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1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION  
3 THE BURLINGTON NORTHERN AND    )  
SANTA FE RAILWAY COMPANY,       ) Docket No. TR-010684  
4                                    )  
                          Petitioner,   ) Volume II  
5                                    ) Pages 13 to 34  
                          vs.            )  
6                                    )  
CITY OF SPRAGUE,                    )  
7                                    )  
                          Respondent.   )  
8 \_\_\_\_\_ )

9                   A hearing in the above matter was held on  
10 September 16, 2002, from 1:32 p.m. to 2:00 p.m., at 1300  
11 South Evergreen Park Drive Southwest, Room 108, Olympia,  
12 Washington, before Administrative Law Judge THEODORA M.  
13 MACE.

14                   The parties were present as follows:  
15                   THE COMMISSION, by JONATHAN THOMPSON,  
Assistant Attorney General, 1400 South Evergreen Park  
16 Drive Southwest, Olympia, Washington 98504-0128,  
Telephone (360) 664-1225, Fax (360) 586-5522, E-mail  
17 jthomps@wutc.wa.gov.

18                   BURLINGTON NORTHERN AND SANTA FE RAILWAY  
COMPANY, via bridge line, by DANIEL L. KINERK, Attorney  
19 at Law, Koschel Gibson Kinerk Reeve, L.L.P., 110 - 110th  
Avenue Northeast, Suite 607, Bellevue, Washington  
20 98004, (425) 462-9584, Fax (206) 625-6517, E-mail  
dkinerk@kgkr.com.

21                   CITY OF SPRAGUE, via bridge line, by SYLVIA  
22 FOX, Mayor, 312 East First Street, Sprague, Washington  
99032, Telephone (509) 257-2662, Fax (509) 257-2691,  
23 E-mail foxsylvia@aol.com.

24                   Joan E. Kinn, CCR, RPR  
25 Court Reporter

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

2                                    JUDGE MACE:  Let's be on the record in Docket  
3                                    Number TR-010684.  We're on the record today in a second  
4                                    pre-hearing conference.  The title of the docket is  
5                                    Burlington Northern and Santa Fe against the City of  
6                                    Sprague.  My name is Theodora Mace, and I'm the  
7                                    presiding Administrative Law Judge.  Today's date is  
8                                    September 16th, 2002, and we are convened in a hearing  
9                                    room at the Commission's offices in Olympia, Washington.  
10                                   We have with us by telephone right now the Mayor of the  
11                                   City of Sprague.

12                                   I just want to indicate that for the record,  
13                                   and I will take appearances in just a moment, I want to  
14                                   just quickly go over a short agenda that I have for  
15                                   today's pre-hearing, then I will take appearances.  And  
16                                   if we have anything to add to the agenda at that point,  
17                                   then I will deal with additions to the agenda.  What I  
18                                   intend to cover today is take appearances, to discuss  
19                                   the impact of Burlington Northern's amended petition, to  
20                                   make sure that there has been publication of the notice  
21                                   of the hearing, to discuss the process for evidentiary  
22                                   hearing that's to take place on September 18th beginning  
23                                   at 9:30 in the morning, and then to discuss the process  
24                                   for the public hearing which is scheduled to take place  
25                                   on September 18th at 6:30 p.m.  So those are the items

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1 that I have on the agenda, and I will ask the parties if  
2 there is anything further after we take appearances.

3 I note that we don't have Burlington Northern  
4 on the phone right now or in the hearing room, and I'm  
5 hoping that someone from the company will enter an  
6 appearance shortly. If we don't hear from them right  
7 away, then we will break when they do come on the line.

8 I would like to have appearances beginning  
9 with the Mayor. Would you go ahead and introduce  
10 yourself. You don't have to give the long form of your  
11 appearance.

12 MS. FOX: Sylvia Fox, Mayor with the City of  
13 Sprague.

14 JUDGE MACE: Thank you.

15 MR. THOMPSON: This is Jonathan Thompson,  
16 Assistant Attorney General appearing on behalf of the  
17 Staff of the Utilities and Transportation Commission.

18 JUDGE MACE: Thank you. Well, my intention  
19 was then to ask if anybody had any additions to the  
20 agenda that I outlined.

