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BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

THE BURLINGTON NORTHERN & SANTA)Docket No. TR-010194
FE RAILWAY COMPANY,)Volume II
Petitioner,)Pages 30-107
v.)
SNOHOMISH COUNTY,)
Respondent.)
_____)

A hearing in the above matter was held on August 17, 2001, at 1:48 p.m., at 1300 Evergreen Park Drive Southwest, Olympia, Washington, before Administrative Law Judge LAWRENCE BERG.

The parties were present as follows:

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, by Robert E. Walkley, Attorney at Law, 20349 N.E. 34th Court, Sammamish, Washington 98074-4319.

SNOHOMISH COUNTY, by Jason J. Cummings, Attorney at Law, Civil Division, 2918 Colby Avenue, Suite 203, Everett, Washington 98201.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, by Jeffrey Stier, Assistant Attorney General, P.O. Box 40113, Olympia, Washington 98504.

THE COMMISSION, by Jonathan Thompson, Assistant Attorney General, 1400 S. Evergreen Park Drive, S.W., Olympia, Washington 98504.

Barbara L. Nelson, CSR Court Reporter

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1 JUDGE BERG: Go ahead and be on the record.
2 This is a prehearing conference in Docket Number
3 TR-010194. This case is captioned as the Burlington
4 Northern and Santa Fe Railway Company, Petitioner,
5 versus Snohomish County, Respondent. Burlington
6 Northern and Santa Fe Railway Company may also be
7 referred to as BNSF during the course of this
8 proceeding.

9 This prehearing conference is being
10 conducted pursuant to due and sufficient notice
11 served on the parties dated August 14th, 2001. My
12 name is Lawrence Berg. I'm the Administrative Law
13 Judge assigned to preside in this proceeding.
14 Today's date is August the 17th, 2001. This
15 prehearing conference is being conducted at the
16 Commission's headquarters in Olympia, Washington.

17 At this point in time, we'll take
18 appearances from the parties and I'll begin on my
19 right with the Assistant Attorney General.

20 MR. THOMPSON: Yeah, this is Jonathan
21 Thompson, Assistant Attorney General, appearing on
22 behalf of the Commission Staff.

23 MR. STIER: My name's Jeff Stier. I'm
24 Assistant Attorney General, and this is my first
25 appearance on the record, so I'll give you my

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1 address. And all of a sudden, I've forgotten my
2 address. You have my address on record. Oh, thanks.

3 JUDGE BERG: I've had to pull out my
4 business card on numerous occasions.

5 MR. STIER: P.O. Box 40113, Olympia,
6 Washington, 98504-0113, and my office -- main office
7 phone is 360-753-6126. My e-mail address is
8 jeffreys@atg.wa.gov, and my fax number is 360 -- but,
9 of course, locally it's just 586-6847. Thanks.
10 Thank you, John.

11 MR. WALKLEY: I am Robert E. Walkley, and
12 I'm appearing on behalf of the Petitioner, the
13 Burlington Northern and Santa Fe Railway Company, and
14 I've made a previous appearance that should be of
15 record.

16 MR. CUMMINGS: Good afternoon. I'm Jason
17 Cummings, Deputy Prosecuting Attorney present on
18 behalf of Snohomish County, the Respondent in this
19 matter and the movant on the issue that's brought us
20 all here today.

21 JUDGE BERG: All right. Let me ask if
22 there's anyone else who wishes to enter their
23 appearance in the room at this time? Hearing no
24 response, let me inquire whether there's anyone
25 appearing on the bridge line who wishes to enter

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1 their appearance? And let the record reflect that
2 there's no response.

3 The first matter to address with the
4 parties is the receipt by the Commission of a letter
5 from the City of Marysville in response to several
6 questions that were posed to the parties for
7 response.

8 The City of Marysville, although it did
9 make some appearance at a prior prehearing
10 conference, has not requested intervention, nor has
11 it been given status as a party to this proceeding.

12 In order to fully comply with the
13 Commission's rule regarding ex parte communications,
14 WAC 480-09-140, a copy of the correspondence from the
15 City of Marysville has been provided to all parties.
16 Let me ask at this time whether any party wishes to
17 formally submit a written response to the letter from
18 the City of Marysville?

19 MR. WALKLEY: Your Honor, this is Robert
20 Walkley. We just received this. I haven't had time
21 to even look at it. I would register that while
22 there's no objection to people participating in the
23 hearing at the public hearing, this is highly unusual
24 to permit a filing like this, if that's what it's
25 going to be.

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1 I have no objection to this letter going to
2 the Staff, for example, of the UTC, for whatever it
3 may portend, but the city simply doesn't have party
4 status. If, however, you wish to let this in, I
5 would only ask that parties be given an opportunity
6 to comment on it, if they wish to comment, on perhaps
7 Monday by fax.

8 JUDGE BERG: All right.

9 MR. STIER: Your Honor, I might -- could I
10 supplement that to a certain degree?

11 JUDGE BERG: Yes, sir, Mr. Stier.

12 MR. STIER: I adopt Mr. Walkley's
13 statement, and I'd also like to say that it appears
14 to me, and I don't quite understand the status of
15 this document, that we -- you know, when you say we
16 respond, I -- this is a hearing for a motion with
17 rules as to how we present evidence to the hearing.
18 And all of a sudden, here's this document that comes
19 out of -- basically, out of nowhere, essentially, and
20 I wouldn't say it's within the record on the motion.
21 And I also, just glancing at the document, it appears
22 -- I see the third item talks about -- well, third
23 and fourth talk about continuance, I guess, so I
24 guess it does directly assess it -- or address it,
25 but I wouldn't say it's been submitted as an item of

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1 evidence. And as such, I guess I see no need to
2 comment on it unless this body rules that it is an
3 item of evidence. And otherwise, it seems somewhat
4 irrelevant.

5 JUDGE BERG: It is a document that has been
6 received by the Records Center and has been made part
7 of the file. And in preparing for this afternoon's
8 prehearing conference, I did read it. I think the
9 best way to go forward is to allow parties, all
10 parties, an opportunity to comment on the letter and
11 its substance in writing to be filed by facsimile
12 12:00 noon on Monday, August the 20th, with a hard
13 copy to follow. Mr. Walkley.

14 MR. WALKLEY: Your Honor, perhaps a
15 clarification. I would be appreciative. We are
16 very, very close to this hearing. Of course, that's
17 why we're here today, is to determine how close we
18 are, but I would ask that the record simply reflect
19 that if a party does not comment on it, for example,
20 if BNSF does not have a comment by 12:00 noon on
21 Monday, it should not be presumed thereby that we
22 agree with it, of course, or that we admit anything
23 in it. And if that's understood, it would be helpful
24 to me to have that on the record.

25 JUDGE BERG: Yes, that's understood.

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1 MR. WALKLEY: Okay, thank you.

2 JUDGE BERG: You're welcome. Anything else
3 on this subject before we move on? All right. Thank
4 you, everybody.

5 At this point I'd like to first address the
6 issue of lead agency and lead agency status. The
7 first of these questions will be primarily directed
8 to Commission Staff and to County of Snohomish, but I
9 want to make it clear that in all instances parties
10 will have an opportunity to comment before we leave a
11 subject area.

12 And the first thing, a question that arises
13 is whether or not there is a dispute between the
14 Commission and the County over lead agency status and
15 what the status of discussions or any agreements
16 between the Commission and the County are. Mr.
17 Thompson, if you could start off, and then Mr.
18 Cummings, fill in however appropriate.

19 MR. THOMPSON: Right. Well, first I would
20 just say that this case has presented, as far as I
21 know, an unprecedented issue for the Commission in
22 that we are ordinarily the only agency doing a SEPA
23 review in a closure case. But in this instance, BNSF
24 has, in a way, packaged their request for the closure
25 with a project they intend to do with the

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1 construction of the siding on the -- on the tracks at
2 this same location, and my understanding, based on
3 representations by the Railroad, is that the reason
4 for that is that if they are able to obtain the
5 closure, then this becomes a more attractive site for
6 the building of that siding.

7 I guess I'd just that say that the usual
8 posture in one of these cases, as far as I know, is
9 that the Railroad or Staff comes to the Commission
10 and says, Here is a particularly dangerous crossing
11 and maybe it's not of particularly great use to the
12 traveling public or the road authority that maintains
13 the crossing, and therefore it should be the public
14 safety requires its closure.

15 But in this instance, because of the fact
16 that the Railroad has packaged it up, for lack of a
17 better word, with the project to build a siding, and
18 also because of the SEPA policy against piecemealing
19 of environmental review, that is, breaking projects
20 into smaller pieces so that they might appear less --
21 to have less of an impact on the environment, we
22 decided to view this, the siding construction and the
23 closure, as part of one proposal under the meaning of
24 the Department of Ecology Rules.

25 And the DOE rules say that when there is

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1 more than one permit required for a proposal, the
2 city or county involved should be lead. So that was
3 our -- that has been our thinking on deciding the
4 lead agency question. And that is the explanation
5 for Mr. Nizam's letter to the County indicating that
6 we would -- I don't know if relinquish is the right
7 word, but we would agree that they're taking lead
8 agency status.

9 JUDGE BERG: Before I turn to Mr. Cummings,
10 let me ask whether that letter from -- that came
11 above Mr. Nizam's signature, whether that was a
12 decision that was made by Mr. Nizam or was that a
13 decision that was made by the director of the
14 department?

15 MR. THOMPSON: I don't believe that the
16 director was consulted in that. So I imagine you're
17 making reference to the arguments made in Mr. Stier's
18 submittal for this motion about whether that might
19 have been ultra vires or something of that sort.

20 And I guess that comes down to whether --
21 we have a rule in our WACs that says that all final
22 determinations for purposes of SEPA should be made by
23 the Director of Regulatory Affairs, and that may be
24 the case. I don't know how important that is,
25 because certainly we could effectuate the transfer

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1 simply by a letter from the director, even if we
2 haven't done so already, so --

3 MR. STIER: If that's what he wants to do.

4 MR. WALKLEY: If, in fact, that's right.

5 MR. THOMPSON: So anyway, that's the state
6 of things at this point. We're also exploring the
7 possibility of having co-lead agency status with the
8 County, and I'm not entirely sure what the
9 implications of that would be. A suggestion I would
10 have is that perhaps we could bifurcate or somehow
11 phase the environmental review to enable the
12 Commission to make a decision in this case possibly
13 prior to a full environmental review determination by
14 the County, but I have not brought that up with the
15 County.

