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

2 JUDGE TOREM: We'll be on the record. This
3 is Administrative Law Judge Adam Torem. It's Friday
4 afternoon, the 13th of February, 2009. It's a little
5 after 1:30, and we are getting started in Docket No.
6 TR-090121. This is the matter of the Burlington
7 Northern Santa Fe Railway Company as petitioner versus
8 Snohomish County as respondent, and this is regarding
9 the proposed closure and abandonment of a railway
10 crossing located in Snohomish County near the City of
11 Stanwood known at Logen Road.

12 Today, I want to go through and take
13 appearances from the parties who are here in Olympia,
14 and also I understand we have at least one intervenor
15 petitioning on the bridge line, and once we get through
16 with appearances, then I want to clarify for the record
17 from my experience the location of the crossing, that
18 it's outside the city limits, and confirm that the City
19 of Stanwood doesn't need to be a party, and then we
20 will go through the issues that are presented in this
21 kind of case under the statute, take up the petition
22 for intervention at that time, and then we will talk
23 about a schedule for a hearing as necessary in the
24 case, and if there are other agenda items, we will go
25 on from there.

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1 Let's take appearances. I'll ask that BNSF
2 go ahead and make your appearance and then Commission
3 staff.

4 MR. SCARP: This is Bradley Scarp. My last
5 name is spelled S-c-a-r-p, and I'm here with Ms. Kelsey
6 Endres. Her last name is E-n-d-r-e-s, and we represent
7 BNSF Railway Company, petitioner.

8 MR. THOMPSON: I'm Jonathan Thompson,
9 assistant attorney general. I represent the Commission
10 staff, and my address is 1400 South Evergreen Park
11 Drive Southwest, Olympia, Washington, 98504. My
12 telephone is (360) 664-1225. Fax is (360) 586-5522,
13 and my e-mail address is jthomps@wutc.wa.gov.

14 JUDGE TOREM: And representing Snohomish
15 County, Mr. Otten?

16 MR. OTTEN: My name is Matthew Otten,
17 O-t-t-e-n. My address is 3000 Rockefeller Avenue,
18 Everett, Washington, 98201. Telephone number is (425)
19 388-6337. Fax is (425) 388-6333, and e-mail,
20 motten@snoco.org.

21 JUDGE TOREM: On the bridge line, are you
22 there, Lynn Logen?

23 MR. LOGEN: Yes, I am.

24 JUDGE TOREM: If you could go ahead and state
25 your appearance and then we will get to your petition

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1 for intervention.

2 MR. LOGEN: My name is Lynn F. Logen. That's
3 L-y-n-n, F, L-o-g-e-n. My address is 15017 Southeast
4 43rd Place, Bellevue, Washington, 98006. My telephone
5 number is (425) 641-1692. I do not have a fax machine.
6 My e-mail address is jynnludy@aol.com, and I'm
7 representing the Logen family.

8 JUDGE TOREM: Let me ask Snohomish County and
9 the Railway officials if they have any indication that
10 the City of Stanwood wanted to take an interest or had
11 any jurisdiction over this crossing?

12 MR. OTTEN: My client advises me that the
13 crossing is outside the City of Stanwood and they have
14 no interest.

15 JUDGE TOREM: Lat time, we had to swap the
16 caption around, and I wanted to make sure that wouldn't
17 be the same issue here. Mr. Scarp, do you agree with
18 that?

19 MR. SCARP: I don't have any information to
20 the contrary.

21 JUDGE TOREM: It's easiest now to just
22 clarify what the issues are in the case. Statute is
23 with RCW 81.53.060, and it essentially addresses one
24 statutory requirement that when a petition is filed to
25 close a crossing of this nature that if it's in the

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1 requirements of public safety dictate, then the
2 Commission will grant the petition and close the
3 crossing.

4 There is a 1949 Supreme Court case from the
5 State of Washington that says once a Commission finds
6 that the crossing would be inherently dangerous, then
7 the Commission should also take up the question of
8 whether the convenience and necessity of the use of the
9 crossing is a factor that tends to be supported or not
10 by testimony from local residents. We've already had
11 numerous comments filed on this petition up to this
12 point.

13 And then finally, the FRA handbook talks
14 about looking at alternatives to closure, and those
15 three issues have been talked about in many Commission
16 cases, but those are the ones that present themselves
17 by statute, by regulation, and by custom in these
18 cases. I didn't see in the petition or in any of the
19 comments any particularly unique issues that needed to
20 be taken up in this case aside from those.

21 Mr. Scarp, I know that your focus is always
22 on the requirements of public safety. Did you have any
23 other issues that you were aware of that we need to
24 take up in this matter?

25 MR. SCARP: I think they all come in, Your

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1 Honor, under the rubric of public safety, it would be
2 fair to say.

3 JUDGE TOREM: And the County, I know you have
4 already filed a waiver through your engineer of a need
5 for a hearing. If there is a full-blown hearing in
6 this case, is there any issue the County sees as
7 necessary?

