

**FD 36005  
241306**

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**Date:** July 27, 2016

**Case:** In the Matter of: KCVN, LLC and Colorado Pacific Railroad, LLC



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SURFACE TRANSPORTATION BOARD

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IN THE MATTER OF: : Docket Number  
KCVN, LLC AND COLORADO PACIFIC : FD 36005  
RAILROAD, LLC - FEEDER LINE :  
APPLICATION - LINE OF V&S :  
RAILWAY, LLC, LOCATED IN CROWLEY, :  
PUEBLO, OTERO AND KIOWA COUNTIES.:  
-----x

Hearing Room 5  
Federal Energy Regulatory  
Commission  
888 First Street, NE  
Washington, DC

Wednesday, July 27, 2016

The above-entitled matter came on for oral  
argument, pursuant to notice, at 10:00 a.m.

BEFORE :

HONORABLE JOHN P. DRING  
ADMINISTRATIVE LAW JUDGE

Page 2

1 APPEARANCES:

2

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21

22

23

24

25

1 PROCEEDINGS

2 PRESIDING JUDGE: Good morning.

3 Please be seated.

4 We're on the record here.

5 I'm U.S. Administrative Law Judge John  
6 Dring, and by decision served on June 7, 2016, the  
7 director of the Surface Transportation Board's  
8 Office of Proceedings assigned and authorized me to  
9 entertain a rule on discovery matters, resolve all  
10 disputes concerning discovery in this proceeding,  
11 which is -- today we're having oral arguments on  
12 motion of V&S Railroad, LLC for issuance of  
13 third-party subpoenas in Docket Number FD 36005,  
14 KCVN, LLC and Colorado Pacific Railroad, LLC, feeder  
15 line application, in Crowley, Pueblo, Otero and  
16 Kiowa Counties, Colorado.

17 At this time, will the counsels enter  
18 their appearances.

19 MR. WILCOX: Yes, Thomas Wilcox, GKG Law  
20 here in Washington, I'm representing KCVN, LLC and  
21 Colorado Pacific Railroad. In the audience is  
22 Mr. William Osborn of the firm of Osborn, Griffith &  
23 Hargrove in Austin, Texas. He is the attorney in  
24 fact for KCVN and CPRR.

25 Thank you, your Honor.

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1                   PRESIDING JUDGE: Thank you, Mr. Wilcox.

2                   Mr. Osborn?

3                   MR. HOCKY: Good morning, your Honor. My  
4 name is Eric Hocky with the law firm of Clark Hill,  
5 LLC. I represent V&S Railway in this proceeding.

6                   PRESIDING JUDGE: Thank you, Mr. Hocky. I  
7 appreciate that.

8                   I think the way we'll proceed today, I've  
9 just for organizational purposes for myself noted,  
10 that in the motion of V&S Railroad, we've got three  
11 nonparties here that would be subject to subpoenas,  
12 Tallman, Thunderbird and Britain. All are past  
13 shippers, and the requests for information are all  
14 the same.

15                   Bartlett and Watco have different requests  
16 for information. So I think just -- I don't like  
17 one argument better than the other, but I think for  
18 the purposes of clarity, I'll proceed using  
19 Mr. Wilcox's reply to the motion for an  
20 organizational tool, just to go through that.

21                   First --

22                   MR. WILCOX: Your Honor, if I may.

23                   PRESIDING JUDGE: Yes.

24                   MR. WILCOX: We have -- in response to  
25 your order, there have been some discussions.

1           PRESIDING JUDGE: All right.

2           MR. WILCOX: And Mr. Hocky can elaborate.  
3 But I don't believe that the motion is for all of --  
4 all of the subpoenas at this point in the process.

5           PRESIDING JUDGE: Well, that's good,  
6 that's good.

7           Tell me about that, Mr. Hocky, please.

8           MR. HOCKY: Yes. Mr. Britain and  
9 Mr. Tallman have informally responded to the  
10 subpoenas already, without waiting for them to be  
11 issued. And I am accepting those informal  
12 responses, so I'm withdrawing my request for those  
13 two.

14          PRESIDING JUDGE: So we just have Watco,  
15 Bartlett and Thunderbird.

16          MR. HOCKY: Correct.

17          PRESIDING JUDGE: All right. Thank you.

18          MR. WILCOX: If I may add, your Honor, the  
19 information from the three wheat farmers was as a  
20 result of -- I had some -- I'm not representing  
21 them, but I had some conversations with their  
22 representative and them and was told that they do  
23 not -- none of them have documents responsive to the  
24 request.

25                 At that point, I advised them if that is

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1 true, and to be sure it is true, to notify Mr. Hocky  
2 and myself.

3 So while we didn't hear from Thunderbird,  
4 my understanding is they don't have documents. But  
5 we did not hear from them. So that's where that  
6 stands.

7 PRESIDING JUDGE: I see. All right.  
8 Thank you very much.

9 Well, Mr. Wilcox, the first six pages or  
10 five pages go through the standards and the  
11 balancing test. And I think we all understand that,  
12 and if need be, we can discuss that later.

13 But let's start on page 6, where you  
14 discuss, you say there's no need for discovery of  
15 the nonparties who submitted verified statements.

16 On page 7 you say, the applicants on June  
17 6 provided V&S with additional information on the  
18 operating plan in response to the discovery.

19 What did you -- what did you provide?

20 MR. WILCOX: Yes, sir. Our general  
21 argument, you see, is that the feeder line process  
22 provides a way to -- for the incumbent railroad, or  
23 even other parties, to try to flesh out the  
24 operating plan, you know, look at the initial  
25 application, you know, file, what's done in past

1 cases, petition to reject, you know, ask the Board  
2 to say it's not complete, and then the Board can  
3 say, you know, it is or is not.

4 There were a couple instances in this  
5 case, as you saw, where the Board asked for  
6 supplemental information. V&S could have asked for  
7 reconsideration of that and said, we want additional  
8 information, we feel it should be more -- the kind  
9 of thing that's laid out in their subpoena.

10 PRESIDING JUDGE: Uh-huh.

11 MR. WILCOX: That's our position on the  
12 operating plan. However, V&S did -- they did file  
13 some -- or submit some discovery which included  
14 requests for additional information on the operating  
15 plan that KCVN and K & O had corresponded and  
16 provided to each other.

17 And so even though we thought -- or our  
18 position is that V&S's inquiry should have been  
19 within the Board's processes, we nevertheless went  
20 ahead and voluntarily gave additional information.  
21 And that included a lengthy PowerPoint presentation  
22 that was given by K & O to KCVN about -- it  
23 essentially said what we said in our filing, but  
24 with some additional detail, some correspondence  
25 between the two parties via e-mail and things like

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1 that.

2 I don't have the exact number of pages  
3 handy. The total number of pages on the production  
4 was about 400 pages, but to be fair, that was not --  
5 there was also additional questions concerning  
6 KCVN's production and, you know, their -- where  
7 their properties were located and things like that.

8 So, I mean, that relates to the operating  
9 plan and some of the issues that Mr. Hocky is  
10 pursuing in his petition, in terms of, you know,  
11 where is the need, where is the -- you know, where  
12 are the grain to be moved by this railroad.

13 So that's essentially what was provided on  
14 June 6.

15 PRESIDING JUDGE: Okay. And that -- would  
16 that answer all of the stated concerns in the  
17 Thunderbird attachment A as to numbers 2, 3 and 5?

