

A P P E A R A N C E S

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1 OLYMPIA, WASHINGTON; OCTOBER 19, 2015

2 1:33 P.M.

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4
5 JUDGE KOPTA: Let's be on the record in
6 Docket TR-150284, entitled Washington Utilities and
7 Transportation Commission versus BNSF Railway Company.
8 We are here on Monday, October 19th at 1:30 p.m., for
9 a hearing on the settlement agreement between
10 Commission Staff and the Company.

11 I am Gregory Kopta, the administrative law
12 judge who is assigned to this case, and presiding with
13 me on the bench today are Chairman David Danner and
14 Commissioners Philip Jones and Ann Rendahl. Our
15 purpose today is to allow the Commissioners to ask
16 questions and for the parties, if they wish to say
17 anything more about the agreement, to explain to the
18 Commission why it is in the public interest and should
19 be adopted as the resolution of this case.

20 First we have several witnesses that are
21 available for providing testimony, so I will swear you
22 all in. If you would stand and raise your right hand.
23
24
25

1 BETTY YOUNG, DAVE PRATT, JOHAN HELLMAN, COURTNEY
2 WALLACE, JERALD COMPTON, having been first duly sworn
3 on oath testified as follows:
4

5 JUDGE KOPTA: All right. Let's identify
6 each witness for the record before we begin. We will
7 start to my immediate left.

8 MS. YOUNG: Betty Young, Utilities and
9 Transportation Staff in Transportation Safety.

10 MR. PRATT: Dave Pratt, Commission
11 Staff.

12 MR. HELLMAN: My name is Johan Hellman,
13 I am the Executive Director of Government Affairs for
14 BNSF Railway Company in the Pacific Northwest. My
15 area includes Washington, Oregon, and
16 British Columbia.

17 JUDGE KOPTA: If you would use the
18 microphone, too, please.

19 MS. WALLACE: Courtney Wallace, Regional
20 Director of Public Affairs for BNSF for the
21 Pacific Northwest.

22 JUDGE KOPTA: And our last witness.

23 MR. COMPTON: Jerald Compton,
24 J-E-R-A-L-D. I am the EOC manager with Washington
25 State Emergency Management Division, and I am the lead

1 for the 24/7 warning center.

2 JUDGE KOPTA: Thank you very much.

3 And while we were identifying folks, how about
4 appearances from the attorneys. We just need name,
5 firm and company that you are representing.

6 Let's begin with BNSF.

7 MR. DiJULIO: Thank you. This is Steve
8 DiJulio, Foster Pepper, representing BNSF, respondent,
9 in TR-150284.

10 JUDGE KOPTA: Thank you.

11 And for Commission Staff.

12 MR. BEATTIE: Julian Beattie, Assistant
13 Attorney General, representing Commission Staff.

14 JUDGE KOPTA: Thank you.

15 Anyone else wishing to make an appearance?

16 Hearing none, we are ready to proceed.

17 Unless anyone has any kind of opening remarks,
18 then I will immediately go to Commissioner questions.

19 Hearing nothing, Mr. Chairman, would you like
20 to begin?

21 CHAIRMAN DANNER: Thank you. I would.
22 Thank you all for being here this afternoon.

23 Well, let me start by saying that the
24 settlement and the narrative supporting the settlement
25 agreement were, I have to term them a bit of a black

1 box. I was trying to understand what went into it, so
2 I very much appreciate the response to the Bench
3 Request No. 1. That filled in a lot of my
4 understanding of what has been going on.

5 It seems I -- there's three things that I see
6 here. One is that there's questions about the --
7 when -- when calls were made to the EOC as required by
8 our rules, and then some legal questions about who was
9 responsible when a train was on shipper's property as
10 opposed to on the tracks, and then last is a question
11 about responsibilities when the fuel that leaks is
12 fuel, as opposed to -- or when the oil that leaks is
13 fuel, as opposed to a commodity.

14 So I guess let me start by asking some
15 questions around the reporting to the EOC. From what
16 I understand, a request was made to EOC when we
17 were -- when our staff was doing its investigation.
18 They were looking at when -- were phone calls made to
19 the EOC, when were they made, were they in compliance
20 with our rules for a 30-minute time line. In some
21 cases the calls were made, although not perhaps within
22 30 minutes.

23 The original information we received from EOC
24 was that they were not received and then later that
25 was changed. I am just wondering what the process is

1 at EOC. When they receive calls of this sort, how are
2 they generally handled?

3 Mr. Compton, let me ask you that.

4 MR. COMPTON: When a HAZMAT call comes
5 in to the EOC, records from BNSF or any other person,
6 we will take that call, take all the pertinent
7 information, basically containing what was spilled,
8 how much was spilled, where was it spilled, and a
9 little bit of information about what occurred to cause
10 the spill, when it occurred, and then we will record
11 at that point the date and time of the call that we
12 received.

13 That information primarily goes to the
14 Department of Ecology and to the local jurisdiction.
15 In specific cases, such as railroad incidents, we also
16 generate an e-mail to the Utilities and Transportation
17 Commission, basically outlining all of that
18 information as well. If it would be something on I-5,
19 we would notify WSP, because they have specific
20 jurisdiction there. So there are some ancillary
21 notifications that we will make.

22 CHAIRMAN DANNER: Is this -- the
23 reporting to the UTC, is there some form of memorandum
24 of understanding or memorandum of agreement that you
25 have with our agency? What is -- what is the backdrop

1 for this activity?

2 MR. COMPTON: We operate based on an
3 established set of standard operating procedures.
4 Those are in writing at the Alert and Warning Center.
5 In the cases of all of our partners, we coordinate
6 with them as to what kind of information they need
7 regarding specific incidents that may occur. Those
8 are incorporated into those standard operation
9 procedures.

10 CHAIRMAN DANNER: Okay. So there is no
11 memorandum of agreement with the UTC, but there is
12 standard operating procedures.

13 And I haven't seen those. Are those something
14 that you could provide to us or --

15 MR. COMPTON: Absolutely.

16 CHAIRMAN DANNER: -- that our staff has?
17 Do you have -- Mr. Pratt, do we have those?

18 MR. PRATT: (No verbal response.)

19 CHAIRMAN DANNER: Okay. That would be
20 helpful, if you could get those to us.

21 MR. COMPTON: When would you like them?

22 CHAIRMAN DANNER: Well, let me -- I will
23 work through the Judge. Maybe this will be a bench
24 request.

25 JUDGE KOPTA: Yes, this will be Bench

1 Request, actually, No. 3, since we have two other
2 bench requests.

3 When do you think you would be able to get
4 those to us?

5 MR. COMPTON: I can have them in e-mail
6 within the next 15, 20 minutes.

7 JUDGE KOPTA: By the end of tomorrow.
8 We will give you even more than 15 minutes. That
9 would be great. Thank you.

10 MR. BEATTIE: Judge Kopta, this is
11 Julian Beattie, Counsel Staff. Just for clarity of
12 the record, EOC is not a party to this proceeding.

13 CHAIRMAN DANNER: Thank you very much
14 for clarifying that. I do know that. I am just
15 trying to develop a chronology of events here.

16 MR. COMPTON: One more question. Who do
17 I send that to?

18 JUDGE KOPTA: You would send it to our
19 records center, UTC.wa.gov -- records@UTC.wa.gov.

20 MR. COMPTON: Records@ UTC.wa.gov.

21 JUDGE KOPTA: Yes. And address it to
22 Steve King, executive director and secretary.

23 MR. COMPTON: Very good, sir.

24 JUDGE KOPTA: Thank you.

25 CHAIRMAN DANNER: Mr. Compton, when you

1 first responded to inquiries from our agency, or when
2 your agency did, I should say, it was communicated to
3 us that the -- either that the calls didn't happen or
4 there -- there seemed to be some misunderstanding. I
5 was just wondering when those calls came in to you,
6 the ones for example, let me see here, on -- I have
7 the date here -- on 12/09 at -- so December 9th you
8 would have received some -- some calls, and what --
9 how would those have been responded to?

10 MR. COMPTON: In some cases we received
11 these via phone call. In other cases we received them
12 via a hard copy report from the National Response
13 Center. In most of the cases we expect to receive
14 both, a phone call and a report.

15 We will receive one of those first, then we
16 will act on that, whichever ones come in first. So if
17 it is a phone call, we will page out; if it's after
18 hours, we will page out the Ecology responder, provide
19 the information to them. And then if we get an NRC
20 following after the fact, we will forward that to them
21 via e-mail as well. The same thing with the local
22 jurisdiction.

23 As far as our notification to the Utilities
24 and Transportation Commission, we will generate an
25 e-mail summary of the event and send it to them.

1 COMMISSIONER RENDAHL: You used the term
2 RC, what is -- I think I heard you --

3 MR. COMPTON: Oh, NRC. National
4 Response --

5 COMMISSIONER RENDAHL: NRC. Thank you.

6 CHAIRMAN DANNER: And so did that happen
7 in all cases with the -- with the calls that were made
8 from BNSF to the EOC, in the incidents that we have
9 under review today? Are you aware of some that may
10 have been called in or e-mailed to your agency, but
11 that were not then communicated with the UTC?

12 MR. COMPTON: I do have the records on
13 each one here. All of the information that we
14 provided to the UTC, I have a copy of with me today.
15 There is unfortunately a human element involved,
16 especially when we are talking about after hours. As
17 it gets later in the day, people's minds get a little
18 cloudier.

19 It is also a fact that we are not handling
20 just hazardous material spills, but a number of other
21 spills, or a number of other types of events, such as
22 weather events and other things that are going on in
23 the state. And so I will admit that there are times
24 where our duty officers will slide on a particular
25 notification that they should, by SOP, accomplish.

1 In regards to the specific -- was it
2 December the 9th?

3 CHAIRMAN DANNER: Well, I'm looking at
4 one, for example, on Attachment 8 to the Bench -- to
5 Bench Request No. 1.

6 COMMISSIONER RENDAHL: Do you have that
7 bench request response?

8 MR. COMPTON: I have it in my e-mail,
9 but I don't have it before me.

10 COMMISSIONER RENDAHL: Mr. Beattie, do
11 you have a copy with you that you can share?

12 MR. BEATTIE: Commissioner Rendahl, I
13 don't have a clean copy.

14 COMMISSIONER RENDAHL: Okay. All right.

15 MR. DiJULIO: (Complies.)

16 CHAIRMAN DANNER: Again, I am not
17 looking to go event by event, I'm just -- I'm just
18 trying to get a sense of -- there were some that
19 apparently fell through the cracks. I am trying to
20 understand when it was determined that they fell
21 through the cracks and how did it get communicated to
22 the UTC that there had been no calls made.

23 MR. COMPTON: Okay. This particular one
24 that I am looking at was opened at 17:16. Just a
25 moment.

1 All right. So on this particular one, it was
2 received at 5:16 in the afternoon. It was a
3 notification of an occurrence that happened at 10:45
4 that day in Vancouver. On the back of each report --
5 this one only contains the front, but on the back of
6 it, it has a record of the notifications that were
7 made. I do see here that no notification to the UTC
8 was made or documented, on the reports that I have
9 here in front of me.

10 CHAIRMAN DANNER: So how is it that we
11 received -- in response to our inquiries, that no
12 calls had come in?

13 MR. COMPTON: This particular one here,
14 there is no call listed on it. It was an NRC-only
15 report.

16 CHAIRMAN DANNER: Okay. And when was it
17 discovered that a call had come in?

18 MR. COMPTON: I don't see any
19 documentation here that a call did come in.

20 This may be one that I discussed with
21 Mrs. Young a short time ago via e-mail, in which they
22 have records, phone records, of an actual call. That
23 call was not documented on the paperwork.