16 JUDGE BERG: On page three of Staff's
17 written position on the continuance, Staff states
18 that if the siding construction and grade closing
19 petition are treated as part of the same project
20 within the meaning of SEPA, then it is necessary to
21 decide how to share SEPA responsibility between the
22 Commission and the County.

23 MR. THOMPSON: Yeah.

24 JUDGE BERG: So if they are not treated as
25 part of the same project, what's the Commission's

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1 position?

2 MR. THOMPSON: Well, it seems to me that
3 the standard under the relevant statute, which is
4 81.53.060, is whether the public safety requires the
5 closure. And I believe that means that the danger
6 presented to motorists by the at-grade crossing is
7 heavy enough to outweigh the public convenience and
8 necessary of having an at-grade crossing.

9 And see, that doesn't necessarily bring
10 into the question, you know, the Railroad's operating
11 efficiency or the benefit to the Railroad in building
12 the crossing -- or building the siding, rather, as a
13 reason to grant the crossing. So I'm not sure, if
14 you view it in that way, and if the Railroad's
15 argument that it intends to make at this hearing is
16 that, look, regardless of our project, this crossing
17 is unsafe and should be closed, then I think the
18 Commission might be able to conclude, well, okay,
19 we'll just issue an environmental assessment of the
20 crossing closure itself, proposed crossing closure,
21 and be done with it. It has nothing to do with the
22 construction of a siding.

23 I think if we were to do that, and the
24 County strongly disagreed with it, they could
25 probably appeal that to the Department of Ecology and

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1 get a determination as to whether it's one project or
2 not.

3 JUDGE BERG: Was the SEPA checklist
4 prepared by BNSF specifically related to the closing
5 or was it also related to construction of the siding?

6 MR. THOMPSON: Both. I believe it
7 mentioned the construction of the siding as part of
8 the project.

9 JUDGE BERG: And if there was to -- if we
10 did view this as one -- as the same project within
11 the meaning of SEPA, and it was necessary to decide
12 how to share SEPA responsibility between the
13 Commission and the County, would that be divided
14 along the lines of SEPA checklist items and review
15 related to the closure and SEPA checklist items
16 pertinent to the siding construction, or is there
17 some other factor that would determine who would
18 assume what responsibilities without regard for
19 designation of nominal lead?

20 MR. THOMPSON: Well, I think it's actually
21 open to whatever agreement the co-lead agencies will
22 reach. And there's a specific rule that addresses
23 that, which is WAC 197-11-944, and it just says that
24 two or more agencies may, by agreement, share or
25 divide the responsibilities of lead agency through

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1 any arrangement agreed upon, which is pretty much the
2 -- it goes on, but that's pretty much the heart of
3 it.

4 JUDGE BERG: Mr. Cummings. And then, Mr.
5 Walkley, before I ask any more questions, I'll come
6 around to you, and also Mr. Stier.

7 MR. CUMMINGS: Well, to comment, I guess, I
8 don't want to be too redundant to what Mr. Thompson
9 just discussed, but I believe your first question is
10 is there a dispute between the County and the UTC
11 regarding who should be lead agency. I believe at
12 this time there's not a dispute.

13 A letter from the UTC was provided to the
14 County that suggested the UTC had reviewed the
15 matter, consulted with the Department of Ecology, and
16 concluded that the County should be the lead agency.
17 The County has essentially undertaken those
18 responsibilities.

19 Of late, there's been some suggestions by
20 both representatives of Burlington Northern and the
21 intervening party, Wash. DOT Rail, suggesting that
22 they would feel better if maybe there was a co-lead
23 agency situation, i.e., UTC and the County partnering
24 together to help review the environmental aspects of
25 this project.

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1 At this point, obviously, as Mr. Thompson
2 pointed out, there's an agreement that needs to be
3 worked out, pursuant to WAC 197-11-944, that would in
4 a sense discuss who's going to be -- obviously,
5 you're going to have to say who's the nominal party,
6 but it would also look at if there are disputes, or I
7 shouldn't say disputes, but maybe drawing on the
8 expertise of the varying agencies to determine who
9 should or should not have maybe a little more of a
10 laboring oar on a particular area of the SEPA review.

11 I think, obviously, the UTC has a certain
12 expertise when it comes to crossing issues, and
13 obviously the County is involved with environmental
14 review of permits that deal with many other issues on
15 -- road issues on quite a large level, since the
16 County has many roads up there.

17 To that end, I don't believe there's been
18 any dispute. If the UTC, and they've actually -- I
19 believe that Staff of the UTC has contacted Staff at
20 the County to discuss this idea of maybe sharing and
21 being co-leads. I believe an agreement is probably
22 going to be worked out. To my understanding, they're
23 willing to work on that together to effectuate quick
24 review, and that that would likely happen.

25 But, again, I don't believe there's any

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1 dispute necessarily taking place. I know that Mr.
2 Walkley disputes the actions maybe being ultra vires
3 or not complying, but I will point out that
4 Burlington Northern has availability under the WACs
5 if they believe that a proposal should -- you know,
6 basically, they can appeal to the Department of
7 Ecology considering if they don't believe somebody
8 should be lead agency. I don't necessarily know if
9 that necessarily should be before this hearing and to
10 be decided, but the WACs specifically point out that
11 they can appeal to the Department of Ecology, and
12 that's actually WAC 197-11-924(4), and just for -- I
13 know not everyone has that in front of them, but just
14 to read it, it point blank says, An applicant may
15 also petition the department to resolve the lead
16 agency dispute under WAC 197-11-946.

17 JUDGE BERG: Doesn't that presume that
18 there is a lead agency dispute?

19 MR. CUMMINGS: That presumes there's a
20 dispute. I think the dispute between the two
21 agencies, there is no dispute. The dispute is one
22 that if the applicant, for some reason, has a
23 dispute, he can -- he or she or, I guess in this
24 case, the entity may petition to the Department of
25 Ecology to resolve a dispute.

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1 JUDGE BERG: Mr. Walkley, I know that both
2 BNSF and Washington DOT have some arguments opposing
3 the process of this change of lead agency. Let's try
4 and leave that aside for the moment, and I'd like to
5 get your comments on this area as it's discussed. It
6 sounds as if the discussion that is ensuing between
7 the County and the Commission regarding co-leadership
8 is some concession to BNSF. Is that fair, Mr.
9 Cummings?

10 MR. CUMMINGS: I don't necessarily know if
11 it's a concession. I know an offer's been made by
12 BNSF that they would appreciate seeing that, and that
13 that may make them feel better and not want to
14 challenge the present lead agency. I don't know if
15 that is indeed still the case. I don't know what
16 Wash. DOT Rail's position -- obviously, Mr. Stier and
17 I haven't discussed and I haven't seen any responsive
18 pleadings submitted on this motion. Were there?

19 MR. STIER: It was faxed to you yesterday.

20 MR. CUMMINGS: We didn't receive it, so I

21 --

22 JUDGE BERG: Let's go ahead and hear from
23 Mr. Walkley and Mr. Stier and --

24 MR. WALKLEY: Your Honor, it's difficult to
25 know where to start, because the purpose of this

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1 hearing is simply to determine whether or not we're
2 going to have a hearing in ten days or so. But let
3 me try to do what I can to set the record straight.

4 There's been a lot of speculation about
5 what the railroad thought or what the railroad was
6 doing or not doing. I might just show you that this
7 all is unnecessarily complicated. The first thing
8 that we need to bear in mind, and Commission Staff,
9 as well, is that there is only one action that has
10 ever been requested by Burlington Northern in this
11 whole matter. That action is under RCW 81.53. The
12 exclusive jurisdiction of the WUTC to determine a
13 petition to close an at-grade crossing. That is the
14 only action by any government authority that has so
15 far been requested.

16 Secondly, it must be recognized that the
17 siding itself is part of an interstate common carrier
18 railroad and that an interstate common carrier
19 railroad is under the exclusive and plenary
20 jurisdiction of the Interstate Commerce Commission of
21 the -- under the Interstate Commerce Commission
22 Termination Act of the Surface Transportation Board.
23 Therefore, there is no need, nor will there probably
24 be any permit application to Snohomish County or to
25 the Commission, this Commission, for any siding

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1 extension work.

2 Therefore, this whole siding extension
3 thing, in terms of SEPA, is a red herring, because
4 under both state law and federal law, the County has
5 no jurisdiction whatsoever. And when you look at
6 there has been no application filed with the County
7 and the only conceivable County jurisdiction would be
8 if the Railroad elects to continue to keep its
9 cul-de-sacs. As part of the project, we offered two
10 amenities when this crossing was closed, to build
11 little turnarounds, which have been called
12 cul-de-sacs, at each end of the 156th Street when it
13 is cut. However, that is not essential to the
14 project and BNSF may at any time elect to withdraw
15 that. It was simply an amenity to begin with, but
16 when you look at the rules, the 197 rules, you'll see
17 replete throughout the rules, as we argue in our
18 brief here, that the agency that has, first of all,
19 the lead agency status must have the, quote, main
20 responsibility, end of quote, for decision on the
21 action.

22 The only action that's been requested is
23 before this Commission, and that is the closure. No
24 one is coming to this Commission and no one is coming
25 to the County for permission to build the siding.

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1 Far from it.

2 But what we are -- the reason that there
3 may be some confusion here is this. Burlington
4 Northern's policy on this matter, even though the
5 federal law permits us to completely bypass any
6 County permits and interference, Burlington
7 Northern's policy is to attempt to work with local
8 communities to learn what their concerns are, to
9 listen to them if they do have a concern, and of
10 course to obey normal reasonable permit requirements,
11 such as the erection of silk screens, wetting down of
12 roadways, you know, and other ordinary things you
13 might get with a grading permit.

14 If that has confused the County into
15 thinking that we are asking the County for permission
16 to build this, that's unfortunate. All we are doing
17 here at this Commission and all we're doing before
18 any government at the moment is applying for closure.

19 There is one other permit that is a series
20 of permits that are being requested, and that's of
21 the United States of America Corps of Engineers. And
22 they have exclusive authority over the environmental
23 aspects of the siding project itself, the wetland
24 delineations and all that. The County has no say in
25 that at all, and therefore our earlier exploration of

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1 the idea of a co-lead status for the County looks now
2 to us to be a very bad idea.

