you chose to ask just one at a
6 time, you simply have both witnesses available, so if
7 you found in your preparation for the hearing that you
8 wanted to complete your examination of Ms. McIntyre and
9 have her stay on the stand and then you turn to
10 Mr. MacDonald, that could work, and then you could go
11 back and ask if he agrees with what she said, etcetera.
12 I could see this working both ways. It depends on how
13 you structure your exam. I don't know, but it sounds
14 as though we want to have both those witnesses
15 available on the same day, and if on the date in
16 question you and Mr. Thompson have figured out a way to
17 do this or reject it entirely, let me know either on
18 Monday or Tuesday would be the appropriate day to have
19 them testify.

20 MR. ROGERSON: Okay.

21 JUDGE TOREM: It doesn't sound like any other
22 witness has to be accommodated specially besides
23 Mr. Rabel, and Mr. Burke, is he flying out on Monday
24 night?

25 MR. BURKE: That's my understanding, yes.

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1 JUDGE TOREM: So him being done before
2 lunchtime would keep his family happy?

3 MR. BURKE: Yes.

4 JUDGE TOREM: Let's get to the business of
5 crafting the schedule to make it as least inconvenient
6 for these witnesses that want to attend to their life
7 and not sit through the hearing in its entirety. If we
8 have a start time, I believe, of nine o'clock in the
9 morning on Monday, and we can pretend that by 9:30 we
10 will be started and have the preliminaries out of the
11 way. Is that overly optimistic? So I would hope we
12 would have three hours on the record up until 12:30,
13 and then we have a 1:30 public hearing. Until I see
14 the room, I won't know what we need to shuffle things
15 around, but Mr. Rogerson, you arranged for the facility
16 in Mount Vernon?

17 MR. ROGERSON: Yes.

18 JUDGE TOREM: Will we be moving things for
19 the for the public hearing?

20 MR. ROGERSON: This is a multipurpose room.
21 It has the ability to have the technology for
22 recording. It's the counsel chambers. I don't imagine
23 that there is going to be much need for additional
24 setup.

25 JUDGE TOREM: With that in mind, if we take a

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1 12:30 to 1:30 lunch break, we will see who arrives, and
2 it can either be 20 minutes or it will be four hours.
3 I don't know what to expect.

4 How long for Mr. Rabel? It looks like the
5 Railway will be the only one indicating a need to
6 cross-examine him, so I'm going to have to try to get
7 some cross-estimates from you, Ms. Endres and
8 Mr. Scarp, on each of these witnesses so we can figure
9 out who else can we can fit in, and I think you we want
10 to pause quickly to see if we can find the document
11 that you sent in, we can try to do that if it would
12 make things go faster.

13 MS. ENDRES: I think it was more specific
14 with respect to exhibits than actual timing.

15 JUDGE TOREM: So do you feel comfortable
16 without that document in front of you telling you how
17 long --

18 MR. SCARP: Estimating? You bet.

19 JUDGE TOREM: Mr. Rabel is one of the County
20 Fire District witnesses.

21 MR. SCARP: 20 minutes.

22 JUDGE TOREM: 20 minutes for Mr. Rabel. From
23 the Railway's perspective, since you are making the
24 petition in this case, do you want a chance to put on
25 your witnesses first and then have Mr. Rabel at the end

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1 of the session, or do you want to have Mr. Rabel on and
2 off and then shift gears into your own witnesses?

3 MR. SCARP: Mr. Rabel is only available on
4 that Monday, and so we are -- I'm trying to recall that
5 we have potentially five hours or estimated five hours
6 of cross-examination time of BNSF witnesses, which
7 would not allow us in all likelihood to complete that
8 in the first day.

9 JUDGE TOREM: I was going to propose that
10 Mr. Peterson testify. There is a projection of two
11 hours and fifteen minutes for him, now 20 minutes for
12 Rabel. That would easily eat three hours that morning
13 of time that we have. It may be that we can have some
14 other witnesses available in the afternoon, but I don't
15 know -- it could be that we have Mr. Schultz available
16 in the afternoon, because I understand he's going to be
17 there the whole time. So if the public hearing is
18 done, we could go to Mr. Schultz.

19 The following day, I propose that
20 Ms. McIntyre and Mr. Gordon, who is only available on
21 Tuesday, and Mr. MacDonald pick up in the morning, and
22 then we shift and finish with Mr. Norris from the State
23 Department of Transportation on Tuesday as well. So
24 the question again was at 9:30, do you want to start
25 with Mr. Peterson or with Mr. Rabel?

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1 MR. SCARP: I think we would get Mr. Peterson
2 done.

3 JUDGE TOREM: So, Mr. Burke, why don't you
4 alert Mr. Rabel that he will be scheduled tentatively
5 at 11:30 in the morning. If he wants to show up early
6 any time after eleven, as soon as Mr. Peterson is done
7 and Mr. Rabel is available, have him on and off
8 hopefully before 12:30, and then we will do the public
9 hearing in the afternoon.

