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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY COMPANY,)
)
 Petitioner)
)
 v.) DOCKET TR-140382 and
) DOCKET TR-140383
 YAKIMA COUNTY,)
)
 Respondent)
)
)

PREHEARING CONFERENCE, VOLUME I

Pages 1 - 38

ADMINISTRATIVE LAW JUDGE ADAM TOREM

10:06 A.M.

MAY 23, 2014

Washington Utilities and Transportation Commission
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1 OLYMPIA, WASHINGTON; MAY 23, 2014

2 10:06 A.M.

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5 JUDGE TOREM: Good morning. This is
6 Adam Torem, I'm an administrative law judge for the
7 Washington Utilities and Transportation Commission.
8 There are two dockets in front of us this morning, on
9 Friday, May the 23rd, 2014. It is Docket TR-140382
10 and Docket TR-140383. These are captioned together as
11 The BNSF Railway Company versus Yakima County. There
12 are two different petitions filed by the Railway with
13 the Commission on March 10th, 2014, seeking closure of
14 two different highway-rail grade crossings, one near
15 the City of Toppenish and one near the City of Mabton,
16 both of these crossings in Yakima County. We had two
17 objections come in, one from the County itself, and
18 then two additional notes of concern, one from the
19 Yakama Nation, and then from the Washington Farm
20 Bureau.

21 Today we are having a prehearing conference.
22 We are in Olympia, Washington, in Room 206, upstairs
23 at the Commission's headquarters. We have a couple of
24 parties participating by phone. First we are going to
25 take appearances. What I will ask is that the Railway

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1 and Commission Staff state their appearances. And
2 then. We will take the -- I think the Yakama Nation
3 and Yakima County are both on the telephone line, we
4 will take them, see if there are any petitions to
5 intervene, and particularly for the Yakama Nation, as
6 to the status they wish to pursue in the case, if they
7 are seeking intervention. Then we can talk about
8 discovery, check with the Railway on SEPA status of
9 the proposed crossings, and go over any other
10 procedural items, including a proposed procedural
11 schedule that was handed up to me by Staff earlier,
12 before we went on the record.

13 So let me start with appearances, first from
14 the Railway.

15 MR. MONTGOMERY: Tom Montgomery on
16 behalf of BNSF Railway. Also here with me is Richard
17 Wagner.

18 JUDGE TOREM: From Staff?

19 MS. BROWN: Sally Brown, Senior
20 Assistant Attorney General. My contact information is
21 as previously noted.

22 JUDGE TOREM: All right.

23 And from Yakima County.

24 MR. HARPER: Ken Harper of the law firm
25 Menke Jackson Beyer in Yakima.

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1 JUDGE TOREM: And for the Yakama Nation?

2 MR. JONES: This is Ethan Jones with the
3 Yakama Nation Office of Legal Counsel, and I represent
4 the Confederated Tribes and Bands of the Yakama
5 Nation.

6 JUDGE TOREM: All right, thank you.

7 Turning to intervention. Mr. Jones, can we
8 hear from you as to -- I know you filed a letter,
9 May 20th, with a motion for leave to file an amicus
10 brief in these two dockets. I have had a chance to
11 skim through the amicus brief and would encourage you
12 to tell me if you are familiar with the Commission's
13 regulations and the Administrative Procedure Act rules
14 on intervention in a case of this sort, and what the
15 Confederated Tribes and Bands of the Yakama Nation
16 might want to do to participate and assist the
17 Commission in developing the record in this matter.

18 MR. JONES: Thank you, Your Honor. I am
19 relatively up to speed on the procedures for
20 intervention. The Yakama Nation at this time is
21 really interested -- while there are significant
22 public safety issues that I am sure will come out
23 throughout this proceeding, the Yakama Nation is
24 concerned at this time with asserting its significant
25 cultural and sovereign interests in this dispute. We

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1 believe, at least at this time, depending on the
2 decision today, that intervention is not necessary as
3 long as the Yakama Nation is able to fully brief these
4 cultural and sovereign interests. We believe that the
5 best tool for that would be an amicus brief, however,
6 you know, we will leave that to you. To the extent
7 that that is not something that this body is willing
8 to entertain, then we will be moving to intervene in
9 this matter.

10 JUDGE TOREM: Mr. Jones, when you talk
11 about the cultural and sovereign interests, are those
12 matters of law or would they be matters of fact?

13 MR. JONES: Well, they will be matters
14 of fact, in terms of the implications that this is
15 going to have on the traditional ceremonies and
16 funerary processions, dealing with a longhouse and a
17 church in the area. This will deal with just policy
18 interests of the Yakama Nation and its people in the
19 area, the effect it is going to have on homeowners,
20 the effect that it is going to have on trust
21 properties in the area. And then we will be asserting
22 the Yakama Nation's sovereign interests, which I would
23 like to say are matters of fact at this time, but they
24 do have legal implication.