24 CHAIRMAN DANNER: Okay. So that would
25 have been brought to your attention, then, by

1 Burlington Northern?

2 MR. COMPTON: It was, in fact, brought
3 to my attention by Ms. Young.

4 CHAIRMAN DANNER: By Ms. Young. Okay.

5 And so we can assume in that instance that a
6 call was made and no record was made of the call?

7 MR. COMPTON: I believe that that would
8 be the case.

9 CHAIRMAN DANNER: Okay.

10 And then can you tell me what steps have been
11 made to ensure that we are not going to continue to
12 have things fall through the cracks?

13 MR. COMPTON: Both myself and the EOC
14 supervisor, my supervisor, have sat with the duty
15 officer team and reinforced the importance -- the
16 legal importance of the work that we do in the Alert
17 and Warning Center.

18 The best we could do is basically reinforce
19 what the SOP states. It's very plainly stated in
20 there what notifications we have to make, including
21 those to the UTC. It's very plainly stated how we
22 record what we need to document. When a slip-up is
23 made, all we can do is address that with that
24 individual duty officer.

25 CHAIRMAN DANNER: Is the desk staffed

1 24/7?

2 MR. COMPTON: It is.

3 CHAIRMAN DANNER: Okay. So it really
4 shouldn't matter what time of day a call comes in --

5 MR. COMPTON: That's correct.

6 CHAIRMAN DANNER: -- somebody is there.

7 MR. COMPTON: That's correct.

8 Another -- sometimes it can be an issue, is we
9 do have two duty officers. If we have a number of
10 calls that come in, and they do tend to come in large
11 clumps, clusters, and one handles the actual call
12 regarding a particular spill and the other one picks
13 up a call that is related to that spill and jots down
14 information. Another thing that I have been trying to
15 reinforce with them is the communication back and
16 forth between the two duty officers on duty at any
17 given time. It's so important that that -- that call
18 that the second duty officer receives gets documented
19 on the original documents, which the other duty
20 officer actually has possession of. So there is some
21 slip-ups that can occur in that regard.

22 CHAIRMAN DANNER: So what comfort can
23 you give to the Commission and to the public that
24 we've got this under control and that when calls come
25 in, they are not -- I mean I know you are dealing with

1 Oso and bridges going down and every other thing. How
2 can I be sure that in the future, that when these
3 calls come in, they are going to be processed, as you
4 have laid out in your SOP?

5 MR. COMPTON: It is a major point of
6 emphasis to the duty officers in regards to the legal
7 ramifications of the work that we do in that office.
8 It is constantly reinforced. In fact, an e-mail went
9 out to them in regards to this hearing as a
10 reinforcement.

11 All we can do is continue to monitor them and
12 receive information and feedback from our partners in
13 regards to anything that is occurring that seems to be
14 not according to that SOP.

15 CHAIRMAN DANNER: Okay.

16 And then under your SOP you also notify
17 Ecology when there is a spill?

18 MR. COMPTON: They are the primary party
19 that we notify, yes.

20 CHAIRMAN DANNER: Okay. All right.
21 Well, thank you very much. I appreciate your
22 attention to this matter, so that we make sure we
23 have -- the SOP is followed and that we -- we have the
24 information that we need, because we do rely on the
25 EOC for that information.

1 JUDGE KOPTA: I would like to follow up
2 on a couple of questions, if I might.

3 So you said that something did come in either
4 by telephone or by some other means. What is the
5 other means it might come in?

6 MR. COMPTON: The National Response
7 Center sends us reports via fax and e-mail.

8 JUDGE KOPTA: Okay.

9 MR. COMPTON: We will receive it --
10 usually, those two come in simultaneously. It makes
11 for an easier reporting process. We can forward the
12 NRC to the UTC and other partners.

13 JUDGE KOPTA: Does every call have both
14 a phone call component and another component?

15 MR. COMPTON: No.

16 JUDGE KOPTA: Is there any record of
17 phone calls, other than a live person jotting it down?

18 MR. COMPTON: Well, it does get recorded
19 upon the forms for each incident.

20 JUDGE KOPTA: But it is a person that
21 actually is on the phone and jots that down, there's
22 no recording of the telephone call?

23 MR. COMPTON: There are recordings. At
24 this point in time our recording system has a few
25 technical glitches to it, but we can definitely see if

1 we can recover phone calls, if you have a particular
2 one in mind.

3 JUDGE KOPTA: No, I was just wondering
4 what kind of record, other than a human being writing
5 something down. Is there any requirement for a
6 confirming e-mail after a telephone call?

7 MR. COMPTON: A confirming e-mail to
8 who?

9 JUDGE KOPTA: From the person who made
10 the phone call to the person who received it, just to
11 say, Following up on our conversation, here are the
12 details, or --

13 MR. COMPTON: No requirement.

14 JUDGE KOPTA: Is that something that you
15 have considered doing?

16 MR. COMPTON: Well, there's not a lot we
17 can do to require a commercial entity to do anything
18 beyond what they decide they are going to do in
19 regards to reporting. They have specific legal
20 requirements for reporting spills to us. As far as
21 the administrative piece behind there, I am not aware
22 of anything that would give us any kind of leverage to
23 require them to do more than make the call.

24 JUDGE KOPTA: So from your
25 understanding, what is the obligation of a private

1 entity, just either a phone call or through the NPC?

2 MR. COMPTON: I don't know the
3 particulars of the law. I do know that companies that
4 handle hazardous materials are required to report
5 spills of those materials. Our number is published on
6 the Department of Ecology website as a primary.

7 During the day, our primary thing is
8 waterborne spills. Those are required by law to come
9 to the Alert and Warning Center. We don't -- we also
10 accept other types of spills during the day as well,
11 and provide that information on to the Department of
12 Ecology. We really don't take on the full
13 responsibility of that until after the five o'clock
14 hour, when the Department of Ecology closes. At that
15 point, we become their answering service. We have a
16 list of responders for each of their four regional
17 offices that are on call for any given day. When we
18 receive a call, we notify them and pass it on to them,
19 as well as, as I said earlier, the local jurisdiction
20 and any ancillary partner, such as the UTC.

21 JUDGE KOPTA: Okay. Thank you.

22 CHAIRMAN DANNER: Mr. Compton, when the
23 desk receives a call, how quickly do you turn that
24 around and notify the UTC or the Department of
25 Ecology?

1 MR. COMPTON: Our requirement to the
2 Department of Ecology is within 25 minutes. Normally,
3 it's between 5 and 10 minutes of hanging up that phone
4 that we are speaking with them.

5 CHAIRMAN DANNER: Okay.

6 MR. COMPTON: And it depends on how
7 quickly they get back to us. The system for
8 notification of them, especially after hours, is a
9 pager system. We page them out, wait for their call
10 back. If we don't hear from them within ten minutes,
11 repeat the page. We do have a backup for each
12 regional office as well. If we cannot reach the
13 primary within 15 minutes or so, we will go to the
14 backup.

15 CHAIRMAN DANNER: And what about the
16 UTC?

17 MR. COMPTON: The UTC has required us --
18 or not required, but they have asked us to basically
19 keep them informed via e-mail. There is no call-out
20 process for them or anything, unless there is
21 something really significant that occurs. Now, that's
22 somewhat subjective. And if something amazingly large
23 occurs, standardly I will get a call as well, because
24 there is a potential of activation of the EOC.

25 CHAIRMAN DANNER: All right.

1 So let me ask Mr. Pratt, then. So there's a
2 requirement that calls be made within 30 minutes from
3 the Railroad to the EOC. The EOC then turns around
4 and contacts you. Generally e-mail, but if a, quote,
5 really significant event occurs, then they will
6 contact you by phone. The 30-minute deadline suggests
7 that time is of the essence. It seems that time is
8 important. So when a call comes to the UTC, whether
9 it's an e-mail or a telephone call, what is our
10 standard operating procedure?

11 MR. PRATT: Okay. As Mr. Compton said,
12 I think that primarily will depend upon the
13 seriousness of the call. The issue we are talking
14 about here, about hazardous materials releases,
15 generally our job there is to be made aware of them,
16 to understand.

17 Because Ecology is the responding agency, one
18 question -- it's really not even a question, one
19 statement they make to me during those calls, or in
20 e-mail, is that Ecology was notified. That's my
21 primary concern there, if there's a spill that Ecology
22 knows about it, that they are on track. Our case,
23 from that point, is to make sure we are aware of it,
24 we have record of it, and if action is required that
25 we take it. We do not generally take action on

1 hazardous material spills because it is outside of our
2 expertise.

3 The issues we might take action on would be if
4 there was a collision, a derailment, a fatality, we
5 might send staff out to the location if we believe
6 that it is critical. We would also coordinate with
7 the FRA. A lot of times if we get a call of a serious
8 issue, say there's a derailment, I might contact the
9 FRA. We will coordinate our resources with them.
10 Generally, they are the lead agency in that point of
11 view there, but often we hear before them. I would
12 say probably in the last year FRA has also asked to be
13 added to this notification list now, so they get it
14 too.

15 Our job there is to coordinate and make sure
16 we respond as necessary, dependent upon the incident.

17 CHAIRMAN DANNER: Okay. So let's say
18 that 1,611 gallons leaked and we are notified within
19 30 minutes. What would be the action that you would
20 take if you knew that Ecology had been notified, or
21 perhaps you are notified and Ecology hasn't been, or
22 you're not told whether Ecology has --

23 MR. PRATT: No, generally I do. That's
24 generally something they report to me. They will say,
25 Ecology has been notified, yes or no?

1 If there is a spill like that and Ecology has
2 not been notified, my job would be to contact them
3 right away, or ask EOC to contact them right away.
4 They disperse the spill response. They would get
5 somebody out there to contain it and clean up.

6 CHAIRMAN DANNER: But you wouldn't --
7 there's no urgency on your part to get a UTC inspector
8 up to that facility?

9 MR. PRATT: Not specifically on a spill.
10 Again, it would depend upon the seriousness of it.

11 CHAIRMAN DANNER: Okay.

12 MR. PRATT: I can think of some
13 scenarios maybe where we would want to send somebody
14 up, but primarily we would want to make sure that
15 somebody was there cleaning it up.

16 Most of these issues fall under FRA
17 jurisdiction. We would make sure that FRA had an
18 inspector on their way. Often, if they don't, we
19 would send one in their place.

20 CHAIRMAN DANNER: All right.

21 So in a number of cases -- and maybe this is
22 for Mr. Hellman -- the calls were not -- they were
23 made on the same day, but they were not made within 30
24 minutes. There's a number of instances of this. In
25 the Railroad's opinion, is there a time criticality to

1 making a report within 30 minutes?

2 MR. HELLMAN: Certainly, Mr. Chairman,
3 we make every effort to comply with laws and
4 regulations where we are operating. Safety is the
5 number one priority of our railroad.

6 My understanding is that in this situation,
7 there was concern over conflicting Washington state
8 regulations. BNSF has made notifications using
9 Washington Department of Ecology spill notice
10 criteria, but through productive discussions with the
11 UTC regarding the reporting of potential releases,
12 they may not otherwise trigger a report to the EOC
13 under Ecology guidelines. BNSF has now expanded its
14 reporting in an effort to capture those isolated
15 incidents where a report to Ecology may not be
16 required.

17 CHAIRMAN DANNER: So Ecology wouldn't
18 require you to report a spill to them within 30
19 minutes, but the UTC might; is that what you
20 are saying?

21 MR. HELLMAN: What I am saying is I
22 think there was perhaps some confusion about
23 overlapping regulations and that protocols that were
24 in place to ensure that we were meeting regulations
25 through Ecology were somehow confused with what

1 that responsibility -- how that responsibility
2 translates to the UTC.