3 This whole thing could be collapsed into
4 the WUTC simply taking back its file, which
5 apparently was sent to Snohomish County, and take
6 back the file, take back the lead status, issue its
7 threshold determination. It could all be done within
8 -- well within the time before the hearing on August
9 30th.

10 There simply is no jurisdiction on the part
11 of the County, under either federal or state law, and
12 this whole thing, we think, is a smoke screen to get
13 into this proceeding and to stop it or delay it or
14 hinder it. And quite frankly, we want to continue to
15 work with the County. We enjoy a pretty good
16 relationship with the County, believe it or not. We
17 do work with them on a daily basis. We want to
18 continue that.

19 So there's no hard feelings yet, but, on
20 the other hand, we cannot stand by and watch this
21 proceeding be derailed and defeated when you, the
22 WUTC, have the exclusive jurisdiction over the only
23 issue before any government at the moment, and that
24 is closure of the crossing. That's the only thing.

25 JUDGE BERG: So BNSF would agree with

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1 Commission Staff that the only consideration before
2 the Commission is whether the public safety requires
3 the closure of this crossing?

4 MR. WALKLEY: No, the BNSF does not agree
5 that that is the only thing before this Commission,
6 but it does -- or the only test or the only standard.
7 And we are prepared, as we have indicated in our
8 pleadings, to show a complete picture of why this
9 whole thing should be closed. Obviously, the public
10 safety standard in the statute that Mr. Thompson
11 refers to will, of course, be addressed. But there's
12 more than one view of the public safety, and we will
13 give a complete view.

14 It must be remembered that this project
15 that everybody's talking about, the siding project
16 is, first of all, on an interstate common carrier
17 railroad, it is for the benefit of the shipping and
18 the traveling public and so on, and as I've outlined
19 in our pleading.

20 We -- the benefit of the public, as Mr.
21 Thompson has said, is weighed against the detriment
22 to the public safety, and we will be pounding away on
23 safety, but we desire to give the Commission and the
24 County and the public a complete view of the project
25 so that everybody knows why it is and that we didn't

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1 just pick this crossing at random to try to close.

2 JUDGE BERG: So the parameters, in your
3 complete view, would encompass the need for a public
4 siding, whether it's English North or English South?

5 MR. WALKLEY: Yes, but it must be made very
6 clear, we are not applying to the Commission for any
7 authority to build the siding. There is no
8 jurisdiction and there's no requirement to do that.
9 That decision would rest, if with anyone, with the
10 Surface Transportation Board, which, of course, has
11 exempted that kind of project from even their
12 application. But it does not mean that anyone else
13 has authority to do it. We are intending to present
14 as complete a picture as possible to the public, to
15 the County, to everyone, as to why this would benefit
16 the public safety, what are the other benefits of the
17 proposed action, as well as being prepared to listen
18 to and comment on any contentions by the County or
19 the fire department or anyone else as to what might
20 be the downsides for public safety or the reasons for
21 not closing, and that is what this hearing is for.

22 The only final thing I would say is this.
23 There is a confusion, I think, going on here. And
24 I'm certainly confused by the entire theory that the
25 County has adopted. How in the world can the County

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1 argue in one breath that this hearing should not got
2 forward because to do so would somehow limit the
3 information available for decision. I cannot imagine
4 why that's true.

5 The purpose of an evidentiary hearing is to
6 obtain evidence, it is to obtain, as part of the
7 Commission's decision process, and therefore there's
8 no reason, as we argue in our briefs here, under any
9 law, under any statute or any rule that I'm aware of,
10 or any case law, why this hearing could not proceed
11 no matter what the SEPA status is.

12 And so thank you very much for indulging
13 me, but it's -- I hope it's a little bit clearer now.
14 The Railroad wants to cooperate with everybody in the
15 room here, and is cooperating with everybody in the
16 room. However, we cannot stand by and wait for an
17 indefinite indeterminant decision by an agency that
18 has no jurisdiction whatsoever over this project.

19 JUDGE BERG: If the --

20 MR. WALKLEY: Or the closure.

21 JUDGE BERG: If the siding construction is
22 a part of the complete picture of what's going on,
23 just accepting that as a starting point, why wouldn't
24 the SEPA review or an EIS relating to the
25 construction siding not also be part of the complete

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1 picture?

2 MR. WALKLEY: It is, it is. We have no --
3 we have no problem with that. Back in July 2nd, I
4 believe it was, 2001, I think I said July 5th in my
5 pleadings, but it was actually July 2nd, the Railroad
6 submitted its checklist to Mr. Nizam, to the WUTC.

7 In that checklist, as is required under
8 SEPA rules, the entire project was disclosed,
9 including maps and so on, so forth. And as I speak,
10 the Section 404 permit application is being filed
11 with the Corps of Engineers, and a copy of which will
12 be presented to the Commission, to the County, and so
13 on. To the County because they are a party in this
14 case, not because they have any jurisdiction,
15 however.

16 And so, yes, the siding, however, is not a
17 matter of decision for any governmental agency. It
18 is a matter of decision for the Railroad, do we build
19 it or do we not build it. And that's the federal
20 law. However, we desire to cooperate with local
21 communities. If they allow us to cooperate and do
22 not obstruct unreasonably, we are prepared to work
23 with them on reasonable concerns.

24 JUDGE BERG: Let me repeat what I think I'm
25 hearing you saying, and then you help me if I'm not

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1 hitting the nail on the head. From BNSF's
2 perspective, an EIS relating to the siding
3 construction is restricted or limited to issues
4 surrounding the cul-de-sac; is that correct?

5 MR. WALKLEY: Well, it's more complicated
6 than that, but simpler than that at the same time.
7 And that sounds strange, but I'll try to explain it.
8 The problem is that we've got the cart before the
9 horse here.

10 What should have happened is that when Mr.
11 Nizam received the checklist, that, as part of this
12 agency's responsibility, this agency would review the
13 checklist and determine whether or not, first of all,
14 it was going to be lead agency. That they did by
15 letter dated July 5th.

16 MR. STIER: Eleventh.

17 MR. WALKLEY: July 11th. I thought it was
18 the 5th.

19 MR. STIER: I don't think so.

20 MR. WALKLEY: Yeah, July 5th.

21 MR. STIER: Okay.

22 MR. WALKLEY: In the July 5th letter, or
23 what was it? Anyway, whatever it was, that July
24 letter to the County advised the County that we are
25 the lead agency and we request your comments and

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1 here's a copy of the submission that BNSF made.
2 Then, after it was satisfied with the comments it
3 received and its own review, this Commission would
4 issue, as any agency should who's the lead agency,
5 would issue a threshold determination, it's called,
6 and that would either be a determination of
7 nonsignificance, a mitigated determination of
8 nonsignificance, or perhaps a determination of
9 significance. Only then would -- only if there's a
10 determination of significance would we be talking
11 about an EIS of any kind.

12 If it's not significant or if it's
13 mitigated, there would be no EIS for the siding, for
14 the cul-de-sacs, for anything.

15 The reason that the cul-de-sacs have even
16 been discussed is that the cul-de-sacs will be
17 located slightly off the railroad right-of-way if
18 they are built. Therefore, the Railroad does not
19 claim an exemption. If we decided that we wanted to
20 build that, we would go to the County and apply for a
21 permit to do grading work and so on off the
22 right-of-way. That's what we've done elsewhere and
23 that's what we'd do here.

24 However, they can be pulled out of the
25 project at any time and we will never darken the door

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1 of the County with a permit application for those.

2 It must be remembered, when we're looking
3 at all this, that there is a specific rule that would
4 help the Commission I think immensely if it
5 underscores the rule. 197-11, and I will find the
6 cite page, 197-11-055, I believe it is, talks about
7 the SEPA determination being made at the conceptual
8 stage of a project, and that rule -- I believe it's
9 that rule -- specifically states that the applicant
10 shall not be forced to apply to every Tom, Dick and
11 Harry a detailed permit application and need not do
12 that for a successful SEPA determination to be made.

13 But to listen to some of the comments we
14 get in the room here, you would think that we'd have
15 to apply for every damn permit before a determination
16 can be made, and that clearly is not what the rules
17 are.

18 So we handed the Commission a conceptual
19 document, which is required, the checklist, and it
20 pulls no punches. It doesn't keep a secret about,
21 geez, if you close this, we're going to build a
22 siding, but what it does do is lay it out clearly for
23 the reviewing authority to look at and make a
24 determination, which should have been made by now.
25 At that point, we proceed ahead.

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1 I've got other comments, too, about the
2 co-lead agency thing, but just suffice it to say that
3 we are very upset, frankly, that at this stage of
4 this proceeding, we would be sitting here wondering
5 if we're going to have a hearing in ten days. I
6 mean, we have to know that answer, because we've got
7 people who have to be prepared, so I would urge that
8 a decision be made on this.

9 We would be happy to sit down with other
10 counsel and see if there's some way through this
11 SEPA, but I would only conclude by saying that SEPA
12 and this evidentiary hearing process are not in
13 conflict with each other. They're complementary.
14 There is no conflict. There is no reason in the
15 world why this hearing should not continue as
16 scheduled. Thank you.

17 JUDGE BERG: Mr. Stier, I know you're being
18 incredibly patient, but let me just pose one more
19 question to Mr. Walkley. Mr. Walkley, if -- I'm
20 trying to get a handle on the scope of the SEPA
21 review that needs to be completed in order for the
22 Commission to make a final determination.

23 And the reason why that seems important to
24 me is that if a determination of significance is made
25 and an EIS follows, then it seems that parties will

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1 need some additional opportunity to present evidence,
2 whether it's independent witnesses or conduct
3 cross-examination of those individuals preparing the
4 EIS. There would need to be some further process
5 that would -- that might be necessary before the
6 Commission can make that final determination.

7 And so, as it looks in my mind, I try and
8 draw pictures sometimes to see how the pieces of the
9 puzzle fit together. While we have -- while I
10 understand the argument that the evidentiary hearing
11 can proceed independent from the SEPA process, if the
12 SEPA process results in an EIS, there may be a need
13 for additional process, additional hearing; is that
14 correct?