21 Mr. Thompson?

22 MR. THOMPSON: I don't believe so, no.

23 JUDGE MACE: And Ms. Fox?

24 MS. FOX: I also have two council members  
25 here with me.

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1 JUDGE MACE: Would you introduce those  
2 individuals.

3 MS. FOX: Okay, there's Jean Meyer.

4 JUDGE MACE: How do you spell Jean?

5 MS. FOX: J-E-A-N.

6 JUDGE MACE: And how do you spell her last  
7 name?

8 MS. FOX: M-E-Y-E-R.

9 JUDGE MACE: M-E-Y-E-R, thank you.

10 Do we have Burlington Northern on the line at  
11 this point? Mr. Kinerk? Did someone from Burlington  
12 Northern come on the line?

13 All right, who is the other council member  
14 that you have with you?

15 MS. FOX: Mike Evans.

16 JUDGE MACE: Would you repeat that, please, I  
17 didn't hear your response.

18 MS. FOX: Mike Evans.

19 JUDGE MACE: Mike Evans, thank you.

20 MR. KINERK: Good afternoon, this is Dan  
21 Kinerk, I'm counsel for the Burlington Northern Santa Fe  
22 Railway Company. I apologize that I was not on the  
23 phone call earlier.

24 JUDGE MACE: Thank you, Mr. Kinerk. We have  
25 had the parties enter appearances, and I have asked if

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1 they have any other agenda items they want to add. Let  
2 me just briefly recite for you the items I intend to  
3 cover today.

4 MR. KINERK: Thank you.

5 JUDGE MACE: Giving appearances, the  
6 discussion of the impact of your amended petition.

7 MR. KINERK: Okay.

8 JUDGE MACE: Verification that notice was  
9 published, discussion of the process for the evidentiary  
10 hearing, and a discussion of the process for the public  
11 hearing. Do you have anything that you would like to  
12 add to that, Mr. Kinerk?

13 Mr. KINERK: Nothing further, thank you.

14 JUDGE MACE: All right.

15 Ms. Fox, did you have anything to add to that  
16 agenda?

17 Hello.

18 MS. FOX: No, we don't.

19 JUDGE MACE: Okay, thank you.

20 First I would like to talk about the amended  
21 petition then since we have gone through the appearances  
22 portion of this agenda.

23 MR. KINERK: Your Honor, this is Dan Kinerk  
24 again, I apologize, in terms of those appearances, I  
25 would greatly appreciate it if I knew who was on the

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1 line.

2 JUDGE MACE: Mr. Thompson entered an  
3 appearance for Staff and Ms. Fox for the City of  
4 Sprague.

5 MR. KINERK: Thank you, Your Honor.

6 JUDGE MACE: In addition, there are two  
7 council members from the City of Sprague, Jean Meyer and  
8 Mike Evans.

9 MR. KINERK: Thank you.

10 JUDGE MACE: Mr. Kinerk, since you're  
11 representing Burlington Northern, would you briefly for  
12 the record describe the amended petition and its  
13 purpose.

14 MR. KINERK: Yes, thank you, Your Honor. As  
15 indicated in the petition that was filed, it is the  
16 Burlington Northern Santa Fe Railway Company's position  
17 that the whole big picture talking about crossing  
18 consolidation, the primary focus originally had been  
19 with the proposed closure of D Street. As the Court may  
20 or may not be aware, there is also E Street and F Street  
21 crossings at grade.

22 JUDGE MACE: Mr. Kinerk, we're having trouble  
23 hearing you.

24 MR. KINERK: I'm sorry. Basically, Your  
25 Honor, there is a crossing consolidation purposed behind

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1 the petition for closure of the D Street is joined  
2 basically with the same analysis of F Street. How that  
3 particular kind of extension of that particular analysis  
4 came about was when there was the public hearing held in  
5 May to discuss with the townspeople in Sprague the issue  
6 of closure, potential closure of the D Street crossing,  
7 there was at least perceived by the BNSF representatives  
8 a greater support of a potential closure of F Street  
9 with the possibility of there being a pedestrian  
10 crossing installed there to facilitate ongoing  
11 pedestrian crossings for the public to access the school  
12 as it relates to F Street crossing. That being said, it  
13 was felt and in kind of an effort to try and address  
14 this issue globally that it would be appropriate to take  
15 testimony with regard to the closure of D Street or in  
16 the alternative the closure of F Street.