25 JUDGE TOREM: All right, thank you. I

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1 think I understand where your client is coming from
2 and what interests you would like to pursue. I am
3 going to ask the Senior Assistant Attorney General for
4 the Commission for her suggestions or position on
5 this, and then the Railway as well, maybe the County
6 can, if they have a view on intervention versus simply
7 a legal brief coming in, and then I can make a
8 recommendation further or a decision.

9 Ms. Brown?

10 MS. BROWN: Thank you, Your Honor.
11 Staff's preference is that the Yakama Nation have full
12 party status and participate as an intervenor in the
13 docket. I also read the motion for leave to file an
14 amicus brief and the motion itself contains several
15 factual allegations. My concern is that acceptance
16 into the record of a brief filled with factual
17 allegations may be problematic, separate and apart
18 from the legal issues raised in the application of the
19 law to those facts. My preference is full party
20 status by the Yakama Nation.

21 JUDGE TOREM: Mr. Montgomery?

22 MR. MONTGOMERY: Thank you, Your Honor.
23 We got this on the 21st. I was on an airplane from
24 New York all day yesterday. Your Honor, at best I
25 have skimmed it. Notwithstanding my best efforts to

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1 get ahold of certain decision-makers, my client, I
2 haven't had a chance to even talk to them about it.

3 My reaction is, I don't know if there are any
4 provisions for amicus in this procedure and I don't
5 know why public comments, 480-07-498, wouldn't
6 suffice, and the Tribe, if it wishes, to file an
7 actual motion to intervene can do so, and then we
8 would have an opportunity to give a measured and
9 complete response to that. But as it stands today, I
10 don't have any -- I am not prepared to give any
11 further comments.

12 JUDGE TOREM: Okay.

13 MR. MONTGOMERY: Except that I would
14 like a chance to respond, unless the court is going to
15 rule against the motion outright.

16 JUDGE TOREM: All right.

17 From the County?

18 MR. HARPER: Your Honor, I think the
19 County would support the views of Ms. Brown. I don't
20 believe we take any other particular position on the
21 matter one way or the other, though. But to the
22 extent that Ms. Brown has expressed a preference, we
23 would agree with that.

24 JUDGE TOREM: Mr. Jones, my thoughts
25 align more with what Ms. Brown says as well, that

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1 there are issues of fact raised in your letter and
2 attached motion to file the brief. The best way to
3 get those in front of the Commission, Mr. Montgomery
4 suggested there would be a public comment hearing
5 typically held in these proceedings. That gives
6 somebody a chance, anybody truly a chance to come and
7 spend a few moments addressing what their individual
8 concerns are, and that can be done by an organization
9 as well.

10 We indicated earlier, we had a letter from the
11 Washington Farm Bureau. They may choose simply to
12 participate via public comment, either in writing or
13 at a public meeting held in conjunction with the
14 evidentiary hearing. It seems to me that the
15 Confederated Tribes and Bands of the Yakama Nation are
16 asking this Commission to consider, as you say, a
17 number of cultural and sovereign interests, some of
18 which are fact based. To get the full measure of
19 facts in front of the decision-maker, and also to
20 subject the presentation of those facts to any
21 necessary cross-examination so they can be fully
22 fleshed out and developed, then a motion for
23 intervention is the most appropriate way to ensure
24 that the Yakama Nation's interests are fully heard.

25 I don't -- as far as the motion for the amicus

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1 brief, it would be premature at this point for me to
2 say that we will accept an amicus brief when we
3 haven't even scheduled the case yet. There is no
4 specific provisions allowing or disallowing that kind
5 of additional briefing. We have quite a bit of
6 latitude. If the Commission thinks its decision will
7 be better served by briefing from outside parties,
8 that could be accommodated down the road.

9 With that in mind, I don't think I would be
10 ready to rule on your motion for an amicus brief
11 today. If we are going to set a procedural schedule
12 and the Yakama Nation wants to participate and
13 influence the course of proceedings going forward, now
14 would be the time to make a formal motion to
15 intervene. You can do that orally. All you need to
16 do under our rules is set out a substantial interest
17 in the matters before the Commission. And then I
18 would give Mr. Montgomery, if he wants to argue in any
19 way, shape or form, in support or against it, an
20 opportunity to do that today.