8 MR. OTTEN: There is no issues that the
9 County would raise.

10 JUDGE TOREM: Commission staff?

11 MR. THOMPSON: I think we would agree that
12 the issues are weighing the hazards of the crossing
13 against the public convenience and need, so that's what
14 we would see as the overarching question.

15 JUDGE TOREM: From my brief review of the
16 comments that have been filed regarding the proposal to
17 close the crossing, I didn't see anything that sticks
18 out as a unique issue, such as flood evacuation,
19 farming animals. There are traffic issues and getting
20 people across a crossing, but nothing to do with
21 emergent issues that we've seen before.

22 So those are the issues, and I want to now
23 turn to the petition for intervention from Mr. Logen.
24 He's raised some personal issues and asked to be a
25 party in the case. Mr. Logen, let me ask you to

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1 restate your petition in summary form now. I'll ask
2 then for Mr. Scarp or Ms. Endres to summarize their
3 opposition to it and see if there is any other input
4 from the parties and go forward, and I will be able to
5 make a ruling on that today. So Mr. Logen, if you will
6 go ahead.

7 MR. LOGEN: Thank you, Judge. Our interest
8 in the proceeding is the fact that we have property on
9 both sides of the track. That is accessed most easily
10 with farm equipment and implements by crossing at the
11 Logen Road crossing. To do otherwise would pose danger
12 to not only ourselves but the general traveling public
13 on the roads that we have to travel. Some equipment
14 that we have we would have to go through the town of
15 Stanwood in order to reach the other parcel.

16 JUDGE TOREM: Can you describe more
17 particularly whether the parcels of land that you or
18 your family members own are adjacent to the tracks or
19 adjacent to the crossing itself?

20 MR. LOGEN: The parcels are adjacent to the
21 track on both the east and west side; more specifically
22 south of the crossing on the east side and north of the
23 crossing on the west side.

24 JUDGE TOREM: Do they abut the crossing
25 itself?

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1 MR. LOGEN: The one west of the railroad
2 does. The one on the east side does not. There is a
3 parcel in between.

4 JUDGE TOREM: So did you also get notice of
5 this served, I believe, by our Commission that you were
6 within, I think, 300 feet of the track on that
7 particular parcel?

8 MR. LOGEN: Yes, our family was served
9 notice.

10 JUDGE TOREM: Because when I looked at the
11 map that accompanied this, I couldn't see the
12 individual parcel lines or the property owners, so I
13 wasn't sure whether your petition for intervention was
14 related to any of the parcels in particular. So you
15 are clarifying that yes, the notice went to a family
16 member and that was a parcel that got direct notice as
17 being directly affected.

18 MR. LOGEN: I believe that's the case;
19 although I've been following this proposal for several
20 years.

21 JUDGE TOREM: Let me hear from BNSF and see
22 if they agree that they understand which parcel we are
23 talking about, and if there is argument as to where the
24 parcel is located, we will see if we can sort that out
25 over the phone, but let me hear from BNSF as to the

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1 nature of their objection and opposition to your
2 petition to intervene.

3 MR. SCARP: Can I ask for clarification on
4 what I understood Mr. Logen to say was the location of
5 the two parcels relative to the crossing, the
6 quadrants, if you will? Did I understand that it was
7 north of the crossing on the west side of the tracks?

8 MR. LOGEN: That's correct.

9 MR. SCARP: And then south of the crossing,
10 where is the parcel?

11 MR. LOGEN: There is a parcel that is
12 immediately south of the crossing.

13 MR. SCARP: I'm sorry. South of Logen Road?

14 MR. LOGEN: Yes, south from Logen Road. It's
15 bounded by Logen Road on two sides, on the north, and
16 actually, it's divided by Logen Road on the east. That
17 parcel number, if you have parcel numbers, is
18 32031300300300.

19 MR. SCARP: Am I correct then that the other
20 parcel that you are referring to would be in what we
21 call the southeast quadrant relative to the crossing
22 itself?

23 MR. LOGEN: Yes.

24 MR. SCARP: So it's northwest and southeast;
25 those are the two?

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1 MR. LOGEN: Yes.

2 MR. SCARP: Thank you.

3 JUDGE TOREM: If I could hear the Railway's
4 position, knowing with more specificity the location of
5 the parcels, the objection if there is one to his
6 petition to intervene?

7 MR. SCARP: Your Honor, there is, and BNSF
8 objects, and our first was a question of standing;
9 although presuming that the represented party does
10 indeed own the parcels, we are not seriously
11 considering that they don't have standing to file the
12 petition. However, we did point out that the proposed
13 intervenor resides in Bellevue, so it was not clear to
14 us, and I think that obviously that's an issue.
15 However, presuming that he states as plead that they do
16 own the parcels, we are not going to rely on that.

17 The real issue here is whether this petition
18 identifies some public interest or just simply a
19 private interest, which is what we understand based on
20 the comments of Mr. Logen and the petition that it has
21 to do with a farmer who wants to go from one parcel,
22 and that would not meet the standard we contend
23 regarding a public interest or a public convenience for
24 this crossing.