10 MR. BURKE: I will do that, sir.

11 JUDGE TOREM: Does anybody have any ideas,
12 estimates, as to what will occur with this Monday
13 afternoon public hearing? Have you heard from any of
14 your public constituents up there in Mount Vernon as to
15 their intent to come to one or the other?

16 MR. JONES: Your Honor, I've been getting
17 phone calls from people like Dave Christianson, who has
18 got a crossing, Jim Youngsman, some of the people who
19 have written letters about their SEPA issue. They
20 haven't told me when they are going to come. I have
21 told them there is a public hearing that Monday
22 afternoon. I'm kind of expecting there will be several
23 people. How long they will take, I have a hard time
24 estimating because it's kind of up to them what they
25 do. I know there is substantial public interest. 600

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1 people signed petitions opposing this crossing closure.

2 JUDGE TOREM: We have copies of those, I
3 believe, already filed with the Commission and a
4 variety of letters as well. I've heard estimates as of
5 as much as 200 individual comments are already in the
6 Commission's databanks. We are going to have a lot of
7 people. How many will get up once a comment has been
8 stated, because we tend to instruct folks that if they
9 agree with Mr. Smith or whatever and want to get up,
10 they can do that. If they want to get up and say, I'm
11 opposed or against, that's fine. The number of people
12 that show up will depend on how long I give them.
13 Usually the rule of thumb is three minutes, which tends
14 to be a lot longer for most lay people than they need,
15 but one minute is too short, and I want to be
16 consistent between Monday and Tuesday, so we may just
17 be going with two to three minutes and see what we get,
18 and Tuesday may be kind of a long evening if we don't
19 get enough folks on Monday afternoon.

20 MR. THOMPSON: As far as the number of people
21 is concerned, Kathy Hunter from staff told me there is
22 a notice of the meetings being run in the Skagit Valley
23 Herald this week, and we also sent out letters to the
24 200 or so people who have written in to the Commission
25 to inform them of the hearing.

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1 JUDGE TOREM: So there won't be a question of
2 invitations. It's a question of RSVP's at this point.
3 Mr. Schultz, if you will be available in the afternoon
4 on Monday just in case we don't fill it, then those
5 that wish to cross-examine Mr. Schultz should be
6 prepared for Monday or Tuesday. Do you intend to have
7 Mr. Norris available both days of the hearing?

8 MR. LOCKWOOD: We can make him available both
9 days or Tuesday. We haven't discussed it.

10 JUDGE TOREM: It would appear to me that if
11 he could be made available, his is a much longer
12 cross-examination, and unless very few people come
13 Monday afternoon, I think we might be wasting his time
14 to have him sit through it just in case. So it would
15 appear to me at best, accommodating the public hearing
16 where it's scheduled, we would get Mr. Peterson on at
17 9:30 Monday morning, Mr. Rabel on close to 11:30, and
18 Mr. Schultz, if possible, at three or 3:30 in the
19 afternoon and call it a day.

20 Anybody else think we can shoehorn anything
21 else in on Monday? Then Tuesday morning at nine,
22 Mr. Scarp, would you want to have Mr. Gordon on first
23 or Ms. McIntyre or Mr. Macdonald, who may be
24 cross-examined jointly?

25 MR. SCARP: I'm assuming Mr. MacDonald just

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1 out of scheduling purposes, but that would be what I
2 would anticipate.

3 JUDGE TOREM: And the cross-exam on him is
4 supposed to be just over an hour, so potentially, we
5 could put on Ms. McIntyre at 10:30?

6 MR. SCARP: That would be fine.

7 JUDGE TOREM: And then Mr. Gordon, if it all
8 ran on time, I will take him before lunch. I would
9 take a late lunch that afternoon or take him after
10 lunch and go for a little while.

11 MR. SCARP: Hopefully before lunch.

12 JUDGE TOREM: Let's put him down for 11:30
13 and see if we can get that done. Look at a 12:30 to a
14 1:30 lunch break again, and normally I would say in a
15 hearing like this where you've got a public hearing
16 scheduled that night, we would want to stop a little
17 bit earlier. I think the public hearing is scheduled
18 for six o'clock; is that right, Ms. Hunter, or 5:30. I
19 can't recall. I actually have my notice.

20 MS. HUNTER: 5:30.

21 JUDGE TOREM: 5:30 is the public hearing, and
22 I would imagine we are going to have the same court
23 reporter, so taking into account that person's needs as
24 well, what time do we need to stop after a lunch break
25 for everybody to get refreshed before the public

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1 hearing; four o'clock or 4:30? Probably right, so that
2 afternoon then if we don't have Mr. Schultz on, we
3 would have him then and Mr. Norris after lunch, and
4 that would be as far as we can get, and the proponents'
5 case would hopefully be done Monday and Tuesday.