18 MR. WILCOX: I'm sorry, sir?

19 PRESIDING JUDGE: If you look at the  
20 request for information, attachment A for  
21 Thunderbird, which is the only of the three shippers  
22 that are in question today.

23 MR. WILCOX: Right.

24 PRESIDING JUDGE: And you look at numbers  
25 2, 3 and 5 of that attachment, would your response

1 that you just provided me address all of the  
2 information that would have been subject to those  
3 requests?

4 MR. WILCOX: No, sir. I don't believe  
5 that V&S asked for correspondence between Tom and  
6 Farms and KCVN. But as to the others, with the  
7 material we provided did not include the information  
8 in the other requests.

9 PRESIDING JUDGE: On 2, 3 and 5?

10 MR. WILCOX: Yes, sir. Not to my  
11 recollection.

12 PRESIDING JUDGE: Well, why should I not  
13 grant this request here as to 2, 3 and 5?

14 MR. WILCOX: Well, the Board has never  
15 issued a subpoena in a feeder line application  
16 process.

17 PRESIDING JUDGE: Right.

18 MR. WILCOX: The closest they came was in  
19 that Pico decision they cited in their footnote.  
20 But that wasn't a subpoena. They didn't issue a  
21 subpoena. They just asked the parent company to  
22 provide additional information on financial  
23 responsibility.

24 So subpoenas -- they're rarely issued by  
25 the Board anyway. But they have never been issued

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1 in a feeder line application. And we don't believe  
2 it's appropriate here, due to the fact that in  
3 this -- the feeder line application process  
4 contemplates verified statements and then replies  
5 from the -- from the other side.

6 And I guess it might also -- my  
7 understanding is that Tallman -- or excuse me,  
8 Thunderbird doesn't have any documents in response,  
9 but obviously I can't represent that because I'm not  
10 here on their behalf.

11 PRESIDING JUDGE: Right. Okay. Well,  
12 we'll get back to this. I think this will  
13 probably -- there are other factors in this reply of  
14 yours that will lead us back in this direction.

15 You say on page 9, these witnesses,  
16 including Thunderbird, had verified statements that  
17 you say here "they did not testify that they had  
18 conversations."

19 Does that -- is the inverse also correct?  
20 I mean, you don't know, do you? Just because  
21 someone didn't testify that they had conversations  
22 doesn't mean they had them; right? Or is that not  
23 right in this case?

24 MR. WILCOX: Well, I can't -- all I can --

25 PRESIDING JUDGE: You don't know?

1           MR. WILCOX: -- speak to, yes, is the  
2 verified statement. I don't know for a fact that  
3 they did not have conversations.

4           PRESIDING JUDGE: All right. But you also  
5 say that that information is not a specific,  
6 necessary prerequisite for the demonstration that  
7 public convenience and necessity requires the sale.  
8 And then you go through the points made in Coos Bay;  
9 right?

10          MR. WILCOX: Yes, sir.

11          PRESIDING JUDGE: Mr. Hocky, do you think  
12 Coos Bay would be dispositive here?

13          MR. HOCKY: I do think it's still  
14 relevant. One of the standards they have to show,  
15 that there was a failure to provide service. So if  
16 they -- didn't request service, that is a factor  
17 that I think goes into these Coos Bay  
18 considerations.

19          PRESIDING JUDGE: Okay. Okay.

20          MR. HOCKY: So I do think that their  
21 location, whether -- and then the other is  
22 whether --

23          PRESIDING JUDGE: So you need the shippers  
24 to address these points? I mean, you're hoping the  
25 shippers will say that they have inadequate service

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1 and --

2 MR. HOCKY: No, I'm thinking that they  
3 will say that they haven't requested service and  
4 that they will say they haven't promised any  
5 shipments and that they -- but I need confirmation  
6 of that.

7 PRESIDING JUDGE: Right.

8 MR. HOCKY: As you said, I don't have the  
9 inverse.

10 PRESIDING JUDGE: Right, okay. Well, let  
11 me look at this. The Bartlett grain, it's my  
12 inclination, which is -- which weighs somewhat into  
13 these determinations -- this is not a cookbook  
14 exercise here.

15 My inclination is to suspect that the  
16 Bartlett Grain Company's position is probably fairly  
17 similar to the other shippers', past shippers' on  
18 the Towner line. And Mr. Robert Knief, president of  
19 the Bartlett Grain Company, wrote us a very short  
20 letter I'm going to read into the record.

21 Now, for the record, Bartlett Grain  
22 Company operates in several states; is that correct?  
23 I'll just state --

24 MR. HOCKY: I believe that they do.

25 PRESIDING JUDGE: Yes, they do. Yes, they

1 do. Well, this letter is to the Board. "Dear  
2 Ms. Brown, Bartlett Grain Company, LP, Bartlett,  
3 which is not a party to this proceeding and is not  
4 by this letter seeking authority to intervene for  
5 any purposes, asks the Board to accept this brief  
6 response to the motion of V&S Railway, LLC for  
7 issuance of third-party subpoenas filed on May 25,  
8 2016.

9 "One of the proposed subpoenas attached to  
10 the motions is directed to an employee of Bartlett,  
11 Mr. Joe Griffith, Bartlett's general director of  
12 transportation. Mr. Griffith provided a verified  
13 statement in support of the feeder line application  
14 filed by KCVN, LLC and Colorado Pacific Railroad.

15 "Bartlett strongly objects to V&S's  
16 attempt to harass our company with broad and  
17 intrusive discovery requests for confidential and  
18 proprietary business information that have no  
19 relevance to the issues in this proceeding and are  
20 not justified by Mr. Griffith's statement.

21 "Mr. Griffin's statement merely explains  
22 what V&S already well knows, that Bartlett is a  
23 large grain shipper with elevators located on the  
24 Towner line that has used rail service in the past  
25 and would probably use it again if rail service was

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1 restored.

2 "Mr. Griffin's statement neither stated  
3 nor implied that Bartlett has considered any  
4 specific volumes of grain that might ship by rail or  
5 the terms under which any future rail transportation  
6 would take place. Accordingly, the proposed  
7 subpoena is wholly unnecessary and is obviously an  
8 attempt to harass and intimidate Bartlett and  
9 Mr. Griffith.

10 "Accordingly, Bartlett respectfully asks  
11 the Board to deny the motion as it applies to  
12 Bartlett. If any subpoena issued, Bartlett will  
13 vigorously oppose it."

14 Now, you know, Mr. Knief is upset,  
15 obviously. But I think that the one point, the one  
16 takeaway from this short letter, is that Bartlett  
17 has used rail service in the past and would  
18 probably -- he says "would probably use it again if  
19 rail service was restored."

20 Mr. Wilcox has said you can observe along  
21 the Towner line what the facilities are that handle  
22 grain. You can also apparently, according to the  
23 counties involved in this case, observe the truck  
24 traffic on Route 96, which parallels the Towner  
25 line. And the counties are not pleased with the

1 amount of truck traffic hauling grain from these old  
2 shippers of yours.

3 They tear up the roads. They're a hazard  
4 to navigation for bicyclists and motorists. And  
5 generally, the counties would like to see the rail  
6 restored to get these trucks off the road.

7 Parenthetically, it's not hard to find  
8 these grain elevator operators. I looked on Google  
9 Maps yesterday. Look on Google Map, you can find  
10 them. They're there. I believe they're there.