3 CHAIRMAN DANNER: But in either case,
4 you would have been required to notify the EOC; is
5 that correct?

6 MR. HELLMAN: My understanding is that
7 we did notify the EOC on the possible spillage that we
8 felt would have been captured underneath the laws and
9 regulations of the State.

10 CHAIRMAN DANNER: Okay. But in a number
11 of these cases it wasn't within the 30-minute
12 deadline.

13 MR. HELLMAN: I think some of those
14 were -- were argued within the settlement agreement,
15 or discussed within the agreement, and that the
16 agreement reflects the best communication between our
17 organization, the UTC, the State of Washington, in
18 terms of how those actually came. I believe there was
19 some discussion and possibly some conflict over what
20 exactly was reported or reportable and when those
21 reports were made.

22 MR. DiJULIO: From the statement,
23 Commissioner Danner, it is clear that there was some
24 reporting that was not right within the 30 minutes.
25 Some of that is directly related to where the calls

1 started. In some cases, as reflected by reporting,
2 the calls came directly from local people at BNSF
3 in -- on the ground, in the state of Washington. In
4 other cases, the calls went to a desk in Fort Worth,
5 that is charged by -- that is -- it's a 24/7 emergency
6 hotline, that the Railroad publishes, that the UTC and
7 EOC has, that is reporting -- any incident reported
8 immediately. Sometimes the calls come out of that
9 desk to the reporting agencies.

10 As Mr. Hellman indicated, one of the questions
11 that arose last fall, that has now been reconciled in
12 the course of these discussions, is that BNSF has
13 created an app for all of its personnel. It has all
14 of the reporting requirements in the 30-plus states
15 that have reporting separately from the National
16 Response Center, the NRC, to make sure that any spill
17 gets reported, whether it falls within some of the
18 jurisdictional limits that may differ, depending what
19 jurisdiction you're in, because it differs.

20 Some reporting is required by the NRC, that --
21 or some reporting is required at the State of
22 Washington level, that is not required at the NRC.
23 That was one of the tensions. Ecology has generally
24 adopted the NRC standard. We have -- BNSF, for its
25 part, isn't paying attention to any distinctions, it

1 is reporting everything. I will state that for --
2 from an internal standpoint, the goal of the -- of
3 BNSF, both locally and at the national desk in Fort
4 Worth, is to report within 15 minutes, not half an
5 hour now.

6 CHAIRMAN DANNER: Okay. Well, I
7 appreciate that.

8 I understand that, you know, we are in a
9 federal system and you operate in many states, but I
10 also believe that -- that with planning and resources
11 that -- that you can satisfy all of the various
12 masters that you have. I am happy to hear about that
13 progress.

14 So I next want to turn to --

15 COMMISSIONER RENDAHL: Chairman Danner,
16 may I ask a few questions --

17 CHAIRMAN DANNER: Oh, sure.

18 COMMISSIONER RENDAHL: -- before you
19 turn to another --

20 CHAIRMAN DANNER: Do you want to stay on
21 this topic for a while?

22 COMMISSIONER RENDAHL: Yes.

23 CHAIRMAN DANNER: All right.

24 COMMISSIONER RENDAHL: That makes sense.

25 CHAIRMAN DANNER: Go right ahead.

1 COMMISSIONER RENDAHL: I just have a
2 few.

3 This is for both Staff and for Mr. Compton.
4 If you could both talk about this, whether you have
5 had conversations with the 24/7 call center staff, and
6 the call center staff, to talk about particularly
7 these railroad reporting incidents. It sounds like,
8 Mr. Compton, from what you have said, that you have
9 been reminding your staff about the importance of
10 this. Have the two agencies had conversations about
11 this?

12 MR. COMPTON: We have had regular
13 conversations, primarily my supervisor and myself,
14 with Dave Pratt and with Ms. Young, through e-mails
15 and telephone.

16 COMMISSIONER RENDAHL: And Ms. Young or
17 Mr. Pratt?

18 MR. PRATT: Yes, I would agree with
19 that. We have had multiple conversations since this
20 case started, to make sure we understood procedures.
21 We talked about the problems that occurred and their
22 assurances that those were corrected.

23 COMMISSIONER RENDAHL: So are you
24 confident at this point, that you think any -- any
25 misunderstandings or lack of follow-through have been

1 corrected?

2 MR. PRATT: I've been given the
3 assurances, yes.

4 COMMISSIONER RENDAHL: Okay.

5 And Mr. Compton?

6 MR. COMPTON: I think it can be
7 documented through the e-mails that we have been
8 sending to them, based on the reports that we have
9 received over the last few months.

10 COMMISSIONER RENDAHL: Okay. Thanks.

11 That's all I have on this particular question
12 about the EOC, so thank you.

13 CHAIRMAN DANNER: Mr. Jones, do you have
14 any questions at this time?

15 COMMISSIONER JONES: No.

16 CHAIRMAN DANNER: Okay.

17 So I wanted to ask the -- to get some
18 clarification on this issue of possession, if you
19 will. As I understand it, when there is a leak and it
20 is discovered on a shipper's property, even though
21 that leak may have happened for a thousand miles on
22 the track, and may be actually leaking on the track,
23 if it's not discovered until it is on the shipper's
24 property, then it is not a reportable incident. Is
25 that the understanding?

1 I don't know if this is directed to counsel or
2 if this is directed at witnesses, but I will throw it
3 out there for whoever feels that they can help me
4 clarify that information.

5 MR. DiJULIO: As indicated in the
6 settlement, that's one of the disputed areas of
7 concern. It is the position of BNSF that when the
8 piece of equipment is no longer under control of the
9 railroad, then the railroad has no further
10 responsibility for it. In the case of the incident
11 that was cited regarding November 5th, not only was it
12 not on BNSF trackage, it was not on BNSF property, and
13 it was not under the control of the Railroad. As I
14 suspect, the Commission understands the Railroad
15 doesn't own most of the cars that are operating.

16 So our position, legal position, but certainly
17 not for purposes of settlement, is that when the leak
18 is discovered, it is the responsibility of the entity
19 that controls the facility, controls the track,
20 controls the train, that is responsible for reporting.
21 As it turns out, nevertheless, BNSF did report it to
22 the NRC in that case.

23 CHAIRMAN DANNER: So, you know -- and
24 this -- this is -- I struggle with this one because in
25 some ways this sounds like it could be, you know, a

1 high-speed chase, where you are trying to get across
2 the state line, where you are absolved of
3 responsibility. In this case, you may have a leak
4 that occurs in Montana and Idaho and Washington, gets
5 to the shipper's property, crosses the line, and the
6 Railroad has no duty to either inspect its trains
7 along the way or a duty to notify the EOC, even though
8 it may know about the leak before the shipper does.

9 I guess if -- if that is the position of the
10 Railroad, it seems a rather -- a rather technical one,
11 as opposed to a policy-based one. I am just
12 wondering, is there any other responsibility that the
13 Railroad has when it is on the track before it gets
14 across the state line to the shipper's property?

15 MR. DiJULIO: Well, answering the
16 broader question, and unrelated to the specifics of
17 this incident, BNSF is very much concerned about that,
18 and I suspect the Commission is aware of the issue.
19 In fact, the -- one of the more clearer exposures in
20 this particular case relates to an incident that was
21 not reported, regarding what are known as McKenzie
22 valves, a piece of equipment that is not owned by the
23 Railroad, a piece of equipment on a car that has been
24 a cause of concern. That is the Railroad's concern,
25 that it is in fact resulting in spillage of product

1 and is addressing that.

2 It is not the fact that, you know, it is
3 running across state lines. It does have the
4 responsibility under the national standards for
5 inspection of its trains, and does in fact inspect
6 those trains throughout the course of the transit from
7 point to point. And some of the investigation --

8 CHAIRMAN DANNER: So where -- where does
9 that inspection take place?

10 MR. DiJULIO: It depends on where the
11 train is. Obviously, if the train is moving, there is
12 not going to be an opportunity for inspection.

13 CHAIRMAN DANNER: Sure.

14 MR. DiJULIO: But as I think indicated
15 by Ms. Young's investigation, and UTC's own
16 investigation, when they are in yard, when they are in
17 switching areas, then there is a presence of an
18 inspection. In fact, in the Pasco yard, which is one
19 of the large yards in the state, there were two
20 incidents that were reported by -- as a result of a
21 UTC inspection of the trains.

22 There is an opportunity, and the Railroad
23 will -- does inspect those cars, those trains, when it
24 is in a position to do so. Traditionally, typically,
25 in yards, beginning, middle, when it is in stoppage

1 position, and at the end, typically.

2 CHAIRMAN DANNER: And so just as a
3 general matter, an oil train that is leaving
4 North Dakota, going west, it will stop in yards along
5 the way in almost every case. They don't just go as
6 an entire train all the way to Cherry Point, for
7 example?

8 MR. DiJULIO: There are two questions
9 there. The question is as an entire train. The
10 trains that typically leave North Dakota are unit
11 trains. They are trains of approximately 100 cars in
12 size, engines, plus buffer cars on either end, so
13 maybe 106, 108 cars total in length. Those unit
14 trains go from point -- from point of origination to
15 point of destination. The assemblage of the cars
16 occurs at the point of origination, in North Dakota.

17 CHAIRMAN DANNER: And it doesn't change
18 until --

19 MR. DIJULIO: And it doesn't typically
20 change until it gets to the refinery, point of
21 delivery, shipper, wherever it's going.

22 But those unit trains are going to stop at
23 some point along the way for switching, as they move
24 from one track to another track, in order to get to
25 where they are located. That's when the Railroad does

1 inspect trains.

2 CHAIRMAN DANNER: Is that inspection
3 something that happens regularly? Is that part of
4 their operating procedures, or it just doesn't --
5 happen happenstance, if there's an --

6 MR. DIJULIO: It's part --

7 CHAIRMAN DANNER: -- inspector in the
8 yard?

9 MR. DiJULIO: It's part of the operating
10 procedures.

11 CHAIRMAN DANNER: Okay.

12 COMMISSIONER RENDAHL: Mr. DiJulio, I
13 would assume, too, that there are hours of operation
14 requirements for the locomotive engineers, that they
15 have to stop to change engineers at some point between
16 South Dakota or North Dakota?

17 I may have to ask your experts here.

18 MR. DiJULIO: But I don't know whether
19 they change on the fly or whether the train physically
20 stops or not.

21 COMMISSIONER RENDAHL: Right.

22 MR. HELLMAN: The train would physically
23 stop and they would change out the crew. That happens
24 regularly between North Dakota and the final
25 destination, wherever that may be.

1 COMMISSIONER RENDAHL: And when you
2 change out a crew, do you do any -- did they do any
3 inspection of the train, to make sure that the
4 locomotive engineer, who is taking possession of the
5 train and driving it, knows that the condition of the
6 train is a certain way?

7 MR. HELLMAN: Correct, there is a set of
8 operating procedures that they go through. There is
9 an actual whole manual that travels with the train
10 crew. There's a set of procedures that they go
11 through when they stop that train, when they secure
12 the train, when they pass that train over, with the
13 idea that they are going to be handing the next crew a
14 safe train. The next crew that's coming online will
15 also be ensuring that that train is safe.

16 COMMISSIONER RENDAHL: I am assuming
17 that with this valve issue that's been identified,
18 that there is a procedure now to make sure that the
19 valves are secure and not leaking?

20 MR. HELLMAN: In terms of the McKenzie
21 valve, Mr. DiJulio may be best to answer that question
22 because the McKenzie valve issue is an ongoing issue.
23 I can say that the issue of the McKenzie valves has
24 been highlighted within the railroad and that those
25 people who are working with those trains are aware of

1 that and are particularly sensitive to the possible
2 challenges that those valves may create.