6 On Wednesday, we would be ready to take the
7 City's and all the other witnesses for the opponents
8 and/or staff's witnesses, depending on
9 cross-examination estimates, and again, it looks to me
10 as though unless the Commission staff has any desire to
11 cross-examine or follow-up on questions that come up
12 from the party opponents, they haven't yet listed any
13 desire to do that, so I'm going to rely now from this
14 point forward with the Railway on how long your
15 estimates are for each witness, and if there is any
16 desired sequence you want to ask them questions in, let
17 me know so we can see if each counsel that's on the
18 phone today can advise their witnesses to be present on
19 Wednesday or Thursday as needed.

20 MR. SCARP: We have already determined that
21 Mr. Zeinz will be at a later date?

22 JUDGE TOREM: Correct. Mr. Zeinz and
23 Mr. Liou will not be included on these two days we are
24 trying to schedule, Wednesday and Thursday.

25 MR. SCARP: So Mr. Curl and Mr. Johnston. It

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1 doesn't matter to me what order or how that works out.

2 JUDGE TOREM: How long do you estimate for
3 Mr. Curl?

4 MR. SCARP: I don't know.

5 MS. ENDRES: He's the one that testified
6 about the excerpts.

7 MR. SCARP: Just out of caution, I would say
8 an hour, but I think that's probably overstating it.

9 JUDGE TOREM: So we will schedule him for
10 nine a.m., and Mr. Johnston?

11 MR. SCARP: I can't see that taking more than
12 15 minutes.

13 JUDGE TOREM: So we will schedule
14 Mr. Johnston for ten a.m., but if you could have them
15 there at the beginning of that session, he could be up
16 directly after Mr. Curl.

17 MR. THOMPSON: Okay.

18 JUDGE TOREM: Which witness did the Railway
19 want to cross-exam next?

20 MR. SCARP: I guess I would say most likely
21 the Fire District's witnesses.

22 JUDGE TOREM: Mr. Burke, is there any
23 availability issue for the chief and the fire
24 commissioner on Wednesday morning?

25 MR. BURKE: That should not be a problem.

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1 JUDGE TOREM: So let's have them there by ten
2 o'clock, and we'll see if by 10:30 we can put on Chief
3 Skrinde. How long do you think the cross-examination
4 of the chief will last?

5 MR. SCARP: 30 minutes.

6 JUDGE TOREM: For Commissioner Benson?

7 MR. SCARP: I'll say ten minutes, and it may
8 not be necessary to cross-examine him, depending on the
9 cross-examination of Chief Skrinde.

10 JUDGE TOREM: So in that half hour to 45
11 minutes between 10:30 and 11:15 will be Fire District's
12 witnesses, and if you do know in advance you are going
13 to waive cross-examination since you are the only
14 party, please let them know and they won't have to
15 worry about it that week.

16 MR. SCARP: I would just reiterate that there
17 are some key bits of information by way of data
18 requests that will likely be determinative. I'm doing
19 this estimate in what I think is a cautious amount,
20 because I don't like to ask a lot of questions. I
21 prefer to shortcut it. It just depends on what is
22 available.

23 JUDGE TOREM: After the fire district's
24 witnesses, where are we going from there?

25 MR. SCARP: I guess it's probably determined

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1 by volume, and I would say probably the City's.

2 JUDGE TOREM: So we've got Mr. Bell,
3 Mr. Brautaset, Mr. Norris, Ms. Love, and Ms. Hanson.

4 MR. SCARP: I would just say two hours total.
5 It won't exceed that. More likely within an hour and a
6 half.

7 JUDGE TOREM: Let me propose then that the
8 Staff's witnesses and the Fire District witnesses be
9 accommodated and cross-examined, it sounds like we
10 could get this done by 11:30, so we will schedule an
11 11:30 lunch hour and be back by 12:30 or thereabouts,
12 pick up at one. Tell me what you think, but at 12:30,
13 the City's witnesses, could they all be available
14 Wednesday at 12:30, Mr. Rogerson?

15 MR. ROGERSON: I've confirmed that the City's
16 employees or witnesses, without Albert Liou, have not
17 scheduled a vacation and they should be available,
18 unless there is a flood. Then obviously, all bets are
19 off and these are first responders.

20 JUDGE TOREM: We are counting on you to
21 prevent that. So you think about two hours tops?

22 MR. SCARP: I would say two hours for the
23 City's witnesses, and I will try to give counsel,
24 Mr. Rogerson, a more precise estimate of that, but
25 again, it's going to depend on what we have to finalize

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1 our preparation.

2 JUDGE TOREM: So those five witnesses from
3 the City that will be available will be between 12:30
4 and 2:30, directly after lunch. That leaves you with
5 the County's witnesses and Mr. Jones's witnesses.