11 And although they haven't stated that they  
12 would use the rail line, the record shows that in  
13 2012, if I'm not -- if memory serves me, you raised  
14 their rates about -- you about quintupled them,  
15 which drove them into the truck business, trucking  
16 business.

17 And I think any reasonable businessman,  
18 which I trust these people are, especially -- well,  
19 they all probably are. But you don't run a family  
20 farm growing grain if you're not a good  
21 businessperson.

22 And I suspect that if the Towner line  
23 provides a cheaper means of transportation of grain  
24 than trucks, they will take it.

25 Do you have any response to that,

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1 Mr. Hocky?

2 MR. HOCKY: I have a number of responses I  
3 guess.

4 PRESIDING JUDGE: All right. I've got  
5 time.

6 MR. HOCKY: With respect to Bartlett, we  
7 don't deny that they have facilities adjacent to the  
8 line. They own two grain elevators at two different  
9 locations on the line.

10 We haven't asked them for the location of  
11 their properties. People we asked, the other  
12 shippers, are the grain farmers who have not  
13 requested service and we don't know where they are  
14 or why they say they can't use us.

15 PRESIDING JUDGE: You don't know if  
16 they're around that railroad? You don't know if  
17 there are any grain -- if they grow grain around  
18 there?

19 MR. HOCKY: Well, I do now because two of  
20 them told me where their farms are located. So yes,  
21 I do now.

22 PRESIDING JUDGE: Well, I have a strong  
23 suspicion that there are a lot of them, particularly  
24 after looking at Google Map.

25 MR. HOCKY: Well, and some of them, a lot

1 of them sell through Bartlett. Bartlett is not a  
2 farmer. Bartlett is a grain distributor.

3 PRESIDING JUDGE: No, I know. That's  
4 correct.

5 MR. HOCKY: So they buy the grain, it's  
6 delivered to them by truck. And then Bartlett, what  
7 we don't know, even when Bartlett was a shipper, how  
8 much of their grain that were in those elevators  
9 were going out by truck to other railheads or other  
10 locations and how much was being shipped on our  
11 line. That's what we've asked them in the first  
12 inquiry.

13 PRESIDING JUDGE: Do you think that when  
14 you began running this line in 2005, the business  
15 that you conducted on that line, hauling grain for  
16 these shippers, was adequate to support the line as  
17 a going concern?

18 MR. HOCKY: I don't know that it ever was  
19 for the entire line.

20 PRESIDING JUDGE: For the 126-or-so miles.

21 MR. HOCKY: For the 120-some miles. The  
22 eastern end, which is where the only business was,  
23 which is where Bartlett is, and historically has  
24 only shipped from its locations east to Towner and  
25 not west across the part that's been -- already been

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1 discontinued, where we already have authority not to  
2 serve over there.

3 You know, I disagree with their  
4 characterization of the increase in rates.

5 PRESIDING JUDGE: All right.

6 MR. HOCKY: A single car rate went up, but  
7 the 50-car rate that they used was actually less  
8 than they paid in the prior year.

9 PRESIDING JUDGE: That's correct. I  
10 understand that.

11 MR. HOCKY: So, you know, the rates were  
12 meant to cover the cost of service, and if they only  
13 ship one car every so many months, it cost \$3000 to  
14 do everything to be able to serve them.

15 Nobody has challenged the rates. They  
16 don't like the rates, but they haven't challenged  
17 them.

18 If they collect the grain and they use the  
19 rail service, they always were provided with cars  
20 when they requested it. That includes in '11  
21 and '12, after the rates went up.

22 PRESIDING JUDGE: Right.

23 MR. HOCKY: If they could take advantage  
24 of it. They asked for lower rates, they didn't get  
25 lower rates because they wouldn't commit to volumes.

1 They said if we ship more than 50 cars but later  
2 it's in smaller increments, you know, can you do --  
3 extend the price break. And we said no, because it  
4 doesn't match up unless they -- you know, unless  
5 you're going to be doing 50 cars in the month, even  
6 if it's 10 cars at a time.

7 PRESIDING JUDGE: Okay.

8 MR. HOCKY: So, you know, there's a lot of  
9 characterizations about it. They say our pricing  
10 drove it all to truck.

11 PRESIDING JUDGE: Yes.

12 MR. HOCKY: You know, we'd like to know  
13 that. They say they made attempts over the years to  
14 ask for our service or to get it reinstated. We  
15 don't believe that happened after 2012 when they  
16 stopped.

17 They were the last shipper -- the only  
18 shipper for about four years.

19 PRESIDING JUDGE: Bartlett?

20 MR. HOCKY: Yes. And so, you know, we  
21 know how many cars were shipped on the line. The  
22 most they ever shipped was 500-some. The least they  
23 shipped was 27, I think, in those years.

24 So we're trying to figure out where, you  
25 know -- K & O is saying there's 2000 car loads of

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1 grain right away, and we don't know that it's there.

2 If we had 2000 car loads, we'd be doing great.

3 PRESIDING JUDGE: Okay. Can you address  
4 that, Mr. Wilcox? You have an application, and I  
5 guess the application provides information. And I  
6 guess you've also provided recent information on  
7 this, I suspect.

8 MR. WILCOX: Yes.

9 PRESIDING JUDGE: Your June 6 reply.

10 MR. WILCOX: First, it's telling that the  
11 V&S, who was supposed to be a common carrier  
12 railroad operating a line under the jurisdiction of  
13 the STB, has no idea who its shippers are or where  
14 they're located and whether they need service or not  
15 here in 2016.

16 I mean, that's one of the points, one of  
17 the main points in the case, is that they -- the  
18 reason the feeder line application should be granted  
19 is because the V&S stopped in 2012 being a railroad,  
20 and they started trying to sell it and do other  
21 things.

22 So instead of marketing the line and  
23 developing the line, they don't even know who their  
24 shippers are now, including they don't know what  
25 their biggest shipper is doing.

1 In terms of the truck versus rail --

2 PRESIDING JUDGE: Well, it has been four  
3 years; right?

4 MR. WILCOX: Right. But as a common  
5 carrier with an obligation to the public, their job  
6 is to try to market the line to the extent they can.

7 In terms of the volumes in truck versus  
8 rail, Mr. Hocky just admitted that, I mean, these  
9 requests asked for information from 2010 to 2015.  
10 V&S knows what happened between 2000 to 2012. They  
11 don't need discovery from Bartlett to know that --  
12 what happened there, because they were the rail, the  
13 shipper, rail transportation provider. They know  
14 the car loads.

15 They even quoted some of those statistics  
16 in some filings with the STB in 2012.

17 PRESIDING JUDGE: And they know the  
18 location of Bartlett; right?

19 MR. WILCOX: Right.

20 PRESIDING JUDGE: So the first question  
21 they asked about the location, they probably already  
22 know that?

23 MR. WILCOX: And Mr. -- well, they did not  
24 ask where Bartlett's elevators were, so I'll say  
25 that. But in terms of the volume of truck traffic,

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1 Mr. Griffith has sworn testimony that after 2012,  
2 100 percent went to truck.

3 PRESIDING JUDGE: Okay. But you've --  
4 you've conducted an appropriate business plan for  
5 your operation, should you take over this line of  
6 rail?

