

FD 30400 Sub 1-7 - Pages 50-109

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BEFORE THE
INTERSTATE COMMERCE COMMISSION

In the Matter of:]	
]	
SANTA FE SOUTHERN PACIFIC CORPORATION]	Finance Docket No.
]	30400 Sub. 1 thru 7
-- CONTROL --]	
]	MC-F-15628
SOUTHERN PACIFIC TRANSPORTATION COMPANY]		

Interstate Commerce Commission
12th and Constitution Ave., N.W.
Hearing Room "A"
Washington, D. C.

Wednesday, July 25, 1984

The above-entitled matter came on for further
prehearing conference, pursuant to notice, at 9:35 o'clock
a.m.

BEFORE:

THE HONORABLE JAMES E. HOPKINS
Administrative Law Judge

APPEARANCES:

(As previously heretofore noted.)

P R O C E E D I N G S

1
2 JUDGE HOPKINS: Let's come to order ladies and
3 gentlemen. Finance Docket Number 30400, Santa Fe
4 Southern Pacific Corporation Control-Southern Pacific
5 Transportation Company which embraces finance dockets
6 30400 Sub Numbers "1" through "7" and number MC-F-15628
7 have been set for prehearing conference today mainly for
8 the matter of working out a perspective schedule for this
9 hearing but also any other matters that need attention at
10 the present time.

11 Let's take the appearances again, gentlemen, so
12 we will know who is here and who isn't here. Who appears
13 for the Applicants?

14 MR. NELSON: Good morning, Your Honor. My name is
15 Milton E. Nelson, Jr. I am an attorney admitted to practice
16 before the Commission. I represent the Atchison, Topeka
17 and Santa Fe Railway Company at 80 E. Jackson Boulevard,
18 Chicago, Illinois, 60604. With me are R. K. Knowlton who
19 represents the Santa Fe Southern Pacific Corporation
20 at 224 South Michigan Avenue, Chicago, Illinois, 60604,
21 Dennis Wilson representing the Santa Fe Railway, Richard E.
22 Weicher representing the Santa Fe Railway and Robert R. Cowell
23 representing the Santa Fe Railway.

24 JUDGE HOPKINS: Thank you.

25 MR. STEPHENSON: Good morning, Your Honor. My name

2

1 is Douglas E. Stephenson. I am an attorney appearing for
2 Southern Pacific Transportation Company and am admitted to
3 practice before the Commission. With me for Southern Pacific
4 Transportation Company are Thormund A. Miller, vice-president
5 and general counsel of Southern Pacific, John McDonald Smith,
6 Michael A. Smith and Lewis P. Warchot. All of us have the
7 same address, Southern Pacific Building, One Market Plaza,
8 San Francisco, California, 94105.

9 JUDGE HOPKINS: Thank you.

10 MR. MOATES: Good morning, Your Honor. My name is
11 Paul Moates. I am with the law firm of Sidley and Austin
12 at 1722 Eye Street, Northwest, Washington, D. C., 20006.
13 With me with this morning is Mr. R. Eden Martin also of our
14 firm and Mr. Ronald S. Flagg. I would also like to enter the
15 appearance at this time of Mr. Terrence M. Hynes of our firm.
16 We appear on behalf of the Applicant, Santa Fe Southern
17 Pacific Corporation.

18 JUDGE HOPKINS: Thank you. Any other appearances
19 for the applicant?

20 MR. MURRAY: Your Honor, my name is Steven L. Murray
21 and I am an attorney with the International Brotherhood of
22 Teamsters and I am here today on behalf of the International
23 Brotherhood of Teamsters Local 315 as well as Vince Aloise
24 on his own behalf as secretary-treasurer of IBT Local 315.

25 JUDGE HOPKINS: Protestants? Other protestants and

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1 intervenors?

2 MR. KHARASCH: Robert N. Kharasch and Kathleen Mahon
3 representing the Missouri-Kansas-Texas Railroad Company.

4 JUDGE HOPKINS: Thank you.

5 MR. MILLER: Good morning, Your Honor. I am Charles
6 A. Miller from the law firm of Covington and Burling. With
7 me is Arvid Rouch from that firm. We represent the Union
8 Pacific Railroad Company and Missouri Pacific Railroad Company.
9 I would also like to enter the appearance on behalf of those
10 companies of James B. Dolan, Paul A. Connolly, Jr., and
11 William G. Barr all of the Union Pacific Railroad Company,
12 Legal Department.

13 JUDGE HOPKINS: Thank you. Next.

14 MR. RAKER: Good morning, Your Honor. Morris
15 Raker of the firm of Sullivan and Worcester representing the
16 Kansas City Southern Railway and with me today is my partner
17 Robert Calhoun.

18 JUDGE HOPKINS: Thank you. Next.

19 MR. KAHN: Good morning. I am Fritz R. Kahn and
20 I am accompanied by my partner William C. Evans. We are
21 entering appearances on behalf of the Chicago and North
22 Western Transportation Company. We are with the law firm of
23 Verner, Liipfer, Bernhard and McPherson, Suite 1000,
24 1660 "L" Street, Northwest, Washington, D. C., 20036.
25 I also am accompanied by Mr. Stuart F. Gassner, general

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1 solicitor of the Chicago and North Western and I would like
2 to enter an additional appearance for Mr. James P. Daly,
3 Senior Vice-President, Law and Real Estate and the address
4 of the Chicago and North Western Transportation Company is
5 One North Western Center, 165 North Canal Street, Chicago,
6 Illinois, 60606.

7 JUDGE HOPKINS: Thank you.

8 MR. HYMSON: Good morning, Your Honor. I am
9 Edward Hymson representing Consolidated Rail Corporation,
10 1138 Six Penn Center, Philadelphia, Pennsylvania.

11 JUDGE HOPKINS: Next.

12 MR. KOONTZ: Good morning. My name is Howard D.
13 Koontz representing the ICG Railroad Company, 233 North
14 Michigan Avenue, Chicago, Illinois, 60601.