25 JUDGE TOREM: Again, we are talking about the

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1 Commission's rules, 480-07-355(3), which requires that
2 the petition disclose either a substantial interest in
3 the subject matter of the hearing or the petitioner's
4 participation is in the public interest, then I can
5 grant that petition. That's the standard you are
6 referring to, and you on the Railway's behalf do not
7 believe that Mr. Logen meets that standard?

8 MR. SCARP: Correct, Your Honor.

9 JUDGE TOREM: Let me ask Mr. Logen to reply
10 as to why you believe you have a substantial interest
11 or your participation is in the public interest, and
12 then I'm going to ask if the Commission staff or the
13 County have any comments. Mr. Logen?

14 MR. LOGEN: Thank you. We have a substantial
15 interest because of having property on both sides of
16 the crossing, and also, I believe, an interest in the
17 safety of the public at large if we were to take
18 slow-moving farm equipment out on the public highways
19 rather than the rural Logen Road that is posted with
20 signs that says it's a farming area.

21 JUDGE TOREM: Mr. Otten, from the County's
22 perspective, I think it more appropriate to ask you
23 about the public interest being furthered by having a
24 family with farming interests apparently on both sides
25 of the tracks and having to move equipment through

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1 other public rights-of-way, whether you have any
2 comment from your client's perspective.

3 MR. OTTEN: From the County's perspective,
4 they generally do not oppose the closing of the
5 crossing, and we are not making any statement to
6 support or deny the petition to intervene.

7 JUDGE TOREM: Commission staff?

8 MR. THOMPSON: Well, in order to discuss
9 this, I would like to hand out a copy of the statute
10 and kind of present my theory of how somebody gets
11 standing to be in the case.

12 JUDGE TOREM: Which statute are you handing
13 out copies of?

14 MR. THOMPSON: It's a copy of RCW 81.53.060
15 with some parts emphasized, and I tried to send a copy
16 by e-mail to Mr. Logen ahead of time.

17 JUDGE TOREM: Mr. Logen, do you have that
18 e-mail handy?

19 MR. LOGEN: I do.

20 JUDGE TOREM: So, Mr. Thompson, go ahead. As
21 you hand those out, Mr. Logen, if you will find your
22 copy of whatever Mr. Thompson has e-mailed.

23 MR. LOGEN: I have the petition of Burlington
24 Northern.

25 JUDGE TOREM: This will be a separate e-mail

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1 from Mr. Thompson with what appears to be a Revised
2 Code of Washington, Title 81, Chapter 53, Section 060.
3 You can certainly pull that up on the Internet if you
4 like if you can't find that, but let's listen to what
5 Mr. Thompson has to say, and if you have questions,
6 I'll let you ask those.

7 MR. THOMPSON: Just in looking at what the
8 statute that governs these kinds of cases says, it's
9 unfortunately kind of a big, cumbersome statute written
10 a long time ago before plain talk came into vogue, but
11 I've tried to underline the parts that I think are
12 relevant, and maybe I'll read the parts I think are
13 relevant while omitting the parts I think are not
14 relevant, and then I will say why I think the petition
15 to intervene should be granted based on this language.

16 It states that if the change petitioned for;
17 in other words, the change in the crossing that is
18 being petitioned for by the Railroad, requires that any
19 portion of an existing highway be vacated and
20 abandoned, and I'll just say I think that's applies
21 probably to the closure of a roadway at the point at
22 which it crosses a railroad, the portion of the road
23 becomes vacated; that notice of the hearing is to be
24 provided to the owner or owners of private lands,
25 property, or property rights that will be affected by

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1 the proposed vacation and abandonment of the existing
2 highway.

3 So in other words, I think Mr. Logen has
4 shown that he owns property in the vicinity and has
5 made an argument that he would be affected. I think
6 "affected" is a pretty broad term that does not just
7 include impact on the property. It would constitute a
8 taking or a damaging of the property, but probably
9 broader than that.

10 And then further on down it says, At the time
11 and place fixed in the notice, all persons and parties
12 interested are entitled to be heard and introduce
13 evidence. So the question is who is a party that's
14 interested, and I think that's probably answered at
15 least by looking up at the prior clause, which says,
16 owners of property affected by the vacation.

17 So that's one way of looking at it. Further
18 on down at the end of the statute, there is a process
19 for having a grade crossing closure without a hearing,
20 and what it requires is that one notice be posted at
21 the crossing; two, it be published in a newspaper of
22 general circulation, and that no objections are
23 received as a result of that process.

24 So however you look at it, I think there is
25 an interested party that is objecting, so I think it

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1 requires a hearing, and how that is to be done is
2 another question, but in any case, I think that
3 Mr. Logen has stated a sufficient interest in the case
4 that it requires a hearing.

5 JUDGE TOREM: Mr. Logen, did you have
6 anything else you wanted to add at this time?

7 MR. LOGEN: No, thank you.

8 JUDGE TOREM: I'm going to give the Railway
9 one chance to comment on Commission staff's position in
10 supporting you, and then because it's your petition,
11 I'll give you the last word before I render a decision
12 based on the discussion this afternoon. Mr. Scarp?