17           When that discussion -- I know that there  
18 were representatives obviously of the City of Sprague  
19 that were there in the May public hearing. Subsequent  
20 to that when I came onto the case, I discussed that  
21 briefly with Mayor Fox in terms of the intentions on  
22 behalf of BNSF. At least it was my understanding from  
23 my discussions with her that it made sense to  
24 consolidate this in terms of one hearing in terms of  
25 taking testimony and evidence with regard to that.





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1 JUDGE MACE: All right, thank you.

2 Is there any objection to the granting of  
3 this amended petition?

4 MS. FOX: He wants to close D and F?

5 MR. KINERK: Excuse me, again this is Dan  
6 Kinerk. For the record, Your Honor, I'm talking about  
7 not closing both of them, but closing one of those two,  
8 i.e., that being an alternative solution to the  
9 proposal.

10 JUDGE MACE: So do you understand that,  
11 Ms. Fox? They're not proposing to close both, but  
12 rather one or the other.

13 Mr. Thompson, do you have any comments on  
14 this amended petition?

15 MR. THOMPSON: I do have some comments, and I  
16 was just going to state initially that, well,  
17 tentatively we don't have any objections to this. I  
18 believe the discussions to date have included this  
19 possibility of a closure of either one or the other of  
20 the two named streets. And I would just point out also  
21 that prior to the receipt here at the Commission of  
22 Burlington Northern's motion to amend their petition, we  
23 did publish in the -- last week on the 9th and -- in the  
24 Davenport Times and on the 11th in the Lincoln County  
25 Advertiser a notice which -- in anticipation of what

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1 Burlington Northern was going to do. We stated the  
2 following. It says:

3 On May 8th, 2001, the Burlington  
4 Northern Santa Fe Railway Company filed  
5 a petition with the WUTC to close D  
6 Street crossing in the City of Sprague.

7 And then we also stated:  
8 BNSF has also expressed interest in  
9 pursuing the closure of the F Street  
10 railroad crossing in lieu of closing the  
11 D Street crossing.

12 And that was -- so it's our view that that  
13 would satisfy the notice to the public requirement of  
14 RCW 81.53.060.

15 JUDGE MACE: Thank you.

16 Ms. Fox, do you have any comments on this?

17 MS. FOX: No, not at this time.

18 JUDGE MACE: All right. I'm going to grant  
19 the amended petition to inter -- the amended petition or  
20 grant Burlington Northern permission to amend their  
21 petition as they have, adding the possibility of an  
22 alternative closure of the F Street grade.

23 Mr. Thompson, I understand that there has  
24 been publication of the notice of hearing.

25 MR. THOMPSON: Yes, correct.

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1                   JUDGE MACE:  And would you indicate to me  
2  where that notice has been published and the dates?  You  
3  may have already done that.

4                   MR. THOMPSON:  Yes, I will do that again.  It  
5  was published in the Davenport Times on or about  
6  September 9th I think, and then it was also published in  
7  the Lincoln County Advertiser on the 11th of this month.

8                   JUDGE MACE:  Thank you, those appear to meet  
9  the requirements of the Commission with regard to notice  
10 the requirements with regard to notice.

11                   All right, let's turn now to the process for  
12 evidentiary hearing, and I'm hoping that the lawn mower  
13 has now moved away so that we can have a reasonable  
14 discussion.  My understanding is that Burlington will  
15 first present its case, and then the City of Sprague  
16 will have an opportunity to present its case.  And when  
17 I refer to cases, I mean any witness testimony or  
18 exhibits.  And what I would like to know at this point  
19 is on each side who the witnesses will be, how many  
20 there will be, and who they will be.

21                   So I'm going to ask first Burlington Northern  
22 what they intend to present in terms of witnesses at  
23 this proceeding on the 18th.

24                   MR. KINERK:  Your Honor, this is Dan Kinerk  
25 again.  The primary witness who will be testifying on

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1    behalf of BNSF at the hearing is Michael Cowles,  
2    C-O-W-L-E-S. He is the BNSF Manager of Public Works  
3    Projects in Washington. The second slated witness is  
4    Curtis Froscheiser, F-R-O-S-C-H-E-I-S-E-R.