15 JUDGE HOPKINS: Thank you. Next.

16 MR. EDMOND: Your Honor, my name is John A. Edmond
17 of the law firm of Highwaw and Mahoney representing the
18 Railway Labor Executives Association. I am located in Suite
19 210, 1050 17th Street, Northwest, Washington, D. C., 20036.

20 JUDGE HOPKINS: Thank you. Next.

21 MR. SIPPEL: Your Honor, my name is William C.
22 Sippel. I am appearing on behalf of Richard B. Ogilvie,
23 Trustee of the property of the Chicago, Milwaukee, St. Paul
24 and Pacific Railroad Company, Debtor.

25 MR. STEINER: Good morning, Your Honor. My name is

5
1 Robert S. Steiner, General Counsel, Transportation Regulation
2 Authority, Iowa Department of Transportation, 507 Tenth
3 Street, Des Moines, Iowa, 50319. I would also like to enter
4 the appearance of Jane Phillips, counsel for Iowa Department
5 of Transportation.

6 JUDGE HOPKINS: Thank you.

7 MR. KAGAY: Good morning, Your Honor. My name is
8 Charles Kagay, K-A-G-A-Y, Deputy Attorney General for the
9 State of California appearing for John K. VanDeKamp, the
10 attorney general of the State of California.

11 JUDGE HOPKINS: Thank you. Next.

12 MR. KRAUSHAAR: Good morning. I am Richard H.
13 Kraushaar, Standard Building, Cleveland, Ohio, representing
14 the Brotherhood of Locomotive Engineers.

15 JUDGE HOPKINS: Next.

16 MR. PRETTYMAN: Good morning, Your Honor. I am
17 E. Barrett Prettyman, Jr. of the law firm of Hogan and
18 Hartson representing the Denver and Rio Grande Western
19 Railroad. With me is my partner, Thomas B. Leary.

20 MR. WHITE: Good morning, Your Honor. My name is
21 Charles H. White, Jr., a member of the law firm of Arnall
22 Golden and Gregory. I am here representing the Texas Mexican
23 Railway.

24 MR. ROBERTS: My name is Barry Roberts, 600
25 Maryland Avenue, Washington, D. C. and I represent Sunkist

1 Growers, Inc. in California.

2 MR. GELTMAN: Your Honor, my name is Edward A.
3 Geltman, 1201 Pennsylvania Avenue, Northwest, Washington,
4 D. C., 20004 representing Mazda Motors of America.

5 MR. COOPER: Your Honor, my name is Stephen Cooper.
6 I am an attorney for Phillips Petroleum Company, Bartlesville,
7 Oklahoma and with me is Mr. William Collins.

8 MR. CPAIG: Your Honor, my name is Peter S. Craig
9 and with me is Mr. Frederick C. Ohly. We represent the
10 National Railroad Passenger Corporation, 400 North Capitol
11 Street, Northwest, Washington, D. C., 20001.

12 JUDGE HOPKINS: Thank you. Next.

13 MS. CAMPBELL: Good morning, Your Honor. My name
14 is Elizabeth A. Campbell. I represent Fig Garden New
15 Town. I am with the law firm of Verner, Liipfert, Bernhard
16 and McPherson located at Suite 1100, 1660 "L" Street, North-
17 west, Washington, D. C., 20036. I would also like to note
18 the appearance of my partner, L. John Osborn and for the
19 record, please remove the firm's representation of Rancho
20 Limited.

21 MR. BECKER: Good morning, Your Honor. My name is
22 Bill Becker. I am with the law firm of Landfield, Becker
23 and Green, 1220 Nineteenth Street, Northwest, Washington,
24 D. C., 20036. I represent Rancho Limited Partnerships
25 previously represented by the law firm of Verner, Liipfert,

7
1 Bernhard and McPherson.

2 JUDGE HOPKINS: Thank you. Are there any other
3 appearances?

4 MR. SHERMAN: Good morning, Your Honor. My name
5 is John R. Sherman. I represent the State of Kansas in the
6 State Office Building, Eighth Floor, Topeka, Kansas, 66612.

7 MR. MACDOUGALL: Gordon P. MacDougall, 1120
8 Connecticut Avenue, Northwest, Washington, D. C., 20036
9 appearing on behalf of Patrick W. Simmons. I am an attorney
10 admitted to practice before the Commission.

11 MR. MACKENZIE: Your Honor, my name is Vincent V.
12 MacKenzie, State of California, Public Utilities Commission.
13 The address is 350 McAllister Street, San Francisco, Califor-
14 nia, 94102.

15 MR. SOLANDER: C. J. Solander, Your Honor,
16 representing the State of California Department of Transpor-
17 tation, 1120 "N" Street, Room 1347, Sacramento, California,
18 95814.

19 MR. WILSON: Your Honor, my name is Richard R.
20 Wilson of the law firm of Vuono, Javelle and Gray, 2310
21 Grant Building, Pittsburgh, Pennsylvania, 15219. We
22 represent PPG Industries, Inc. I would also like to enter
23 an appearance of my associate, John A. Vuono.

24 MR. HILL: Your Honor, I am Brian Hill, Suite 302,
25 1220 19th Street, Northwest, Washington, D. C., 20036. I

8
1 would also like to enter the appearance on behalf of my
2 partner, Frederick L. Shreves, II, on behalf of the Port of
3 San Francisco.

4 JUDGE HOPKINS: Thank you. Any others?

5 MR. RATNER: Good morning, Your Honor. My name is
6 James R. Ratner. I am here representing the United States
7 Department of Justice, Post Office Box 481, Washington, D. C.,
8 20044.

9 MS. REED: Good morning, Your Honor. My name is
10 Mary Bennett Reed. I am an attorney on behalf of the U. S.
11 Department of Transportation. I am accompanied here today
12 by Joseph King who is representing the Federal Railroad
13 Administration.

14 JUDGE HOPKINS: Thank you. Is that it?

15 (No response.)

16 JUDGE HOPKINS: Mr. Kharasch.

17 MR. KHARASCH: Would the record please add Michael
18 E. Roper to the Missouri-Kansas-Texas appearances who is
19 the client and should not be forgotten on the record. He
20 is here this morning.

21 JUDGE HOPKINS: Thank you. Is that it, ladies
22 and gentlemen?

23 (No response.)