3 CHAIRMAN DANNER: Actually, I would like
4 to follow up on that.

5 So these are valves that we know have had
6 defects, that have led to some leakage, yet they are
7 still being -- they are still being used, the cars
8 that they are on are still being used; is that
9 correct?

10 MR. HELLMAN: Well, my understanding is
11 that the Railroad has raised those issues and they are
12 being discussed at a higher level, within the federal
13 bureaucracy, I imagine.

14 Part of the challenge that we have is that we
15 operate the trains. We don't always necessarily own
16 the cars that we are moving with and therefore have
17 limited authority over the rolling stock that might be
18 moving on our railroad.

19 CHAIRMAN DANNER: So even --

20 MR. HELLMAN: There's a whole set of
21 issues that --

22 CHAIRMAN DANNER: Even if a tank has
23 been identified as having a defective valve that is
24 prone to leakage, that you wouldn't be able to tell
25 the tank car company or the shipper that you want

1 to -- you don't want to take that car at this time?

2 MR. HELLMAN: Well, not in all
3 circumstances. You know, you would have to go through
4 a process where the other side would provide their
5 evidence, and there would be a discussion as to
6 whether or not the issues that we raise are accurate
7 or whether or not the issues that they raise are
8 accurate. So even though we may not agree with a
9 piece of rolling stock or say something like a valve,
10 we don't always have control over that. The best
11 control we have is to ensure that people are aware of
12 those issues and are taking necessary steps to ensure
13 that that won't come back and create a safety issue
14 while it is under our authority.

15 CHAIRMAN DANNER: Are you aware of any
16 FRA or other federal government review of McKenzie
17 valves?

18 MR. HELLMAN: I am going to defer to
19 Ms. Wallace on that.

20 CHAIRMAN DANNER: Thank you.

21 Ms. Wallace?

22 MS. WALLACE: So the federal government
23 and the federal regulators are aware of the issue.

24 They --

25 CHAIRMAN DANNER: And the federal what,

1 I'm sorry?

2 MS. WALLACE: The federal regulators are
3 aware of the issue.

4 A notification has gone out to the shippers,
5 so the owners of the tank cars are required -- and I
6 can get you the exact timing, I'm happy to do that and
7 send that to you, about the exact timing of when the
8 valves need to be replaced.

9 I know several of the tank car owners here in
10 the state of Washington are actively working on, with
11 the tank car manufacturers, to get those replacements
12 in and to meet that deadline. I believe the deadline
13 is -- I will get you the exact time line and send that
14 to you. But there has been a notification and a
15 requirement sent out to all the owners of the tank
16 cars to get those valves replaced.

17 CHAIRMAN DANNER: Okay. I don't know
18 insofar as it is a federal document, can we take
19 notice of it if we obtain it or do you want to do a
20 bench request?

21 JUDGE KOPTA: Well, just for
22 clarification, let's make it a bench request. We will
23 make it Bench Request 4.

24 Mr. DiJulio, since you are a party, when do
25 you expect that you would be able to get us that?

1 CHAIRMAN DANNER: And our staff may
2 already have it.

3 MR. DiJULIO: It is common information,
4 it's been widely publicized, it has been put out. We
5 should -- we will get it to the information center for
6 this record by the close of business on Wednesday the
7 21st.

8 JUDGE KOPTA: Okay.

9 CHAIRMAN DANNER: I did notice
10 Mr. Lewis's nod, in the back of the room, that he
11 actually has this document in his possession. If you
12 would rather just have him distribute it, we can do it
13 that way as well.

14 JUDGE KOPTA: Since this is on the
15 record, why don't we just go ahead and have you
16 provide it to us. It makes for a cleaner record if
17 the party provides it.

18 MR. DiJULIO: That's fine, happy to do
19 so.

20 COMMISSIONER RENDAHL: Mr. DiJulio, is
21 there a standing sort of fix? I am assuming that the
22 Railroad or the manufacturer or FRA has come up with
23 some kind of temporary fix so that we don't have
24 railroads running around with leaking valves operating
25 right now. Is there one in effect?

1 MS. WALLACE: Yes. I actually just
2 pulled up the directive from the FRA. There is a fix.
3 They have outlined two. It's pretty technical, but
4 basically it is going to be replacing a certain type
5 of 3-inch ball valve with the correct 1- or 2-inch
6 valves.

7 COMMISSIONER RENDAHL: So before they
8 replace those valves, is there some way to ensure,
9 like putting in another, I don't know --

10 MS. WALLACE: Another fix?

11 COMMISSIONER RENDAHL: -- washer, for
12 lack of a better term.

13 MS. WALLACE: Yes, I believe there is.
14 I am not an engineer or a technical expert on this,
15 but it is in the directive that I believe Staff has
16 and that we will send out as well.

17 COMMISSIONER RENDAHL: Okay. So right
18 now we don't -- there is no leaking valve at the --
19 they are not leaking because there has been a
20 temporary fix, but the valve issue is being corrected?

21 MS. WALLACE: There is a directive right
22 now, and I know the tank car owners are working very
23 closely to address the issue.

24 CHAIRMAN DANNER: Are you aware --

25 MR. DiJULIO: They don't all leak, but

1 some -- but enough of them do leak that it is a
2 problem.

3 CHAIRMAN DANNER: Thank you for that
4 clarification.

5 COMMISSIONER RENDAHL: Thank you.

6 CHAIRMAN DANNER: Because of that, are
7 there any changes to the Railroad's operations, such
8 as more frequent inspections, or anything along those
9 lines?

10 MS. WALLACE: We are working very
11 closely with the owners of the tank cars to make sure
12 that they are in compliance with the directive,
13 providing any technical expertise that they may
14 request. We are in constant communication with them
15 on which tank cars may be affected. Again, not all
16 tank cars are impacted. We do know that most of our
17 customers and shippers are working very closely to
18 make sure that this issue does get resolved.

19 CHAIRMAN DANNER: Okay. But there's
20 no -- no change in the Railroad's operating procedures
21 with regard to inspections or something like that?

22 MS. WALLACE: No.

23 CHAIRMAN DANNER: Okay.

24 MS. WALLACE: Our inspections continue.

25 And the one thing I will add on --

1 CHAIRMAN DANNER: Do you mean continue
2 in the way they would if it were an oil train or if it
3 were any other commodity being shipped?

4 MS. WALLACE: Correct. And we do have
5 stricter operating procedures on unit trains, crude by
6 rail, and those have been going on in voluntary
7 measures over the last 18 months or so.

8 CHAIRMAN DANNER: Okay. Thank you.

9 If I may, so once the train moves onto the
10 refinery property or the shipper's property and a leak
11 is detected by -- let's -- I mean, in some cases it's
12 the FRA inspectors, but let's -- if it's -- if it's
13 determined -- if it's identified by an employee of the
14 refinery, what obligation does the refinery have to
15 call the EOC or the Department of Ecology?

16 MR. DiJULIO: Well, my response is that
17 they have the same responsibility for spill reporting
18 as any of us do in that regard.

19 CHAIRMAN DANNER: Okay. And so is
20 that -- have you received -- Mr. Compton, have you
21 received calls from shippers or refiners about rail --
22 oil leaks on trains?

23 MR. COMPTON: Primarily, when it comes
24 to a train leak, they are calls from the rail owner,
25 whether it be Union Pacific, BNSF, whoever it is.

1 CHAIRMAN DANNER: But to clarify, from
2 the railroad?

3 MR. COMPTON: Exactly.

4 CHAIRMAN DANNER: Not the tank car owner
5 or the refiner, but from --

6 MR. COMPTON: That's true.

7 CHAIRMAN DANNER: Burlington Northern
8 or UP or another rail line?

9 MR. COMPTON: However, we do receive
10 calls from refineries and others about spills that are
11 on the scene. I cannot tell you -- there's so many.
12 There's I think in the neighborhood of 3,000 a year,
13 somewhat more than that, that are received from all of
14 the people throughout the state to the alert warning
15 center. I can't give you a specific case of whether
16 or not it was a railcar or if it was just being
17 reported as --

18 CHAIRMAN DANNER: Yeah, so -- so you
19 don't -- do you know whether they are required to
20 notify you?

21 MR. COMPTON: I do not. We receive the
22 calls based on -- the Ecology folks are the ones that
23 are the actual legal authority in our review. We just
24 receive the calls and pass the information on.

25 CHAIRMAN DANNER: Mr. Beattie or

1 Mr. DiJulio, do you have information in regard to the
2 obligation of the shippers?

3 MR. BEATTIE: Chairman Danner, I am not
4 aware of any other -- you know, any obligations on
5 shippers or refiners, I haven't done that research.
6 The WAC that is at issue in this case only applies to
7 railroad companies.

8 CHAIRMAN DANNER: Okay. All right.

9 JUDGE KOPTA: Moving on? I have a
10 couple of questions.

11 CHAIRMAN DANNER: Yes, go ahead.

12 JUDGE KOPTA: Mr. DiJulio, does the
13 railroad have a contractual arrangement with each of
14 its shippers?

15 MR. DiJULIO: Yes.

16 JUDGE KOPTA: And as part of the terms
17 and conditions, is there anything in there about
18 reporting, in terms of spills on the property? Does
19 the shipper have any obligation to inform the Railroad
20 if there is a spill from one of the cars that's been
21 delivered to its property?

22 MR. DiJULIO: I don't know the answer to
23 that question.

24 JUDGE KOPTA: In this one incident that
25 is listed in the response to the bench request and is

1 part of the settlement agreement, the Railroad did in
2 fact report this spill, even though it was on the
3 shipper's property. Is that something that's part
4 of -- maybe Mr. Hellman would know. Is that something
5 that is part of the Railroad's standard procedure, if
6 it learns of a spill, even if it's not responsible, it
7 would go ahead and report it?

8 MR. HELLMAN: Could you repeat the
9 question, please?

10 JUDGE KOPTA: Sure. In the first
11 incident, the November 5th incident at the Blaine BP
12 Cherry Point facility, that was on the shipper's
13 property. The Railroad did in fact report that. Not
14 to the EOC, I gather, but to perhaps the --

15 MR. DiJULIO: NRC.

16 JUDGE KOPTA: -- NRC. Is that something
17 that's part of the Railroad's normal procedure if it
18 learns of a spill, even though it is not perhaps
19 technically legally responsible for it, that it will
20 report that?

21 MR. HELLMAN: Yeah, I can't speak to the
22 specifics of that.

23 JUDGE KOPTA: Does the Railroad have any
24 kind of a procedure or process to report spills that
25 it learns of, even if it may not be ones that it

1 believes it has a legal obligation to report?

2 MR. HELLMAN: I don't know of one. I
3 imagine it would be on a case-by-case basis. In this
4 specific instance -- I don't know the specifics of
5 this instance, so I really can't speak to it.

6 MR. DiJULIO: I know that as a result of
7 the recent emphasis on reporting, that the Fort Worth
8 desk reports without evaluation, it just reports and
9 worries about responsibility later.

10 JUDGE KOPTA: So is it common for
11 shippers to inform the Railroad when it discovers a
12 spill on a tank car that's been delivered?

13 MR. DiJULIO: We hope so.

14 JUDGE KOPTA: Anything more than hope?

15 MR. DiJULIO: I can't answer the
16 question as to whether or not they are contractually
17 obligated to do so.

18 JUDGE KOPTA: But at least in this one
19 instance they did in fact report it?

20 MR. DiJULIO: Well, again, we believe
21 that we received a report from them and reported
22 accordingly, but we also could have been on site for
23 some other reason and determined that there was a leak
24 and reported it.

25 JUDGE KOPTA: So at this point you don't

1 know whether there is any kind of process in place for
2 the Railroad to be informed by a shipper if there has
3 been a spill on the shipper's property as a result of
4 a tank car that's been delivered by the Railroad to
5 the shipper?