21 I would like to make a decision on
22 intervention today. I recognize Mr. Montgomery is in
23 a little bit of a time crunch if I do that, but the
24 bar is relatively simple. It is not low, but it is a
25 substantial interest, and that would be what I would

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1 direct your motion, if you make such a motion, to
2 address, as to your client's substantial interest in
3 these crossings, and the issues you raised earlier,
4 and then have Mr. Montgomery, if we need to take a
5 brief recess, for him to consult with anybody we can,
6 and then hear from the Railway as to if they think you
7 don't have a substantial interest.

8 Mr. Jones, are you prepared to respond to all
9 of that?

10 MR. JONES: Thank you, Your Honor.

11 Given the lack of decision on the motion for
12 leave to file an amicus brief at this time, I am going
13 to move on behalf of my client to formally intervene
14 in this matter as a matter of right. The Yakama
15 Nation people have interests in public safety, as well
16 as their sovereign and cultural interests, which were
17 outlined in the briefing, which will be negatively
18 impaired and impeded by the disposition of these
19 petitions.

20 The Yakama Nation is further the only party
21 properly situated to represent its interests in this
22 dispute. The sovereignty interests -- you know, and
23 again, this is in the briefing, so I will go briefly
24 through this. You know, I think there is a broad
25 implication that needs to be considered here about

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1 determining matters of public safety on the Yakima
2 reservation without including the Yakama Nation as a
3 party at the table. I think that should preface all
4 of these interests.

5 The Yakama Nation provides emergency services
6 to its members, whether that's in conjunction with
7 local cities and fire districts, whether that's our
8 own wildfire prevention crews, and closing down these
9 railroad crossings is going to negatively impact our
10 ability to provide emergency services to the Yakama
11 members and the Yakama Tribal Trust Allotment in this
12 area.

13 Further, these closures are going to hurt the
14 Yakama Nation's economic well-being. It is going to
15 limit access for leasehold farmers to these leased
16 agricultural lands. These are an important source of
17 income for tribal members in the area. To the extent
18 that this is going to have a negative impact on those
19 leaseholds, the Yakama Nation would like an
20 opportunity to speak on that matter.

21 The Yakama Nation is also concerned that --
22 the closure of these railroad crossings is really an
23 attempt by Burlington Northern to speed up its trains,
24 to increase train traffic through the corridor which
25 runs through the Yakama Nation Reservation. The

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1 Yakama Nation has been very publically vocal about its
2 opposition to Burlington Northern's coal efforts in
3 the area. Increasing traffic and train speed through
4 the Yakama Reservation is only going to exacerbate the
5 interests that have already been explained, the
6 negative impacts of the coal dust through the railway
7 corridor, and then the negative impact more broadly on
8 climate change from these coal issues. There are
9 numerous sovereignty issues and public safety issues.

10 The Yakama Nation also has significant
11 cultural issues in this area. There is a Shaker
12 church in the area, there is a longhouse in the area.
13 Access to these cultural sites are going to be
14 dramatically impacted by the closure of these railroad
15 crossings. Actually, the Barnhart Road crossing in
16 particular is actually along a traditional funeral
17 area route that the Yakama Nation has used ever since
18 this has been open. This would vastly hurt the Yakama
19 Nation's cultural interests in this area as well.

20 And then I think it shouldn't be lost that
21 there is a matter of convenience here as well for
22 Yakama Nation tribal members that can't be lost.
23 There are tribal members who live just on the other
24 side of the train tracks and they have direct access
25 to their homes and their lands from these crossings.

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1 You know, these petitions to close the crossings are
2 going to have a very dramatic impact on their ability
3 to access their land conveniently.

4 On the basis of all of those interests, I
5 would move that this administrative body grant the
6 Yakama Nation's motion to intervene in this matter.

7 Thank you, Your Honor.

8 JUDGE TOREM: Are there parties that
9 wish to speak either in support or in opposition to
10 the motion that has been made?

11 MS. BROWN: This is Sally Brown.
12 Commission Staff supports the participation at the
13 table of the Tribe.

14 JUDGE TOREM: Yakima County?

15 MR. HARPER: We would agree with the
16 same support by Ms. Brown.

17 JUDGE TOREM: And the Railway?

18 MR. MONTGOMERY: I don't think I will
19 need more than 90 seconds or two minutes.

20 JUDGE TOREM: We will just pause and
21 stay in place here.

22 (Pause in the proceedings.)

23 MR. MONTGOMERY: I guess in view of the
24 way that the dominos are falling, Your Honor, I am not
25 going to sit here and make a pitch that the Tribe

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1 doesn't have an interest in this matter, so I am not
2 going to go down that road. I think all that I will
3 do is point out the obvious and just say that the -- a
4 lot of the reasons given in statements made by counsel
5 obviously aren't facts. You know, whether or not it
6 is dramatically impacted is what we, of course, are
7 going to be here to determine.