7 MR. WILCOX: Well, and that's -- I mean,  
8 the Board's regulations require a detailed plan.

9 PRESIDING JUDGE: That's right.

10 MR. WILCOX: And we've cited that had in  
11 our footnote. And so to have an application  
12 accepted, the operating plan has to be of sufficient  
13 detail.

14 And the Board accepted it, asked for some  
15 supplemental information, which we provided. At no  
16 point in the process did V&S undertake or avail  
17 itself of anything that asked -- to ask the Board,  
18 hey, this isn't enough, maybe they should provide  
19 some more detail, you should reject the application  
20 because it doesn't include A, B, C, D, E, F and G.

21 Instead they sat on their hands, and now  
22 they're trying to get it through a subpoena, which  
23 the Board has never authorized in a feeder line  
24 case.

25 And the final thing on the --

1                   PRESIDING JUDGE: Just because the Board  
2 never authorized it doesn't mean I wouldn't do it.  
3 But I understand that argument.

4                   MR. WILCOX: Well, I'm not saying that the  
5 Board should never do it. I'm just saying this is  
6 not the case and the circumstances to take the first  
7 step.

8                   PRESIDING JUDGE: I understand.

9                   MR. WILCOX: In terms of the discussion of  
10 rates, as Mr. Griffith explained, the volumes at  
11 that time did not justify a 50-car rate. So if  
12 you're a -- if you're a railroad that doesn't want  
13 to provide service, you provide a rate that no one  
14 will use, and then the one that they have to use,  
15 the smaller car rate, less than 50 cars, you put at  
16 a very high level, so nobody uses it. But it still  
17 looks like you're there.

18                   But all they have to do is come up with a  
19 50-car train, which as Mr. Griffith testified, just  
20 the volumes didn't justify it. So they changed to  
21 truck.

22                   Then in terms of rate cases, no grain  
23 shipper has brought a rate case at the STB in 30  
24 years. The processes are extremely onerous. They  
25 are -- it's very hard to get relief.

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1           So that's -- it's not like someone could  
2 just file a rate case and then move on.

3           PRESIDING JUDGE: Right. Thank you.

4           MR. HOCKY: Your Honor, if I can just  
5 respond, just briefly.

6           PRESIDING JUDGE: Yes, Mr. Hocky, please.  
7 I would appreciate that.

8           MR. HOCKY: The fact that the Board hasn't  
9 ever issued a subpoena in a feeder line case that  
10 we're aware of, I also didn't find any instances  
11 where the Board denied subpoenas in a feeder line  
12 case.

13           So I think it's really just that it hasn't  
14 come up.

15           PRESIDING JUDGE: I have experience in  
16 another case, where I intend on doing something the  
17 Board has never done. And they -- their general  
18 counsel looked, and they said we haven't done it,  
19 but that doesn't mean anything.

20           And I appreciate your candor.

21           MR. HOCKY: The second thing. On the  
22 amount of grain shipped in years when they did not  
23 ship by rail, and years they did ship by rail for  
24 Bartlett. We know how much they shipped by rail.  
25 We don't know how much were in those elevators that

1     went out by truck.

2                 PRESIDING JUDGE:    Yes.

3                 MR. HOCKY:    And we would not have that  
4     information.    Even if we know that they shipped 51  
5     cars, we don't know how much else they shipped out  
6     by truck.

7                 And in the later years, what we're trying  
8     to figure out is what the available freight is for a  
9     new operator, if there were one.

10                They have made estimates.    If Bartlett --  
11     if it was all bad years and they only had very small  
12     amounts of grain in their elevator, they might not  
13     have shipped anyway.

14                It's not necessarily the rates that drove  
15     it to truck.    It might be that they didn't have the  
16     available grain.    So asking them how much grain they  
17     moved through the elevator does not seem  
18     unreasonable, in our trying to verify the operating  
19     plan.

20                PRESIDING JUDGE:    Okay.    Okay.    Well --

21                MR. HOCKY:    Your Honor, I'm sorry, one  
22     more thing.

23                PRESIDING JUDGE:    Yes.

24                MR. HOCKY:    On Bartlett, although I don't  
25     think it's an unreasonable request, because we ask

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1 for other people's correspondence to us all the time  
2 as a kind of fact check, we would, you know, be  
3 willing to eliminate request number 4, which is  
4 correspondence between V&S and Bartlett --

5 PRESIDING JUDGE: Yes, my notes to myself  
6 in the margins say you should already have this.

7 MR. HOCKY: We have our side of it, and so  
8 we would withdraw that. I don't think it's a  
9 nonstandard request, but we would still withdraw it.  
10 And we would withdraw that with Mr. Stumm as well.  
11 We also asked for his correspondence with us, as one  
12 of his numbers. And we would withdraw that as well,  
13 which would be number 4.

14 PRESIDING JUDGE: That's Thunderbird, yes.

15 MR. HOCKY: Yes. I think you alluded to  
16 that because you asked Mr. Wilcox about 2, 3 and 5.  
17 So --

18 PRESIDING JUDGE: I did. I did.

19 Well, I think that as to -- as to  
20 Thunderbird, which would have also been as to  
21 Tallman and Britain, these are not the types of  
22 parties under the Board's recognized test for  
23 issuing subpoenas to third parties, nonparticipating  
24 third parties, that these are the types of parties  
25 that the Board would envision involving them in

1 these cases. So I'm going to deny everything as to  
2 them.

3 Now, let's discuss -- and I will do so for  
4 the sake of completeness, I will refer to and adopt  
5 Mr. Wilcox's reply motion with regard to those  
6 parties.

7 Let's discuss Bartlett again for a minute.  
8 This is not the way I'm going to rule, but I'm  
9 heavily leaning toward denying as to Bartlett's  
10 attachment numbers 2, 3 and 4. But I'm thinking  
11 about number 1.

12 Mr. Wilcox, you heard Mr. Hocky's  
13 arguments as to number 1, and they did not, to me,  
14 seem to be unreasonable. They seemed to, as you can  
15 see from what I've said, they seem to stand apart  
16 from the others.

17 What do you think about that?

18 MR. WILCOX: Well, as a general statement,  
19 there is an issue that I think we'll be arguing  
20 before the Board as to what level of detail we as  
21 applicants need to get into in terms of need. In  
22 some cases, there are shippers in feeder line cases,  
23 there are shippers on the line and railroads  
24 providing inadequate service.

25 In other cases, the railroad has not done

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1 anything in years.

2 And so you get farther removed from  
3 whether there's an immediate need of actual volumes,  
4 car loads, agreements.

5 V&S is trying to move it towards a more  
6 specific need, whereas we think, just by where the  
7 circumstances are, we think -- and looking at some  
8 of the other cases, that a more generalized need is  
9 required, combined with the other --

10 PRESIDING JUDGE: Yes. Let me just  
11 interrupt and say it appears -- I've read the entire  
12 record in this, and it appears to me in a macro  
13 sense that there should be a need for rail service  
14 for these shippers and that it appears evident.

15 I mean, I think the counties are probably  
16 not overstaffed and they probably only address  
17 things of vital interest to the -- to their -- to  
18 the homeowners and taxpayers in the county.

19 They seem fairly well exercised about the  
20 trucks on the road, and the trucks are hauling grain  
21 from these nearby farms.

22 So not knowing -- if you didn't know  
23 anything about the legalities or the technicalities  
24 of this case, I think just the average person should  
25 be able to intuit that if -- since the cessation of

1 rail service to the grain elevators and farmers in  
2 the area, there has been a tremendous increase in  
3 truck traffic on the road paralleling the line,  
4 there is some nexus there, there is some cause and  
5 effect.