6 MR. SCARP: I would say Mr. Jones's witnesses
7 in the afternoon on Wednesday.

8 JUDGE TOREM: So from three o'clock to five
9 o'clock? Do two hours give you sufficient time?

10 MR. SCARP: Yes.

11 JUDGE TOREM: And there are seven potential
12 witnesses?

13 MR. JONES: I thought there were eight but...

14 JUDGE TOREM: You've got David Boon and his
15 brother, Dr. Winkes, Mr. Smith, Mr. DeJong,
16 Mr. DeVlieger and Mr. Morrison? If you are counting
17 Mr. Olson, that would be the eighth, but he's not
18 listed.

19 MR. JONES: Maybe that's where we are
20 confused here.

21 JUDGE TOREM: So we have seven witnesses for
22 Western Valley Farms, and that would carry us to
23 Thursday to finish up with the County's witnesses in
24 the morning.

25 MR. SCARP: Correct.

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1 JUDGE TOREM: Mr. Fallquist, will that work
2 for Mr. Watkinson and Mr. Boge?

3 MR. FALLQUIST: To be perfectly honest, I had
4 informed Mr. Boge and Mr. Watkinson that they would
5 most likely be required to testify on the 7th or 8th,
6 because it was my understanding that the 9th and 10th
7 would only be utilized if necessary. I did inform them
8 that the hearings would be the 7th through the 10th. I
9 didn't hear any specific objection from them. They
10 just both asked that I give them as much advance notice
11 as possible, so I don't know right now that there is
12 any specific problem with that, but again, I did tell
13 them it's most likely on the 7th or 8th.

14 JUDGE TOREM: If they are there that week,
15 then hopefully they will be available the entire week.
16 If you tell them now, they will be able to fix their
17 schedules. If they need to be accommodated, I would
18 recommend it has to be on a Wednesday as the other
19 option, because I think the schedule we've built for
20 Monday and Tuesday has a couple of witnesses that can't
21 be accommodated any other day, and just the way we've
22 got it grouped, it would probably disrupt the flow to
23 move Mr. Watkinson or Mr. Boge into one of those slots,
24 so if they need Wednesday, let me know and we may be
25 able to make a swap there.

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1 MR. FALLQUIST: I'll just tell them it needs
2 to be Thursday the 10th.

3 JUDGE TOREM: And it will be nine o'clock in
4 the morning. How many hours for these two witnesses? ,
5 since we are grouping them?

6 MR. SCARP: I can't see more than an hour
7 apiece, but if it's Thursday morning, it may take,
8 depending on how this all shakes out -- I was only
9 going to add that I'm eternally an optimist that we
10 could get to these witnesses by Wednesday and that I
11 would not be using all the time allotted, perhaps, for
12 the Western Valley Farm's witnesses, but I'm always
13 being cautious.

14 MR. FALLQUIST: I would like to be able to
15 set a time for certain for my witnesses. If it's
16 Wednesday, they can be there Wednesday. Thursday, I
17 don't know if it's necessary for them to spend two days
18 in the hearing.

19 JUDGE TOREM: Mr. Fallquist, where are they
20 located in relation to the situation?

21 MR. FALLQUIST: Rick Boge is here at the
22 Public Works Department for the County. Mark Watkinson
23 is actually out at the 911 call center, the Department
24 of Emergency Management, so he's got a bit further of a
25 drive --

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1 JUDGE TOREM: How far would you estimate?

2 MR. FALLQUIST: A couple of miles, but his
3 schedule is much more mailable. Rick is more of a 7:30
4 to 4:30 guy.

5 JUDGE TOREM: Why don't you let those
6 witnesses know we are scheduling them for Thursday
7 morning but I would like them to be on telephone
8 standby for the entire period of Wednesday afternoon.
9 I'm requesting nicely that they be available and not
10 have any firm commitments on Wednesday afternoon.

11 MR. FALLQUIST: I'll see what I can do.

12 JUDGE TOREM: If they can be, let Mr. Scarp
13 know on Wednesday morning if something has come up, but
14 if they are available and he can make a phone call or
15 we at a break can ask them to come over, and we will
16 take them as they are. They need not put on a coat and
17 tie, but whatever the uniform of the day is, we will
18 take them that way. I don't know what their
19 experiences with these proceedings have been, but if
20 they can get done and we can close out Wednesday late
21 afternoon, it's preferable. So let them know, and if
22 we can do that, and Mr. Scarp changes his
23 cross-examination times, at least we will have some
24 flexibility to complete the opponents' case on
25 Wednesday.