13 MR. SCARP: Your Honor, we would only take
14 exception with the analysis that the statute requires a
15 hearing under these circumstances as opposed to public
16 comment, posted or otherwise, so we would say that
17 there is a narrower reading of the statute as written,
18 and our interpretation would be that it doesn't support
19 the need where the County has waived as the
20 Respondent's. That's our position.

21 JUDGE TOREM: Anything further as to
22 Mr. Logen's petition from what you heard from
23 Commission staff?

24 MR. SCARP: Just only that I'm not sure the
25 analysis regarding the taking or the interest -- the

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1 statute, I think, is broad regarding the private
2 party's interest, but I don't think that analysis
3 regarding a taking is really what's at issue here and
4 wouldn't come into the Commission's review at this
5 stage.

6 JUDGE TOREM: Mr. Logen, anything else to
7 add?

8 MR. LOGEN: Just that WAC 480-07-660 provides
9 that anyone that objects to a highway railroad grade
10 crossing must file an objection within 20 days after
11 publication of a notice, and I filed an objection at
12 least a couple of years ago when the closure was
13 proposed before, and then that was eventually dropped,
14 and then I filed an objection prior to this by
15 communicating with Commission staff before the docket
16 was opened at the Commission.

17 JUDGE TOREM: Sir, I've looked -- Mr. Scarp
18 has something else.

19 MR. SCARP: Your Honor, we are not going to
20 take issue with the timeliness of the filing.

21 JUDGE TOREM: Thank you. I've looked at the
22 governing regulations as well, and I concur with
23 Mr. Thompson's reading of the statute that it's broadly
24 worded enough that someone who has been directly
25 affected, such as the Logen family with these parcels

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1 as clarified today, that they are adjacent to the
2 crossing of at least one of them, and they are directly
3 impacted by the closing of this way to get back and
4 forth over the tracks.

5 If the petition from the Railway is granted,
6 the Logens will have a different issue than the general
7 public who might come through there from time to time.
8 Certainly, there will be more evidence taken in any
9 hearing that's held, if that proves necessary to
10 determine how that affects convenience and necessity,
11 as the statute refers out to and as the Supreme Court
12 has interpreted those terms back in 1949.

13 I'm going to grant the petition, and
14 Mr. Logen, you will be a party to this case, and I
15 think what that means is it's different than just being
16 a member of the public who might have filed comments
17 for today and may be listening or watching today. As a
18 party, you are going to have the ability to
19 cross-examine any witnesses at a hearing and present
20 your own witnesses.

21 We had talked when you called me yesterday to
22 make sure it was okay to be by phone as was authorized
23 in the notice of today's prehearing conference that you
24 were pro se, that you were not an attorney, and I want
25 to reassure you that you can participate fully as a

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1 party without legal representation, but you may want to
2 get some additional preparation before any witness
3 examinations or preparation of exhibits and make sure
4 that they are going to be compliant with any forms or
5 rules that we have. So far, you've shown you know how
6 to read our rules and find them, so I think that's a
7 good sign, but if you need legal representation, let's
8 think about that sooner in the case rather than later,
9 because I know the other parties will be ready to go
10 forward and object to any motions to delay or postpone
11 the case simply because of a late association of
12 counsel, so I just want to be on record with that up
13 front. If you are comfortable representing yourself
14 throughout, perfect. If you change your mind, I want
15 to make sure you are on notice to do it in a timely
16 fashion, okay?

17 MR. LOGEN: Thank you.

18 JUDGE TOREM: Let's turn then to some other
19 quick questions before we get to a proposed schedule.
20 We may go off the record when we get to that point, but
21 first let me ask, is there a need for a protective
22 order of any sort? We didn't have one in the last
23 railway crossing case, and I'm not sure if we need one
24 here. Is the Railway putting any evidence into the
25 record that would need to be protected or marked

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1 confidential?

2 MR. SCARP: We don't anticipate that at this
3 time. If that issue arises, we could take it up then,
4 but don't anticipate it.

5 JUDGE TOREM: Unless there is an interest
6 from anyone else saying we need a protective order, we
7 will reserve that, and if it becomes necessary, make me
8 aware. If there is a need for a hearing, I would
9 anticipate that the Commission's discovery rules would
10 need to be invoked so you could talk to each other and
11 formally request information. Is there anyone who
12 thinks we don't need to invoke the discovery rules?
13 Hearing none, we will just invoke those and I will put
14 that in the prehearing conference order.

15 Schedule and the need for a hearing,
16 Mr. Scarp, you've indicated that you think the statute
17 could be read differently, and I would like if we are
18 going to have any further discussion as to a request
19 that we not schedule an evidentiary hearing that we do
20 that on the record, and then if I rule that that's the
21 case today, you tell me how we are going to go forward
22 instead, so we can take up the objection and
23 Mr. Logen's intervenor status, and then if we get to
24 scheduling a hearing, we do that off the record, come
25 back on and memorialize our conversations, so

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1 Mr. Scarp?

2 MR. SCARP: Well, Your Honor, I understood
3 you to grant the petition for intervention, so my
4 reading was that a hearing was necessarily going to
5 follow by statute, so I'm not sure exactly what my
6 comments might be.