6 MR. DiJULIO: We cannot answer that
7 question today.

8 JUDGE KOPTA: All right. Thank you.

9 COMMISSIONER JONES: Judge, I have a
10 follow-up question on that.

11 JUDGE KOPTA: Sure.

12 COMMISSIONER JONES: So on this BP
13 Cherry Point facility on November 5th, 2014, it is my
14 understanding in this bench request that BNSF did
15 report it to the NRC, correct?

16 MR. DiJULIO: Correct.

17 COMMISSIONER JONES: Now, is that under
18 the control of the EPA, the Coast Guard? I'm a
19 little -- do you know where that resides in the
20 federal government, Mr. DiJulio?

21 MR. DiJULIO: That's the Department of
22 Transportation.

23 COMMISSIONER JONES: It's DOT?

24 MR. DIJULIO: Yes.

25 COMMISSIONER JONES: But there was no

1 report to the EOC by BNSF?

2 MR. DiJULIO: Not in that case, correct.

3 COMMISSIONER JONES: Mr. Compton, so did
4 Savage report that? Did the shipper report that to
5 the EOC?

6 MR. COMPTON: I do not have any report
7 at all on that particular day. I did print the log
8 for November the 5th. I don't have anything in regard
9 to this incident.

10 COMMISSIONER JONES: Okay.

11 CHAIRMAN DANNER: Again, Mr. Compton,
12 just to clarify, when something is reported to the
13 NRC, eventually -- or what is the process for them to
14 get that information to you, or do you have to go find
15 it from NRC?

16 MR. COMPTON: It's an interesting
17 question. They push the information, we don't -- we
18 don't pull it.

19 CHAIRMAN DANNER: Okay.

20 MR. COMPTON: The NRC that I'm speaking
21 of, the National Response Center, it's my
22 understanding it is governed by the U.S. Coast Guard.
23 There may be two -- two governmental agencies here
24 that we are talking about, that have a very similar
25 acronym, I'm just not sure.

1 MR. DiJULIO: It --

2 COMMISSIONER JONES: Yeah, that's why --

3 MR. DIJULIO: It is the Coast Guard, I
4 apologize. I just -- frankly, I was thinking about
5 all of this under DOT. It is the Coast Guard.

6 CHAIRMAN DANNER: The Coast Guard used
7 to be under the DOT.

8 MR. DiJULIO: It used to be a long time
9 ago.

10 MR. COMPTON: So the only thing I can
11 think of -- and I'm just talking off the cuff here, I
12 have no specific knowledge of this particular incident
13 because it did not come to us -- is since it was so
14 close to the border, it may have been, by the NRC,
15 construed as a north of the border-type station, as
16 opposed to an actual state of Washington situation.
17 Again, I am just talking right off the cuff here.

18 CHAIRMAN DANNER: So if something
19 happens in the far north of the United States, the NRC
20 will have confusion --

21 MR. COMPTON: I don't --

22 CHAIRMAN DANNER: -- about where the
23 boundary is?

24 MR. COMPTON: -- know. I cannot answer
25 that. I am just saying that's the only conceivable

1 scenario in my head that would say that they did
2 not -- as a reason why they would not forward it to
3 us.

4 CHAIRMAN DANNER: Okay.

5 MR. COMPTON: We get --

6 CHAIRMAN DANNER: In most cases they
7 will send you information when things get reported?

8 MR. COMPTON: Exactly. Along with other
9 partners, including the U.S. Coast Guard and others.

10 COMMISSIONER JONES: So I have a few
11 questions, if I could, for Mr. Hellman and BNSF.

12 I'm a little confused about the improved
13 enhanced reporting requirements that you briefly
14 mentioned. So you are saying that all of your
15 employees now have an app? Or Mr. DiJulio said that.

16 MR. HELLMAN: Mr. DiJulio said that.

17 COMMISSIONER JONES: So who has the app
18 and who do they report to on that app? Does it go to
19 NRC, the state EOC, somebody else? Just kind of
20 clarify that for me, please.

21 MR. DiJULIO: Because, as Commissioner
22 Danner inquired about the fact the trains cross state
23 lines, the Railroad wanted to be sure that its people
24 were reporting properly when it gets information
25 regarding a spill. What it did was created an app

1 that has the reporting responsibilities for each of
2 the states that the Railroad operates in, as well as
3 the federal reporting responsibilities. So that if
4 there is a call from North Dakota to the service
5 interruption desk in Fort Worth, those people have the
6 phone numbers and the reporting responsibilities there
7 so they don't have to go look for it or figure out who
8 to report to. It's all right there.

9 COMMISSIONER JONES: Okay.

10 MR. DiJULIO: So that's what that app is
11 there to do, is to make sure that the folks on the
12 ground know whom to call, where. And also the desk in
13 Fort Worth knows that if -- for example, somebody on
14 the ground in the Pasco yard didn't make the call, the
15 person in Fort Worth knows to whom to make the call.

16 So those are the --

17 COMMISSIONER JONES: Okay.

18 MR. DiJULIO: That's the purpose of that
19 app, to inform the people to make sure the reporting
20 gets done timely.

21 COMMISSIONER JONES: I used to be in
22 operations in my previous life. I am a big believer
23 in single point of contact.

24 Does that mean that the employee with the app
25 has the ability to communicate directly with EOC state

1 of Washington, EOC state of Oregon, or does everything
2 have to go to the 7-by-24 active desk in Fort Worth?

3 MR. DiJULIO: It depends upon the --
4 well, first of all, everything has to be reported
5 under BNSF's policies to the service interruption desk
6 in Fort Worth. That desk, 24/7, is also responsible
7 for reporting. Some of the reports are -- indicate
8 here that some of the calls came from the operational
9 people on the ground in the state of Washington,
10 particularly Justin Piper, who is the -- who is not
11 only stationed in the state of Washington, but is also
12 the western assistant director for hazardous material.
13 Because of his particular sensitivity to the EOC, he
14 will personally call the EOC, in addition to placing
15 his call to Fort Worth. And so because of the
16 heightened sensitivity to this, EOC may be getting
17 calls from two BNSF sources with respect to the same
18 spill.

19 COMMISSIONER JONES: Is that your
20 understanding, too, Mr. Hellman, that BNSF, since a
21 number of these incidents, is reporting almost any --
22 I mean, the WAC 480-60-2310, in Sub A says "Release of
23 any hazardous material." So what is -- are you
24 reporting almost any hazardous material per the
25 guidance that Mr. DiJulio just mentioned?

1 MR. HELLMAN: That's correct,
2 Commissioner. We have taken a more conservative
3 approach.

4 COMMISSIONER JONES: Okay.

5 And then just briefly, if you would, before we
6 move on to the next area of questions, describe how --
7 just so I have an understanding, you talked about the
8 various jurisdictions. You are responsible for B.C.,
9 Oregon?

10 MR. HELLMAN: Correct.

11 COMMISSIONER JONES: So how do B.C. and
12 Oregon differ and are similar to reporting
13 requirements, that 30 minutes, in any hazardous
14 material? How -- are they roughly similar to the
15 state of Washington or not?

16 MR. HELLMAN: Well, I think given the
17 level of conservatism that we just described in
18 approaching this, we are reflecting that in the areas
19 that we serve, including B.C., and Oregon as well.
20 Because we travel across 28 states throughout the
21 West, we try to have kind of standard operating
22 procedures as much as possible. The additional
23 securities that we are seeking in Washington, we will
24 likely be using those as well.

25 I would also mention that Mr. Piper also

1 covers the state of Oregon as well, so there is going
2 to be consistency on an individual level, based on the
3 information that Mr. DiJulio just communicated.

4 COMMISSIONER JONES: Thank you.

5 COMMISSIONER RENDAHL: So you have
6 adopted a 15-minute notification period, at least in
7 Oregon, Washington, or all of your 28-state area?

8 MR. HELLMAN: We are communicating as
9 quickly as we can.

10 COMMISSIONER RENDAHL: Okay. Thanks.

11 CHAIRMAN DANNER: So I want to ask next
12 about the question -- there was a spill on
13 January 25th, and it's the thirteenth item listed in
14 Bench Request No. 1, and it talks about, What is a
15 reportable incident? It says a Reportable incident
16 is -- this was not one because it did not occur during
17 the course of transportation in commerce. In this
18 case, the lube oil leaked from the locomotive and was
19 not being transported in commerce.

20 Can you explain that distinction to me?

21 MR. DiJULIO: Yes, the simplest way to
22 explain it is that while there is a reporting
23 requirement for -- and the comment was made with
24 respect to UTC's jurisdiction. We all have
25 responsibilities with respect to reporting of

1 hazardous waste spills, whether it is the UTC's
2 jurisdiction or subject to the state hazardous waste
3 laws. The fact is, that if -- we are supposed to
4 report an oil spill out of our car, it happens all the
5 time. It is not a commodity in transit that is
6 therefore subject to the Commission's jurisdiction and
7 therefore not reportable, consistent with the
8 Commission's regulation.

9 That's the answer to that question. It's
10 not -- internal lubrication material, whether it's in
11 my engine or in the WUT -- or a BNSF locomotive, is
12 not an item in commerce, not reportable as such.
13 Whether it had a responsibility to report it to
14 Ecology is a different issue, but it did not have a
15 responsibility to report it to the UTC.

16 CHAIRMAN DANNER: Basically, because
17 there's a -- you are defining -- let me go back.

18 MR. DiJULIO: It's a locomotive. It's
19 not an item in commerce, it's not being transported,
20 it is internal to the engine. If it is in a tank car,
21 it is reportable.

22 CHAIRMAN DANNER: So help me with this
23 because I am reading 49 CFR 171.15. That is the CFR
24 that has been adopted by reference by the UTC, as
25 required to do. It says, Reportable incident. A

1 telephone report is required whenever any of the
2 following occurs during the course of transportation
3 in commerce.

4 So it says when something occurs during the
5 course of transportation in commerce. I am trying to
6 figure out how that would be limited to the commodity,
7 as opposed to anything else that is a facet of making
8 mass transportation in commerce possible. I mean,
9 certainly in terms of the underlying policy, it would
10 seem to me that the environmental impacts of a spill
11 that involves fuel oil, as opposed to commodity oil,
12 wouldn't be that different, and so it wouldn't make
13 sense to have a rule that makes that kind of a
14 distinction when the environmental impact would be the
15 same.

16 But I also read this as saying when it occurs
17 during the course of transportation in commerce, that
18 that certainly would be more inclusive than just the
19 commodity itself.

20 I'm wondering if you have any -- is there case
21 law on this? Is there something I am not seeing here?

22 MR. DiJULIO: The Railroad relies on
23 precedent from -- with respect to federal
24 interpretation of that standard from throughout the
25 country in that respect. I don't have the citation,

1 the authority, but it is a well recognized
2 distinction.

3 CHAIRMAN DANNER: And so --

4 MR. DiJULIO: The Commission regulates
5 solid waste transport, but you don't regulate the
6 lunch -- the garbage in the -- of the driver on his
7 UTC rounds. He may violate law by throwing his bag of
8 litter on the road, but it's not violation of the UTC
9 regulations.

10 CHAIRMAN DANNER: And so somebody
11 somewhere is responsible for reporting that fuel oil,
12 which is not commodity oil, has fallen onto the ground
13 and is creating an environmental hazard, but we
14 don't -- it's not our agency, so somebody -- and
15 it's -- this is in the CFR, so it appears that it is
16 not DOT's responsibility. Whose responsibility is it
17 to notify somebody that fuel oil has fallen onto the
18 earth?