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1 I think we have a schedule put together, but
2 we haven't figured out where to do on-site visits.
3 What I was going to propose to you is if you come up
4 with a site visit guide that can be agreed and submit
5 it Monday morning before we get started with
6 Mr. Peterson's testimony at 9:30, and everybody will
7 agree and stipulate this is what the judge should do.
8 The judge should drive his own car. We should put him
9 in the back of a van. Tell me what it's going to be,
10 and then over the lunch hours that are available, I
11 would anticipate, unless there is dramatic traffic,
12 flooding, or otherwise, then I can arrange to eat,
13 drive, and until July 1st use my cell phone over the
14 lunch hour and figure this out and go do the site
15 visits without having to schedule another day of
16 hearing, and then whatever is the least rainy day, I
17 can get this done, Monday, Tuesday, or Wednesday.

18 Do the parties have any thoughts on another
19 way to accommodate or create a site visit? I hope I'm
20 old enough to do what you tell me to do, but if you
21 would like to have a caravan approach, which I've not
22 liked in other cases.

23 MR. SCARP: If I may, the suggestion I would
24 make, given the parties, their counsel, and the
25 witnesses familiarity with all of the crossings at

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1 Stackpole, Hickox, and Blackburn, the perimeter roads
2 to the west, Britt Road and Dike Road, with which I'm
3 sure you've become somewhat familiar through the
4 exhibits, would, in my opinion and my suggestion, would
5 necessitate only your review as you see fit, and it's
6 our position that you are welcome to review that in any
7 manner that you find timely, expedient and suitable.

8 It's not very difficult to make that loop,
9 once, twice, but to find those areas and see them, I
10 would further suggest that a more formal proceeding
11 with other people involved will necessitate BNSF to
12 start inquiring about people who will be on the
13 right-of-way, protective equipment, and that would be
14 our position is whatever time you can find in the
15 daylight hours to observe all those.

16 JUDGE TOREM: Let me not take more time today
17 doing that, unless someone has a direct comment in
18 opposition today?

19 MR. ROGERSON: I like Mr. Scarp's suggestion.
20 I don't believe the routes, the crossings, the overpass
21 and those areas that we've identified through exhibits
22 would not take long to travel. I would prefer not to
23 have the circus as well. However, the press may ask on
24 their own accord to be allowed to do that. That is
25 just a caution.

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1 JUDGE TOREM: My thought on that,
2 Mr. Rogerson, is we had this whole counsel and it was a
3 much bigger piece, and because parties wanted to
4 gesture and point in this particular instance I'm
5 thinking of over in Ellensburg, the press was at the
6 hearing and they watched the departure of this group,
7 so they tagged along. There was not much one could do
8 to control that, and what became the mess was we didn't
9 want to have the court reporter coming along and taking
10 down each word said, so we had agreed paragraphs that
11 would be stated.

12 What I would suggest is if there is enough
13 testimony, I don't need a written narrative, but if all
14 of you could get together on Monday morning, present me
15 with essentially a driving route, and I don't care if
16 it looks like a Triple A map, or go here, turn right,
17 stop here, look. Tell me which points. That way, each
18 of you can do it. It can be marked as an exhibit, and
19 for appeal purposes in the case, if there is one, there
20 is a good record of what I viewed, and if I have to
21 reference anything in a finding of fact that as on my
22 site visit, I did "X," we can refer to it and there
23 will be no confusion as to what I was doing where.

24 MR. SCARP: Your Honor, if I could take a
25 stab at that, when you said Monday, were up talking

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1 about Monday January 7th?

2 JUDGE TOREM: Yes. That first half hour we
3 have before Mr. Peterson comes on.

4 MR. SCARP: Again, my suggestion, and I just
5 make this for counsel, would someone care to take a
6 swing at a proposal, and I might even say if you wanted
7 to start at the fire district on the east side and go
8 that direction and then go across I-5 and whatever, and
9 if somebody would like to do that, I think we could
10 probably circulate that well in advance, have it so we
11 are not taking up additional time on Monday; anybody?

12 MR. JONES: I approve of that idea very much,
13 and I join in those who say that it really isn't going
14 to be very beneficial to have a court reporter along
15 and people having an opportunity to probe or ask
16 questions of point on this situation.

17 I think having the route, having an
18 understanding about when this is going to take place
19 just so that we have something in the record that said
20 when it happened, that it followed the route, and then
21 maybe at least an opportunity on the record for the
22 administrative law judge to say, Yes, I followed the
23 route. This is when I did it, and some opportunity to
24 identify any questions that might have arisen from the
25 viewing of the thing when at least all counsel are

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1 present so there would be an opportunity to fill in
2 gaps if there were gaps after this view of the route.

3 JUDGE TOREM: Excellent. Do you have any
4 concern, Mr. Jones, about Commission staff drafting a
5 proposed route and sending it around to everybody?

6 MR. JONES: That's fine. I would be willing
7 to try myself, but I think it does need to make the
8 circuit on everybody. I'm sure individual parties have
9 concerns, whether it's the Fire District or my client
10 or the City. We each have point of reference along the
11 route that might not be appreciated by the others.