15 MR. WALKLEY: You can -- we could make any
16 -- we could make any assumptions. Let me try to
17 address it this way. Let us assume, first of all,
18 that the UTC Staff decides on Monday morning to do
19 what it should do, in our view, and that is that it
20 contacts the County and says, Hey, would you give us
21 our file back. This whole thing was a mistake. It
22 wasn't even done by the Director of Regulatory
23 Services, it was an ultra vires act, it was wrong for
24 us to do it. Give us our file back.

25 The County will give them the file back,

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1 they will make a determination or they won't,
2 whichever the case may be. If they make a
3 determination of nonsignificance, then all of the
4 concern we have about having to have a second hearing
5 would evaporate. If they make a determination of
6 nonsignificance, but it should be mitigated, same
7 thing. In other words, it's nonsignificant.
8 Therefore, it is not a concern that there might be an
9 EIS that takes a year and a half.

10 If, on the other hand, they came back and
11 said, This is a DS, we made a determination of
12 significance, then the hearing would know that, yes,
13 there is going to be an environmental impact
14 statement and there's going to be more activity, but
15 it's got to be pounded loud and clear to everyone,
16 the only thing at issue here is the closure of a
17 crossing, the closure of a crossing.

18 JUDGE BERG: So --

19 MR. WALKLEY: It is not the end of western
20 civilization. It is a closure of a crossing. And
21 that is what is at issue. Not the siding, not the
22 wetlands, not any of that, except as this Commission
23 needs to review it to make its threshold
24 determination. Once it does that, there is no
25 problem.

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1 JUDGE BERG: I apologize for my stuttering
2 while you were making your point. If Staff were to
3 follow that course of action, take the file back and
4 then conduct a SEPA review on the issues before the
5 Commission, should that SEPA review be strictly
6 limited to SEPA issues regarding the closure of the
7 crossing or should that or would that SEPA review
8 properly encompass factors relating to the siding
9 construction?

10 MR. WALKLEY: In my judgment, and I'm not a
11 judge, of course, but in my understanding of the
12 SEPA, the lead agency, which is the Commission, as
13 far as we are concerned, has the duty to look at the
14 proposal, they call it in the rules, the proposal.
15 That's why we presented to the Commission a checklist
16 that did not pretend that the only thing going on
17 here ever would be the closure of this crossing. We
18 could have done that. It might have made things very
19 simple, except it would have been wrong.

20 Therefore, we presented to the Commission
21 something that, frankly, it says it has not had
22 before, and that is a project that, by the way, just
23 happens to be following this closure.

24 Normally, Your Honor, the reason that this
25 has been a problem for the Commission here is that

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1 normally when the railroad is involved, another
2 agency has already done a determination. Usually a
3 lead agency has already done this. This is an
4 unusual case, where no lead agency had made an
5 initial determination under SEPA, and it was the
6 Commission that was chosen as the lead agency.
7 Therefore -- and with it tied a project, and so
8 people were saying, my gosh, the -- as I understand
9 the rules, though, the Commission was given by the
10 BNSF sufficient information to determine, as a
11 conceptual matter under the rule, as a conceptual
12 matter, to determine as a threshold determination
13 whether or not it was a DNS or mitigated DNS or a
14 significant project.

15 Then, under the rules, after the Commission
16 issues its determination, which I understand, by the
17 way, that it was prepared to do, once it issues a
18 determination, the County can claim that it has a
19 right to assume lead agency status under the rules,
20 and there is a specific rule that says that they
21 cannot do it before the DNS has been issued by the
22 lead agency.

23 In other words, they cannot do it now
24 because there's been no DNS issued. But they must do
25 it within a 14-day period after the DNS is issued by

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1 the WUTC. So if they desire to do that within that
2 14-day period, then, under -- and I think I'm talking
3 about 197-11-340, if they desire to do that, they can
4 certainly try to do it. We might still have a
5 problem with it, because they have no jurisdiction.
6 But other than that, they might still try to do it.

7 The rules, in other words, contemplate
8 everything that we're talking about here and are very
9 clear, and it's also very clear that what happened
10 here is not correct. And if you have the authority,
11 Your Honor, to get this straightened out, we
12 certainly would appreciate that.

13 JUDGE BERG: Thank you, sir.

14 MR. WALKLEY: Okay.

15 JUDGE BERG: Let me hear from Mr. Stier,
16 and then, Mr. Cummings, I'll come back to you. I'm
17 thinking that your comments in response might also
18 address whatever Mr. Stier may have to make.

19 MR. CUMMINGS: If I could just make it
20 clear for the record, I haven't received Mr. Stier's
21 responsive document, so I'm at a little bit of a loss
22 or disadvantage. I'm sure there's probably some
23 error in faxing, but --

24 MR. STIER: Well, all I know is my
25 secretary faxed everything out at once. I said, Fax

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1 it to all the parties, including Mr. Cummings. And
2 unfortunately, she was gone today and I didn't have
3 time to retrieve the fax sheet, so I can't respond.
4 But I'm surprised by his statement.

5 JUDGE BERG: Let's go forward, and then
6 maybe, if we need to take a break, Mr. Cummings, for
7 you to review the filing, we'll, you know, do so. I
8 understand that that's maybe less than ideal, but
9 I'll try and accommodate you along those lines.

10 MR. CUMMINGS: Thank you.

11 MR. STIER: Thank you, sir. I agree with
12 Mr. Walkley's comment that this is -- this matter has
13 become overly complicated, and it really is quite
14 simple, but I have to admit it's very easy to get
15 caught into the circular nature of the situation.

16 There's several circular aspects. The
17 first one I find, just as a general point, the
18 position expressed by the Staff that this matter is
19 limited to public safety is somewhat of a disconnect
20 from the point that it has to be then -- that the
21 environmental issues, the broad environment issues
22 especially relating to the siding and so forth, have
23 to be considered.

24 If this, in the opinion of Staff, and by
25 the way, I disagree with that opinion wholeheartedly

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1 at this point, but that's not for us to determine
2 today. I'm actually surprised to see that argument
3 being raised at this time. That's the issue of the
4 scope of evidence at the later hearing.

5 But if the issue is, as they say, just
6 public safety, then we don't have anything to talk
7 about here, you know. We're talking about
8 environmental statements and sidings and wetlands and
9 all this material, and the Commission Staff
10 apparently think's that's all irrelevant. And I
11 don't agree with that, I want to make clear. But I
12 think it is somewhat an indication that people are
13 tying themselves into theoretical knots here and we
14 need to step back and look at this thing a little bit
15 more broadly as to what we're doing.

16 Now, first of all, I think we need to do
17 what we do in any hearing. We should look at the
18 record and look at the decision on lead agency
19 status, because this is a public agency and there's a
20 process to do these things.

21 And the first thing that strikes me in this
22 matter is that on July 11th -- I'll stand by that,
23 Bob -- there was an indication that the County did
24 what they -- or the UTC did what they're supposed to
25 do. They claimed lead agency status and served

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1 notice to the County and BN and the state that they
2 had done so, and requested comments.

3 Now, looking at the record, what happened
4 next is very important. What happened next was
5 nothing. Nothing happened. The County did nothing.
6 To date, as we sit here, I've not seen one thing from
7 the County that explains exactly what the problem is
8 environmentally out there. That's never been --
9 never been articulated in any formal fashion. Now,
10 that's pretty important, from a procedural point of
11 view. There is no record that shows that the County
12 has standing whatsoever, any whatsoever to claim lead
13 agency status.

14 Now, I'm familiar a little bit with
15 administrative law and it seems to me that it's an
16 abuse of discretion to make an administrative
17 decision when you have no evidence in your record to
18 base it on. As I recall, that was called arbitrary
19 and capricious, at least clearly erroneous, and
20 perhaps even an error of law. And it -- you know,
21 and I contend that there was no information available
22 to, number one, to make the assumptions that they
23 made.

24 Assumptions appear to be, although I'm not
25 quite sure, that, number one, that the County has a

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1 complaint, no evidence. No evidence. Number two,
2 that the County is going to ultimately have licensing
3 authority, and that's a terminology in the WAC,
4 licensing authority. That is what they have to have
5 to kick in these presumptions as to where lead agency
6 status should go. And Mr. Walkley has spoken at
7 length on that issue. And number one, it sounds to
8 me like the County has no licensing authority within
9 the railroad right-of-way, and number two,
10 everybody's making a big assumption that there's
11 going to be some kind of a permit application made to
12 them, and there's no basis for that. So once again,
13 no evidence that there's any licensing authority on
14 the side of the County.

15 Now, the cul-de-sac, that's a minor issue,
16 and you heard Mr. Walkley say that if it's going to
17 be used as a club, it's going to drop out of this
18 case. You know, basically, it's there to make things
19 more palatable to the County, but if it's going to be
20 -- if we're going to be victimized by that
21 contribution, then it's going to disappear and --
22 but, yes, it's in right now, that minor issue is in
23 right now, and I think that that modification of
24 dropping the cul-de-sacs, if that's what this thing
25 hinges on, should be considered by the UTC in making

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1 its procedurally correct decision on whether or not
2 to transfer lead agency status, which hasn't been
3 done.

4 The third issue is there's no evidence, and
5 the third issue is it was done improperly. It was
6 done by the wrong person. It says right there who
7 it's supposed to be done, and Mr. Thompson admits it
8 wasn't done that way. And as far as this hearing
9 should be concerned, it's a nullity. So -- and the
10 decision hasn't been made.

11 The fourth issue here is that it's my
12 understanding that the Commission was in a position
13 that they would have -- they could have made and
14 perhaps were going to make a threshold determination
15 quite some time ago, were it not for all of a sudden
16 this firestorm over lead agency status.

17 And fifth, not that I think that it's a --
18 that it's a requirement, by any means, but since we
19 are in a -- we're all a big family here and it seems
20 like there should have been some opportunity for
21 comment on the action to transfer lead agency status.
22 If there had been, perhaps none of this would have
23 happened and we wouldn't have wasted two weeks
24 flailing around on this issue. But that didn't
25 happen. So you know, I'm sorry. I don't mean to be,

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1 you know, pounding on the UTC about this, but they
2 made the call. And -- or the Commission Staff made
3 the call and the call is extremely prejudicial to the
4 interests of the state and of Burlington Northern,
5 and it was based -- it wasn't based on any evidence
6 that was in the record.