24 JUDGE HOPKINS: I see I received something this
25 morning that appears to be an Applicant's Revised Proposed

1 Procedural Schedule. I would like to go into the question of
2 the procedural schedule right away because that appears to me
3 to be the basic reason for being here today and to see what
4 we can do and get this case moving along as fast as possible.

5 Is this just the Applicant's revised schedule?

6 MR. MOATES: Your Honor, we met for several hours
7 yesterday with the key group of the Protestants and I call
8 them "key" because they are, I think, the responsive
9 applicants and reviewed our respective schedules. I believe
10 we submitted to Your Honor separately proposed hearing
11 schedules that in some particulars were remarkably similar
12 and in some others were importantly different.

13 Mr. Kharasch, I think, will be in a position to
14 speak perhaps for the other group but from our perspective
15 there was disagreement on several very important matters
16 and the revised schedule or agenda that we handed up to you
17 this morning and which by the way is available here in the
18 hearing room for other parties who may not have received it
19 and it contemplates an initiation of the first phase hearings,
20 that is, the cross-examination phase of the applicant's case-
21 in-chief commencing on September 17, 1984.

22 We blocked it out for about a four week period on
23 the very strong representation of the counsel for the group
24 with whom we met yesterday that they had in fact made a
25 careful analysis of their projected cross-examination and

1 believe in good faith that they can complete it in that
2 period of time. Now, of course, there are an awful lot of
3 counsel here this morning who are not responsive applicants
4 who are not privy to those discussions yesterday and what
5 effect their anticipated or proposed cross-examination may
6 have on the schedule, I think we ought to explore this
7 morning.

8 But just to highlight one or two of the other
9 important matters here for Your Honor's understanding before
10 you hear from Mr. Kharasch, I think the parties have a dis-
11 pute as to the appropriate kick-off date, if you will, for
12 the hearings and I note parenthetically that the September 17
13 date is, of course, substantially later than the August 14
14 which Your Honor had initially suggested in his June 14 order
15 but all parties recognize and Your Honor, of course, recog-
16 nizes that in decision number "12" of this docket the
17 Commission granted the responsive applicants an additional
18 time to supplement to September 10 and this schedule attempts
19 to take note of that fact.

20 Another important date that the applicants feel
21 very, very strongly has to be decided and decided fairly this
22 morning is the date for the filing by all parties, all
23 non-governmental parties, of testimony in opposition to the
24 application.

25 This schedule proposes that that take place on

1 October 24 which would be at or shortly after and under this
2 schedule shortly after the completion of the cross-examination
3 in phase one.

4 I would note at this point, Your Honor, that
5 of course that is the testimony filed in response to the
6 direct evidence that was submitted with this application
7 in March of this year. So at that point the parties would
8 have had well in excess of eight months really to prepare
9 that testimony, an ample amount of time.

10 Another area where our schedules deviate and I
11 honestly don't know whether Mr. Kharasch and his other
12 counsel differ with us on this but I will mention it
13 because it was something that was discussed yesterday is
14 with respect to the timing of filing by governmental parties
15 which you will see is item number eight on this new agenda
16 and it is established as February 18, 1985.

17 I believe under the schedule first submitted by
18 the responsive parties there was a contemplation that the
19 governmental parties would file their evidence before they
20 ever saw any responsive materials from the applicants with
21 respect to inconsistent and trackage rights application.

22 I wouldn't want to speak for the Department of
23 Justice and the Department of Transportation but I think at
24 a minimum, they indicated that they would be willing and
25 interested in seeing those materials and we think that it

1 would be helpful for the record to have that take place before
2 the government filed.

3 The other area in which there was some disagreement,
4 of course, is the matter of rebuttal. We frankly think
5 that is a matter of no disagreement. The Commission's
6 regulations state explicitly and this Commission has ruled
7 on numerous occasions that Applicants have the right to open
8 and close their case. The schedule that had been proposed
9 by the responsive applicants contemplated the completion of
10 applicant's case-in-chief rebuttal a substantial period of
11 time in excess -- rather, prior to the completion of the
12 rebuttal cases on the responsive applications. We think
13 that that is inappropriate. We believe that the responsive
14 applications to the extent that they have life have only a
15 life within the context of the primary application and the
16 Santa Fe Southern Pacific Corporation has the right to close
17 this case including the final word if you will with respect
18 to these responsive applications.

19 So I haven't attempted to describe each and every
20 step here. I think it is fairly self-explanatory but I
21 believe I have highlighted the areas in which there is
22 possibly some disagreement.

23 JUDGE HOPKINS: If there is any other disagreement,
24 I am sure Mr. Kharasch will bring it up.

25 MR. KHARASCH: Your Honor, we gave you the group

1 of railroads mentioned in the letter of July 23 gave you a
2 schedule which had very carefully worked out with some
3 principles in mind. The first principle in mind is that
4 adequate time has to be allowed for preparation and if we
5 allow adequate time and we allow adequate time to schedule
6 cross-examination and work out coordination, we hope to save
7 a good bit of time during the hearing.

8 The second principle is that a certain amount of
9 fairness is required and we really did try in our schedule
10 in our letter of the 23rd to proceed as rapidly as possible
11 allowing each side, that is, the applicants and those who
12 aren't applicants, to have an equivalent amount of time
13 after a close of a phase of cross-examination in order to
14 prepare the next phase of the testimony and then to allow
15 an equivalent amount of time for preparation after
16 receiving it for cross-examination.

17 Nevertheless, we came out surprisingly quite close
18 to the time schedule in the applicant's original proposal.
19 We met yesterday. We thought it was obligatory to try to
20 give you a joint-joint proposal. I thought for a while that
21 sweet reason had broken out and we were about to get some-
22 where.

23 We did not reach that joint proposal. That is too
24 bad. There are certain elements that I think are still open
25 for agreement on both sides. What we got this morning is

1 quite another matter. The Applicants are proposing in this
2 morning's revised procedural schedule to run a month longer.
3 They are extending the case and they seem to run a month
4 longer by starting at a time and allowing times that are
5 simply not doable on our side and giving themselves rather
6 large blocks of time, not balanced blocks of time on either
7 side, to prepare what they want to put in.