5                   JUDGE MACE: Would you repeat that again,  
6    please.

7                   MR. KINERK: Yes, Your Honor, Curtis  
8    Froscheiser, F-R-O-S-C-H-E-I-S-E-R.

9                   JUDGE MACE: Thank you.

10                  MR. KINERK: Who is the Superintendent of  
11    Operations for the BNSF out of Spokane, Washington. The  
12    third slated witness is Mr. Gary Larsen, who is a BNSF  
13    engineer who is involved as a local representative for  
14    the area including Sprague for Operation Lifesaver.  
15    Those would be the witnesses, Your Honor. I anticipate  
16    that Mr. Cowles' testimony would take up the majority of  
17    the time. Mr. Froscheiser and Mr. Larsen would be  
18    offering very limited testimony.

19                  JUDGE MACE: How do you spell Mr. Larsen's  
20    last name?

21                  MR. KINERK: Yes, Your Honor, L-A-R-S-O-N.

22                  JUDGE MACE: S-O-N, thank you.

23                  Let me ask you before I go to Staff and the  
24    City of Sprague, Mr. Kinerk, do these witnesses intend  
25    to present exhibits?

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1                   MR. KINERK: Yes, and again almost all of the  
2 exhibits will be presented through the testimony of  
3 Mr. Cowles in terms of the exhibits, and I am currently  
4 preparing the final exhibit witness list, which I will  
5 have for the Staff, for the Court, and for the City  
6 prior to the hearing on Wednesday.

7                   I can let, kind of a global analysis, let you  
8 know that I anticipate that there will be an aerial type  
9 of photograph used as an exhibit that will outline the  
10 streets and landmarks of the City of Sprague. In  
11 addition, there will be laser photographs of the B  
12 Street, the F Street, and D Street crossings basically  
13 taken from all angles that will be offered for  
14 illustrative purposes to basically to assist the parties  
15 and the fact finder in looking at the and assisting  
16 everyone in understanding the track layout, the crossing  
17 protective measures that are at each of the crossings,  
18 and just the landmarks as they relate to the layout of  
19 the City. In addition, I would anticipate using the  
20 timetable, which will establish the speeds of the Amtrak  
21 and freight trains that travel through there. There  
22 will also be some statistical information that comes out  
23 of the FRA's Railroad Safety Statistical Report as well  
24 as the WSDOT Closed Crossing Initiative, there are  
25 documents relative to that, the BNSF Grade Crossing

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1 Closure Project, and that will be the primary exhibits  
2 that I foresee being used. And as I indicated,  
3 primarily those photographs will be introduced through  
4 the testimony of Mr. Cowles.

5 JUDGE MACE: All right, thank you.

6 Let me ask the City of Sprague.

7 MS. FOX: Okay, I will have a letter that is  
8 going to be from the County Commissioner, Lincoln County  
9 Commissioner, Bill Gradel.

10 JUDGE MACE: Do you have any witnesses who  
11 will be testifying live during the evidentiary  
12 proceeding?

13 MS. FOX: Myself, Sylvia Fox. I will have  
14 the fire chief, Kon Lamparter, possibly Beth Ann Engles.

15 JUDGE MACE: And who is that?

16 MS. FOX: Sprague Grange.

17 JUDGE MACE: Okay, and who else?

18 MS. FOX: At this time I don't have any other  
19 witnesses.

20 JUDGE MACE: All right. And you indicated as  
21 far as exhibits you will have a letter from?

22 MS. FOX: Bill Gradel, he's the Lincoln  
23 County Commissioner.

24 JUDGE MACE: Do you intend to have any other  
25 exhibits?

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1 MS. FOX: Not that I know of at this time.

2 JUDGE MACE: And how about Staff?

3 MR. THOMPSON: We will just have one witness,  
4 that's Ahmer Nizam, and I would anticipate that his  
5 testimony would probably be somewhere in the range of 45  
6 minutes. And at this point, we have about four exhibits  
7 that we will probably be offering. Would you like me to  
8 run through them?