7 So the question next becomes what do we do
8 next in relation -- we have a hearing. And I think
9 this is the point of your question. If -- let's say
10 we went -- none of this had happened, and let's say
11 the County -- or excuse me, the UTC Staff had issued
12 a determination, a threshold determination. Let's
13 say -- let's look at the scenario of -- let's say
14 it's a determination of nonsignificance. The County
15 can object to that. There's a period of time after
16 they issue that where they can object, and they can
17 ask, under the rules Mr. Walkley mentioned, come in
18 and request what they call an assumption of lead
19 agency status. There's a remedy. And that may --
20 and then UTC would make a determination if that's
21 appropriate, and if there's a problem, then there's
22 an appeal mechanism to the DOE.

23 But that scenario, to assume all that's
24 going to happen and -- you know, that means you could
25 never have a hearing if there was any outstanding

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1 environmental issue, you could never have a UTC
2 hearing on any kind of a closure or any other case
3 that affects land or social situations like the
4 welfare of people in the vicinity of an action.
5 That's what that means. And that's not the intent.

6 Now, the UT -- the SEPA rules had this
7 ongoing process. Now, how do you take that fact that
8 I just said and coordinate it with a hearing? Well,
9 it's very easy. There's lots of ways to do it. Mr.
10 Thompson mentioned several of them. You can
11 segregate issues, you can leave the hearing record
12 open, you can perhaps, in this situation, if there's
13 a DNS and no objection, you can proceed and finalize
14 it. You know, there -- but to predict what's going
15 to happen at this point without any evidence in the
16 record is inappropriate.

17 Now, in this particular situation, we don't
18 know what the UTC would have done, although we have
19 reason to believe it would be issue a DNS. And the
20 County can be perfectly protected under the rules,
21 but the fact here is that there's -- in all this
22 scenario, and this is a simple part of this, none of
23 this has anything to do with the hearing that's going
24 to be conducted on the 30th. And that hearing goes
25 into, essentially, issues of safety, transportation

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1 needs in the area and the effect of this action on
2 them, and it goes into the fact that this relates to
3 the need to promote intercity rapid passenger rail by
4 constructing the siding. Okay. Those are the
5 issues.

6 And environmental issues arguably relate
7 only to that last issue, true environmental issues.
8 Now, there have been cases that say, and it's pretty
9 much accepted, that traffic issues, even, you know,
10 light safety issues can be social issues, I would
11 call them, can be, quote, environmental, and so that
12 would bring in that aspect those first two points
13 that I just gave you.

14 However, those particular issues are
15 exclusively vested in the UTC, the review of those
16 issues is their responsibility, by statute. They are
17 the party or the entity vested with the expertise and
18 recognized by WAC, by Ecology as the entity vested
19 with the expertise to look at these issues, those
20 very issues. Not the County. It doesn't have
21 anything to do with the County from an environmental
22 point of view.

23 MR. WALKLEY: Right.

24 MR. STIER: And the County has a forum to
25 come in at this hearing and raise their objections,

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1 and we have a process for it. Now, to say that, for
2 some reason, we have to delay the UTC hearing to
3 address issues that the UTC has special expertise and
4 fully equipped to handle in a total due process forum
5 is, frankly, ludicrous.

6 Now, the other issue, of course, that
7 complicates it is the siding that apparently Staff
8 says has nothing to do with this, so that, if you
9 believe them, then I guess there's no reason for a
10 continuance. And I guess we're arguing against
11 ourselves when we say it does have something to do
12 with this, and we do believe it does.

13 However, Mr. Walkley's pointed out to you
14 that, number one, there's no obligation to seek a
15 permit in regards to that, and number two, no permit
16 has been sought at this point, and number three,
17 we've heard not one scintilla of evidence in the
18 record that there's an environmental problem out
19 there.

20 So we're going to delay the hearing based
21 on some fiction and delay the UTC from looking into
22 issues of safety and public welfare in that vicinity
23 and other issues of state policy because of something
24 that we don't even know, as we sit here, if there's
25 anything to even object about. So I think it is a

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1 lot simpler than this convoluted morass that, at
2 first blush, it looks like we're involved in. Thank
3 you.

4 MR. WALKLEY: Your Honor, if I may, I agree
5 with everything he said, including the fact that it
6 was July 11th. I had a chance to check.

7 JUDGE BERG: That's an important concession
8 to make with Counsel at the table.

9 MR. WALKLEY: Yes, sir, I concede to my
10 friend that it was, in fact, July 11th. July 5th was
11 the day that the Commission received the checklist
12 from the BNSF, July 2nd, but notice that it's been
13 six weeks already. To make a threshold determination
14 can be done much faster than that.

15 But I might say this. There were some
16 cases cited by the County that I have searched on
17 this issue which is before you today, and that is
18 under 197-11-070, what do the courts say about
19 whether this hearing could proceed or not. And as
20 you've seen in our argument, it's very simple. The
21 hearing is not an action. In other words, you're not
22 performing an action when you have a hearing; you are
23 attempting to gather facts.

24 The action, and the only action here, will
25 be the decision by the UTC, the Commission, the three

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1 members of the Commission, as to whether or not this
2 crossing should be closed. That is the action, not
3 the hearing.

4 So to argue that the hearing cannot go
5 forward because facts may be adduced and facts may be
6 heard is ludicrous.

7 But there is a case, and I -- if anybody
8 wishes to see it, there's an unpublished opinion
9 dated January 29 of this year, 2001, from -- it's an
10 appeal from the Superior Court of King County, and it
11 was decided by the Court of Appeals, Division One,
12 and it's called Chinatown International District Save
13 Lane Street vs. City of Seattle, and I have copies of
14 it here. It is not directly on this point, but you
15 will see, when you read it, it does talk about
16 197-11-070, and it talks about a case that's even
17 worse than anything the County can imagine here, and
18 that's where a city council makes a decision to
19 proceed with a certain proposal, and the Court is
20 saying that not even a decision by the city council
21 was violative of this act or of the rule because
22 somebody else made the final decision.

23 So Your Honor, you can conduct a hearing
24 because somebody else is going to make the final
25 decision. That somebody else, of course, are the

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1 three Commissioners.

2 MR. STIER: Your Honor, I have one thing I
3 forgot, and it is very important and it's along these
4 lines. You know, this is the very last --

5 JUDGE BERG: All right.

6 MR. STIER: If Bob and I are completely
7 wrong and the broad issues are here, then there's a
8 failsafe mechanism that -- there's perhaps a policy
9 against piecemealing environmental, but that's not a
10 requirement that you can't piecemeal environmental.
11 And this thing -- the problem here is this thing has
12 to play out on that forum and this forum. And our
13 forum's pretty specific and fairly nonenvironmental,
14 as that term is conventionally looked at. It relates
15 to a crossing closure.

16 But if -- even if within the context of
17 that proceeding, we should be looking at wetlands and
18 all this business, there's still a way to do it,
19 because, you know, if they're right, a permit must be
20 made and then the County can look at it. And if
21 Bob's right and a permit doesn't have to be made,
22 well, then, it was preempted, anyway, and we never
23 had to send it over there.

24 So either way, either they didn't have a
25 right in the first place to look at environmental at

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1 all or they will get to look at environmental at that
2 point. And the point here is the environmental
3 relates not to the closing; it relates to the
4 construction. That's clear. And they're going to be
5 able to look at the construction. I mean, nothing's
6 going -- if it requires a permit, it won't happen
7 until an application's made. There will be nothing
8 there. It can't happen.

9 Once again, if we don't -- if the railroad
10 doesn't have to make a permit application because of
11 preemption, well, then that's the way it is and they
12 never had a right to look at that in the first place,
13 so they're not harmed. So either way, you know,
14 there is a failsafe mechanism here.

15 JUDGE BERG: I understand, from comments
16 filed by Snohomish County, that they say it is
17 possible to bifurcate these processes, but that it
18 was not an efficient use of resources. And so I want
19 to make that clear that I'm cognizant of that
20 position.

21 Mr. Cummings, I want to give you an
22 opportunity to present some response and possibly
23 give the County's perspective on what the County's
24 role or authority is in this matter, and then we're
25 going to take a short break and -- to give you, Mr.

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1 Cummings, some opportunity to look at the comments
2 filed by the Washington Department of Transportation,
3 and then I have some other follow-up questions that I
4 want to pose to parties.

5 And Mr. Thompson, I don't mean to leave you
6 out of the mix, but I think for now, I just want to
7 hear from Mr. Cummings. And then, when we come back
8 from a break, if you have other matters that you
9 think need to be raised, I'll give you that
10 opportunity.

11 MR. THOMPSON: Thank you.

12 MR. WALKLEY: Your Honor, are we only on
13 the line item number one of your five-item agenda?

14 JUDGE BERG: No, actually, we've made quite
15 a bit of progress, and the parties' ability to
16 assimilate the issues has been very helpful, but
17 there are some other matters I want to check off and
18 it will give me some time to look my notes over on a
19 break, as well.

20 MR. CUMMINGS: Thank you, Your Honor. A
21 couple matters. Again just for the record, Jason
22 Cummings. The checklist submitted by Burlington
23 Northern Santa Fe Railroad Company for the SEPA
24 review, Section 10 on page four states, List any
25 government approvals or permits that will be needed

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1 for your proposal, if known.

2 The first listing is the Corps of Engineers
3 Section 404 permit. The second permit they identify
4 is a Snohomish County grading permit. The
5 applicants, in their own environmental checklist,
6 identify the need to obtain a permit from Snohomish
7 County for construction of cul-de-sacs as part of
8 their overall project. Even Mr. Walkley has conceded
9 that they believe this entire matter should be
10 considered by the UTC. When I say the entire matter,
11 I'm talking about the siding, the pertinent
12 construction activities, including cul-de-sacs.

13 Right there is what triggers the ability of
14 Snohomish County to act as the lead agency in this
15 matter. The County was notified, obviously, on the
16 11th, along with everyone else, they contacted the
17 UTC within the required time frame, and the UTC
18 conferred with the Department of Ecology and reached
19 a conclusion that the County was the appropriate lead
20 agency because the applicant identified the need to
21 obtain a permit from the County. That's what the
22 WACs require as to who should be a lead agency.

23 Now, in terms of the actions as a lead
24 agency, the parties who are contesting before you
25 today the status as the County as lead agency or the

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1 decision of the UTC, they have a right under the WACs
2 to appeal to Ecology if they're concerned, but
3 Burlington Northern has not availed themselves of
4 that process.