8 We do not like -- at least, I don't like -- and I am
9 only serving as reporter of our discussions to you, Your
10 Honor, I don't like the July 25 schedule at all. I think the
11 previous applicant's schedule had some elements that we could
12 work together on.

13 I would like to explain, Your Honor, that on the
14 starting date the Commission has now decided that the
15 responsive applications will be filed the 10th of September.
16 We only received the last word on the vital traffic evidence
17 last week and the traffic data is the reason that the
18 Commission has extended the time to the 10th to file and
19 indicated that it wants a solid case. We will be working
20 on that. We must have -- we required to have time after that
21 material is submitted, the September 10 Commission date, we
22 require and again we gave three weeks. That is our
23 standard prep time. We require time then to work with the
24 material which has still not arrived from the applicant.

25 I point out to you that the computer procedure

1 statement which was estimated by Mr. Wilson to be due about
2 July 2 or 3 seems to have dropped to the 14th or later of
3 August. We still do not have the stuff. When we get their
4 stuff, there has to be time to run to Chicago and San
5 Francisco and look in depositories in the light of what they
6 are telling us.

7 We seriously put to you, Your Honor, that the
8 time to start is as we suggest, October 1. At that time we
9 are promising to make every effort at coordination not only
10 among the counsel that met yesterday but among all counsel
11 in the room and we would like to see some schedule up so
12 that we can see.

13 We told the applicant, he is quite correct, that
14 with coordinated cross-examination, we don't see necessarily
15 that every applicant's witness would be called and we think
16 things would run very briskly. We are also suggesting, Your
17 Honor, and we suggest that would take four weeks, that first
18 phase. We also suggest that the shipper cross-examination
19 could immediately follow that or if necessary could be run
20 in parallel, the shipper cross-examination.

21 We also reached a point, I thought, of accommodation
22 with the applicants yesterday. We, on our side, are not
23 strong in general on the idea of bifurcated hearings. We
24 see the bifurcated hearing for shipper people, we think
25 particularly the first hearing there was no necessity shown to

1 bifurcate that first cross-examination of applicants' witnesses
2 but when it comes to cross-examining the responsive applicants'
3 witnesses, we are pleased to arrange a bifurcation suggesting
4 that the bifurcation take account of those responsive
5 applications that have an effect one on the other.

6 That might save some time. We see other places
7 actually to save time here. But I must say this morning's
8 schedule is considerably worse than the first schedule from
9 our point of view and we don't like it at all.

10 JUDGE HOPKINS: Mr. Raker.

11 MR. RAKER: Your Honor, if I might just amplify on
12 a couple of points, Mr. Moates indicated I think three
13 principal points and I would like to respond to them just very
14 briefly.

15 First of all, there is the question of when the
16 respondents would be required to file opposition testimony.
17 We had proposed that the opposition testimony be filed three
18 weeks after the conclusion of cross-examination of the
19 primary applicants affirmative case.

20 We gave what we thought was a target date. We
21 were speaking in terms of not fixed dates but an amount of
22 time. Yesterday and today again the applicants have indicated
23 their displeasure with the flexibility of that sort of thing.
24 We continue to believe that that is the correct approach. It
25 was the approach that the Southern Pacific strenuously argued

1 for in the UP-MP-WP case but yesterday we also indicated
2 a willingness to be flexible on that and a willingness to
3 agree to a fixed date if it were a realistic date. We felt
4 that the earliest realistic date is the projected date
5 that was contained in the schedule that we offered which
6 was the 19th of November.

7 Comment has been made that that gives us too much
8 time since the time that we initially received their
9 applications. Let me point out, Your Honor, though that there
10 has been no real complaint from them that the proposal that
11 we offered gave them, gives the applicants some five months
12 after they will have received the completed responsive
13 applications to file their opposition testimony.

14 In other words, there was a reasonableness and a
15 fairness there. Now if they wish to move that back to an
16 earlier date, we have no quarrel with that but the point is,
17 I believe, that what we filed was fair on both sides.

18 In addition to that, Your Honor, we have not been
19 able to work on our opposition case in the way that we would
20 have hoped to. As Mr. Kharasch said we have had tremendous
21 problems with the 1983 data. We have not had the luxury of
22 being able to work with one percent waybill sample. We still
23 do not have a corrected 1983 data from the Santa Fe although
24 we do from the Southern Pacific.

25 We have been spending so much time in Kansas City

1 trying to figure out the Sante Fe's tapes that we haven't
2 been able to get machine tape to complete our own opposition
3 case.

4 Immediately after the last prehearing conference
5 we identified to the applicants in writing the discovery
6 requests of other parties that we wished to have copies of.
7 We still haven't received that material. It was only this
8 morning that I was handed the index of the depository
9 which makes it reasonable to be able to use the depository.

10 This is not to say that there is anything lacking
11 in the way of good faith, but the point is we haven't been
12 able to go forward with the opposition case in the way we
13 would like to have because our time has been completely
14 consumed in trying to figure out the data to be able to
15 present a responsive case.

16 When it comes to the question of where the government
17 parties fall, I think that one can argue as Mr. Moates did
18 that they ought to be able to see the opposition case of the
19 primary applicants. One can also argue that they shouldn't
20 only see that opposition case but they should see the cross-
21 examination of that opposition case. I don't know what is
22 really the fair and the appropriate place for them.

23 It is not a terribly large matter in my view. I
24 don't really care if they are moved back. What happens
25 though if they are moved back is that then the whole schedule

1 has to be reappraised for fairness. Your Honor, what they
2 propose by moving them back is unfair because what they have
3 done is not only move them back, but they require us to file our
4 rebuttal case only six days, that is six calendar days, after
5 we will have completed a cross-examination of the government
6 parties.

7 So it is one thing to move the government parties
8 to the point where they suggest but then if that is going to
9 be done, there has to be some reasonable fairness on giving
10 us some time, time when we are not involved down here in
11 cross-examination of the government parties to prepare our
12 rebuttal.

13 I guess what it boils down to, Your Honor, is that
14 if it is desirable to extend the hearing's conclusion by one
15 month as the applicants now suggest, there could be a much
16 more equitable way of apportioning that time.