9 JUDGE MACE: If you would.

10 MR. THOMPSON: Okay. We have two Commission  
11 orders from 1987, both in the matter of City of Sprague  
12 versus Burlington Northern Railroad Company. The first  
13 is Cause Number TR-2005, and it concerns a petition for  
14 closure of abandonment of railroad crossing at C Street  
15 in Sprague. The other is in Cause Number TR-2006, and  
16 it concerns a petition to close a railroad crossing at E  
17 Street in Sprague. Those are just by way of history of  
18 Commission decisions relating to crossings in the City  
19 of Sprague. The third exhibit is we have our own map of  
20 the city which we would offer. Perhaps it will be  
21 helpful in addition to the aerial photograph that it  
22 sounds like the railroad has. And finally, we have  
23 selected portions of a publication put out by the U.S.  
24 Department of Transportation Federal Highway  
25 Administration, a booklet called Railroad Highway Grade

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1 Crossing Handbook, and the portion that is selected  
2 concerns or gives an overview of policies concerning  
3 closure of at grade crossings.

4 JUDGE MACE: Thank you.

5 I did not ask Burlington Northern in terms of  
6 the amount of time you think each witness will take to  
7 present his testimony. Mr. Kinerk, do you have any  
8 estimate of the time you believe Mr. Cowles will take to  
9 present his testimony?

10 MR. KINERK: Your Honor, I anticipate that  
11 Mr. Cowles would be approximately two hours on direct  
12 examination. I anticipate that the other two witnesses  
13 would be much quicker, in the area of 30 minutes for  
14 either of those witnesses.

15 JUDGE MACE: Thank you.

16 Ms. Fox, do you have any idea how long you  
17 think the individuals you have indicated will testify  
18 for the City of Sprague will be in presenting their  
19 case?

20 MS. FOX: I would say at the most probably 30  
21 minutes.

22 JUDGE MACE: Thank you.

23 I want to indicate to the parties that I will  
24 deal with the marking of the exhibits at the very  
25 commencement of the proceeding and that you will need to



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1 have adequate copies for distribution at the hearing,  
2 and I'm hoping that you will plan accordingly.

3 MR. THOMPSON: On that note, Your Honor, how  
4 many copies would you anticipate, one for the court  
5 reporter, one for the Bench, and then one for each of  
6 the parties?

7 JUDGE MACE: I was actually thinking of six  
8 copies.

9 MR. THOMPSON: Okay.

10 JUDGE MACE: That will allow for some  
11 additional copies if it's necessary.

12 The court reporter, I think, would only  
13 require one; is that correct?

14 THE REPORTER: Yes.

15 JUDGE MACE: Thank you.

16 So six copies of exhibits should be  
17 available.

18 I think the last thing I want to discuss with  
19 regard to the process for the evidentiary hearing has to  
20 do with the post hearing procedures. My thought on how  
21 to close the proceeding would be to have oral argument  
22 take place and that there would not be the submission of  
23 briefs. I want to hear from the parties whether or not  
24 that meets their idea of how the proceeding would close.

25 Mr. Thompson.

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1                   MR. THOMPSON: We would be willing to proceed  
2 either way the Bench feels would be most helpful. We  
3 would be happy to submit a post hearing brief or to just  
4 go with an oral closing.

5                   JUDGE MACE: Thank you.

6                   Ms. Fox?

7                   MS. FOX: I'm not exactly understanding what  
8 you're asking.

9                   JUDGE MACE: Well, at the end of a hearing,  
10 an evidentiary hearing, the parties usually have a  
11 chance, in fact almost always have a chance, to make  
12 argument to the Commission about the merits of their  
13 case and to state why the Commission should adopt their  
14 position, what are the legal arguments for adopting the  
15 party's view of the facts of the situation.

16                   And that can be done in a number of ways, and  
17 I have the discretion to ask you to just simply provide  
18 oral argument, but I want to ask you whether or not you  
19 would prefer oral argument, which is just an argument in  
20 the nature of a brief that is provided at the close of  
21 the proceeding. The alternative to that is to provide a  
22 written brief within a certain number of days after the  
23 close of the hearing. And so on the one hand, it's  
24 quicker if you do oral argument and less costly and less  
25 time consuming for the parties. On the other hand, if

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1 you provide a written brief, it may offer you the  
2 opportunity to marshal your arguments in a different way  
3 or to have some time to process the facts and the  
4 positions of the parties that have come up during the  
5 course of the hearing. I'm inclined to go with oral  
6 argument, but I do want to hear the parties' preference  
7 with regard to this. So that's what I'm asking, I'm  
8 hoping that that explained it, Ms. Fox. Can you tell me  
9 whether you would prefer oral argument or post hearing  
10 briefs?