5 For them to come in here, they obviously
6 are raising the issue, but they certainly had a right
7 for remedy.

8 MR. WALKLEY: We still have it.

9 MR. CUMMINGS: And they certainly do, but
10 they haven't exercised that right.

11 MR. WALKLEY: Not yet.

12 MR. CUMMINGS: Now --

13 JUDGE BERG: Mr. Walkley, I understand that

14 --

15 MR. WALKLEY: I'm sorry.

16 JUDGE BERG: -- this is an issue you take
17 very seriously, and believe me, I kind of hear those
18 voices in the back of my head, as well.

19 MR. WALKLEY: I'm sorry, Your Honor.

20 JUDGE BERG: All right. Thank you very
21 much. Appreciate it.

22 MR. CUMMINGS: So from the perspective on a
23 lead agency status, that's what we have. In terms of
24 some strange, you know, issue of -- well, there can't
25 be any environmental issue, the checklist itself

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1 identifies a plethora of environmental issues, and
2 that has been submitted and reviewed, they're talking
3 about filling wetlands, they're talking about
4 changing transportation routes. Both the state and
5 Burlington Northern have been approached by law
6 enforcement, fire, the school districts. All have
7 voiced their concerns.

8 Now, apparently this, to the state and
9 Burlington Northern, shouldn't amount to any type of
10 impact, because apparently the local jurisdictions --
11 I guess their impact on themselves apparently is not
12 significant in terms of the overall need of the
13 Railroad or the Department of Transportation.
14 Obviously, that's an issue for the UTC to decide.
15 But to help the UTC make that decision, environmental
16 review needs to be performed, and that is the purpose
17 of SEPA.

18 Now, obviously, there is the opportunity to
19 say, Let's hold this evidentiary hearing and then
20 come back some later time when SEPA review is
21 concluded. Mr. Stier's right. If there's a DNS,
22 well, there wouldn't be any reason to have any
23 further hearing. But if there is a determination of
24 significance made, an environmental checklist -- or
25 environmental EIS is required, then it's going to be

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1 the burden on all the parties to come back for a
2 second hearing, because the hearing is what creates
3 the record for the decision-makers to act.

4 We've heard a lot of this, about, well, a
5 hearing is just a hearing, it's not an action under
6 SEPA, and therefore shouldn't be triggered. But 070
7 is very specific in terms of what it's trying to
8 prevent. It says, Until a final determination has
9 been made, no action shall be taken that will limit
10 the choice of reasonable alternatives. Who makes the
11 decision? What record is before them?

12 Mr. Stier was very concerned about records
13 and what's in a record for someone to act on. What's
14 going to be in the record for the UTC Commissioners
15 to make their decision on whether or not a closure
16 should be done. The record is going to be the
17 hearing. Have all the available environmental
18 alternatives, reasonable alternatives, as envisioned
19 under SEPA, been presented in that hearing to be
20 completed in a record so the Commissioners can make a
21 decision. That's what SEPA requires.

22 JUDGE BERG: Let me make it clear that I
23 don't perceive either the Washington Department of
24 Transportation or BNSF as downplaying the public
25 safety issues. I understand there are other issues

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1 that have been talked about, but I don't see that as
2 something that's a concern.

3 Mr. Cummings, if there were no cul-de-sac
4 proposal or no cul-de-sac portion to the overall
5 proposal, then what would the County's role or
6 authority be in this matter?

7 MR. CUMMINGS: Obviously, the County's role
8 in the matter would be affected by the determination
9 of Burlington Northern when it comes to them
10 submitting permits to the County. They've insinuated
11 that they may want to comply with local requirements.
12 Well, if they're coming in to apply for a grading
13 permit to do work on the siding, which they also say
14 is exempt -- or I shouldn't say exempt, but under the
15 federal jurisdiction, if they come in and apply to
16 the County, the County would have some permit
17 authority, which would then trigger SEPA.

18 If they cut the cul-de-sacs and decide to
19 deadhead the roads, obviously that limits the
20 County's ability.

21 JUDGE BERG: Okay. Let's take a break.
22 We'll reconvene at 3:20. Be off the record.

23 (Recess taken.)

24 JUDGE BERG: Let's be back on the record.
25 Mr. Cummings, did you have a chance to look over the

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1 comments of the Washington Department of
2 Transportation?

3 MR. CUMMINGS: I did, Your Honor, and
4 essentially, it's nothing surprising. And in the
5 sense that, obviously, I haven't really looked too
6 much at the issue of the ultra vires, but I assume
7 that the Judge will either decide it's an ultra vires
8 act or it's not and whether or not this is the
9 appropriate forum to raise it in or not.

10 I guess that's essentially my one main
11 response, is that if they have an issue with the
12 agency, Burlington Northern has the ability to appeal
13 upon the Department of Ecology to settle the lead
14 agency dispute.

15 JUDGE BERG: Fine. And I believe that Mr.
16 Stier, in his oral comments, certainly hit on all of
17 the major points that I recall from his comments.

18 MR. CUMMINGS: Certainly. And the
19 remainder seemed to adopt Burlington Northern's
20 responses to the remaining four questions, so to that
21 end, it's certainly no surprises or anything along
22 those lines.

23 JUDGE BERG: All right. Mr. Thompson,
24 there's still some question in my mind whether or not
25 there's a dispute between the Commission and the

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1 County regarding lead agency status. Let me just
2 start off by asking, with the benefit of some of the
3 discussion that's ensued, do you know if the
4 Commission intends to take any action, any new action
5 regarding lead agency status?

6 MR. THOMPSON: Well, this is the thing. We
7 had the discussions with the County and with
8 Burlington Northern. I apologize for leaving counsel
9 for Wash. DOT out of the loop, to the extent that I
10 did that, Mr. Stier, but we were -- it is true that
11 Staff was prepared to issue a determination of
12 nonsignificance for this project if Burlington
13 Northern would communicate to us that they did not
14 intend to seek permits from -- well, actually, at the
15 time, it was just a permit for the construction of
16 cul-de-sacs from the County, because our reading of
17 the law was that if there is any permits required for
18 a project from a local -- from a city or county, then
19 the city or county is the lead agency. That's what
20 the rule says. It's WAC 197-11-932.

21 And actually, we thought there was a bit of
22 ambiguity in it, perhaps for situations between two
23 cities or a city and a county, and we called the
24 Department of Ecology and asked a -- certainly, we
25 don't have the word of the Department of Ecology on

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1 this, but a person who works at the Department of
2 Ecology said, yes, that means that where there's a
3 state permit required and a local government permit
4 required, then the city or county is the lead.

5 And so we felt held by that rule to, you
6 know, that the county would be the lead. I didn't
7 think we had a choice in the matter. And I think
8 from this -- as long as Burlington Northern indicates
9 that it will seek a grading permit for, as I gather
10 now, and as we learned in response to my inquiry
11 whether they would withdraw the statement in their
12 checklist that they were going to need to get these
13 permits, they then said no, not only are we going to
14 get the permit -- still get the permit from the
15 County for the cul-de-sac, but we're also going to
16 get one for the siding.

17 So at that point, we didn't think we had a
18 whole lot of choice in the matter. And that's when
19 Mr. Nizam sent the letter to the County saying, you
20 know, we think you're it.

21 I think probably, though, the agencies can
22 come to any sort of agreement they want about -- if
23 there's no dispute between them about -- or with the
24 applicant, for that matter, as to what their
25 responsibility is for SEPA review. And I guess

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1 Staff's preference at this time, and this was the
2 suggestion at the Railroad and Wash. DOT, was that we
3 share co-lead status, and so if -- you know, I mean,
4 we're here to accommodate, but to comply with the
5 law, so if that works, we're happy to do it. I'm not
6 sure what the preference is of the parties at this
7 point, having listened to the discussions so far. So
8 that's all I have to add.

9 JUDGE BERG: All right.

10 MR. WALKLEY: Your Honor, if I may, just to
11 clarify the record.

12 JUDGE BERG: Yes, sir.

13 MR. WALKLEY: I did not -- I don't believe
14 that I ever indicated to Mr. Thompson that he may
15 have misunderstood it, but I don't think I ever
16 indicated that we were actually going to apply for a
17 permit for the siding construction itself. What I
18 did say was memorialized in a letter to him. It
19 said, basically, that we would work -- we intended to
20 work with the County to -- on reasonable at-grade,
21 you know, grading permit type requirements, if things
22 like that were required, but I don't think we went as
23 far as to say that we would actually seek a permit.

24 I do confirm to him that we indicated that
25 the cul-de-sacs would not, at that time, at least,

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1 would not be pulled out of the project, but as long
2 as everyone understands that they are there strictly
3 as an amenity and not as a required feature and could
4 be withdrawn at any time.

5 I cannot clarify for you whether the
6 Railroad will or will not withdraw the cul-de-sacs,
7 because I would need to confer further with my
8 client, but that -- I just thank you for giving me an
9 opportunity to make that clarification.

10 JUDGE BERG: Well, that touches on a, you
11 know, point that certainly gives me some cause for
12 concern, Mr. Walkley. And that is, in listening to
13 all of the different perspectives and the pieces to
14 the puzzle, if I can just use that as some kind of an
15 analogy, it seems that the pieces are here that could
16 fit together, but that they're really turned around
17 the wrong way and they aren't fitting together.
18 Parties really haven't had a chance to think about
19 all the various ramifications of their positions.

20 For example, the most notable being this
21 issue of whether or not the BNSF is somehow locked
22 into including the cul-de-sacs in its proposal,
23 whether there's any -- in addition to whether or not
24 there's any requirement for a permit from the County
25 for grading, and the disclosure by Staff that, just

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1 based upon their initial perception of the scope of
2 the proceeding, they were prepared to issue a DNS,
3 all these things kind of give me, you know, some
4 concern.

5 Not to minimize the issue of inconvenience
6 to witnesses whenever any proceeding is continued, I
7 couldn't get a really good feel from either the BNSF
8 comments or the Washington DOT comments of exactly
9 what window -- what the window of opportunity to
10 proceed might be.

11 Can you tell me, in possibly some more
12 detail, the real impact of rescheduling a hearing say
13 six weeks down the road in order to give parties an
14 opportunity to clarify their positions and their
15 authority and to then come forward with an
16 evidentiary presentation? What does six weeks do to
17 BNSF?