12 JUDGE TOREM: I'm going to ask Mr. Thompson
13 to get with his staff, propose a route that tries to
14 anticipate those concerns and circulate that over the
15 next week or two. My hope is that there will be a
16 stipulation as to that. It may not even be formal, but
17 just a verbal stipulation or agreement can be offered
18 on Monday, the 7th of January, and you will present me
19 with my driving instructions, and I will let you know,
20 as you indicated Mr. Jones, that I think it's a good
21 idea to say, depending on where our schedule leaves us,
22 before I'm going to do this, I'll say, This lunch
23 break, this is where I'm going to go. I'll report back
24 if I was able to avoid any trains or other collisions
25 with Skagit Valley residents and come back safely to

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1 report back and get that on the record, as you say, and
2 acknowledge that I did follow the routes, and if there
3 is any comments I need to make or questions, I will
4 make them.

5 MR. SCARP: I might only add that I would
6 almost suggest that you not say in advance when you are
7 going to go do that and just tell the parties when you
8 did, and if someone has an issue with that, deal with
9 it then, but I would just think that as long as we are
10 really trying here and all parties are in agreement
11 this is some neutral visit for instructive purposes for
12 you at your best convenience.

13 JUDGE TOREM: That may prevent any
14 unnecessary followers.

15 MR. SCARP: Or any trains make that might
16 come stopping at the crossing.

17 JUDGE TOREM: I'll look forward to getting
18 something from you on Monday morning. It sounds as
19 though the goal is to get done in three days. If we
20 need to, we will carry over to Thursday morning. At
21 this point, do we want to take up issues for closing
22 arguments and written briefs posthearing, or do we want
23 to wait until perhaps Monday morning. That's another
24 issue to look at because by then, you will have gotten
25 in touch with Mr. Liou and Mr. Zeinz and determined

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1 whether we are going to have a written posthearing
2 filing on their cross-examination or another session,
3 probably in Seattle. I'm guessing it's the latter
4 because we do have those two witnesses and we don't
5 know when they will be available, and we don't want the
6 clock ticking on briefs until the record is formally
7 closed. Mr. Scarp, any ideas?

8 MR. SCARP: I don't, Your Honor. I'm sure
9 scheduling purposes or otherwise, I guess I would
10 listen to what others have to say.

11 MR. THOMPSON: I think most parties in these
12 kind of proceedings where you have prefiled testimony
13 and written posthearing briefs that take the place of
14 -- that's where the parties sum up the evidence and
15 show how it supports their position, so you want to
16 have a complete record where you can refer to
17 everybody's cross-examination testimony and have that
18 record. So I think it's a good idea to figure out when
19 we are going to get in the cross-examination testimony
20 of those two witnesses.

21 JUDGE TOREM: So we will leave that for the
22 parties to work out. Mr. Liou is back on the 10th.
23 When does he come back from Hawaii, Mr. Rogerson?

24 MR. ROGERSON: Your Honor, he arrives from
25 Taiwan, scheduled to arrive on the 10th, and then he

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1 will be leaving for Hawaii on the 12th of January to
2 the 18th.

3 JUDGE TOREM: So he's available after the
4 Martin Luther King weekend?

5 MR. ROGERSON: I believe so.

6 JUDGE TOREM: So we are going to look for
7 something after Martin Luther King week to schedule
8 that, so just so you know for Mr. Liou's schedule, you
9 might be able to call him in advance and see when he is
10 available that week, and also determine when it is that
11 Mr. Zeinz is available that seem week and if we are
12 going to have a session together or if you are just
13 going to submit that cross-examination, submit it in
14 writing.

15 So there will be three issues you will brief
16 me on January 7th. That's the site-visit route, the
17 timing on those cross-exam, either scheduling another
18 session or submitting in writing, and then based on
19 that, the schedule for posthearing briefs, and
20 hopefully that's enough to get things settled on Monday
21 morning and then take Mr. Rabel and Mr. Peterson
22 before lunch. Are there any other prehearing issues
23 that we haven't covered?

24 MR. ROGERSON: You might have covered this
25 and I might have just missed it. Are you affording

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1 opening argument?

2 JUDGE TOREM: In these cases, we typically
3 don't. It's not trial-like in which you've got to make
4 a statement and a finder of fact is not already
5 familiar with what the positions are. I've thought
6 about it previously, whether we have should have a
7 verbal opening argument and have been informed it's not
8 been the tradition to do so. I've allowed folks in
9 other cases to state it in writing, but I've found that
10 I'm reading what I already know, so it's not a lot of
11 help to me to do that.

12 Usually, as Mr. Thompson said, in the closing
13 briefs, a short narrative laying out the position is
14 more helpful telling me what the record showed after
15 everything was fleshed out and cross-examined, and then
16 a more detailed item-by-item briefing with citations to
17 the record as needed can be done, so that's where I'm
18 coming from. If you want to convince me otherwise, now
19 is the time.