7 JUDGE TOREM: I interpreted your comments to
8 say even if I granted the petition that perhaps there
9 was a way to resolve this short of a hearing. If we
10 were at different procedural points on that discussion,
11 that's fine. We will go ahead and talk about
12 scheduling a hearing that I think is now necessary.

13 MR. SCARP: I anticipated that.

14 JUDGE TOREM: As usual, I would anticipate
15 your client wants to get the legal proceedings out of
16 the way and heard sooner rather than later. I wanted
17 to also inquire as it strikes me where your partners
18 might be from the State Department of Transportation.
19 Are they going to intervene in this case, to your
20 knowledge?

21 MR. SCARP: To my knowledge, they are not,
22 and if you are talking about the Washington State
23 Department of Transportation, my understanding is the
24 time line for that has passed, if I read the --

25 JUDGE TOREM: The time line for filing a

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1 petition?

2 MR. SCARP: Petition for intervention.

3 JUDGE TOREM: Certainly, anyone can file a
4 late petition, and if they prove to be a necessary
5 party, that could be accommodated, but it's entirely
6 possible that any evidence that might be relevant to
7 the case could be put on through as a witness status,
8 so we need not worry about late petitions. I just
9 wanted to make sure that there wasn't an oversight and
10 an assumption that coming late might not be granted.

11 MR. SCARP: I can only speak to my own
12 understanding, which is that the Department of
13 Transportation was aware of what would have been a
14 timely intervention and if they wanted to assert an
15 interest in the proceeding regarding the closure of the
16 crossing and they did not. So my anticipation would be
17 that they are not planning to intervene.

18 JUDGE TOREM: So whether we hear from them
19 later or not, we will deal with it. For a hearing of
20 this case then, I think it's much less complex than the
21 one in Skagit County from last year. I think we can go
22 quicker, and it would be easier on Mr. Logen to not
23 have prefiled testimony and documentary deposition-like
24 testimony. It would save expense for all parties
25 concerned and hopefully speed things up to a timetable.

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1 Were you planning on submitting prefiled testimony, or
2 do you think that submitting prefiled exhibits with
3 narrative testimony on the record on the day in
4 question would be the most efficient way to go?

5 MR. SCARP: We certainly support any efforts
6 at efficiency. With that said, the only thing that the
7 Railroad has a concern about is exactly what ground
8 Mr. Logen might intend to cover regarding convenience
9 and/or if there is some public safety evidence that
10 would support his claim to not close the crossing, and
11 I guess I don't know what that is at this time.

12 Certainly, we have a public safety argument
13 to support closure, and we will present evidence on
14 that, so from what I've heard is only regards the Logen
15 family use, and I don't know that there is any broader
16 issues coming in, and if that's the case, we don't need
17 to go to any extra steps, but my concern at this time
18 not knowing exactly what the arguments will entail that
19 Mr. Logen intends to present.

20 JUDGE TOREM: Mr. Logen, have you thought far
21 enough ahead to know what points you are making at the
22 hearing? I don't have to know exhibit by exhibit or
23 witness by witness, but the general broad issues you
24 would intend to present?

25 MR. LOGEN: I haven't gotten into it in much

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1 detail, but I felt in general that there was a danger
2 to the public in general of having slow-moving farm
3 equipment travel down Pioneer Highway when cars would
4 try to pass it, and there is some areas where there is
5 limited visibility on that route.

6 JUDGE TOREM: So it sounds as though you are
7 suggesting the public safety might be harmed by closing
8 the crossing and diverting those vehicles and that the
9 job of the Commission would be to weigh which had a
10 greater impact on public safety, expanding a crossing
11 that has one track to, as I understand the proposal
12 now, have two tracks in the future versus leaving it
13 open so that the farm equipment could cross on that
14 more rural road versus the proposal from the Railway,
15 which is to close that crossing to traffic and divert
16 those vehicles elsewhere. That's the general argument?

17 MR. LOGEN: Yes.

18 JUDGE TOREM: So it sounds as this is going
19 to be a leave it open and have the farm equipment
20 continue to cross along with the general public or
21 close it, and what are the consequences to public
22 safety through that diverted traffic, at least in the
23 scope you've discussed it.

24 MR. LOGEN: And I haven't had a chance to
25 spend any time with an attorney yet, which I may do.

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1 JUDGE TOREM: It may prove unnecessary, but I
2 don't think the Railway has spent any time with you.
3 It appears that neither of you have gotten together
4 ahead of this, and now that the formal intervention
5 status has been granted party to party, you can meet
6 with the Railway's attorneys and better flesh out where
7 you are coming from, and it would help us to know if
8 the procedural schedule we set out today needs to be
9 shortened or expanded based on that meeting, and I
10 would also suggest, given the tone for your petition
11 for intervention and your scope of participation
12 section indicated a sort of two-part interest. One,
13 that you wanted it to remain open, but if you were
14 convinced that it was inevitable the Commission would
15 grant the Railway's petition, you had a fall-back
16 position already stated in your petition regarding a
17 private crossing, which may be the subject of a
18 negotiation with the Railway and may be able to resolve
19 your interest in the case, and then they could have a
20 settlement with you.