18 MR. WALKLEY: Your Honor, the position that
19 -- the responses that I filed on the 16th talk about
20 that. Basically, there are two alternatives for
21 building this siding, and once again, BNSF isn't
22 trying to hide anything from anybody. There are two
23 alternatives, English North and English South.

24 The immediate impact of a decision to delay
25 is not just the witnesses, which is bad enough, but

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1 it's the fact that there's no decision for at least
2 six more weeks than had we had the hearing. No
3 decision means that with fish windows, construction
4 schedules, planning that has to go on, there are only
5 short windows of opportunity to construct something
6 like this. If it had to be constructed, for
7 instance, in the north, we feel that there would be
8 only certain opportunities, called fish windows, in
9 which that construction could be scheduled.

10 JUDGE BERG: Can you help me with that? I
11 mean, I haven't heard the expression fish windows,
12 and to whatever extent you can flesh out what the
13 actual deadlines are, the milestones for these
14 various alternatives, it would be helpful.

15 MR. WALKLEY: Thank you, Your Honor. I
16 profess that I'm not an expert on this, and we ought
17 to have a BNSF engineer here to explain it, but I'll
18 try the best I can.

19 The southern alternative will not require
20 -- that is, English South will not require any
21 modification of any stream whatsoever. The north
22 alternative, because the right-of-way has to be
23 widened some to accommodate a siding extension, the
24 northern alternative, we feel, at this time, after
25 preliminary engineering and so on, would require a

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1 modification of a fish-bearing body of water, and we
2 would be prepared at the hearing here to go into
3 that. I don't know how that could be avoided.

4 If that is the case, we feel that it will
5 trigger a far more extensive environmental permitting
6 through the United States of America, not through
7 Snohomish County, but through the United States of
8 America, through the Corps of Engineers and the
9 various agencies, and the fish window metaphor comes
10 from the fact that when these agencies permit work on
11 a stream, they want the work -- depending on what it
12 is, they want the work to be only during certain
13 times of the year, which are tuned to the activity of
14 the salmon. In other words, if it's a crucial, you
15 know, egg-laying season or something of that nature,
16 they would say you cannot build, except in this
17 little window of time between this month and that
18 month. That is one example.

19 There can be other examples. We don't want
20 you to plant certain plants until such and such time
21 and so on. All of that becomes extremely complex.
22 And if we are uncertain about whether or not this
23 crossing at 156th can be closed, then that process,
24 that other alternative, has to be progressed. And it
25 must be progressed as long as there is doubt about

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1 the decision to be made here on 156th.

2 So I cannot sit here, simply because I do
3 not know, and tell you that there's some kind of drop
4 dead date, but I can say to you that every day that
5 goes by makes it more and more difficult to continue
6 these two alternatives.

7 JUDGE BERG: But you won't --

8 MR. WALKLEY: The delay itself may have the
9 effect of eliminating one of these alternatives, and
10 that is English South.

11 JUDGE BERG: But what your client needs is
12 a final determination?

13 MR. WALKLEY: Yes.

14 JUDGE BERG: And that can't occur until a
15 SEPA determination is made, whether it's done within
16 the context of the presently-scheduled hearing or as
17 a follow-up.

18 MR. WALKLEY: Yes, Your Honor, except --
19 but that does not imply that the hearing should not
20 be held, because, again, the hearing is not the
21 action within the rules, as we've discussed in our
22 papers. The action involved is the closure. The
23 closure is the government action that is being
24 weighed; not the siding and not the construction and
25 not the fish, not anything else.

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1 The action cannot be the hearing, as I
2 point out in my pleadings, because you, Your Honor,
3 for example, would agree that you do not have
4 authority to make the decision for the Commission.
5 You have authority to conduct a hearing and you have
6 authority to make recommendations to the Commission,
7 but those recommendations can be accepted by the
8 Commission or rejected by the Commission or whatever.

9 Your process, as I understand it, within
10 the rules of the Commission and within the statutes,
11 is to gather evidence and help us conduct a hearing
12 that will gather the evidence, both pro and con, on
13 all of the relevant issues involved in the permit --
14 in the petition request. And the petition request is
15 may we please close the at-grade crossing at 156th
16 Street. Now, that is the question.

17 And you will conduct an evidentiary hearing
18 to determine the comments not only of the parties in
19 this room, but of the public and everything else.
20 You then gather that together and you make a
21 recommendation to the Commission, but the Commission,
22 as we all know, has its own mind and the Commission
23 will act only when it's satisfied that the SEPA
24 process has been completed, its SEPA process has been
25 completed, and that the hearing process has been done

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1 fully and fairly and so on.

2 So that's our whole point. There is no
3 conflict between them. And as a matter of fact, I do
4 cite some rules here that indicate not only is there
5 no conflict, but that the hearing process itself is
6 exempt from SEPA, and I can't pound away at that
7 enough. The rule says that. And not only that, but
8 the third point is that the hearing process is part
9 of the Commission's decision-making process.
10 Therefore, it has -- it stands on its own legs and
11 should not be interfered with by SEPA.

12 JUDGE BERG: That point is made very
13 clearly. Do you think it's appropriate for the
14 presiding officer to make recommendations without the
15 benefit of a SEPA determination?

16 MR. WALKLEY: These are theoretical --
17 first of all, I don't know if they'll ever arise,
18 because if -- what Mr. Stier and I are saying here
19 today is that if this gets back on track, if this
20 gets back the way it should be, there should be no
21 reason in the world why there wouldn't be a
22 determination, either before the hearing or before
23 your decision comes out.

24 As I understand it, a hearing would be held
25 and then you would take a period of time to analyze

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1 it, make your recommendations. That would be
2 submitted to the parties for comment, I assume. That
3 whole process can continue. You can make whatever
4 recommendation you want, consistent with the record
5 and so on, without limiting, without -- remember the
6 two tests that have been brought before us by the
7 County. One, will it create an environmental problem
8 to have a hearing. I submit to you there's no way a
9 hearing will create an environmental problem unless
10 the place we're going does not have indoor plumbing
11 or something. And secondly, will it -- more
12 importantly, will it limit alternatives available to
13 the decision-maker. And that role, I submit, would
14 never be violated either by a hearing because the
15 hearing officer does not make the decision. He's,
16 therefore, incapable of limiting the alternatives,
17 even if there isn't a SEPA determination through the
18 whole process, until the bitter end, when the
19 Commission itself -- these two things should be going
20 on track with each other, and frankly, until the
21 County attempted to seize lead agency status, this
22 was doing just fine.

23 The Commission had the lead agency status,
24 the Commission was doing its review, and the
25 Commission was about ready to issue a decision. If

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1 the County didn't like it, that's fine, and it's
2 provided for in the rules. But then it got derailed,
3 if I could use a railroad term. It got derailed by
4 letter that was late, it was over 15 days late, that
5 is, it was over the 15-day period in which they're
6 supposed to write such a letter, and whether or not
7 there were nefarious phone calls or whatever, the
8 point is it simply was not done.

9 It can be repaired, I submit to you, simply
10 by the Commission Staff saying, Whoops, we goofed.
11 Our Director of Regulatory Services is back from
12 vacation. He can make the decision, as only he has
13 the authority to make it, as to what they should do.
14 They can pull the lead agency status back into the
15 WUTC. They can then proceed to determine whether
16 they are ready to make a determination or whether
17 they're not, and they can and will advise the County
18 as to what that determination is.

19 The County then has the right, under the
20 rules, to -- various rights under the rules, as does
21 the applicant and other people. But that process
22 goes on, and if it hadn't been interfered with, it
23 would have been done already. And then that
24 interference is used for a reason to stop this
25 hearing, and I find that very disturbing.

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1 MR. STIER: Your Honor, since you said I
2 hadn't made that completely clear, I'd like a very
3 brief opportunity to clarify a little bit on this,
4 because I see -- I have a bit of a different
5 perspective than Mr. Walkley -- and not that I
6 disagree with his comments. I completely agree. But
7 I think that the -- I think I would like to emphasize
8 the fact that we've got the cart in front of the
9 horse here, and a continuance will perpetuate that
10 situation.

11 And I think that I'm looking at that
12 197-11-055, and it says, Timing of review of
13 proposals, and subsection (2)(a), (ii), I think,
14 states it pretty well. Preliminary steps or
15 decisions are sometimes needed before an action is
16 sufficiently definite to allow meaningful
17 environmental analysis.

18 Now, think about that. If this -- you
19 know, there's not going to be a siding likely until
20 there's a closure. And those elements of the
21 decision relating to closure are, I think, very
22 arguably, unrelated to the question of the
23 environmental aspects of the grading and the fill of
24 the wetlands. And I'm once again assuming the
25 cul-de-sacs are coming out, because I think that it's

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1 very clear, when Mr. Walkley has an opportunity to
2 talk to his clients, that's going to happen. So
3 we're just talking about the siding, which can't
4 happen until the closure. So that's one aspect.

5 The other aspect of this is there's a total
6 duplication from my conversations with Mr. Cummings
7 on a very major aspect of this case, which is traffic
8 patterns in the area, which is uniquely within the
9 area of expertise of the UTC. Now, the way we've got
10 this thing now, the cart is -- the cart before the
11 horse is the fact that somehow the County has, I
12 think most admirably, got -- convinced the Staff to
13 give them the cart, which is being the determination
14 of the traffic circulation impacts, which is supposed
15 to be decided by this body, I thought. And they're
16 going to make a decision on it before this agency
17 does, and there's no need for that.

18 The horse should be in front of the cart,
19 and this agency should be making the decision. We
20 should get this back in line. I mean, we not -- I
21 mean, talk about a sufficient process. I mean, this
22 is a lot better than some dark room in Snohomish
23 County. We have an open hearing with public input
24 and a well-considered decision to make here regarding
25 these issues. Why are we allowing the cart to run

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1 the horse and make decisions on these very issues
2 we're vested in?

3 And the rules provide for this. They say
4 -- and then I'm going on when I say -- let's see.
5 Agencies may also organize environmental review in
6 phases. I mean, this is the rules. I mean, there's
7 no obligation to stop this thing, to make a
8 determination or to delay determination of an
9 essential fact, you know, to allow a determination to
10 be made by an unrelated body of that essential fact.
11 That's what we're talking about here. And yes, I
12 think it's very true, but part of our argument is I
13 think it's very true, although I don't agree with
14 Counsel's representation that our sole remedy is to
15 petition the DOE at this time.