17 Thank you.

18 JUDGE HOPKINS: Anything further?

19 MR. MOATES: I would like to respond if I may,
20 Your Honor. First, I think we are beginning to slightly
21 deceive ourselves if we compare all three of these schedules
22 and by three, I mean the one that the applicants initially
23 submitted, the one submitted by protestants and the most
24 recent one, comparing them as though they are all equal and
25 they are not.

1 For example, it has been said a couple of times
2 that there is puzzlement why our revised schedule actually
3 concludes later than the first two submissions. Well, we
4 never really believed that the protestants initial submission
5 was going to end on that date. One of our big problems here
6 is that some of the sequencing they have in their right hand
7 column are unrealistic and, in fact, in terms of the
8 principle of so-called sequencing based on completion of
9 cross-examination before the next phase commences, we think
10 that is an inappropriate principle to adopt.

11 I think that removes all the stimulus to the
12 attorneys to complete cross-examination in any particular phase
13 in an expeditious manner. If everyone knows that it is not
14 until the completion of the cross in a particular phase that
15 clock starts to run on a sequencing event to set up the next
16 phase, there is no inherent discipline built into the
17 schedule.

18 So we don't really think that the projected June 20,
19 1985 completion date is any later. In fact, the one thing
20 that does cause that as Mr. Raker has pointed out is the moving
21 down or the really moving up if you will of our filing in
22 response to the government and the moving down of the time
23 when the government files. I won't walk through all the steps
24 but you can go through here and see that inevitably that
25 moves everything down a little bit. In fact, that is something

1 that puts a little greater burden on the applicant but we
2 are prepared to do that. We actually moved up the time
3 we would file. If you would look at the first schedule that
4 we submitted and Mr. Kharasch says that this new one is
5 substantially worse, I am puzzled by that.

6 The first one indicated that we would start hearings
7 on August 14. This one talks about starting on September 17.
8 The first one projected that opposition evidence would be
9 due on September 17. This one is now projecting October 24.
10 I think that is a substantial improvement for the protestants.

11 Also, there has been a little blurring about how
12 difficult it is going to be to get together those opposition
13 cases because of all the data difficulties that the
14 protestants claim they are having.

15 I would remind Your Honor that the Commission has
16 specified that opposition testimony would be based on 1982
17 data not 1983 and all the problems that certain of the
18 responsive applicants are having with respect to data relate
19 to 1983 data not 1982. So that really should not be a problem.

20 I think it would be important and helpful to hear
21 from some of the other parties who have not been privy to these
22 discussions to see what impact their anticipated participation
23 in this case may have on our schedule. The best laid plans,
24 of course, may not mean a whole lot if while the major parties
25 have a pretty good feel for what they think is going to happen

1 if we have, in fact, six more months of cross-examination
2 sitting out here in the room that we don't know about. I
3 think we ought to get that on the table before we make any
4 decisions on this.

5 JUDGE HOPKINS: I agree on that. Do any of the
6 other parties want to state something specifically on any
7 proposed schedule at all?

8 MR. MACDOUGALL: I think some provision ought to be
9 made for the possibility that parties other than the
10 applicant would want to answer governmental parties. Sometimes
11 the governmental testimony, for example, we have the agency
12 like U. S. DOT would put on a case for the applicants and we
13 have seen that before. This schedule here does not allow for
14 opposition testimony against the governmental testimony
15 which may be in support of the applicants.

16 I don't necessarily think that it has to be on the
17 schedule but there has to be some understanding that if the
18 government comes in with a lot of technical testimony,
19 employee testimony that really supports the applicant, that
20 it should not be just rebuttal but that we have a way to
21 answer that.

22 JUDGE HOPKINS: I can understand the problem.
23 I don't want to get into the surrebutal, et cetera, ad
24 nausium, because I know that has happened and we have had
25 problems in some cases as a result of that. I think some of

1 these matters are going to be left somewhat open but I agree
2 with you, Mr. MacDougall, that there are situations like that
3 and we have to take care of them.

4 These are tentative schedules in my opinion and
5 whatever schedule we try to come up with immediately, I know
6 that there are going to be situations that come along that
7 we are going to possibly have to change some matters. I will
8 be honest with you, I was somewhat taken with the protestants
9 original schedule because I question whether they are correct
10 in the amount of time it is going to take to cross-examine
11 some of the witnesses, but if they are willing to set up
12 schedules in that way, I thought the applicants ought to be
13 willing to go along with that, too.

14 I am also taken with the idea that I think we would
15 be better off with having the testimony complete, the
16 protestants complete testimony in proper form before we force
17 them into cross-examination or anything else so we don't have
18 a case that isn't properly handled.

19 I think we run into those circumstances. I will
20 give you my off-the-cuff opinion, also. I agree that the
21 applicants should have the final rebuttal. There is no
22 question in my mind. If you want to argue that for the
23 protestants, I will disagree with you completely and I will
24 rule right now that the applicant has the final case here.

25 The applicants' revised schedule does extend it

1 back a little more than I thought it would be extended but I
2 can also see the aspect that the government should be able to
3 see all the testimony before they file their testimony, too,
4 We have all these problems.

5 Mr. Kharasch.

6 MR. KHARASCH: Your Honor, we have a particular
7 problem, I think, at the beginning and incidentally our
8 schedule was set up on Mr. Raker's computer which even
9 knows when it is Monday, I was very pleased to see, and that
10 is why we have the sequencing with the event.

11 We do think time can be saved on cross-examination
12 by coordination among counsel, by putting the shippers
13 separately. I think there may be some West Coast witnesses
14 Mr. MacKenzie had called during the week and said that he
15 was quite anxious to have those parties heard there and we
16 do think that the cross-examination of the responsive
17 applications could be split. That doesn't seem a big harm.

18 What is really essential is the beginning time
19 when we must finish our responsive applications and that is
20 put to bed. Then we will turn and we have allowed three
21 weeks. That is what we allow each side. Then we allow three
22 weeks at that point and we are ready to begin with cross-
23 examining the applicants' witnesses.