8 Moreover, some of the other things, and I
9 don't think I will be alone in this room in saying
10 this, that were said raise red flags and alarm bells
11 for me, in the scope of what it is that we are going
12 to be trying to do at the ultimate hearing.
13 Specifically, references to increased speeds, which I
14 did note in the brief was unsupported by any evidence
15 whatsoever, and concerns about coal dust and climate
16 change and those sorts of things are going to be
17 matters that we will need to address insofar as what
18 the scope of the proceeding is.

19 Having said that, I'm done.

20 JUDGE TOREM: All right. So I am going
21 to grant the motion for intervention. We will make
22 the Yakama Nation a party to this case. I will
23 indicate that as much in the prehearing conference
24 order that you should receive next week.

25 As for the issues, we will talk a little bit

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1 about this in a moment and see, under RCW 81.53, what
2 issues are appropriate and others that are well beyond
3 the scope of the Commission's jurisdiction in a
4 railway crossing.

5 Certainly, Mr. Jones, I appreciate the breadth
6 of the statement of interest. On the basis of those,
7 there is more than sufficient indication that the
8 Yakama Nation has a substantial interest. That motion
9 is granted. We will make you a party and an
10 intervenor in this case.

11 MR. JONES: Thank you, Your Honor.

12 JUDGE TOREM: Turning to discovery.
13 Typically in these cases we rely on informal
14 discovery. I think it makes it easier, as far as the
15 amount of resources committed, time, energy, money, to
16 have the informality of asking for information from
17 each other if you need it. Typically parties supply
18 what the others need.

19 We do have formal discovery rules under our
20 procedural rules, WAC 480-07-400. If the parties want
21 to make use of those and restrict themselves
22 essentially to formal discovery, or to I think
23 accelerate things that way, please let me know.

24 Does the Railway think we need formal
25 discovery?

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1 MR. MONTGOMERY: It remains to be seen,
2 Your Honor. We didn't necessarily anticipate the
3 Tribe being intervenors, so I have to think about it a
4 bit. We certainly will have discovery.

5 JUDGE TOREM: And informal is always
6 authorized.

7 Ms. Brown, were you thinking that formal
8 discovery would be needed in this case?

9 MS. BROWN: Yes. Well, to be safe, and
10 it is a prehearing conference, there is no harm in
11 invoking the discovery rule, so that would be my
12 preference.

13 JUDGE TOREM: My only concern in doing
14 so is that it does authorize depositions and other
15 things. I don't want, unless there is a need for
16 depositions, for that to be -- what we have tried to
17 do in the administrative law division is restrict the
18 use of those without formal Commission permission.
19 That way we can make sure we are monitoring the amount
20 of resources one party may be forcing the other into.

21 MS. BROWN: I don't anticipate any
22 depositions.

23 JUDGE TOREM: All right.

24 MR. MONTGOMERY: I think BNSF might well
25 want to do a deposition or two. We would certainly

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1 want to have that opportunity, whether by advance
2 permission or not.

3 JUDGE TOREM: Okay.

4 And from the County?

5 MR. HARPER: Your Honor, I don't want to
6 suggest a restriction on discovery needs of another
7 party, but for the County's own sake, informal
8 discovery would seem sufficient.

9 JUDGE TOREM: All right.

10 And Mr. Jones?

11 MR. JONES: Thank you, Your Honor.

12 Yes, I agree that formal discovery will be
13 necessary. The Nation will also likely be seeking at
14 least one deposition in this matter.

15 JUDGE TOREM: What I will do at this
16 time is authorize formal discovery. I will put an
17 indication that the parties shall not schedule
18 depositions without advance approval of the presiding
19 officer. We will talk a little bit more about my
20 availability to make those approvals in the coming
21 weeks and the timing based on the procedural schedule.

22 It may be that parties agree to it. Maybe I
23 can say unless they are agreed depositions, then I
24 don't need to get involved as well. Some parties need
25 more supervision than others, is my experience. We

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1 will see how well you can work together.

2 SEPA. I understand that, from the Railway's
3 filings, that the Yakima County Public Services has
4 issued a notice of decision. My notes have it as a
5 final determination of nonsignificance back in
6 December of 2012. Is that correct, Mr. Montgomery?

7 MR. MONTGOMERY: Yes, I believe it is,
8 Your Honor.

9 JUDGE TOREM: Is there additional SEPA
10 review that the County is requiring or anything else
11 that has come up that needs another look?

12 MR. MONTGOMERY: Nothing has up come up
13 to us, Your Honor.

14 JUDGE TOREM: Mr. Harper, is that your
15 understanding as well, that SEPA is complete?

16 MR. HARPER: I would agree with that,
17 Your Honor.

18 JUDGE TOREM: We will look at other
19 issues. We don't want to move forward as a Commission
20 unless all of the SEPA review is complete. It sounds
21 like, if it was December 2012, then any applicable
22 appeal periods that could make this case wait have
23 already expired or have been addressed.