20 MR. ROGERSON: No. I don't have a particular
21 concern either way on having oral opening arguments;
22 however, obviously I defer to you. Sometimes I find it
23 helpful when you have several different issues that are
24 at interplay in pretrial briefing that frame the issues
25 from the various parties and how the standards that

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1 come into play apply, and then a posthearing briefing
2 may be beneficial, and that pretrial briefing could
3 very well take the place of an oral opening argument.

4 JUDGE TOREM: If we had more time before
5 hearing, I might even entertain asking the other
6 attorneys if they wanted to take on a briefing, but I'm
7 going to decline on this one because I think the
8 petitions for intervention and the various motions that
9 have already been filed by the parties, I think I know
10 where you are coming from, and while you say you may
11 have some individual nuances as to why the position is
12 the way it is, you can be creative if you like in how
13 you phrase some of your questions and cross-examining
14 the Railroad and Department of Transportation witnesses
15 so that you know that even I will understand what you
16 are driving at, but I don't think it's necessary to
17 have everybody feel like if I say it's optional, then
18 everybody will do it, and everybody will be miserable
19 and they will end up hating me, not you. It won't help
20 me.

21 MR. ROGERSON: That's fine, Your Honor.

22 JUDGE TOREM: Any other prehearing issues
23 that we need to take care of today? Hearing none, then
24 let me sum up. I'm not going to issue a prehearing
25 conference order with a lot of details, but I will

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1 issue maybe a notice, maybe an order, a schedule that
2 will go out as we've indicated today with approximate
3 times. I will take the cross-examination estimate
4 spreadsheet that I've developed that the Commission has
5 had in the past and attach that and indicate the
6 cross-examination times and which parties and indicate
7 the dates of each testimony and also a separate
8 appendix will be the exhibit list that I've already
9 sent around to you. That will be modified with the
10 cross-examination exhibits and numbers, and I imagine
11 in an order or notice, we will have the question of
12 additional cross-exam exhibits to be brought to my
13 notice on Monday morning the 7th and go from there.

14 The only other question that comes to mind
15 now is if there are objections to any exhibits that are
16 going to take up time at hearing that could be
17 addressed today or if there are stipulations as to the
18 admissibility of what I imagine will be the broad
19 majority of exhibits, whether that's good to do now.
20 I'm springing it on you at the end of the conference
21 and that's my fault, but if there are known exhibits
22 that you know as soon as this person goes to adopt that
23 testimony you are going to object to, we really ought
24 to get that on the table this morning so that items can
25 be fleshed out and worked out before we get to hearing

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1 or we may risk, even with the schedule we've got,
2 fouling it up.

3 MR. THOMPSON: If I could raise one issue,
4 the Railroad did refer in testimony to a video that
5 they --

6 JUDGE TOREM: That was Ms. McIntyre's third,
7 MM-3, and she indicates she's going to show that to
8 everybody before hearing. From your tone of voice, I
9 take it that's not yet occurred.

10 MR. THOMPSON: My understanding is that they
11 were going to show it at hearing, but maybe I
12 misunderstood.

13 MR. SCARP: To everyone first so you could
14 preview it, but it has to be done -- there is only a
15 certainly software that the claims people have, so he
16 has to run it, show it.

17 JUDGE TOREM: For my edification if I wanted
18 to look at it again after the hearing, is there a way
19 to run it, show it, and capture the video on a VHS tape
20 or DVD? I think VHS would be best because you could
21 take the picture from the television and put it onto
22 some other media, because for the record to be complete
23 if there is an appeal, that will have to be made
24 available, and I don't think the commissioners or -- it
25 would behoove us not to have everybody get together in

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1 Commission chambers to show this for purposes of an
2 appeal of for the Superior Court.

3 So you can show it on that software at the
4 hearing, but be sure to provide a copy for the record
5 so that we don't run into any posthearing issues. God
6 forbid I should have a question and have to assemble
7 everybody to see it again.

8 MR. THOMPSON: But just for clarification, is
9 the idea that this video would be presented to the
10 judge at the hearing, in which case we would need to
11 put some time in the schedule?

12 MR. SCARP: That's correct. They are not
13 long at all. They are just a short compilation.

14 JUDGE TOREM: So maybe if she adopts her
15 testimony, you could show those and she could narrate
16 what it is, because there is no prefiled testimony on
17 that other than I have these videos.

18 MR. SCARP: It's sort of hard to narrate in
19 something that's not there. That's why we did so.

20 JUDGE TOREM: Mr. Rogerson is going to want
21 to cross-examine and Mr. Thompson as well on these
22 issues.

23 MR. ROGERSON: This video is a video that is
24 an exhibit of one of the experts of Burlington
25 Northern, and from the description of the video, it

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1 sounds like it's for illustrative purposes, and it's
2 not either evidence of one of the crossings here or a
3 foundation, the basis of data of an expert opinion. So
4 my question, if it is for illustrative purposes, does
5 Burlington Northern intend to offer it into evidence?