24 We think that it is essential in our opposing the
25 application statements to have some time after the close and

1 you see what the applicant's witnesses say, that may be the
2 first, I believe, in understanding these computer studies. We
3 shall see and then our guys can say that that explanation is
4 no good, it does not support it and they can put in their
5 testimony and it is complete. The issue will be drawn for
6 you.

7 JUDGE HOPKINS: Mr. Kharasch, I agree with you.
8 I believe the October 1st date is a more feasible date for
9 the beginning of this proceeding and I also agree with you
10 that the filing of the response of the opposition testimony
11 that you presented is a more feasible date.

12 As I told you before, I disagree with you on the
13 rebuttal testimony, et cetera, and one of the points now that
14 I am wondering about and also the question of the place of
15 the hearing. You just mentioned, for example, the shipper
16 testimony. That is a part of the case that I think could be
17 bifurcated if possible. I should think both cases would
18 possibly agree on that.

19 Now we could work that in immediately after the
20 initial stage like I believe it was originally proposed rather
21 than at the same time we are having the testimony of the
22 applicants, the cross-examination of the applicants' witnesses.

23 But I don't agree with the ten percent limitation
24 or anything like that. I don't like that. I know it was done
25 in the Milwaukee case but I don't think it is a feasible way

1 but I also think that I have seen in the past that there is
2 surely no need for cross-examination of 700 shipper witnesses
3 in one and 350 shipper witnesses in another. I am certain
4 that the parties can come to some agreement. There is no
5 need for something more than ten percent but I am not going
6 to set a limitation on that because I don't think it is
7 feasible and I don't think it is the proper way to do it.

8 I also don't agree that I am just going to sit here
9 and if you people decide you are going to cross-examine 500
10 of the 700 witnesses, I don't see that that is in any way
11 necessary. I think that can be worked out by all the parties
12 in the case. I see no problem in that.

13 I don't think any of you people would see any
14 problems in that.

15 Now the question comes up to the number you are
16 talking about. That is where we can reach some agreement as
17 we go along but I am certain it is the responsive applicants
18 who are going to be faced with you cross-examining their
19 shipper witnesses as well as their cross-examining your
20 witnesses. I am certain you both can work that problem out

21 Also, of course, there is a need possibly for at
22 least the shipper witnesses and I don't know whether there
23 would be any need for any other witnesses at a place other
24 than Washington. We are talking about the October 1st date,
25 Washington, D. C. Right, is that what each party is agreeable

1 to? Mr. Moates?

2 MR. MOATES: In terms of the shippers, Your Honor?

3 JUDGE HOPKINS: I am talking if we start the
4 cross-examination of the applicants' witnesses on October 1st.
5 Let's use that as the basis.

6 MR. MOATES: Washington is our strong preference.
7 If I could just comment though?

8 JUDGE HOPKINS: Surely.

9 MR. MOATES: I think the two dates we are all
10 really focusing on here for obvious reasons are the date
11 that we initiate the hearing in phase one which I hear
12 Your Honor saying will be October 1 and the date that the
13 opponents file their opposition testimony. The responsive
14 applications is in the hand of the Commission. They have set
15 a date.

16 If we are going to talk about that opposition date
17 being later than we had projected, we are concerned with a
18 filing on November 19 and we have been told as you would
19 expect is going to be from the responsive applicants some
20 fairly substantial competition studies and that, of course,
21 is a deadline that applies to a lot more parties than the
22 responsive applicants. It applies to everybody except the
23 governmental parties.

24 We don't really know the scope of the submissions
25 that we would see on that date but I think it would be one of

1 the larger filing dates in this entire case but on this
2 projected schedule, we would receive those opposition filings
3 and studies and have to conduct discovery and then cross-
4 examination three weeks later. I submit respectfully, Your
5 Honor, a schedule that gives the protestants seven months
6 to review our evidence and get ready to cross and gives us
7 three weeks on all the protestants, there is not a lot of
8 parity there either.

9 Importantly, whatever date we select and we would
10 strongly ask that it be somewhat earlier than November 19th
11 and maybe we could cut that in half from our 10/24 and take
12 the end of October, but whatever date we select, we would
13 request that that be a fixed date, in other words that it
14 not be driven off of the completion of cross-examination
15 because once again that leaves us wide open and frankly we
16 lose the disciplining factor that the protestants could
17 cross-examine not for four weeks but for twelve weeks
18 in which event we would be seeing that opposition filing in
19 1985 sometime and this whole schedule doesn't mean anything.

20 JUDGE HOPKINS: I thought we were going to keep
21 the schedule. If we are talking about four weeks, we are
22 going to have four weeks.

23 MR. MOATES: That is for all parties?

24 JUDGE HOPKINS: That is for all parties. They are
25 the ones who are cross-examining your witnesses. That is what

1 we are talking about. Now if you want to recross for an
2 extended period of time and you extend the time, too, then
3 we run into that problem.

4 MR. MOATES: I don't see that as a problem.

5 JUDGE HOPKINS: Mr. Raker.

6 MR. RAKER: Your Honor, what I thought the under-
7 standing was that everyone would attempt to complete the
8 cross-examination in four weeks, that we would be bound
9 by a filing date on our opposition testimony, the November 19
10 date is what I understand that would be but that if it turned
11 out that cross-examination ran four and a half weeks or five
12 weeks, cross-examination would continue. Obviously Your Honor
13 is going to be officiating and I am sure that repetitious
14 cross-examination will not be permitted.

15 But if it turns out that cross-examination does
16 continue beyond the four weeks, it doesn't mean that it is
17 arbitrarily going to be cut off. What it does mean though
18 is that it will squeeze us in terms of the time that we have
19 after the completion of cross to complete our opposition
20 testimony.

21 JUDGE HOPKINS: That's fine but your date for
22 filing the opposition testimony and for hearing on cross-
23 examination would be set, would be definite.

24 MR. RAKER: That's right. That is what I under-
25 stood that Your Honor was talking about, a definite date and

1 if the cross-examination takes three weeks, we still have
2 November 19. If it takes five weeks, we still have November
3 19 to file the opposition testimony.