6 And it seems reasonable that if rail  
7 service is restored to those shippers, those past  
8 shippers, that should have some significant effect  
9 on the roads in that it should reduce the truck  
10 traffic.

11 MR. WILCOX: Yes, absolutely.

12 PRESIDING JUDGE: I mean, I just think  
13 that's fairly obvious.

14 Mr. Hocky, I know you don't like it. Go  
15 ahead and tell me why.

16 MR. HOCKY: Well, first of all, they're  
17 just counties commenting because they want to  
18 preserve the railroad. They're not saying that  
19 there's actually --

20 PRESIDING JUDGE: They want to preserve  
21 the railroad or they want to preserve their roads?  
22 Because they said they want to preserve their roads.  
23 It's causing -- it's causing trouble to them.  
24 They're -- the maintenance on the roads has  
25 increased.

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1 MR. HOCKY: So --

2 PRESIDING JUDGE: It's a scenic route  
3 apparently for some reason, there's a lot of bicycle  
4 traffic, and it's creating a hazard.

5 MR. HOCKY: So if we look back at the  
6 couple years before they stopped requesting service,  
7 the only one requesting service was Bartlett. None  
8 of the others requested service so, unless it was  
9 through Bartlett and we didn't -- I mean, they sold  
10 to Bartlett and Bartlett was requesting it.

11 Bartlett moved 51 cars one year, 27 cars  
12 another year. That's not a lot of added truck  
13 traffic to these markets. If that's all that was  
14 added, there's lots of trucks out there, there's two  
15 other parallel rail lines, there's other railheads.

16 Trucks -- you know, it's not -- this added  
17 truck is a euphemism, because it wouldn't take that  
18 many trucks off the road. It would take some trucks  
19 off the road.

20 MR. WILCOX: Well --

21 MR. HOCKY: Admittedly.

22 MR. WILCOX: I'm sorry.

23 MR. HOCKY: Or if they can attract all  
24 this traffic. But we're trying to find out how much  
25 traffic --

1                   PRESIDING JUDGE: You're supposing as much  
2 as I just supposed. You're just supposing the other  
3 side.

4                   MR. HOCKY: No, I'm saying that we know  
5 how much they shipped by rail in those last couple  
6 of years.

7                   PRESIDING JUDGE: Yes.

8                   MR. HOCKY: So if that's all that was  
9 driven to truck, because that's all that would have  
10 gone by rail, that's not a lot of trucks. That's  
11 200 trucks in a year.

12                  PRESIDING JUDGE: Okay. All right.

13                  MR. HOCKY: Or 80 trucks a year.

14                  PRESIDING JUDGE: So where are all the  
15 trucks coming from, if that's the question, if  
16 indeed there are more trucks?

17                  MR. HOCKY: They're going all over,  
18 anywhere, because they're going to other elevators.

19                  PRESIDING JUDGE: Okay.

20                  MR. HOCKY: Or they already were, or  
21 they're going from other railheads, or they're going  
22 from Bartlett to other railheads. But they already  
23 were. It's not just because of this.

24                  PRESIDING JUDGE: Well, it seems to me  
25 like if you knew the answer to number 1, that

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1 would -- that would help you and provide clarity in  
2 this case.

3 MR. HOCKY: Yes.

4 PRESIDING JUDGE: Is that right?

5 MR. HOCKY: Yes.

6 PRESIDING JUDGE: I mean, really, is that  
7 right? Because I'm inclined to deny everything  
8 except that number 1.

9 MR. WILCOX: Well --

10 PRESIDING JUDGE: And I know Bartlett is  
11 not going to like it, but you know, that's just the  
12 way it goes sometimes.

13 MR. WILCOX: Well, the statistics of  
14 what -- how much grain is produced in Kiowa County  
15 and I believe how it's moved is -- no?

16 PRESIDING JUDGE: No what? What were you  
17 going to say that the answer is no?

18 MR. WILCOX: I'm sorry. The USDA keeps a  
19 very extensive database on grain production in the  
20 west in different states.

21 PRESIDING JUDGE: Right.

22 MR. WILCOX: So that may be a way for V&S  
23 to determine -- what I started to say, determine how  
24 it's transported, but that's not true.

25 But it may provide data on how much is in

1 the elevators. Is that -- no? Okay.

2 PRESIDING JUDGE: Mr. Osborn apparently,  
3 he hasn't shaken his head up and down, it's only  
4 horizontally. So I guess you're not getting very  
5 far with that.

6 MR. WILCOX: I'll make the more general  
7 point that the USDA does publish statistics that  
8 might provide the information in lieu of Bartlett.

9 PRESIDING JUDGE: But we don't know if  
10 it's at that level of granularity. I used to work  
11 for that department, and I know they do a lot of  
12 stuff. They have a big budget and they collect a  
13 lot of data.

14 But I have no idea and you don't have any  
15 idea, I don't think Mr. Hocky has any idea, the  
16 level of granularity of those data.

17 So, again, do you think, given the lack of  
18 knowledge about USDA data collection on this topic,  
19 do you think that if Mr. Hocky received response --  
20 responsive answers to number 1 of his attachment A,  
21 that would assist in the Board making an  
22 intelligent, rational decision in this case?

23 MR. WILCOX: Well, I think that the Board  
24 can make an intelligent, rational decision based on  
25 the evidence up to 2012.

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1                   PRESIDING JUDGE:  Would this be even  
2  better?  Would it promote intelligent discussion?  
3  Look at your client.  For once he's shaking his head  
4  up and down.

5                   MR. WILCOX:  I think it would add  
6  information that we don't have.

7                   PRESIDING JUDGE:  All right.  There we go.  
8  There we go.  All right.  I'm not going to say  
9  anything.  Sometimes -- sometimes I get a little  
10 glib, and I don't want to do that here.

11                   All right.  Mr. Hocky?

12                   MR. HOCKY:  Could I just address items 2  
13 and 3 which you're inclined not to --

14                   PRESIDING JUDGE:  Yes, you can address  
15 them.

16                   MR. HOCKY:  Which you're inclined not to  
17 grant.

18                   PRESIDING JUDGE:  I am.

19                   MR. HOCKY:  I do think the information is  
20 relevant whether they have had discussions about  
21 rates, whether they have had discussions about  
22 volumes with either KCVN -- with the applicants or  
23 with K & O as the operator.

24                   PRESIDING JUDGE:  Well, how about asking  
25 them a question, and if it's yes, they can just say

1     yes?

2                     MR. HOCKY: Well, I take it from their  
3     letter that the answer is no.

4                     PRESIDING JUDGE: No.

5                     MR. HOCKY: But I don't -- if it's  
6     included and the answer is no, then all they have to  
7     do is say no documents. It's not very burdensome.

8                     PRESIDING JUDGE: All right. I think  
9     that's fair. They have said -- they have said no.  
10    And you can state that in your communication with  
11    them.

12                    You stated in the letter to the Board of  
13    June 13, 2016, that you've had no such  
14    communications, you have no documents; is that  
15    correct?

16                    Do you want to say that to them?

17                    MR. HOCKY: Yes, I would like --

18                    PRESIDING JUDGE: You're going to ask them  
19    for their -- that's just one more question, and all  
20    he has to do is grumble no or yes, whatever. Is  
21    that okay?