6 MR. SCARP: Yes.

7 JUDGE TOREM: When I look at her rebuttal
8 testimony and Revised Version Paragraph 4, Ms. McIntyre
9 says it's two or three brief videos of drivers ignoring
10 warning devices or trying to beat gates at crossings
11 that are like Hickox Road and supposedly involving more
12 than one set of tracks, which is why they are pertinent
13 here, perhaps.

14 I would ask if there is a way, because it
15 indicates here she's going to show it on a laptop, if
16 there is a better way to show these items. To have it
17 admissible, we have to have it available, and if the
18 parties doing cross-examination of Ms. McIntyre to date
19 haven't seen it, and she's in the Seattle terminal
20 office; is that right?

21 MR. SCARP: Yes.

22 JUDGE TOREM: And there are parties in Mount
23 Vernon and Olympia that will want to see it. Her
24 testimony is not on until Tuesday. Does anybody have a
25 problem with somebody from BNSF bringing a laptop

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1 Monday and showing it at that late date so you can see
2 it before testimony or making an arrangement Tuesday
3 morning when Ms. McIntyre is there early to view it
4 before the hearings? As Mr. Rogerson says, you all
5 have an idea of what it's going to show and there
6 shouldn't be any surprises in there. Mr. Thompson?

7 MR. THOMPSON: That's acceptable to Staff if
8 we could see it on the Monday prior to when she's
9 available for cross-examination.

10 JUDGE TOREM: I just don't want to have Staff
11 or the witness have to travel all over the landscape in
12 the next few weeks for what could be a very short and
13 not particularly substantively influential video.
14 Maybe it will be, but I'm guessing from the
15 description. Mr. Rogerson what do you think?

16 MR. ROGERSON: That's fine. I would want a
17 fair opportunity to review it before it's offered into
18 evidence because it may not receive an objection by the
19 City, but what you propose is acceptable.

20 JUDGE TOREM: If Ms. McIntyre needed to be
21 present -- she probably won't be until Tuesday
22 morning -- we'll just have her come earlier. If it's
23 possible that the laptop can be run by someone other
24 than Ms. McIntyre, we will have it Monday afternoon.
25 Mr. Scarp is nodding he is technologically competent

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1 enough to do this?

2 MR. SCARP: That's the problem, Your Honor.

3 When there is a deep technological question, I just
4 default and nod.

5 JUDGE TOREM: Will you see her before this?

6 MR. SCARP: I will make it a point to see her
7 in view of what you said, which thoroughly hadn't
8 occurred that a copy would be required for the record.
9 I think it behooves us to try to expedite that for all
10 purposes since we are going to have to do so, and I
11 can't make a promise right now without speaking to how
12 that's going to occur from a technological standpoint,
13 but understanding that it's required, we will certainly
14 assist in that process.

15 So I will make every effort to resolve this
16 question in advance of January 7th, and I can say at
17 the very least, we will be available to do so before
18 her testimony, but since we have to provide a copy for
19 the record, I will try to short-circuit this.

20 JUDGE TOREM: I trust that the IT department
21 at BNSF will handle this.

22 So there may be some additional exhibits to
23 come in. I just ask all parties that have data
24 requests out there, even those that were received last
25 night, to do their best. If there are major issues or

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1 hiccups regarding that and things are not completed by
2 the Friday before hearing, let's talk about it Monday
3 morning on the 7th of January, and we already have a
4 couple of other issues, but I think we should be able
5 to stay within the schedule and finish within three
6 days. It's possible that we can at lunchtime be
7 checking out of the hotel and be ready to go home
8 Wednesday night.

9 The public meetings could be long, and
10 depending on what happens Monday afternoon and what I'm
11 predicting will be the larger crowd Tuesday night, the
12 Wednesday morning start time of nine o'clock should be
13 sufficient, but who knows. I hope we will be done by
14 nine a.m. Wednesday. I've been at some rather late
15 ones, and I just encourage folks to prepare yourself
16 over the weekend, be well rested before Monday morning
17 because otherwise, Wednesday will be painful for all
18 involved, and if there is a motion or an indication
19 that you want to talk to me after the Tuesday night
20 hearing if we are still there at ten or eleven o'clock
21 and it's not convenient to tell people enough is enough
22 and we want to defer Wednesday start time later, if you
23 are there Tuesday night, feel free to as a group get
24 together and propose a new start time, but we will have
25 to play that by ear.

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1 Are there any other issues that should come
2 up today? Parties here in Olympia, anything? Folks on
3 the phone, anything else? Hearing none, then it's ten
4 minutes to twelve and we are adjourned. We will see
5 you on January 7th.

6 (Prehearing adjourned at 11:50 a.m.)

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