21 If that were the case, we have an alternative
22 dispute resolution available, and we can assign another
23 judge if the parties are going to request that we have
24 any settlement or mediation among the parties, so that
25 can be an option as well, but we can't foresee what's

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1 going to happen down the road, but I want to make sure
2 that you, Mr. Logen, and Mr. Scarp and Ms. Endres have
3 the chance to discuss this at least informally, and if
4 you decide that alternative dispute resolution is a
5 good thing, we can arrange for that early in the case
6 and develop a schedule today that if it needs to be
7 shortened or lengthened, we can have a motion and have
8 another status conference sometime down the road.

9 Mr. Scarp, any ideas or comments now having
10 heard Mr. Logen's interest and what else I've just put
11 on the table as your client and Mr. Logen getting
12 together?

13 MR. SCARP: Your Honor, if I understood you
14 correctly, those were two separate issues, one of which
15 involves getting together with Mr. Logen. We are
16 certainly amenable to discuss these issues and resolve
17 any differences that are resolvable.

18 Regarding the question of how to deal with
19 the testimony, I don't really have a strong preference
20 right at this point because it doesn't appear that
21 there is a significant amount of issues to resolve. So
22 again, the expeditious nature would be in our interest.

23 JUDGE TOREM: Any position or suggestions
24 from Staff on procedural ways ahead?

25 MR. THOMPSON: I just thought it might be

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1 most efficient to have oral presentation of testimony
2 and then cross-examination on that in the same hearing,
3 so not prefiled testimony, but certainly if -- on the
4 other end of the spectrum, it might be easier for
5 everybody if we just have a paper record, which is
6 another possibility; that the Railroad as the
7 petitioner could submit their evidence that the public
8 safety requires the closure in writing, and then if
9 Mr. Logen would agree to that, he could state his
10 oppositions in writing as well, and then possibly we
11 could just have a public comment hearing for anybody
12 else that wanted to be heard on the proposed closure,
13 so that would be another possibility.

14 JUDGE TOREM: I would think in conjunction
15 with the public hearing we could have a site visit, so
16 that if I'm making a decision, I can view the crossing
17 and the surrounding area and intersections and roadways
18 in the City of Stanwood that might be impacted by any
19 diverted farm equipment. So I would think at a
20 minimum, we would want to have a public comment hearing
21 as well as a site visit, and if we have a live hearing
22 the rest of the way, whether it's a paper record or
23 live hearing, but this is not going to be as complex
24 and require the number of witnesses as the previous
25 case. Does the County have any position or experience

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1 with these cases?

2 MR. OTTEN: We are willing to work on it to
3 make it as quick and efficient as possible.

4 JUDGE TOREM: I realize you filed a waiver
5 for your right to the hearing, but as a party now, if
6 there is a hearing, you can provide witnesses and
7 present evidence.

8 MR. OTTEN: We would like to reserve the
9 right to participate.

10 JUDGE TOREM: Mr. Logen, did you have any
11 views or preference, or anybody tell you what they
12 thought the easiest way to get your point across might
13 be?

14 MR. LOGEN: No. I think what you've outlined
15 is fine.

16 JUDGE TOREM: Nobody is telling me we have to
17 incur the expense of prefiled testimony, so I would be
18 inclined to at this time get ready to go off the record
19 and discuss a procedural schedule that would involve
20 some time period for discovery so all of you can talk
21 to each other and file a witness and exhibit list at
22 some point, and the witness list might have a little
23 more detailed summary of the scope of issues the
24 witness would be expected to be testifying on.

25 Therefore, after that's filed, we will have a

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1 little bit more discovery in case somebody does want to
2 depose a witness in advance so that there aren't any
3 surprises at the hearing, and from there, we would have
4 a hearing in a much more immediate fashion than if we
5 had exchanges of written testimony. That tends to take
6 months at a time. Witnesses could be listed a few
7 weeks from now, if not months, but probably weeks from
8 now, and supporting exhibits could at least be
9 supplemented at a later date, and then we could have
10 the hearing itself within a few months. Does that
11 sound reasonable, Mr. Logen?

12 MR. LOGEN: Yes, it does.

13 JUDGE TOREM: Let's go off the record.

14 (Recess.)

15 JUDGE TOREM: We are back on the record. We
16 are going to have a hearing that may last two days at
17 the most at the end of March, and we will adopt the
18 following procedural schedule: On March 6th, three
19 weeks from today, all parties will file with the
20 Commission and make sure they get service copies to
21 each other an initial witness and exhibit list. The
22 initial group of exhibits will also be filed at that
23 time so it won't be just lists, but it will be a list
24 to tell you what the set of exhibits is, and copies
25 will be filed with the Commission at that time.