22                    MR. HOCKY: That's okay. If he says yes,  
23    then I need to know --

24                    PRESIDING JUDGE: Well, we've got issues  
25    then.

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1 MR. HOCKY: Right.

2 MR. WILCOX: If I may, this question  
3 involves -- question number 2, correspondence  
4 between Bartlett and KCVN or CPRR.

5 That request was not part of V&S's  
6 discovery to KCVN and CPRR.

7 PRESIDING JUDGE: Okay. Well, let's leave  
8 them out of it. Just ask -- we're talking about  
9 Bartlett here, okay?

10 MR. HOCKY: This is Bartlett's -- whether  
11 they had discussions with KVCN about what -- before  
12 they were, you know, put in.

13 So I think that we still would be only  
14 talking about Bartlett's side of things. And, you  
15 know -- we didn't ask KCVN because they're not the  
16 operator, but we didn't know if you had discussions  
17 with them about pricing or what might be available.

18 MR. WILCOX: Well, as I understand it,  
19 your Honor, there were no real substantive  
20 communications between Bartlett and KCVN and CPRR.  
21 There was a -- you know, a meeting or conference to  
22 discuss it, but in terms of communications and  
23 documents back and forth --

24 PRESIDING JUDGE: Conference to discuss  
25 it. Conference?

1                   MR. WILCOX: A meeting between Bartlett  
2 and KCVN.

3                   PRESIDING JUDGE: All right, okay. But  
4 there was nothing that came of it?

5                   MR. WILCOX: Correct. Is that correct?  
6 Yes.

7                   PRESIDING JUDGE: Mr. Hocky, do you want  
8 to ask about that? Do you want to ask if that's  
9 correct?

10                  MR. HOCKY: I would still prefer in  
11 sending this to ask the question whether there are  
12 documents responsive. We understand from the letter  
13 that there are no documents responsive to 2 or 3.

14                  PRESIDING JUDGE: Yes.

15                  MR. HOCKY: If that's correct, please  
16 confirm. If that's incorrect, then we'd like to  
17 discuss with your Honor, you know, what we would be  
18 entitled to get of those documents.

19                  PRESIDING JUDGE: Right. Right. All  
20 right.

21                  Why don't you go ahead and subpoena  
22 Bartlett for number 1 and the 2 and 3 as you've just  
23 described it to me, and we'll not have anyone else  
24 involved in these subpoenas. No one.

25                  I think that the questions that are raised

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1 by 1 and 2 and 3 as revised are significant to the  
2 disposition of -- or significant as to the Board  
3 having the information it needs to make an  
4 intelligent decision in this case. The rest of it I  
5 think is far too attenuated under the standards that  
6 the Board has more subpoenaing third-party -- third  
7 parties in such cases.

8 Have I covered everything? Does anyone  
9 have any questions?

10 Yes, Mr. Hocky.

11 MR. HOCKY: Are we still going to address  
12 K & O? I didn't know if you meant that we were not  
13 involving anybody else, whether -- because we  
14 haven't really discussed that.

15 PRESIDING JUDGE: Well, yeah. You can ask  
16 Bartlett. That's 3. You can ask Bartlett if he's  
17 had communications with KCVN, CPRR and K & O.  
18 That's 3. I mean, may well have.

19 MR. HOCKY: Yes. But K & O, we have a  
20 number of other informational requests.

21 PRESIDING JUDGE: From K & O? To K & O --  
22 to K & O.

23 MR. HOCKY: Yes.

24 PRESIDING JUDGE: I don't see the value in  
25 that, I really don't. I think if you get what you

1 want from Bartlett, you should have sufficient  
2 information.

3 MR. HOCKY: Well, but K & O purports that  
4 there's traffic well in excess of what Bartlett has  
5 ever provided. And I think we're entitled to know  
6 what the basis of those estimates are in their  
7 operating plan.

8 Although Mr. Wilcox says that they -- that  
9 the applicants provided some additional information,  
10 they really -- there really was not additional  
11 information of what we are requesting.

12 They did provide us with a copy of the  
13 draft operating -- lease and operating agreement.  
14 They provided us with a copy of the correspondence  
15 that provided simply the exact same data that then  
16 they recited in their supplement, but there was --

17 PRESIDING JUDGE: So can you tell  
18 Mr. Wilcox what else you would have preferred -- you  
19 would have wanted in his response?

20 MR. HOCKY: I don't know it has to be --  
21 he thinks it has to be -- I'm saying it has to be in  
22 the -- in their application, and otherwise their  
23 application shouldn't have been accepted. I don't  
24 think that's what I have to do.

25 I'm trying to explore what they have said

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1 to see if it's substantiated, so when I file my  
2 comments, I can say they have not proven their case.  
3 Then they have a chance to file rebuttal.

4 If I say -- I don't have to file, like, a  
5 motion to dismiss or a motion to reject the  
6 application. There's nothing in the rules that  
7 provides for that.

8 There is a set procedure where they review  
9 it to see if it's substantially complete, not  
10 whether it's going to be granted. The Board makes  
11 that decision after all the evidence is submitted.

12 PRESIDING JUDGE: Sure.

13 MR. HOCKY: I'm trying to get additional  
14 information about what they submitted so that I can  
15 file a reasonable response.

16 PRESIDING JUDGE: Mr. Wilcox, can you help  
17 Mr. Hocky here? What's going on? I understand what  
18 he said, but what's your response to it?

19 MR. WILCOX: Again, the opportunity for  
20 V&S to obtain this information, the additional  
21 information or additional detail, was during the --  
22 when the application was submitted and then  
23 supplemented.

24 Because they would have -- could have  
25 asked the Board at that point, well, the operating

1 plan needs to have all this additional detail, and  
2 the Board could have said no, in our feeder line  
3 applications, we don't -- we require a certain level  
4 of detail in the feeder line application, and it's  
5 intrusive or not really necessary to go to the level  
6 of granularity that these guys want to go.

7 But they didn't do that, so now they're  
8 trying to do it through the subpoena process.

9 PRESIDING JUDGE: Did you just fall asleep  
10 at the switch there, Mr. Hocky?

11 MR. HOCKY: No. We were waiting for the  
12 Board to make their determination whether it was  
13 complete or not. But we didn't feel that we needed  
14 to ask for that more additional information in that  
15 way. We're not limited that way.

16 There is discovery -- the Board has said  
17 there's discovery in feeder line. This is  
18 reasonable discovery.

19 The way we've chosen to do it, we asked  
20 KCVN or the applicants in our discovery to them,  
21 which we were allowed as a right, for information  
22 about the operating plan and the maintenance costs  
23 and the amount of traffic.

24 And their response was partially, you  
25 know, the same thing they're saying here, you should

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1 have done it before. But in any event, that's K & O  
2 that did that.