11 MS. FOX: The oral would be fine.

12 JUDGE MACE: All right.

13 And Mr. Kinerk?

14 MR. KINERK: Your Honor, oral argument is  
15 fine, thank you.

16 JUDGE MACE: All right. So I will provide a  
17 time for that after the evidence closes. I suppose  
18 there is the likelihood that we would just need one day  
19 for the hearing, but we do have two scheduled so that if  
20 we go over we will still have time the following day to  
21 complete both the presentation of the evidence and give  
22 sufficient time for oral argument.

23 That completes the process for evidentiary  
24 hearing. Is there any question about the evidentiary  
25 hearing, the process or anything about the evidentiary

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1 hearing that the parties would like to ask at this time?

2 MR. KINERK: Nothing from Petitioner BNSF,  
3 thank you, Your Honor.

4 JUDGE MACE: All right, then let's just move  
5 briefly to the process for the public hearing. The  
6 public hearing is scheduled to convene at 6:30 in the  
7 evening on the 18th. And usually I believe what happens  
8 is there's a brief introduction by the Administrative  
9 Law Judge. I will take the appearances of counsel who  
10 are present in the room. I will introduce any  
11 Commission Staff members who are present and any company  
12 personnel who are present. I will make a brief, in my  
13 brief presentation I will outline the issue, and I will  
14 discuss briefly how people should, you know, what the  
15 process is and how people should approach making their  
16 comments.

17 The comments will be sworn comments. Anybody  
18 that signs in who wishes to speak will be given an  
19 opportunity to speak after people are sworn in. I will  
20 limit the time for speaking to approximately three to  
21 five minutes. It will depend on the number of speakers.  
22 If the number of speakers is large, I will have to make  
23 some adjustment to lessen the amount of time per  
24 speaker. And the main purpose of the public hearing is  
25 simply to take comments from the public. It's not

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1 really for the ALJ to answer questions. But what I  
2 would do is refer questions to either Staff or the  
3 company if individuals from the public have questions.

4 So those are basically the procedures for the  
5 public hearing. I believe it's slated to go from 6:30  
6 to 8:30. If there are not many speakers, it's possible  
7 that we will adjourn early. I guess that all depends on  
8 how many people from the public turn out obviously.

9 So are there any questions about the nature  
10 of the public hearing or the process for the public  
11 hearing?

12 MS. FOX: No.

13 MR. KINERK: Your Honor, this is Mr. Kinerk  
14 on behalf of BNSF. The only question that I wanted to  
15 make sure that I knew was where exactly the hearings  
16 will transpire.

17 JUDGE MACE: Where the hearings will  
18 transpire, well, that is a very good question. I'm just  
19 searching to see if I have an answer. They will be in  
20 Sprague.

21 MR. KINERK: Okay, that much I assumed. I  
22 had seen on the notice of change in date of the public  
23 comment hearing that they were listed at the Sprague  
24 Chamber Building, 213 South C Street, and I just assumed  
25 that that would be the same location where the

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1 evidentiary hearing would occur as well.

2 MR. THOMPSON: Yes.

3 JUDGE MACE: I'm advised that the answer to  
4 that question is yes. I know that I did not personally  
5 make those arrangements, and so I don't have that  
6 information, but I'm advised that that's the case, that  
7 all hearings will take place at the Sprague Chamber  
8 Building on 213 South C Street.

9 MR. KINERK: Excellent, thank you.

10 JUDGE MACE: Is there anything else we need  
11 to address at this point?

12 Mayor Fox, do you have anything further that  
13 you feel needs to be addressed at this point?

14 MS. FOX: No, thank you.

15 JUDGE MACE: All right, it looks like then we  
16 are adjourned until Wednesday the 18th at 9:30 in the  
17 morning at the Sprague Chamber Building, and I look  
18 forward to meeting you all there. Thank you.

19 (Proceedings adjourned at 2:01 p.m.)

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