24 Ms. Brown, do you have anything else on SEPA
25 from your perspective?

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1 MS. BROWN: No.

2 JUDGE TOREM: All right. Let's turn the
3 procedural schedule.

4 Ms. Brown, you handed me up an item that has
5 direct and response testimony. I take it that would
6 be in the form of prefiled witness testimony.

7 MS. BROWN: Uh-huh.

8 JUDGE TOREM: For those on the bridge
9 line, what we are addressing is just a table that has
10 a set of dates. I will read those out for you. So we
11 start with the preliminary schedule. Let me actually
12 work backward from the week of the hearing.

13 Commission Staff, I am not sure, Ms. Brown, if
14 you worked with the Railway in developing this, or the
15 County?

16 MS. BROWN: I'm sorry, what?

17 JUDGE TOREM: Who did you work with in
18 developing this schedule?

19 MS. BROWN: I worked with my client.

20 JUDGE TOREM: Okay. So Commission Staff
21 is proposing a schedule.

22 MS. BROWN: That's correct.

23 MR. MONTGOMERY: We will see if there
24 are any other parties that like these dates or think
25 they are too close or too far away.

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1 MS. BROWN: Okay.

2 JUDGE TOREM: The proposed hearing dates
3 is the week of October 6th, for a two-day hearing and
4 holding a public comment hearing on the first evening
5 that we would hold the hearing. I presume this would
6 be held somewhere in the Yakima County area, whether
7 in Toppenish or elsewhere close by, so members that
8 are affected could arrive at the public comment
9 hearing.

10 MS. BROWN: Well, if you put it that
11 way, yes.

12 JUDGE TOREM: So that would be the week
13 of October 6th.

14 Leading up to that, the Commission in these
15 cases typically has written testimony. If you are not
16 familiar with it, it is typically in the form of a
17 friendly deposition, where the written questions and
18 answers are presented under oath and served on all the
19 other parties. At the hearing, then, the written
20 testimony is adopted by the witness, any changes or
21 updates are made, and then the witness is tendered for
22 cross-examination, so we don't have a long direct
23 examination. There is certainly room for redirect at
24 the hearing.

25 With that in mind, the direct testimony coming

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1 first from the petitioner would be proposed due on
2 July the 3rd. Response testimony from all other
3 parties, so from the County, from the Yakama Nation
4 and from Commission Staff, would be August 21st. Then
5 all parties would be given an opportunity to file
6 rebuttal or cross-answering testimony on September the
7 11th.

8 And then prior to the hearing, the week
9 before, on Tuesday, September 30th, Staff proposes
10 that would be the deadline for parties to finalize
11 their cross-examination exhibits and turn them in, as
12 well as a listing of all their proposed cross-exam
13 exhibits. That will give other witnesses an
14 opportunity to review them prior to the hearing, and
15 not have any trial by ambush or surprises come that
16 week of October 6th.

17 There is also a provision in this for
18 posthearing briefs being filed November the 13th, so
19 six weeks or so after the hearing.

20 Mr. Montgomery, these are your petitions, so
21 given these dates being proposed to you by Staff, does
22 that meet the Railway's needs or are there some other
23 suggested dates?

24 MR. MONTGOMERY: Well, my initial
25 reaction is, in particular of Yakama Nation's

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1 comments, and just the fact that --

2 JUDGE TOREM: Can you speak a little
3 more into the microphone?

4 MR. MONTGOMERY: Yeah.

5 JUDGE TOREM: That way they can hear
6 you.

7 MR. MONTGOMERY: I'm sorry, Your Honor.
8 I am trying to talk and read at the same time and I
9 probably shouldn't do that.

10 In view of the Yakama Nation's comments and my
11 own thoughts about the case, the fact that there are
12 two crossings at issue, not just one, and they are
13 separate and they have separate issues attached to
14 them, this might be a little overambitious.

15 My other concern is, of course, just personal,
16 as a whiney litigator, pointing out that I have a
17 trial on the same day that the evidentiary hearing is
18 proposed for, in King County District Court -- I
19 should say King County Superior Court. And then
20 looking beyond that, I have got a trial a month later
21 and trial five weeks later. I don't know how we are
22 going to try to shoehorn it in.

23 I would like to set it -- if I had gotten a
24 call, I would have proposed that we try to set it back
25 a little bit further and give us more time and fit in

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1 a little better with my schedule and my expert's
2 schedule.