3 PRESIDING JUDGE: But this -- but this is  
4 still with regard to Bartlett?

5 MR. HOCKY: No, I was moving over --

6 PRESIDING JUDGE: Number 3.

7 MR. HOCKY: That's all discussions with  
8 one potential shipper.

9 PRESIDING JUDGE: Yeah. Well, that's what  
10 you asked for here. Where is --

11 MR. HOCKY: No, I was moving to the --  
12 maybe I'm confused.

13 PRESIDING JUDGE: Well, you're confusing  
14 me. Where are you?

15 MR. HOCKY: I'm on the subpoena to K & O,  
16 the separate one.

17 PRESIDING JUDGE: All right.

18 MR. HOCKY: There's a separate subpoena to  
19 Doug Story of Watco Transportation Services. And  
20 his -- Watco or K & O's attorney, Carl Morrell,  
21 filed --

22 PRESIDING JUDGE: What number is it? So  
23 we're squared away with Bartlett and the other  
24 shippers.

25 MR. HOCKY: We are.

1           PRESIDING JUDGE: Let's look at this.

2           Which one are you talking about?

3           MR. HOCKY: So it's Mr. Story, who is --

4           PRESIDING JUDGE: Yeah, I've got it here.

5           MR. HOCKY: So with Mr. Story --

6           PRESIDING JUDGE: You're looking at all of  
7 these?

8           MR. HOCKY: We're looking at all of these  
9 except for 1. 1 asks for correspondence between K &  
10 O and KCVN, and we asked KCVN for that information,  
11 and they provided us with responsive documents, so  
12 we no longer need to ask for that.

13           PRESIDING JUDGE: So you're looking at 2  
14 through 9.

15           MR. HOCKY: We're looking at 2 through 9.

16           MR. WILCOX: And our point is that --

17           PRESIDING JUDGE: Your what?

18           MR. WILCOX: Our point on this is that  
19 this level of detail, granularity on the operating  
20 plan, is not required under feeder line application.  
21 And had they asked the Board during the process --  
22 you know, feeder line is more -- it's more  
23 regimented, it's more robust than other proceedings,  
24 in terms of you have application with specific regs  
25 on what it's supposed to contain, the reply and then

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1 a rebuttal round.

2 And I think that had they -- had they  
3 asked the Board --

4 PRESIDING JUDGE: Just hold on here. I'm  
5 an energy guy, not a railroad guy.

6 Mr. Hocky; is that correct? Is his  
7 characterization of the process correct?

8 MR. HOCKY: It requires certain elements.  
9 It does not specify the level of detail.

10 But to prove a feeder line case, they have  
11 to -- and it's not an easily-granted relief  
12 because --

13 PRESIDING JUDGE: This is proof in the  
14 application or what?

15 MR. HOCKY: Yes. The application is their  
16 case-in-chief.

17 PRESIDING JUDGE: All right.

18 MR. HOCKY: And eventually, they have to  
19 establish the standards for getting relief, which  
20 includes that the public convenience and necessity  
21 requires the sale.

22 PRESIDING JUDGE: Right, okay.

23 MR. HOCKY: As part of that, they have to  
24 show either that there was a lack of service or poor  
25 service to existing customers, or in some cases it's

1     been found that the person tried to run off the  
2     traffic and that's why there's no traffic.

3                 PRESIDING JUDGE:   Yeah.

4                 MR. HOCKY:   But it also has to show that  
5     it can be operated as a successful railroad by the  
6     new party, which includes their operating plan,  
7     their potential levels of traffic.

8                 And you can't examine when their operating  
9     plan is reasonable or whether their expenses are  
10    reasonable or whether their estimates are reasonable  
11    unless you have information about how they did their  
12    calculations.

13                I mean, I can say any railroad line, if it  
14    had 10,000 car loads, it's going to be successful.  
15    So if I can just say that, then I can just say that.

16                So I'm asking for the basis for this  
17    operating plan. I think it's perfectly reasonable.  
18    And they have to -- it's their burden of proof, but  
19    I'm going to say that they haven't met the burden of  
20    proof and then they're going to file in their  
21    rebuttal all this information that I'm asking for,  
22    and I won't have a chance to rebut it or to look at  
23    it.

24                PRESIDING JUDGE:   Well, I have seen that  
25    in my practice. My law clerk is grinning over here.

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1 All right.

2 Mr. Wilcox, would you respond to that,  
3 please.

4 MR. WILCOX: Well, just to say again that  
5 I think that there's, you know, sufficient detail.  
6 There's also the -- there's V&S has shown a  
7 propensity, you said you've read the record and  
8 you've seen they have shown a propensity to try to  
9 use the Board's procedures and rules to, you know,  
10 prolong this -- this has been going on for several  
11 years now.

12 PRESIDING JUDGE: Well, I didn't say that.  
13 I didn't say that. That's your characterization,  
14 not mine.

15 MR. WILCOX: That's what I'm saying.

16 PRESIDING JUDGE: Yes.

17 MR. WILCOX: So we think there's an  
18 element of that here. The fact that they waited so  
19 long to do it, and this is going to prolong the  
20 case.

21 And our view is let's get going and move  
22 the case along rather than --

23 PRESIDING JUDGE: Mr. Hocky, this is --  
24 this is a line of rail that just is lying out there.  
25 The at-grade crossings that deteriorated, I've seen

1 the pictures. I looked at Google Map. It's -- it's  
2 pretty delapidated.

3 Why do you care what Mr. Wilcox and his  
4 clients want to do with this? Why do you care?

5 MR. HOCKY: Because it's our rail line.  
6 We are --

7 PRESIDING JUDGE: You just kind of like  
8 the land, sentimentally attached to the Towner line?

9 MR. HOCKY: We're using portions of it for  
10 storage, we're generating a lot of income right now.

11 PRESIDING JUDGE: Okay, all right. See, I  
12 didn't know that. That's not -- all right.

13 MR. HOCKY: So for storage of cars on the  
14 western end that's not being used.

15 PRESIDING JUDGE: Okay.

16 MR. HOCKY: The eastern end, you know, we  
17 had provided service when requested, and there  
18 hasn't been a lot of service requested. And so, you  
19 know, we can argue about whether it's because of the  
20 rates or not.

21 Right now -- there was a fire that burned  
22 down a bridge, so there's no service at the moment.  
23 And, you know, we're getting estimates for replacing  
24 the bridge.

25 But, you know, it's -- it's a forced sale

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1 that we're not interested in at the moment.

2 PRESIDING JUDGE: I see. Well, that's  
3 helpful. I appreciate that.

4 MR. WILCOX: Well, if I could respond,  
5 your Honor.

6 PRESIDING JUDGE: Yes, you may.

7 MR. WILCOX: As we explained in the  
8 filing, there was a litigation in Colorado over the  
9 line. KCVN obtained an injunction because V&S was  
10 tearing up the line and was going to sell without  
11 abandoning it.

12 PRESIDING JUDGE: I remember seeing that.

13 MR. WILCOX: The parties reached a  
14 limitation settlement agreement where V&S would  
15 abandon the line; which would have allowed --  
16 there's another proceeding called offer of financial  
17 assistance, where if a party comes in and can  
18 purchase the line at liquidation value --

19 PRESIDING JUDGE: I'm familiar with those,  
20 right.

21 MR. WILCOX: In the middle of that  
22 proceeding, you had the crude oil train collapse in  
23 terms of market, and car storage opportunity fell in  
24 their laps, and they reneged on the settlement  
25 agreement, withdrew their abandonment application.

1 That's the only reason we're here.

2 So the reason they don't want -- the  
3 reason that they care, as you say, is they're  
4 making -- it's for personal gain, not to serve  
5 shippers, not to market the line. It's for V&S to  
6 make money storing -- privately storing railcars.

7 And then the other issue right now is that  
8 the valuation of the line will be determined by  
9 the -- in large part by the price of steel. And the  
10 price of steel is very low right now.