19 MR. DiJULIO: I can't answer that
20 question.

21 CHAIRMAN DANNER: Are you aware that
22 somebody is responsible for that?

23 MR. DiJULIO: If it is a hazardous
24 substance and is reportable otherwise pursuant to EPA
25 or Ecology or other regulatory standards, then it

1 would be reportable. In this case, I don't know
2 whether 100 gallons of lube oil would meet the
3 requirements for reporting under RICRA or the state
4 act or otherwise.

5 CHAIRMAN DANNER: So since I am not
6 aware of the well-developed case law on this, I was
7 wondering if I could get some case law from you so
8 that I could -- or from counsel, or Staff, so that I
9 can get some -- some -- get my own mind around the
10 fact that when something occurs during the course of
11 transportation in commerce, it is only the commodity
12 itself.

13 JUDGE KOPTA: Mr. Hellman, it looks like
14 he is wanting to respond, Mr. DiJulio, but I will let
15 you nod in his direction first.

16 MR. DiJULIO: Well, I was looking to see
17 if I actually have that here today. I am looking at
18 my notes and I don't -- I am not locating it.

19 Mr. Hellman.

20 MR. HELLMAN: Mr. Chairman, a point of
21 clarification. You are referring to reporting of an
22 incident that occurred January 25th, 2015; is that
23 correct?

24 CHAIRMAN DANNER: I'm looking at that
25 one, but I am also looking at the CFR generally. I

1 mean they are both referring to part 71 15 7b of 49
2 CFR.

3 MR. HELLMAN: So as a point of
4 clarification, the question is not whether BNSF
5 actually reported that incident, but it's a more broad
6 interpretation of the CFR; is that correct?

7 CHAIRMAN DANNER: Yeah, I'm trying --
8 I'm trying to understand how there is a reading here
9 that when something -- we have a leak of fuel oil from
10 a train that is operating in transportation in
11 commerce, that that definition of transportation in
12 commerce is very narrow and wouldn't include fuel oil
13 that falls to the earth and creates an environmental
14 hazard, but would only deal with commodity oil that
15 falls to the earth and creates an environmental
16 hazard.

17 MR. HELLMAN: Okay. Thank you,
18 Mr. Chairman, for that clarification.

19 CHAIRMAN DANNER: Okay.

20 COMMISSIONER RENDAHL: So I have a
21 follow-up question. So it appears from Bench
22 Request 1 that there are four -- four incidents that
23 are potentially subject to whether they are a
24 reportable incident or not. Two that parties appear
25 to have stipulated that or not, and that would be

1 No. 10, which was the December 13, 2014, and that was
2 lube oil in Quincy-Columbia subdivision, and the one
3 we were just talking about, the January 25, 2015
4 Seattle BNSF Interbay yard. Those are the two that
5 the parties agree. I guess I am looking to Staff and
6 counsel and Mr. DiJulio that -- agree that subject to
7 this reportable distinction we are talking about, in
8 terms of being in the course of transportation in
9 commerce, have stipulated that these are not subject
10 to being reported.

11 MR. BEATTIE: It is my understanding --
12 and I will confer with Mr. DiJulio after the hearing
13 to provide additional legal backup for this. It is my
14 understanding that based on some of the comments he
15 made during the settlement negotiations, that Staff
16 was satisfied that this particular substance and the
17 way it was spilled did not meet the definition of
18 release of a hazardous material, out of the WAC, and
19 that's why we were satisfied that it was inappropriate
20 for the Commission to penalize the Company for that
21 particular release.

22 COMMISSIONER RENDAHL: Mr. DiJulio, is
23 that your understanding as well?

24 MR. DiJULIO: That is correct,
25 Commissioner. And -- but with respect to the general

1 sensitivity to this issue, you have also understood
2 from the record in this case, that nevertheless it was
3 reported.

4 COMMISSIONER RENDAHL: It was reported
5 to the FRA under 5800.

6 MR. DiJULIO: Correct.

7 COMMISSIONER RENDAHL: Okay.

8 And then there are two other incidents that it
9 appears the parties couldn't reach agreement about,
10 and that would be the first one on November 5th at the
11 BP Cherry Point facility, and the second one being
12 the -- number two, in the Pasco grain yard, and
13 that -- I understand the nature of that is whether in
14 fact -- or I understand from just reviewing the
15 documents and trying to figure this out, that it
16 appears that it has to do with possession.

17 Is that a correct understanding of what the
18 dispute might be about?

19 MR. DiJULIO: That's correct.

20 MR. BEATTIE: Commissioner Rendahl, the
21 dispute regarding the first incident is whether -- you
22 know, can be characterized as whether the -- you know,
23 in whose custody was the car at the time of the leak,
24 and also whether BNSF knew, because the rule language
25 speaks of learning of an incident. So the dispute is

1 whether BNSF -- anybody at BNSF knew that a leak
2 occurred in transit, which would -- you know, from
3 Staff's litigation position was that that would have
4 triggered the requirement.

5 We are not --

6 CHAIRMAN DANNER: So --

7 MR. BEATTIE: -- able to reach agreement
8 on that.

9 CHAIRMAN DANNER: The language you just
10 used, though, you said if the leak occurred while
11 in -- I can't remember exactly what you said -- in
12 the --

13 MR. BEATTIE: In transit.

14 I want to be --

15 CHAIRMAN DANNER: Before that you said,
16 though, that the leak -- the leak occurred while the
17 train was in the railroad's possession. So there's a
18 difference between the leak -- where the leak occurred
19 and where it was discovered. Are you -- is -- are you
20 talking about where the leak happened or are you
21 talking about where the leak was discovered?

22 MR. BEATTIE: Well, let me preface my
23 answer to that question by saying I want to be
24 careful, because the purpose of our being here today
25 is not to actually litigate this case. We are in

1 agreement that we are joining forces to support this
2 settlement.

3 Were we to go to hearing, Staff's position,
4 which is known to the Company, would be that an FRA
5 inspector informed a BNSF representative that a leak
6 had occurred, and specifically informed that
7 representative that the leak occurred in transit.
8 Staff's position is that such information would be
9 sufficient to that BNSF representative to trigger,
10 hey, I've got to call this in.

11 Of course, you know, this isn't an evidentiary
12 hearing, so I don't want to get too much into these
13 disputed facts. The fact of the matter is, BNSF's
14 position, which Steve DiJulio has already articulated,
15 is that the leak was discovered when the car was not
16 in BNSF's custody, and further, that there was no
17 clear evidence that it occurred in transit, thus not
18 triggering any requirement.

19 That's sort of the crux of the dispute. For
20 purposes of settlement, we agree to disagree on that
21 and move forward with the penalty that we thought
22 reflected --

23 COMMISSIONER RENDAHL: So I appreciate
24 the nature of the hearing that we are having. I am
25 just trying to get a sense of why the parties would

1 believe something was reportable or not or why they
2 couldn't agree, and not wanting to delve into the
3 discussions occurring in settlement negotiations.
4 That's why I was asking whether this had to do more
5 with nature of possession and maybe timing of
6 discovery. Those first two appear to be in that
7 nature, and the latter to appear to be the question of
8 whether it is in fact subject to the rule.

9 MR. BEATTIE: We would agree on the
10 latter two. On the second one, just a quick point of
11 clarification. From my view, the crux of the ongoing
12 dispute about that, that has been settled by the
13 parties, is from BNSF's perspective the quantity was
14 small, one gallon we are talking about, and that there
15 was no evidence of contact with the ground. The
16 parties continue to dispute whether that still,
17 despite the quantity and the lack of hitting the
18 ground, would trigger the reporting requirement.

19 CHAIRMAN DANNER: So can I ask a
20 question? When something leaks from -- when a liquid
21 leaks from a train, where does it go if it doesn't hit
22 the ground? Does it disperse into the air? I'm just
23 curious whether that -- that was a curious comment.

24 MR. BEATTIE: Well, given -- you know,
25 again with the same caveat I had before, it would be

1 staff's position at an evidentiary hearing that --

2 CHAIRMAN DANNER: Okay.

3 MR. BEATTIE: -- requirement to hit the
4 ground is not actually in the rule.

5 MR. DiJULIO: It could very well sit on
6 the side of the car and just get gummy.

7 COMMISSIONER RENDAHL: Thank you for --

8 CHAIRMAN DANNER: So --

9 COMMISSIONER RENDAHL: -- allowing me to
10 ask these specific questions.

11 CHAIRMAN DANNER: So there is no -- is
12 there some kind of legal presumption that it hits the
13 ground, or is there a legal presumption that it gums
14 up on the side of the car, or does that require an
15 evidentiary hearing in all cases?

16 MR. DiJULIO: It's the position of the
17 Railroad, Commissioner Danner, that that would be an
18 evidentiary hearing issue.

19 CHAIRMAN DANNER: Okay.

20 And then I just want some clarification,
21 because again, Mr. Beattie, what you said was, with
22 regard to January 25, 2015 leak of 100 gallons of lube
23 oil, you said that didn't rise to a hazardous
24 materials incident. Was that the -- was that the
25 reason or the basis for this one being contested, or

1 because in the narrative that you provide here in
2 Bench Request No. 1 you talk about it as not having
3 occurred during the course of transportation in
4 commerce? I'm just wondering, what is the basis for
5 your position on that?

6 MR. BEATTIE: My understanding is --

7 CHAIRMAN DANNER: Is it because it is
8 not in commerce --

9 MR. BEATTIE: -- lube oil --

10 CHAIRMAN DANNER: -- or is it because
11 it's not --

12 MR. BEATTIE: -- could not be defined as
13 a hazardous material within the meaning of the WAC.
14 That's why Staff let go of those particular incidents
15 for purposes of settlement.

16 CHAIRMAN DANNER: Okay. So it's not --
17 it's not because it is not in commerce, it is because
18 lube oil may not be a hazardous material.

19 MR. BEATTIE: Within the meaning of the
20 WAC, correct.

21 COMMISSIONER JONES: Is that your
22 understanding too, Mr. Pratt?

23 MR. PRATT: Yes, it is.

24 CHAIRMAN DANNER: So may I ask, what are
25 the characteristics of lube oil that make it more or

1 less hazardous than crude oil?

2 MR. HELLMAN: Is the question directed
3 to me, Mr. Chairman?

4 CHAIRMAN DANNER: It is thrown out there
5 for whoever.

6 MR. HELLMAN: You were looking at me.
7 I can't speak to the specific qualities of it.

8 MR. PRATT: Mr. Danner, I can answer
9 that question.

10 CHAIRMAN DANNER: All right. Thank you.

11 MR. PRATT: I don't know the
12 characteristics, but I can tell you that the FRA
13 produces a table of hazardous materials and it is --
14 there is a whole list, it is hundreds of pages of
15 tables. Lube oil is not on that table, so it is not
16 defined by the FRA as a hazardous material.

17 CHAIRMAN DANNER: Is lube oil -- is
18 there any distinction that lube oil is different than
19 any of the other materials on there? In fact, are you
20 giving a label to something where it is really just
21 oil?

22 MR. PRATT: There is no distinction in
23 their rules that I am aware of.

24 CHAIRMAN DANNER: So it could be that we
25 are calling this lube oil, when in reality it is oil

1 for purposes of federal rules? I mean, I am just
2 asking that question.

3 Mr. DiJulio?

4 MR. DiJULIO: This is a nonengineer
5 person speaking.

6 CHAIRMAN DANNER: To another
7 nonengineer.

8 MR. DiJULIO: Lube oil is not explosive,
9 it's not flammable. And so there is a distinction
10 among the qualities or the characteristics of lube oil
11 that distinguishes it from other types of oil. I know
12 that from my understanding, but that's all I know.