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1 The witness list should contain name,
2 address, telephone number, and as needed, e-mail
3 addresses for your witness, and a good, concise summary
4 of what you expect them to say at the hearing. So the
5 questions you want to ask them, the direct testimony
6 you think they need to present, and the issues they
7 need to present should be summarized, and as an
8 example, it might say, Mrs. Smith will describe where
9 she lives, how the crossing will affect her, the new
10 routes she would have to take. If there is a railroad
11 engineer, they might explain the nature of the current
12 rail traffic and the speeds of the trains and the
13 safety issues presented by the crossing, whether they
14 be speed, view, obstructions, or disruptions to
15 traffic, as was discussed in the petition.

16 So the witnesses will be lined up with their
17 issues, just a few sentences. Err on the side of two
18 or three extra sentences rather than two or three less,
19 so the idea is to inform your fellow parties in the
20 case just what you intend to present at hearing. That
21 will all be due on March 6th, and the documents those
22 witnesses want to introduce should be accompanying
23 those initial lists.

24 Two weeks later on March 20th will be the
25 final deadline to supplemental witness and exhibit

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1 lists, and it's that time if you saw anything you
2 overlooked the first time after looking at everybody
3 else's case, you will file a supplemental witness and
4 exhibit list with new witness descriptions or perhaps
5 an expanded description of a current witness and new
6 exhibits. You don't have to refile the ones you put in
7 on the 6th.

8 For numbering of witness and exhibit lists,
9 let me ask that parties follow the first, middle, and
10 last initial for each witness, and Mr. Logen, for your
11 benefit, take a look at the previous case on the Hickox
12 Road and the exhibit list that was filed there. If you
13 can find from our records department the exhibit list,
14 that will give you a good idea as to how those items
15 were put together.

16 If there are going to be cross-examination
17 exhibits to be submitted in advance, let me suggest
18 that you file those with the supplemental exhibit list
19 if you need to file a cross-examination exhibit. That
20 way, the witness will have a chance to see it before
21 the hearing, but file those with your supplemental
22 lists on March 20th. If there are additional
23 cross-exam exhibits to be filed, they can be done the
24 week before hearing or at the hearing itself. I'm not
25 going to enforce some arbitrary deadline before, but if

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1 you bring them, tell me you've exchanged them
2 electronically with the concerned party beforehand so
3 that they have as much notice as you do.

4 The hearing itself will be Monday, March
5 30th, and if we need to, we will continue onto Tuesday,
6 March 31st. It sounds as if we are going to try to do
7 that in Everett, but on Monday night the 30th, we will
8 have a public comment hearing probably in the City of
9 Stanwood but as close to the community as our staff can
10 identify an appropriate location. I'm guessing that we
11 will schedule a nine a.m. start for the hearing and
12 probably a six p.m. public comment hearing unless the
13 Commission's public comment staff says there is a
14 better time for that community, say, 7 p.m.

15 I think that's all the dates we agreed to.
16 March 6th for the initial lists, March 20th for the
17 supplemental lists, and what I just pitched out as a
18 deadline for cross-examination exhibits that you know
19 about, and then March 30th and 31st for the hearing
20 with the first day of hearing, March 30th, being the
21 simultaneous public comment hearing.

22 So if we are getting done by three or 3:30 in
23 the afternoon or earlier, we will make sure we have
24 sufficient time for folks to get a bite to eat and get
25 up the road to Stanwood. Mr. Scarp, does that meet

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1 with the Railroad's expectations as to how we can get
2 this procedural schedule as fast as possible?

3 MR. SCARP: So far from all the input
4 regarding scheduling, I think it sounds fine.

5 JUDGE TOREM: For the County?

6 MR. OTTEN: Sounds fine.

7 JUDGE TOREM: Commission staff?

8 MR. THOMPSON: Sounds fine.

9 JUDGE TOREM: Mr. Logen?

10 MR. LOGEN: Sounds fine.

11 JUDGE TOREM: Mr. Logen, if you have further
12 questions, I can't be an attorney for you, but
13 certainly Commission staff knows where to find
14 something, but I ask you to look probably at the Hickox
15 Road as a much more complex example of what was done.
16 Mr. Thompson is not your attorney. He's the Commission
17 staff's attorney, but certainly, you can send an e-mail
18 to all the parties inquiring as to their procedural
19 view of a question you might have. I would think that
20 Mr. Thompson can put you and guide you in the right
21 direction, and if there is a need for us to have a
22 conference with a judge to answer a procedural
23 question, as I said, just by my particular absence in
24 early March, we will have another judge available to
25 handle that.

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1 I want to encourage on the record that you
2 and the attorneys for the Railway get together sooner
3 rather than later and talk about, if necessary and if
4 possible, setting up a time for a settlement
5 conference. The other parties, of course, would be
6 invited, but it seems that you two are the ones that
7 might have issues that are resolvable, and if they are
8 and you can use a settlement judge, fine. If you want
9 to do it on your own, there is nothing to be lost in
10 that, so consider that for the Railway and for you,
11 Mr. Logen, as a possibility, and I would think that the
12 week that stands out to me is the week after filing the
13 initial witness and exhibits lists so you at least have
14 a documentary view of everything that might be
15 presented to the Commission at the end of the month.