11 PRESIDING JUDGE: Sure, sure.

12 MR. WILCOX: So to the extent V&S can drag  
13 this out and, you know, they collect their car  
14 revenues and the price of steel maybe goes up,  
15 that's to their gain.

16 So we think there's more than a little bit  
17 of that to what's going on here.

18 PRESIDING JUDGE: I understand. All  
19 right. Well --

20 MR. HOCKY: Your Honor, one last thing. I  
21 did -- I did have discussions with Mr. Morrell, who  
22 is counsel for K & O, who said he would not be here,  
23 who also said he wouldn't voluntarily submit -- you  
24 know, provide documents unless you issued a  
25 subpoena.

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1           But I did make the offer to him that if  
2 the subpoena is issued, that I would be happy to  
3 discuss with him the scope of the requests to  
4 minimize burden, if he has, you know, ways to do  
5 that or he's afraid that they would be burdensome.

6           But he wasn't willing to talk to me until  
7 the subpoena was issued.

8           PRESIDING JUDGE: All right. Okay.  
9 Mr. Wilcox, are you in a position to work through  
10 numbers 2 through 9 in attachment A to K & O as to  
11 whether or not all the terms are -- let me say, if  
12 any of the terms are unreasonably burdensome, are  
13 you in a position to do that?

14           MR. WILCOX: Well, I've had some  
15 conversations with Mr. Morrell as well, so yes, I  
16 would be in a position to talk to them, as well as  
17 Mr. Hocky talk to him.

18           PRESIDING JUDGE: You don't want to do  
19 that here today. It's probably better if you have  
20 an agreement that the three of you can sit down and  
21 try to work something out amicably, you can do that?  
22 Is that right? Is that right?

23           MR. WILCOX: I'm willing to do that, sure.

24           PRESIDING JUDGE: Is that right?

25           MR. HOCKY: Yes, we're all amicable. We

1 all know each other. We all can talk to each other.

2 PRESIDING JUDGE: All right. Well, if you  
3 all want to know the back story to this, you can  
4 look at my ANR storage case, where the Commission  
5 ruled against me on one of my rulings, and I had  
6 something to say about it in another docket around  
7 the energy business that's referred to as appendix  
8 C.

9 I have an aversion to allowing  
10 sandbagging. I have a real commitment to due  
11 process. And I think that in keeping with my  
12 philosophies on this, I'm going to allow subpoenas  
13 in numbers 2 through 9, with the understanding here,  
14 I don't know if it's enforceable, but I would be  
15 terribly disappointed and I'll remember it if I ever  
16 see you guys again, that you work together, the  
17 three of you, Mr. Morrell, Mr. Wilcox, you,  
18 Mr. Hocky, to try to make this as less burdensome as  
19 possible on K & O. I really mean that.

20 And if you don't do it, you know --  
21 everybody gets a fair hearing before me, but I will  
22 remember, it might color my opinion of you. Okay?

23 MR. HOCKY: Understood.

24 MR. WILCOX: Yes, sir.

25 PRESIDING JUDGE: All right.

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1                   MR. HOCKY: With respect to the Bartlett  
2 letter subpoena, and I guess this one, should we  
3 just as part of our working this out determine a  
4 return date, or do you want to set a return date?

5                   PRESIDING JUDGE: Do you want to do that?  
6 You know, if you guys can work it out, that's fine.  
7 What do you think?

8                   MR. WILCOX: I'd like a date set.

9                   PRESIDING JUDGE: All right. Do you want  
10 to take a few minutes now off the record and try to  
11 figure something out that's reasonable? Want to  
12 make a phone call?

13                   MR. WILCOX: I just -- I don't see that  
14 there's going to be a lot of material at the end of  
15 the day, so I would -- I would say, you know, two  
16 weeks, three weeks tops. I don't think -- we  
17 certainly don't need a month for this. So I would  
18 say two weeks from now.

19                   PRESIDING JUDGE: That's encouraging.

20                   MR. HOCKY: I was going to say 30 days,  
21 but I mean -- 20 days. But -- so somewhere just --  
22 I won't be able to get these out until tomorrow  
23 because I'm going to be traveling back to  
24 Philadelphia. So, you know, if we said 20 days from  
25 today, that would give me time.

1 MR. WILCOX: I still think 20 days is too  
2 long. We want to -- I'd go for -- I don't have a  
3 calendar in front of me, but --

4 MR. HOCKY: Two weeks from Friday? Today  
5 is Wednesday. I mean, I'll get them out tomorrow so  
6 they will get them --

7 PRESIDING JUDGE: That puts us somewhere  
8 in the week of August 15th, okay? Monday is the  
9 15th.

10 MR. WILCOX: Two weeks from Friday,  
11 whatever that comes out to be.

12 PRESIDING JUDGE: Well, two weeks from  
13 Friday is the 12th, August 12th. Friday, August  
14 12th?

15 MR. HOCKY: Yes.

16 MR. WILCOX: Is that okay?

17 MR. HOCKY: Yes, your Honor.

18 PRESIDING JUDGE: You guys are going to  
19 copy me on these?

20 MR. HOCKY: Yes, I will copy you and I'll  
21 reference today's hearing as the order date or  
22 authorization date.

23 MR. WILCOX: If I may, your Honor.

24 PRESIDING JUDGE: Yes.

25 MR. WILCOX: Mr. Hocky, what exactly are

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1 you going to be drafting for Bartlett in particular?  
2 I guess for K & O there's nothing to draft yet,  
3 but --

4 MR. HOCKY: Well, I'm going to redraft the  
5 attachment to include 1, 2 and 3, and then I'll have  
6 a cover letter.

7 I'm a little constrained with how I  
8 communicate with Bartlett because they don't have a  
9 lawyer that they have told me about yet. And I have  
10 felt uncomfortable calling them directly.

11 PRESIDING JUDGE: Sure.

12 MR. WILCOX: Well, let me just represent  
13 that you can work with me through Bartlett. I'm not  
14 representing them in this matter, but obviously,  
15 he -- he is our witness. So you can work through me  
16 on that.

17 MR. HOCKY: So I'll serve you with the  
18 cover letter and you'll just --

19 MR. WILCOX: Sure.

20 MR. HOCKY: You'll accept it for him and  
21 then we'll --

22 MR. WILCOX: Yes.

23 PRESIDING JUDGE: That's good. I  
24 appreciate that, thank you.

25 MR. WILCOX: Sure.

1 MR. HOCKY: And I'm happy to share the  
2 cover letter with you to make sure you think I've  
3 accurately represented.

4 MR. WILCOX: I appreciate that.

5 PRESIDING JUDGE: That would be helpful.

6 MR. HOCKY: On 2 and 3 so we're not  
7 arguing about it.

8 PRESIDING JUDGE: Yes, thank you.

9 So are we done here?

10 MR. WILCOX: I think so, your Honor.  
11 Thank you very much.

12 MR. HOCKY: Thank you, your Honor.

13 PRESIDING JUDGE: Thank you. I appreciate  
14 it. Appreciate it when people can work together  
15 too. Thank you for that.

16 Thank you, Mr. Osborn, for attending,  
17 shaking your head.

18 (Whereupon, at 11:05 a.m., the hearing was  
19 concluded.)

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CERTIFICATE OF NOTARY PUBLIC & REPORTER

I, CARMEN SMITH, the officer before whom the foregoing hearing was taken, do hereby certify that the witness whose testimony appears in the foregoing hearing was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said hearing is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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