4 MR. MOATES: Your Honor, basically the point I am
5 asking is we are going to set that date at sometime other
6 than the 24th. Please entertain the possibility that we
7 at least compromise on it again for the reasons I said.

8 The burden on applicants at that stage to receive
9 all of that testimony, all those opposition studies and to do
10 discovery on them and to prepare cross in three weeks at
11 the same time they would be preparing their cross in the
12 responsive applications which admittedly we would have had
13 a little longer would be a very big burden.

14 It seems to me that the bulk of what the
15 protestants are going to do and I mean protestants broadly
16 here, it is more than the responsive applicants, they should
17 already have underway. They have had the application for
18 many months. Now I understand that experts take time to do
19 studies and testimony gets refined when cross-examination
20 takes place, that is fine but it doesn't mean that it all gets
21 done at that point.

22 Why couldn't with an expected completion of 10/26
23 on the phase one cross-examination, why wouldn't it be fair to
24 have a submission date in early November, the 7th. I don't
25 have a calendar right here but the 7th or 8th or whatever a

1 comparable Monday would be.

2 JUDGE HOPKINS: You are talking about a ten or an
3 eleven-day difference.

4 MR. MOATES: That is right but that could be a
5 very important period for us.

6 JUDGE HOPKINS: Mr. Kharasch.

7 MR. KHARASCH: Two points, Your Honor. First, we
8 heard the point yesterday and I thought there was merit in
9 it saying "Well, we would like more time," say the Applicants,
10 "to deal with your November 19 filing." And you say, "Well,
11 you have the stuff that is filed on September 10. Conduct
12 your cross-examination on our side in two phases, one before
13 Christmas and one after." That is the way it would break
14 and get to that after Christmas. Start your January hearings
15 with the material that we filed November 19.

16 JUDGE HOPKINS: Mr. Moates, I thought it was more
17 feasible anyway that if you are going to have both the
18 opposition and the response of applications, the cross-
19 examination of them, that you would start with one and then
20 move on to the other anyway so you would have two different
21 stages of the one because I believe you, yourself, at the
22 beginning as I remember in the initial presentation were
23 having two separate stages.

24 MR. MOATES: That's right. Two points though,
25 Your Honor. First of all, there are going to be parties

1 submitting opposition testimony who don't have responsive
2 applications and that is a separate set of people we have to
3 deal with. The other is the responsive applicants told us
4 yesterday and it didn't surprise me, I think it makes sense,
5 that they see their opposition studies, their competition
6 studies, as being the predicate for the responsive applications.

7 In other words, they will analyze the impact of
8 the overall application, make a claim that there is some
9 impact on competition that necessitates the responsive
10 relief that is the subject of their application.

11 Therefore logically it makes sense that you would
12 examine on the opposition study before you would come to the
13 responsive application.

14 JUDGE HOPKINS: Mr. Kharasch, isn't there a
15 possibility of at least a week earlier on the filing?

16 MR. KHARASCH: The problem on that, Your Honor,
17 is that we will be cross-examining. That is our point. We
18 are cross-examining and we have said four weeks and we will
19 do our level best to stick to that. But in the cross-
20 examination people will be talking and that is the applicants'
21 witnesses and their explaining what they are talking about and
22 you are discovering things and you are discovering their
23 justifications. Then you want as we want our testimony to
24 reflect that so that is the way we draw the issue. That is
25 the reason for allowing the cross-examination first and then

1 we get it in. That is the three weeks.

2 I think that because we are going to be before and
3 after Christmas break any way and because we have offered,
4 I don't know if the applicants want to do that but they
5 can if Your Honor can arrange it to bifurcate the cross-
6 examination of the responsive applicants if they want to do
7 it.

8 JUDGE HOPKINS: We can go into that, too. That is
9 a possibility, too.

10 MR. KHARASCH: If they want to do that then I
11 think the time is there.

12 JUDGE HOPKINS: That is a possibility that that
13 could be worked out.

14 MR. KHARASCH: If you look at our schedule on
15 Mr. Raker's computer it is three weeks, three weeks, two
16 weeks, two weeks.

17 JUDGE HOPKINS: With definite dates for filing
18 certain matters we are talking about?

19 MR. KHARASCH: Yes. We are talking about November
20 19th.

21 JUDGE HOPKINS: Definite dates.

22 MR. ROACH: Your Honor, may I just add a word about
23 the definite date in the four weeks. We had long and
24 serious discussions just as to how much time we needed and we
25 are sincere in saying four weeks. We also said to the

1 applicants yesterday that if after a couple of weeks it looked
2 like there had been delays, we would be happy to consider
3 bifurcating the cross and putting some segments that are
4 logically discrete of their case into a parallel hearing
5 and working with them in any way to adhere to the four
6 week schedule.

7 JUDGE HOPKINS: Then it is up to us to try to
8 figure out another Judge to help on that, too. Is that
9 right?

10 MR. ROACH: There is that.

11 JUDGE HOPKINS: We are getting pretty short of those,
12 too. But I think even that could be worked out. I am
13 inclined, Mr. Moates, to agree with Mr. Kharasch on those
14 dates because I would rather have the case completed in a
15 proper form when cross-examination comes, et cetera. I also
16 see the possibility of bifurcating or separation as we get
17 along with this.

18 To me it makes more sense and also in view frankly
19 when I saw the protestants' original schedule and they were
20 coming up with a timeframe that I thought was very reasonable
21 overall, I thought I would like to hold them to that so that
22 we would get this case over with within a reasonable period
23 of time.

24 I know there are limitations within that schedule.
25 I know that. I would like to adhere generally to what we have

1 done and while we have been talking about four weeks, I know
2 there is slippage sometimes but yet we are talking about
3 other dates, the filing dates, being specific.

4 I really don't see the major problem for you in
5 that, in the days that they are talking about. I would rather
6 adhere to those. One point that I have and it is very possible
7 that you can't do it, but I had thought in the beginning
8 that it might be wise and I have seen this, I thought that
9 you people might come up with a combined schedule but since
10 you haven't and since I have given you some indication of
11 what I think, I wonder if it is possible for you people if
12 you would like a short recess to see if there is a possibility
13 of your working this out.