3 JUDGE TOREM: For the County, any
4 insight on those dates?

5 MR. HARPER: Your Honor, we could
6 accommodate the dates you have just described. I
7 understand Mr. Montgomery's point, too. For our
8 purposes, again, we could make those dates work.

9 JUDGE TOREM: Mr. Jones, what is the
10 Tribe's -- what is your availability representing the
11 Tribe?

12 MR. JONES: Thank you, Your Honor.

13 Yeah, the dates as proposed will work,
14 although, I am mindful BNSF needs to push things back
15 a little bit.

16 I will just point out that mid November I have
17 a trial happening. Early November, late November, if
18 we are pushing things back, will work a little better
19 for the Nation.

20 JUDGE TOREM: It might be helpful at
21 this point for me, rather than play intermediary,
22 to -- we can go off the record and have counsel
23 prepare and compare notes, and maybe give you 10 or 15
24 minutes to discuss calendars, and then I can come back
25 and see if there is a new set of proposed dates that

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1 fits more with Mr. Montgomery's schedule and is also
2 potentially agreeable to all the parties.

3 Staff may want to push Mr. Montgomery a little
4 bit, to make sure we promptly deal with all of the
5 issues here. I don't know that there is any sense of
6 urgency that Commission Staff has greater than the
7 Railroad filing the petitions. I want to --

8 MS. BROWN: That's correct.

9 JUDGE TOREM: I think, Mr. Montgomery, I
10 am going to step back from the bench and leave you to
11 have these discussions.

12 Leave the microphones on and make sure to
13 include Mr. Jones and Mr. Harper, so they can
14 continually check these issues and accommodate their
15 trial schedules or other items.

16 While we are talking about it, maybe --
17 Mr. Jones and Mr. Harper, you are going to be more
18 aware of potential facilities at which the Commission
19 could put on the hearing, closer to where the affected
20 communities are, and then advise us of a few options.

21 One thing I want to make sure is, even if, as
22 a party, you offer to host the Commission, I still
23 want to make sure that everybody feels it is neutral
24 ground and there is not a home court advantage for any
25 particular party being set up. I want to make, again,

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1 the location of the hearing convenient to those that
2 would want to come and give public testimony on that
3 first night of whenever it is going to be for the
4 hearing, and make sure it is a big enough room to
5 accommodate however many people might come out either
6 to watch the hearing during the day, observe
7 testimony, and then give public comment the first
8 night.

9 Those are the only caveats I have for you.
10 Sometimes we have gotten great offers of hosting
11 things, but it tilts the tables a little too far, one
12 party or the other. I want everybody before the
13 Commission to get an unbiased and fair hearing.

14 Any questions before I turn you over to
15 yourselves for scheduling discussions?

16 MR. MONTGOMERY: No, Your Honor.

17 JUDGE TOREM: Those on the bridge line,
18 anything else before we go off the record temporarily?

19 MR. JONES: No, Your Honor.

20 MR. HARPER: No, Your Honor.

21 JUDGE TOREM: All right. We are at
22 recess. It is now 10:35. I will come back in about
23 15 minutes and see how you are doing. Ms. Brown, I
24 think, knows where they have moved my office to this
25 week, and can come find me down by the commissioners,

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1 if necessary, if you are ready in shorter than 15
2 minutes.

3 MS. BROWN: Okay.

4 JUDGE TOREM: Thank you. We are at
5 recess.

6 MS. BROWN: Thank you.

7 (A brief recess.)

8 JUDGE TOREM: Let's be back on the
9 record. It is now a little bit before eleven o'clock.

10 Ms. Brown, I understand you have worked out a
11 full schedule?

12 MS. BROWN: We have indeed.

13 MR. MONTGOMERY: Apparently, I am the
14 designated reader of the schedule, Your Honor.

15 JUDGE TOREM: All right.

16 Mr. Montgomery, I will turn to you for dictation.

17 MR. MONTGOMERY: Direct testimony,
18 October 31, '14.

19 JUDGE TOREM: All right.

20 MR. MONTGOMERY: A settlement conference
21 of some sort November 24th, '14.

22 JUDGE TOREM: All right.

23 MR. MONTGOMERY: Response testimony,
24 December 15.

25 JUDGE TOREM: Okay.

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1 MR. MONTGOMERY: Rebuttal testimony,
2 January 15 of '15.