13 CHAIRMAN DANNER: Okay. Well -- and
14 that's helpful, although, again, my nonengineer,
15 nonscientific head would assume that it doesn't help
16 the plants grow if it fell to the earth. I am just
17 trying to figure out the gradations and why things are
18 treated differently in law and rule.

19 Other questions?

20 COMMISSIONER JONES: On that point,
21 Mr. Chairman, I just refer us to the definition of
22 hazardous material in our rule. It just says,
23 Materials that are corrosive, flammable, explosive,
24 reactive with other materials, or toxic.

25 So if that is indeed the case, that's my

1 understanding of lube oil, being a nonengineer, but
2 having been to some hazardous material testing sites
3 before.

4 A question for Mr. Hellman. This is just
5 putting this in perspective a little bit. So this
6 like a math quiz on unit oil trains.

7 The largest incident here that we are talking
8 about is, number one, at BP Cherry Point, in terms of
9 crude oil, right? And I want to speak in barrels.

10 So in one barrel, how many gallons? How many
11 gallons in a barrel?

12 MR. HELLMAN: Roughly 50 gallons, to my
13 understanding.

14 COMMISSIONER JONES: Would you accept
15 42?

16 MR. HELLMAN: I would accept that,
17 gladly.

18 COMMISSIONER JONES: So the biggest of
19 the 14 incidents here, the largest spill of petroleum
20 crude is Item No. 1, at Cherry Point, right? Roughly
21 about 38 barrels.

22 If you assume that there are 100 tank cars in
23 a unit oil train, how many -- how many barrels of oil?

24 MR. HELLMAN: Commissioner, I don't do
25 math publicly, I'm sorry.

1 COMMISSIONER JONES: Would you hazard a
2 guess -- sorry, "hazard." Would you venture a guess
3 on how many barrels of crude oil are in a tank car?

4 MR. HELLMAN: In a tank car?

5 COMMISSIONER JONES: Yes.

6 MR. HELLMAN: How many barrels of crude
7 are in a tank car?

8 COMMISSIONER JONES: Barrels of crude
9 petroleum.

10 MR. HELLMAN: In terms of gallons, I
11 would venture 25- to 30,000, and then convert that to
12 barrels.

13 COMMISSIONER JONES: Okay. Subject to
14 check, would you accept about 700 barrels of crude oil
15 in a tank car?

16 MR. HELLMAN: Yes, that sounds about
17 right.

18 COMMISSIONER JONES: And about 60- to
19 70,000 barrels on a 100-unit oil train?

20 MR. HELLMAN: Generally, yes.

21 COMMISSIONER JONES: Those are fairly
22 significant quantities of crude oil, right?

23 MR. HELLMAN: Certainly.

24 COMMISSIONER JONES: Okay.

25 So the largest spill that we are dealing with

1 is 38 barrels, which would be about, if math serves,
2 maybe 4 percent. And I am not saying that's
3 insignificant, I'm just trying to put this in
4 perspective. Four percent of one unit car, right?

5 MR. HELLMAN: Okay.

6 COMMISSIONER JONES: But what you
7 replied to me before is that you are reporting to the
8 EOC, in this reporting protocol that you have through
9 the NRC, is you are -- you are being very
10 conservative, not just for crude oil but for anything
11 related to petroleum products, and you are reporting
12 any, even if it's a gallon or one-tenth of a barrel.
13 You are trying to report as much as possible.

14 MR. HELLMAN: Well, Commissioner, I
15 don't know that I can give you a specific amount or
16 level or threshold that we are reporting or not
17 reporting. What I can say is that we are certainly
18 approaching it -- taking a conservative approach. We
19 are trying to be more aggressive on the reporting than
20 perhaps we have been in the past.

21 COMMISSIONER JONES: Okay.

22 That's all I have on that one, before we get
23 to further questions.

24 COMMISSIONER RENDAHL: So I have some
25 questions, and I think counsel will be very happy to

1 hear it has something to do with the settlement
2 agreement.

3 So the -- and this is to both Staff and BNSF,
4 but I think I would like to hear first from Staff.

5 So is this -- would you say that the
6 substantial reduction and violations subject to
7 penalty that you all agreed to in the settlement is
8 due to the updated information from the EOC?

9 MR. BEATTIE: Yes, Commissioner Rendahl.

10 COMMISSIONER RENDAHL: Okay.

11 MR. BEATTIE: Also, the phone log that
12 was provided by BNSF through the course of informal
13 discovery, that indicated other calls had been made.
14 There are about four incidents that -- you know,
15 totaling about over 300,000 violations under state law
16 that were reevaluated by Staff simply based on those
17 phone logs.

18 COMMISSIONER RENDAHL: Okay.

19 MR. BEATTIE: So it wasn't just the EOC
20 updating its information, it was also through the
21 process of discovery.

22 COMMISSIONER RENDAHL: Thank you.

23 So -- and I don't know if Mr. Pratt or
24 Ms. Young, you can answer this.

25 If the Commission had received correct

1 information from the EOC initially during its
2 investigation, would Staff have recommended a penalty
3 significantly less than the one that was recommended
4 in the investigation report?

5 MR. PRATT: Yes. By doing the math in
6 the report we have, we believe we ended up with 239
7 violations, so we would have pursued those instead of
8 700.

9 COMMISSIONER RENDAHL: And so would
10 Staff have still recommended a complaint and penalties
11 with the correct -- assuming you had the correct
12 information?

13 MR. PRATT: I believe so, yes.

14 COMMISSIONER RENDAHL: Okay. And --

15 MR. PRATT: I guess I say the way that I
16 believe that is I would have to go back to that day
17 when we evaluated it. We do have two options in a
18 case like this, a penalty assessment or a complaint.
19 We would have evaluated those two options, so we would
20 have pursued one of them.

21 COMMISSIONER RENDAHL: And so -- but the
22 rationale for Staff pursuing the complaint is because
23 of the number of issues and the ongoing issue with the
24 leaks?

25 MR. PRATT: Yes. And the fact that we

1 are limited to \$100 per violation on the penalty
2 assessment, and we didn't believe that was the
3 appropriate amount.

4 COMMISSIONER RENDAHL: And so by filing
5 the complaint, did you think that Staff received the
6 response necessary from the Company, the Railroad
7 Company?

8 MR. PRATT: Yes, we have. And I will
9 say at this point that we believe that there has been
10 complete compliance since this time. We have been --
11 we have been watching our records, we've been watching
12 the EOC reports and the NRC reports. We do believe
13 that they have made a substantial improvement. I will
14 say that I am getting calls now about one cup of
15 spills.

16 COMMISSIONER RENDAHL: That's good.

17 So I don't know, Mr. DiJulio, if you have
18 anything to add to what Staff responded to?

19 MR. DiJULIO: I will observe -- I cannot
20 obviously comment on what Staff was thinking or what
21 Staff's consideration or intent was, but from the
22 report itself, from March 2015, the report itself in a
23 number of places recognizes -- and I quote, recognizes
24 that BNSF generally complies with Commission
25 regulations.

1 COMMISSIONER RENDAHL: But it showed
2 also --

3 MR. DiJULIO: Stating again, BNSF staff
4 has been cooperative and responsive, and, quote, BNSF
5 has consistently demonstrated compliance.

6 As indicated by Mr. Hellman, and in the
7 materials before the Commission, there were issues
8 regarding to whom and in what quantities reports
9 should be made. The report itself, from March 2015,
10 would be characterized as perhaps expressing
11 frustration, that it was not -- Staff was not getting
12 the Railroad's attention sufficiently. That has been
13 addressed completely. As Mr. Hellman has indicated,
14 the Railroad is reporting, and also as Mr. Pratt has
15 indicated, the Railroad is reporting.

16 COMMISSIONER RENDAHL: Right, because
17 the investigation report indicates a number of
18 communications in which Staff attempted to provide
19 technical assistance to the Railroad, and continued
20 questions from the Railroad about what the requirement
21 was.

22 MR. DiJULIO: Yes. And again, without
23 speaking for or with respect to the intent of Staff,
24 had the Railroad been more responsive and demonstrated
25 its reporting compliance more readily, we may not be

1 in the position we are in today, but nevertheless we
2 are and we want to move forward from here.

3 COMMISSIONER RENDAHL: Right.

4 So in terms of the settlement agreement, one
5 of the provisions in the settlement agreement has to
6 do with -- I think it's in Paragraph 6 of the
7 settlement agreement, about technical assistance.
8 That settlement provides that at a mutually convenient
9 time and date to be established by separate agreement
10 of parties, Staff will meet with Company
11 representatives to discuss, among other potential
12 topics, best practices for compliance with the rule.

13 Have the Company and Staff met since the
14 settlement agreement was filed to -- have you begun
15 these technical assistance meetings?

16 I guess that question is both for you,
17 Mr. DiJulio, and for Staff, or Mr. Hellman and the
18 Staff.

19 MR. DiJULIO: Those discussions -- on
20 behalf of the Railroad, those discussions commenced in
21 the course of the parties' both early settlement
22 discussions and in the informal discovery. Those --
23 the discussions began. There has not been a formal
24 meeting between Railroad personnel and Staff, as
25 provided in Paragraph 6 of the settlement agreement.

1 I will defer to the other parties to comment
2 on that as well.

3 COMMISSIONER RENDAHL: Mr. Pratt.

4 MR. PRATT: I would agree with
5 Mr. DiJulio's statement there about the -- during the
6 process we did have a lot of conversations about this.
7 We did not schedule anything formal. We believed it
8 was appropriate to wait until this settlement was
9 finalized and then have formal meetings. We are
10 planning on those, the Company is planning on those.
11 It would include staff down lower in the
12 organizations, to make sure we get down to where we
13 need to be. Mr. Piper, as they have mentioned his
14 name a few times, would be part of those. Ms. Hunter,
15 who is out of the state today, would also be part of
16 those.

17 COMMISSIONER RENDAHL: So in the event
18 you don't agree on what the best practices are, would
19 we hear back from the Staff and the Company?

20 MR. PRATT: Certainly. I am confident
21 that we would -- we will be able to agree on that.

22 COMMISSIONER RENDAHL: Okay.

23 And then one other question for both Staff and
24 the Company. So given that -- and this is about
25 Paragraph 5 of the settlement, on the monetary

1 penalty. Given that there are still some areas of
2 potential disagreement, but given the -- the
3 importance of -- of this issue, the settlement
4 suspends over half of the penalty. What's the basis
5 for that?

6 MR. PRATT: Our belief -- our belief of
7 when we -- when we determined formulas for a suspended
8 penalty versus what is paid and what is suspended
9 over, is that we believe there should be a fair
10 penalty assessed at the time and that there should be
11 a substantial penalty left, so to speak, hanging over
12 the head of the Company, to help keep them in
13 compliance. We believe it is good incentive to have a
14 large suspended penalty hanging over them to create
15 compliance.

16 MR. DiJULIO: From the Railroad's
17 perspective on this issue, we looked to prior cases in
18 settlements, and we believe this settlement is
19 consistent with prior settlements that the Commission
20 has approved. From an advocacy standpoint, arguably
21 it is higher than potentially more serious complaints
22 that have been raised regarding issues subject to the
23 Commission jurisdiction, but again, that's a
24 negotiated issue between the parties. The Railroad is
25 prepared to accept this as a reasonable compromise

1 regarding the claims and issues.

2 But in terms of what this -- where this came
3 from, it didn't come out of thin air, it came out of
4 looking at other settlements the Commission has
5 approved.

6 CHAIRMAN DANNER: I'm going to have
7 follow-up on that.

8 You are looking at other settlements involving
9 transportation companies, or are you looking at other
10 settlements involving household good movers?