16 That's all the points I had on my schedule to
17 cover. Mr. Scarp?

18 MR. SCARP: Your Honor, in thinking through
19 your offer for the possibility of a status conference
20 if one is required upon your return, one issue that
21 occurs to me is if there is a question about the scope
22 of the issues that will be addressed in the hearing
23 after we've seen the witness lists and especially
24 seeing the supplemental witness lists, if that might be
25 addressed, if there is an issue that that would be

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1 something we could address at that time, because it
2 would still give the parties a week to prepare for the
3 hearing, and I'm just wondering about the possibility
4 of that, if there is an issue, and I'm not saying there
5 will be, would that be an appropriate time to address
6 it, and would the parties contact Judge Rendahl to
7 schedule a status conference upon your return?

8 JUDGE TOREM: I think in order to give
9 sufficient notice to schedule one, if we have a March
10 20th day that would be your decision point, if we had
11 to get a notice out on Monday the 23rd and give seven
12 days notice, we are already at the hearing day, so I
13 think it might be safer to preschedule a status
14 conference that you can strike as unnecessary. That
15 way, you've got it on the calendar. Any issues that
16 come up that we need to talk about can be addressed,
17 and if it's just a telephonic conference that everybody
18 calls in to on Tuesday the 24th or Wednesday the 25th
19 in the afternoon, I would be amenable to that. I'm
20 pretty sure the bridge line is available Wednesday
21 afternoon, but we would have to confirm that.

22 MR. SCARP: So far as I know, Wednesday
23 afternoon would be fine. I think it's a good idea to
24 just have a status conference available, and we would
25 certainly agree that if it's unnecessary, it's easy

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1 enough to strike. So I defer to your schedule as far
2 as what would work best and Mr. Logen's. I know that
3 he probably has some conflicts as well and the County.

4 MR. OTTEN: With the two attorney coverage,
5 we will work with what other parties want.

6 JUDGE TOREM: Mr. Thompson, do you see
7 anything on your schedule the week of the 23rd?

8 MR. THOMPSON: No. I don't have any
9 conflicts that week.

10 JUDGE TOREM: Mr. Logen, would the 24th or
11 the 25th be preferable for a status conference?

12 MR. LOGEN: What time of day on the 24th?

13 JUDGE TOREM: Any time of the day on the
14 24th, and the 25th, I've got a 9:30 hearing that will
15 probably run an hour and a half in the morning, so I
16 would say we would do something in the afternoon on the
17 25th.

18 MR. LOGEN: I have a noon meeting on the
19 24th. The 25th, anytime would work for me.

20 JUDGE TOREM: Why don't we set it up for the
21 afternoon of the 24th, sooner rather than later, and
22 what time will be your meeting be done on the 24th,
23 sir?

24 MR. LOGEN: By 1:30.

25 JUDGE TOREM: We will set it up at 2:30. If

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1 for some reason the bridge line is not available on
2 Tuesday afternoon, then I will just change that in the
3 prehearing conference order to Wednesday afternoon,
4 since it sounds as though everybody has got that
5 available, and I hope to have the order out by next
6 Wednesday, so look for that, and if I need to confirm
7 anything, any different dates, because I'm not aware of
8 a resource conflict, then I will send an e-mail out and
9 get something decided among the parties.

10 If you know there is an issue for the status
11 conference, send an e-mail out to me and copy all the
12 parties on the 23rd, on Monday, saying, I have a need
13 or an issue at the status conference or I don't. If
14 there are no issues, then we will strike the status
15 conference Tuesday morning before 2:30 rolls around,
16 and everybody will know they don't have to be on the
17 telephone line at that time, okay? Any other issues to
18 take up today at our prehearing conference?

19 MR. SCARP: Judge Torem, are you going to
20 want a prehearing brief?

21 JUDGE TOREM: I think I've been educated
22 enough that I don't want to put the parties through
23 prehearing briefs. If the parties think I still need
24 further education, perhaps, but Hickox Road was
25 eye-opening, and I understand a lot more what's going

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1 on with these cases and all the different directions
2 that trains might come from, so I don't think I need
3 prehearing briefs.

4 The issue of posthearing briefs we can take
5 up at the hearing, and I want to reserve that issue so
6 the parties have a chance to make a good, final
7 argument based on the evidence. I think that would be
8 appropriate in any case. Any other parties think they
9 need to file a prehearing brief?

10 MR. THOMPSON: Not for Staff.

11 MR. OTTEN: Not for the County.

12 JUDGE TOREM: Mr. Logen, I want to save you
13 the hassle of writing up what would be a tough legal
14 document twice, opening and closing briefs, but
15 certainly if we need to have ten minutes each for an
16 opening statement, I would entertain that. I don't
17 know if we'll need it, but if we need opening
18 statements, we will keep them brief and have them on
19 the day of the hearing. Mr. Logen, any questions
20 before we wrap up today?

21 MR. LOGEN: No.

22 JUDGE TOREM: I don't see anybody else
23 leaning to the microphone, so we will adjourn the
24 prehearing conference, and I will get an order out next
25 week, and you guys look and see which date we set for

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1 the status conference. Thank you. We are adjourned.

2 (Prehearing conference adjourned at 2:46 p.m.)

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