3 JUDGE TOREM: Press on.

4 MR. MONTGOMERY: Cross-examination
5 exhibits and list, February 2, '15.

6 JUDGE TOREM: All right. And the
7 hearing itself?

8 MR. MONTGOMERY: February 19 and 20 of
9 '15.

10 JUDGE TOREM: And I take it the public
11 comment hearing would be --

12 MR. MONTGOMERY: The first night.

13 JUDGE TOREM: -- the 19th?

14 And posthearing briefs?

15 MR. MONTGOMERY: March 30.

16 JUDGE TOREM: All right. One date that
17 wasn't on either schedule is a discovery cutoff. I
18 would think typically it comes prior to the rebuttal
19 and cross-answer testimony. Do we need to set one of
20 those somewhere in mid to late December?

21 MS. BROWN: I didn't think that we
22 needed to set one.

23 JUDGE TOREM: All right. If the parties
24 want to add that, we certainly have plenty of time.
25 Maybe that is something that could be talked about.

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1 If the settlement conference in the November time
2 frame is not successful, if the parties think a
3 discovery cutoff is needed, one can be added then.

4 Commission Staff approves of this schedule?

5 MS. BROWN: Yes, Your Honor.

6 JUDGE TOREM: And the County?

7 MR. HARPER: That's correct, Your Honor,
8 we do too.

9 JUDGE TOREM: And Mr. Jones for the
10 Yakama Nation?

11 MR. JONES: Yes, we approve as well.

12 Thank you.

13 JUDGE TOREM: I don't know that I
14 brought a calendar for the Commission that goes as far
15 as hearing dates next February. Since we are going to
16 be not using facilities here at the commission, I
17 imagine that is going to be just fine.

18 If there are any issues with the dates I will
19 let you know. I certainly don't think I have any
20 plans that far out. I can plan around this.

21 Is there any other question we need to take up
22 today?

23 MS. BROWN: Not for Commission Staff,
24 Your Honor.

25 MR. MONTGOMERY: Not for BNSF, Your

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1 Honor.

2 MR. HARPER: Nothing for the County.

3 MR. JONES: And nothing for the Nation.

4 JUDGE TOREM: Excellent.

5 We will pick the place of the hearing probably
6 when we get closer, maybe into the fall. If you have
7 places in mind that we might put a tentative
8 reservation on, please let Ms. Hunter know, on
9 Commission Staff. She will be coordinating
10 everything, as usually from the rail staff, I believe.
11 If you can, between the Railway and the Tribe and the
12 County, forward any suggestions of facilities to Cathy
13 Hunter here at the Commission, that would be helpful.

14 To send out the actual notice prior to the
15 settlement conference, I think might be premature, but
16 we will have plenty of time to notice a hearing in the
17 November/December time frame. We can reserve the
18 facility, make sure it is going to be available on the
19 dates in question, sooner rather than later.

20 Hearing nothing else, thank you all for your
21 time today. If anybody wants to order a copy of the
22 transcript, please let the court reporter know when we
23 go off the record. I will keep the phone lines on.

24 I will be issuing a prehearing conference
25 order that hopefully captures everything, and you have

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1 made most of the notes you need with your schedule
2 already.

3 Ms. Brown?

4 MS. BROWN: There is an issue, not for
5 determination this morning, but you touched on it a
6 moment ago, and that is the scope of the issues to be
7 determined in the context of this contested case. I
8 just -- I want to reserve that for later.

9 JUDGE TOREM: What I would typically
10 advise, and maybe this is -- we can have a status
11 conference later on, because I know that the
12 Railway will submit its -- it seems like the first
13 item we will have on the -- is October, direct
14 testimony from the Railway.

15 I would advise parties that haven't
16 participated in one of these hearings previously, to
17 take a look at RCW 81.53, maybe to seek out from the
18 Commission its previous prehearing conference orders
19 in cases that involve crossing closures, and to make
20 the distinction between what we can do here as a state
21 agency with limited jurisdiction over public safety
22 issues and what federal agencies like the Surface
23 Transportation Board reserve for issues of interest in
24 commerce, or other questions in that regard, on the
25 type of train traffic, on the speed of trains. Those

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1 are some of the issues that were mentioned today by
2 the parties that might want to be taken up in an
3 overall discussion of rail traffic through the county
4 and the reservation, but may not be appropriate here.

5 If there is a briefing to the Commission as to
6 the desire to expand this, we would have to have
7 lawful authority to do so. I don't want the parties
8 to think that every type of issue that was mentioned
9 today can be taken up at the evidentiary hearing.

10 The issues -- and I think mainly for the
11 County and for the Tribe -- I know the Railway has
12 been involved and Commission Staff is familiar with
13 what our restrictions are -- take a look at prior
14 orders that have limited items and you get the flavor
15 of the kind of things we have brought up. Ms. Hunter
16 can certainly give you docket numbers over the last
17 five years of contested cases. You can look at not
18 only the prehearing conference orders, but also take a
19 look at the actual initial, and as needed, final
20 decisions.