16 Our sole remedy is to ask the agency, which
17 arguably has not even acted, to make the appropriate
18 decision. And even if we're wrong and they made a
19 decision, they have every right to say, We made a
20 mistake, we didn't consider this, and after going
21 through this very long hearing and hearing all the
22 arguments, we tend to agree that maybe we shouldn't
23 have handed it over to them. They can do that, too.
24 There's nothing that stops that.

25 And then the County has a remedy. If they

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1 don't like that, then they can go to the DOE. But
2 this thing is completely backwards and it doesn't
3 have to be, and a continuance will only serve to
4 perpetuate that fact.

5 JUDGE BERG: Well, let me just also say
6 that while I understand that the County may have a
7 contrary position to BNSF and to Washington
8 Department of Transportation, there seems to be quite
9 a bit of uncertainty about the process, and this does
10 seem to be a unique situation, such that I would not
11 jump to any conclusions about the County using the
12 process to subvert the petition that's been
13 presented. And it does seem to be a unique situation
14 and I can see where all the parties are trying to
15 advocate for their own position, but doing so under
16 unusual circumstances. In terms of process, the
17 process is definitely unclear.

18 To the same extent, I think -- I agree that
19 BNSF did the right thing by being upfront about the
20 full scope of its intentions without trying to --

21 MR. WALKLEY: Right.

22 JUDGE BERG: -- abuse the process. So I
23 want to try and defuse any tension that may result
24 from those concerns.

25 MR. WALKLEY: And Your Honor, if I might, I

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1 want to just repeat that, regardless of the heat of
2 battle and statements and so on and so forth, the
3 Railroad at this minute still wants to work with and
4 does, in fact, work with Snohomish County every day.
5 It's just that we see no reason for this thing to
6 have gotten the cart before the horse.

7 JUDGE BERG: I've addressed all the
8 questions that I had in order to gather information
9 and to make an informed decision on the issues. Is
10 there anything else that the parties want to bring
11 up?

12 MR. STIER: I have an issue that's
13 unrelated to the matters under discussion, but I'll
14 wait until everybody's spoken to the issue at hand.

15 JUDGE BERG: Okay. Let's just take a quick
16 round.

17 MR. THOMPSON: Nothing.

18 JUDGE BERG: All right. I've got one, as
19 well. You can go ahead with yours first.

20 MR. STIER: Well, there has been involved
21 in this and other matters, and there is some limited
22 depositions discovery that we desire -- the state
23 desires, at least, to do. And I, rather than -- I
24 haven't had a chance to talk to Mr. Cummings about
25 it. I don't even know if he's in a position to

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1 agree, and I don't expect him to agree, but I just
2 wanted to make sure that he's aware of it and the
3 ALJ's aware of that, and that I will seek to
4 informally make arrangements with Mr. Cummings first
5 thing Monday morning and -- under the assumption that
6 I have to, I mean, this thing's getting closer every
7 day, and if there's any problem, then we may seek
8 your assistance, but I don't think there will be.
9 And I'll try to limit these requests.

10 MR. CUMMINGS: Do you have an idea who
11 you're going to depose?

12 MR. STIER: Well, I think I've got -- like
13 I said, but, yes, I'll probably want to talk to some
14 individuals, like representatives of the police or
15 the sheriff. And some of the things that you brought
16 up that there seems to be a bit of shift from what
17 Mr. Norris indicated, and we need to explore that a
18 little bit.

19 MR. CUMMINGS: If we're going to engage in
20 depositions, the County has several they're going to
21 want -- you know, we could also engage in. I guess
22 this is also a concern coming up on the cusp of a
23 hearing. This is kind of late, considering we have
24 discovery cutoff that was --

25 MR. STIER: We'll proceed without it if

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1 you're not going to cooperate. I mean, we'll
2 petition -- you know, I don't want that to become a
3 continuance weapon.

4 JUDGE BERG: All right. Here's what I see
5 happening. What I see happening is Mr. Stier is
6 giving the presiding officer a heads up that there
7 may be a potential problem and just letting me know
8 and -- as a precautionary to let me know that my
9 assistance may be necessary, and emphasis is on may.

10 And that's an appropriate thing to do, and
11 I am available to help parties resolve these sorts of
12 disputes on short notice. I'll commit to the parties
13 that I will do my very, very best to have a written
14 order served to the parties by 2:00 on Monday, so
15 that there will still be some time on Monday for
16 parties to engage in discussions regardless of what
17 the outcome is.

18 MR. STIER: Your Honor, I'll say one thing.
19 Just because of counsel's comment, I will proceed to
20 that hearing without depositions if it has any
21 influence on the continuance. However, and if there
22 is no continuance and I request a deposition, I'll
23 make every effort to recognize the short time frame
24 available to all parties.

25 JUDGE BERG: I understand. And you know,

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1 at this point, that just goes right past me, because
2 I feel that parties will do whatever they have to do
3 to protect the interests of their clients as the
4 proceeding develops, and I just want to make sure the
5 parties understand that I'll do whatever I have to do
6 to get an order to the parties by 2:00 on Monday.

7 And you know, that's not to say you should
8 wait to engage in any other discussions, but that to
9 the extent that helps you decide on what you have to
10 do, then you have that commitment on my part.

11 MR. WALKLEY: Your Honor, may I make a
12 suggestion? It's going to sound strange, because I'm
13 the one sitting here saying I need an immediate
14 answer, and I do, but your comment about, gee, each
15 of you guys is wrestling with a difficult and complex
16 problem, would it make sense for you to hold off your
17 decision until, say, Tuesday at noon to give us, the
18 four of us, a chance to talk some of these issues
19 out?

20 I still haven't given up the possibility
21 that we may be able to work out some kind of
22 clarification, if nothing else. For example, I may
23 know from the Railroad at that time whether or not
24 we're going to drop those cul-de-sacs. Mr. Stier and
25 Mr. Cummings can talk about discovery problems. And

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1 if there's anything significant to communicate to
2 you, we may be able to do that by telephone or
3 something of that nature together, you know, not that
4 individually.

5 And that might allow you also time to
6 review this entire transcript, for instance, that I
7 assume is going to be very large now, and to collect
8 your own thoughts. In other words, I hear you when
9 you say that some important decisions are -- this is
10 an important decision, and we may -- I personally
11 like each one of these attorneys, and they hopefully,
12 at least, can stand me, and I haven't given up the
13 possibility that we could talk together and come to
14 some kind of a resolution.

15 JUDGE BERG: I appreciate that.

16 MR. WALKLEY: On some issues, at least, and
17 make it easier on you.

18 MR. STIER: I guess my point is that I
19 don't think a 2:00 decision Monday and a 9:00 a.m.
20 decision on Tuesday really makes a lot of difference.

21 JUDGE BERG: I understand that Mr. Walkley
22 may be expressing the hopeful side of human nature,
23 and Mr. Stier, you may be expressing the pragmatic
24 side.

25 MR. STIER: Actually, I'm hopeful, too.

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1 JUDGE BERG: What I would -- given the
2 hopeful side of the human nature, which I also share,
3 I'll commit the parties to having that order served
4 by 4:00. I do encourage parties to engage in as much
5 discussion as possible about these various issues.
6 You know, certainly Mr. Stier, I took note that you
7 were -- by your comments that if you were Mr.
8 Walkley's client, that you would be pulling those
9 cul-de-sacs off the board. It may be that that, in
10 and of itself, is not enough to resolve all of the
11 issues that are outstanding between the parties, but
12 I do want to, you know, at least allow that extra
13 time for parties to talk and work things out, and I
14 appreciate that Counsel can work together at the same
15 time they represent separate interests. I don't
16 think I can wait any longer than that to make a
17 decision known.

18 The only other thing that I had on my list
19 was to take note, Mr. Walkley, that you did express a
20 request in the cover letters to some of the filings
21 that certain letters and attachments not be posted on
22 the Internet.

23 MR. WALKLEY: That is correct.

24 JUDGE BERG: As you know, all documents
25 filed with the Commission are public records. And

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1 while the Commission does not make all filed
2 documents available -- for example, documents that
3 are designated as confidential are not made available
4 on the Commission's Web site -- the Commission
5 retains discretion to independently decide which
6 documents to make available electronically. And
7 there really is no process for parties to request
8 that specific nonconfidential public records not be
9 posted.

10 I -- again, to the extent that silence
11 sometimes might be construed as acquiescence, your
12 requests are noted, and -- but I wanted to be clear
13 that if those documents don't appear, it's probably
14 because of other reasons than the request itself.

15 MR. WALKLEY: Thank you, Your Honor. The
16 only -- it's not on behalf of my client that I ask
17 that; it's on behalf of myself. And that is simply
18 that I perceive there to be a tremendous difference
19 between making a public filing in an office such as
20 this and making a public filing in Algeria or Albania
21 or Afghanistan or someplace like that, which is what
22 the Internet is.

23 So I -- and in one case, I did ask -- this
24 is not the only case. In one case, I did ask that
25 the filing be taken off and simply noted that if

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1 anybody wants to see it, of course, they can see it
2 through the Secretary's office.

3 JUDGE BERG: Understood.

4 MR. WALKLEY: But there's a difference in
5 -- just personally, I will note that, and perhaps I
6 can just file. Do you know, Your Honor, whether all
7 the -- everything we file, all of this is going to be
8 posted or not posted?

9 JUDGE BERG: I'll just say generally, where
10 parties don't provide electronic versions, documents
11 don't get posted, but that's generally. I'll let you
12 know that this is a major issue under discussion and
13 development at the Commission, and that if you are
14 interested in having some input to the Commission's
15 decision on the electronic availability of documents,
16 the Commission has conducted a series of bench and
17 bar conferences in which a major discussion has been
18 the utility of a publicly-accessible Web site for
19 lawyers involved in cases and accessing Commission
20 documents. And I'll make sure that your name is
21 added to -- if it's not already on a list of
22 interested professionals, I'll be sure you're there,
23 so you can participate the next time it comes up.

24 MR. WALKLEY: Thank you.

25 JUDGE BERG: All right. Anything else from

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1 the parties be before we adjourn? Thank you,
2 everyone, for excellent presentations. This hearing
3 is adjourned.

4 (Proceedings adjourned at 4:17 p.m.)

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