11 MR. DiJULIO: Transportation companies.

12 CHAIRMAN DANNER: Transportation
13 companies.

14 So the penalty relative to the size of the
15 company or the size of the activity, you are looking
16 at all of that. These would be other penalties that
17 we have assessed against Burlington Northern or other
18 railroads in the state?

19 MR. DiJULIO: The other penalty that was
20 assessed against Burlington Northern was for a number
21 of crossing violations.

22 CHAIRMAN DANNER: I remember that.

23 MR. DiJULIO: You will remember that,
24 Commissioner Danner, from a prior case.

25 Without evaluating the degree of safety issues

1 associated with that, the -- this settlement is
2 certainly within the same framework of that settlement
3 in terms of issues, amounts, and amount suspended.

4 CHAIRMAN DANNER: I recall that one
5 was -- I thought that was 105,000?

6 MR. BEATTIE: Chairman Danner, that's
7 Docket TR-121921. I have the Order 01 that I am
8 reading from. I believe that the Commission can take
9 official notice of this document. The maximum
10 authorized penalty was 457,500 in that case and the
11 Commission approved a penalty of 105,000, and
12 suspended approximately half of that.

13 CHAIRMAN DANNER: Okay.

14 MR. BEATTIE: And so, yes, Staff would
15 agree with Mr. DiJulio's remarks, that while not
16 obviously binding precedent, this case did inform the
17 settlement discussions. Actually, the total penalty
18 that the parties are advocating for in this case
19 represents a higher percentage of the maximum penalty
20 than was approved in the previous case.

21 CHAIRMAN DANNER: You are talking about
22 the full penalty, not -- not the penalty -- the
23 unsuspended part of the penalty?

24 MR. BEATTIE: That's correct.

25 CHAIRMAN DANNER: You're talking about

1 the \$71,000 as being about 10 percent of the --

2 MR. BEATTIE: 10 percent, no. It is
3 actually about 30 percent of what the parties agree
4 would be in dispute were this case to go to an
5 evidentiary hearing.

6 CHAIRMAN DANNER: Okay. So you are
7 working off of 239, or whatever that was?

8 MR. BEATTIE: Correct.

9 CHAIRMAN DANNER: Okay.

10 MR. BEATTIE: And imagining that in that
11 case, were the Commission to find every violation
12 committed and impose the maximum penalty, the maximum
13 exposure for the Company would be 239,000. And so if
14 you --

15 CHAIRMAN DANNER: Yeah.

16 MR. BEATTIE: -- you know, do the math
17 there.

18 CHAIRMAN DANNER: All right. Thank you.
19 That's helpful.

20 COMMISSIONER JONES: So I have a
21 question for Staff, and it is on the settlement
22 agreement, as Commissioner Rendahl said. It's on this
23 Paragraph 5, you know, the money.

24 The total penalty is 71,700, right, Mr. Pratt?

25 MR. PRATT: Correct.

1 COMMISSIONER JONES: And you are going
2 to suspend -- so if we approve the settlement within
3 30 days, BNSF will pay \$31,700 to the Commission,
4 right?

5 MR. PRATT: Correct.

6 COMMISSIONER JONES: Okay. So what
7 gives you comfort -- I think you spoke to this just
8 earlier. What gives you comfort that this is
9 sufficient to provide leverage? As you said, it is
10 something over their heads, over the head of the
11 Company. There is a little bit of leverage there.
12 But what gives you comfort that this will be, A,
13 honored, and B, that there is a sufficient culture of
14 compliance now at BNSF?

15 MR. PRATT: I guess I would go back to
16 the previous docket that Mr. Beattie mentioned, with
17 the -- with the format we used there, and with the
18 procedures we used there, as far as the same kind
19 of -- kind of weighting on the penalty and the
20 suspension.

21 We believe we have had 100 percent compliance
22 on the crossings since that case. That kind of
23 informed me on this case, that said if we follow the
24 same procedures, that we would hope that we could gain
25 the same 100 percent compliance going forward, as

1 shown in the past practice.

2 COMMISSIONER JONES: And based on what
3 you said earlier, that they are reporting almost any
4 violation now, whether it is 1 gallon or 42 barrels of
5 crude -- well, I think the maximum is like 38 -- that
6 gives you some comfort as well?

7 MR. PRATT: Yes. Like I say, I have
8 received notices for one cup of material being
9 spilled.

10 COMMISSIONER JONES: And then what about
11 after one year? Let's say everything works out well
12 from the settlement agreement perspective and they
13 continue to comply, and then after one year you don't
14 have the sword of Damocles hanging over their heads,
15 right?

16 MR. PRATT: Correct.

17 COMMISSIONER JONES: So what gives you
18 comfort that it will continue? Is it the technical
19 assistance meetings that Commissioner Rendahl referred
20 to, that you will have a regular meeting of the minds
21 with the relevant authorities, or what?

22 MR. PRATT: Well, I would say with the
23 settlement agreement, we have one year that we have
24 that penalty hanging over their head. After the one
25 year ended, if we found more violations of this, I

1 would probably go for the full amount of penalty
2 available to me. We would have known that there was
3 multiple technical assistance, there was a settlement
4 agreement that was agreed upon, there was a penalty
5 paid.

6 If it was after the year, we wouldn't go after
7 the previous suspended penalty, but my belief there
8 would be there was no reason for the reporting not to
9 happen. I would probably file a complaint at that
10 time, asking for the full -- the full amount
11 available.

12 COMMISSIONER JONES: Okay. Thank you.
13 That's all I have.

14 CHAIRMAN DANNER: So I guess just to
15 comment, the -- this -- this is a very large company
16 that is shipping an awful lot of commodity through the
17 state of Washington. While I don't want to question
18 the Company's commitment to compliance with our rules
19 or with safety, I -- I don't know that this amount is
20 necessarily a sword of Damocles. It seems more of a
21 Nerf sword of Damocles.

22 You know, so I am -- I think whatever we end
23 up with in this case, there is going to have to be
24 continued vigilance. I don't think if there is going
25 to be a future violation, that that would -- even

1 though that might trigger the rest of this penalty,
2 that we would be foreclosed from additional
3 complaints, sanctions on those same violations in the
4 future; is that correct?

5 MR. PRATT: Yes.

6 CHAIRMAN DANNER: Okay.

7 So I do -- I don't have any more questions. I
8 do want to say I am very pleased that -- you know, for
9 all -- for all of the issues that this has brought
10 forward, it does seem to me, as Staff has commented,
11 that the Company is -- has really stepped up in terms
12 of compliance, and I appreciate that EOC has also
13 stepped up in terms of its adherence to its SOP. In
14 that regard, I am pleased. I think we are making
15 great progress here.

16 In terms of this actual case and the actual
17 settlement, it is my hope that we will take it under
18 advisement and -- when we are done with the hearing
19 today, and we will come back with our response when we
20 have one.

21 JUDGE KOPTA: Anything further?

22 COMMISSIONER JONES: No.

23 COMMISSIONER RENDAHL: No.

24 JUDGE KOPTA: One issue that we still
25 need to resolve is, the Chairman asked some questions

1 about the interpretation of 47 CFR Section 171.15. I
2 would ask for some supplemental briefing on that. It
3 is not a bench request since it is a legal
4 interpretation.

5 Do you have a date by which you can provide us
6 with that? It doesn't need to be long. I would think
7 five pages at the most.

8 CHAIRMAN DANNER: I would just like some
9 citations, actually.

10 MR. DiJULIO: That's fine. And I will
11 comment further. Commissioner Jones read the
12 definition in the course of his comments and
13 questions. Water is a corrosive material. Under a
14 broad -- if you look at this definition in that
15 regard, spilling of water is a reportable incident
16 because water is a corrosive. We will provide that
17 authority, but I think consistent with the way that
18 the federal and the state application of those
19 standards has been applied, we believe that the
20 reporting will be demonstrated as appropriate.

21 We will provide that information. That should
22 go directly to Judge Kopta and not as a bench
23 response?

24 JUDGE KOPTA: It's not a bench response,
25 but it is as you would file a brief.

1 MR. DIJULIO: Yes.

2 JUDGE KOPTA: It would just be with a
3 cover letter, just to Mr. King, with certificate of
4 service.

5 MR. DiJULIO: Yes.

6 JUDGE KOPTA: And by what date would you
7 anticipate?

8 MR. DiJULIO: That will be by the close
9 of business next Monday.

10 JUDGE KOPTA: One week from today?

11 MR. DiJULIO: One week.

12 JUDGE KOPTA: Okay.

13 CHAIRMAN DANNER: All right. Thank you
14 for that.

15 JUDGE KOPTA: And Staff obviously may
16 also provide its own information, or jointly with the
17 Company, whichever you prefer.

18 MR. BEATTIE: I will confer with
19 Mr. DiJulio. I anticipate, without waiving
20 opportunity to provide our own brief, but I anticipate
21 a joint response to that question.

22 JUDGE KOPTA: That would be fine. So we
23 will make that October 26th.

24 COMMISSIONER JONES: Judge Kopta?

25 JUDGE KOPTA: Yes, Commissioner Jones?

1 COMMISSIONER JONES: Just a final
2 comment. I would just reiterate what Chairman Danner
3 said. Mr. Compton, thank you for coming and
4 participating in this. This is a joint
5 responsibility, as I view it. We didn't mean to put
6 you on the hot seat today for any reason other than to
7 inform this discussion, because there are various
8 places it can go. Thank you for coming.

9 MR. COMPTON: Thank you.

10 JUDGE KOPTA: Is there anything further
11 we need to discuss?

12 MR. DiJULIO: To be clear, Judge Kopta,
13 we have two bench requests, Bench Request 3 directed
14 to Staff, Bench Request No. 4 directed to the
15 Railroad, there may or may not be joint responses to
16 the bench requests, as well as the request for legal
17 authority. That's what I see as deliverables coming
18 out of this.

19 JUDGE KOPTA: Yes. I would make one
20 correction, and that was the EOC was going to provide
21 us with a response to Bench Request No. 3.

22 MR. DiJULIO: Is that possible when they
23 are not a party?

24 JUDGE KOPTA: Well, since he is here
25 testifying, then we think so. I don't think that

1 there is any -- you don't have any opposition to
2 providing that information, do you, Mr. Compton?

3 MR. COMPTON: Absolutely not.

4 JUDGE KOPTA: Yes, the EOC will provide
5 that to us tomorrow.

6 And also be sure to include the docket number
7 on there so we know where it goes.

8 MR. COMPTON: Can I get that from you,
9 please?

10 JUDGE KOPTA: Yes, it is Docket
11 TR-150284.

12 MR. COMPTON: And that was Bench Request
13 No. 3?

14 JUDGE KOPTA: No. 3.

15 CHAIRMAN DANNER: Mr. DiJulio, would it
16 be your preference that you and Mr. Beattie be the
17 intermediaries of that information?

18 MR. DIJULIO: If the EOC is going to
19 cooperate, we have not objection.

20 CHAIRMAN DANNER: Okay.

21 MR. DIJULIO: There is no reason for us
22 to handle any more paper.

23 CHAIRMAN DANNER: They have been very
24 cooperative. I echo Mr. Jones's comments. Thank you
25 very much for your participation.

1 MR. COMPTON: Thank you.

2 MR. BEATTIE: So just to be clear, there
3 are no bench requests directed at Staff, other than
4 informal request for briefing on the issues related to
5 Incidents 10 and 13; is that correct?

6 JUDGE KOPTA: That's correct, unless you
7 wanted to weigh in on the McKenzie valve...

8 MR. BEATTIE: Thank you.

9 JUDGE KOPTA: All right. We are
10 adjourned.

11 MR. DiJULIO: Thank you.

12 (Proceedings concluded 3:21 p.m.)

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C E R T I F I C A T E

STATE OF WASHINGTON
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I, Sherrilyn Smith, a Certified
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