21 There were cases in Skagit County, cases in
22 Snohomish County, and there is also pending a final
23 order in Benton County, in the Tri Cities area,
24 although, the flavor of that matter is completely
25 different. That is a railroad crossing, an opening.

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1 But find the crossing closure cases, and that will
2 give you some history of what at least the Commission
3 feels its jurisdiction is. And if you wanted to argue
4 for expanding it, the basis on which you would have to
5 go is under 81.53.

6 MS. BROWN: I would just add that many
7 of the prior commission orders are online, on the
8 Commission's website.

9 JUDGE TOREM: Once you have the docket
10 numbers for the particular cases, they are a lot
11 easier to find on the Commission's website.

12 Mr. Montgomery?

13 MR. MONTGOMERY: I appreciate
14 Ms. Brown's bringing that up. I guess I would only
15 ask, is there some reason that this order will not,
16 like many of the previous orders that I have seen,
17 state what the issues are limited to? And I am
18 looking at one in particular, public safety need and
19 alternatives. Should this order perhaps also do that
20 or are you intending to do that anyway?

21 JUDGE TOREM: Typically, we have had
22 parties come forward in their petitions to intervene
23 and I have raised the issues directly, that they
24 wanted to go potentially outside of what the normal
25 Commission jurisdiction is. That's why some of those

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1 previous orders contained them. We have had some
2 pro se litigants that didn't have the benefit
3 necessarily of legal research and a degree behind
4 their name, so we went into a little bit further
5 detail.

6 If the County or the Tribe wishes for me to
7 include here some preliminary guidance, I can. But
8 because it is a prehearing conference order and we
9 haven't had those issues necessarily briefed or
10 discussed today, I didn't want to, from the bench,
11 unilaterally restrict the parties to issues that I may
12 not be aware of. And certainly there are some issues
13 that are implied within the normal railroad filing.

14 What I haven't seen, Mr. Montgomery, aside
15 from the motion for the amicus brief, a listing of
16 issues that anyone else wants taken up.

17 So from the County, any desire for us to
18 continue the conversation today on the issues, or is
19 this the kind of thing we might have a status
20 conference on further along if the parties are not
21 able to agree on the scope of the issues?

22 MR. HARPER: Ken Harper for the County.

23 I think the topic should be reserved until
24 later.

25 JUDGE TOREM: And Mr. Jones?

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1 MR. JONES: I agree. I think that we
2 should just hold a status conference a little ways
3 down the road.

4 JUDGE TOREM: I would be happy to do
5 that, even, say, mid July, early August, before we get
6 writing on testimony. If there is preliminary
7 discussions -- I don't know what contacts the parties
8 will have between now and the filing of testimony
9 and/or the settlement conference that is going to be
10 held in November, but I am happy to reconvene another
11 status conference or a prehearing conference to narrow
12 down the scope of issues, unless the parties are able
13 to, on their own, find an agreed set of issues.

14 Ms. Brown?

15 MS. BROWN: Well, I was thinking that I
16 would just -- I will just file a motion to strike if
17 testimony comes in that's beyond the scope of the
18 Commission's regulatory jurisdiction. I don't know
19 that I want a status conference to pick through every
20 issue. I am sort of -- I want to reserve my right on
21 behalf of my client to make that motion.

22 JUDGE TOREM: And you certainly would
23 be able to. They way I see --

24 MS. BROWN: I don't think that -- I
25 guess what I am saying is, I don't think a status

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1 conference designated solely for the purpose of
2 limiting issues or narrowing issues is necessary.

3 JUDGE TOREM: All right. So if the
4 parties want it, please advise. I think, looking at
5 past Commission precedent, it will be pretty obvious
6 where the limits are. If there are any questions and
7 you decide to include that in your response testimony,
8 then when it is time for cross-answering testimony
9 after the first of the year, those motions to strike
10 would probably come in promptly thereafter. There is
11 a couple different ways to skin this cat. We can sort
12 it out as things develop.

13 Anything else for the Commission to take up
14 this morning?

15 MR. HARPER: None from the County, Your
16 Honor.

17 MS. BROWN: No.

18 JUDGE TOREM: All right. Hearing none,
19 then we will adjourn at 11:10 and go off the record.
20 If anybody wanted to order a copy of the transcript,
21 now is the time to let the court reporter know. She
22 can let you know the billing information or call you
23 separately.

24 (Prehearing conference concluded 11:10 a.m.)

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3 STATE OF WASHINGTON

4 COUNTY OF KING

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I, Sherrilyn Smith, a Certified

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Shorthand Reporter in and for the State of Washington,

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do hereby certify that the foregoing transcript is

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true and accurate to the best of my knowledge, skill

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and ability.

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SHERRILYN SMITH

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