14 Now if I come up with a definite schedule taking
15 bits and pieces from one and the other, we might come up
16 with real problems. It might be better if you work out
17 taking what I have said already and work generally the
18 schedule out that way. Some of it will have to be tentative
19 because we know as we get along there are problems, but
20 generally I would like to adhere to the schedule that we
21 worked out with the idea that you end your case, you have
22 the last bit of the apple.

23 That has to be taken care of in the two schedules.
24 Now would you like to have a short recess to see what you
25 could work out as to a combined schedule?

1 MR. MOATES: I think that would be helpful, Your
2 Honor.

3 MR. KHARASCH: Did you have an opinion on the
4 government witnesses, Your Honor, the government sequence?
5 There is a little problem in having them hear everything --

6 JUDGE HOPKINS: I can see the point that Mr.
7 Moates makes.

8 MR. KHARASCH: Yogi Berra said, "It ain't over
9 'till it's over."

10 JUDGE HOPKINS: I can see the point that Mr. Moates
11 raised earlier on with the schedule if you can work it out.

12 MR. KHARASCH: We have met with the DOJ and DOT
13 people and they were happy with the schedule.

14 JUDGE HOPKINS: Talk it over with them, but if
15 they want to go forward, that is all right, too.

16 MR. MOATES: That is a little bit much.

17 MR. RATNER: If there is a representation to be
18 made, I would just as soon make it, Your Honor. We would
19 prefer to have it after we have seen your response.

20 JUDGE HOPKINS: I figured you would say that.
21 I didn't doubt that.

22 MS. REED: The Department of Transportation also
23 joins in that.

24 JUDGE HOPKINS: I expected that. I think there
25 have been problems in other matters where it hasn't occurred

1 like that so if you could work it out in any possible
2 schedule that way. Mr. Raker.

3 MR. RAKER: One point, Your Honor, on the rebuttal
4 the reason why we had put the rebuttal where we put it in
5 the order that we put it in and we were aware of the schedule
6 that Your Honor had earlier issued, we saw the whole time
7 period being compressed by doing it that way. If the
8 applicants don't have any problem in extending the time
9 period, I guess that is okay with us.

10 What I was wondering about though was what about
11 the simultaneous filings of rebuttal testimony? In other
12 words, we have separate applications. They have their
13 primary application. We have our responsive application.
14 We could have simultaneous filing of rebuttal testimony in
15 written form and then the hearing would go on, I don't know
16 what order the applicants would prefer, but as far as the
17 cross-examination whichever order they wished, we could
18 follow and I think that would save some time that the
19 applicants seem to think is precious.

20 JUDGE HOPKINS: Mr. Moates.

21 MR. MOATES: I want to talk to our clients, but I
22 am rather disinclined to think that would work. Again,
23 close the case means close the case, it doesn't mean
24 having simultaneous filings.

25 Your Honor, for clarification if we are going to

1 talk about this at the recess, are we at a minimum at this
2 point when we talk about a November 19th date for opposition
3 filing, we are talking about that, I take it, as a fixed
4 date now I take it?

5 JUDGE HOPKINS: That's right.

6 MR. MOATES: All right.

7 JUDGE HOPKINS: No question on that.

8 Are there any other matters before you take a
9 recess? I think you might be able to work out, I know it is
10 hard. We have had the three of them here and I have
11 difficulty seeing which is which and which I have looked at
12 and I had some ideas on one before I got this last one, too,
13 so it seems to me that it is feasible to agree and generally
14 accommodate.

15 I don't want us fighting back and forth on this
16 case all the way through. There are going to be problems as
17 we get along and there are going to be maybe some minor
18 changes. I understand that. It is very possible that we can
19 work out the bifurcation of the shipper testimony, et cetera,
20 et cetera and with the responsive applications as we go along,
21 it is very possible we can work that to speed up the whole
22 case, too.

23 So we can all work together and move this case
24 along and as I say, I am taken with the idea that the
25 protestants in particular have come up with a date that was

1 within the same range that I had originally.

2 MR. KHARASCH: Could we be off the record for a
3 minute?

4 JUDGE HOPKINS: Surely. Off the record.

5 (Discussion off the record.)

6 JUDGE HOPKINS: Back on the record.

7 MR. MURRAY: I would just like to state for
8 Teamsters Local 315 that we have made three separate
9 discovery requests, the latest being a July 11, 1984 request
10 for enforcement of the request of prior discoverable items
11 and we would like to request an order.

12 We have not received any materials and at this
13 time we would respectfully request an order of compliance.

14 MR. STEPHENSON: Your Honor, may I address that?

15 JUDGE HOPKINS: Certainly.

16 MR. STEPHENSON: We received that interrogatory
17 or discovery request. It is purportedly dated the 11th as
18 counsel indicated and it was postmarked July 19th or July
19 18th. I have the envelope here. I don't see how we could
20 possibly have received something on July 11th when it was
21 postmarked the 18th. That was the first time that we had
22 ever seen that document.

23 MR. WILSON: Your Honor, I would add that those
24 discovery requests had been directed to applicants, The
25 Atchison, Topeka and Santa Fe Railway, and we have not yet

1 received them.

2 JUDGE HOPKINS: You people better discuss that and
3 see what you can work out.

4 MR. STEPHENSON: We will respond to any legitimate
5 discovery. We don't have any quarrel with responding to it
6 but when we get it on the 18th or when it is postmarked the
7 18th and we got it on a Friday --

8 JUDGE HOPKINS: I think you ought to discuss that
9 off the record and work that out.

10 MR. STEPHENSON: Yes, Your Honor.

11 MR. PRETTYMAN: I didn't understand that you were
12 going to be taking up discovery problems before the recess.
13 Do you want to do that?

14 JUDGE HOPKINS: Go ahead because then if you have
15 any major discovery problems, go ahead.

16 MR. PRETTYMAN: This is a rather discrete problem
17 and we have a few exhibits to demonstrate it. To give you
18 a little background, we requested in our discovery request
19 number "8" that SP and Santa Fe produce all copies of any
20 documents or workpapers involved in determining the fair
21 market value of S-P-T Company as a separate entity including
22 the fair market value of stock which was placed in the
23 independent irrevocable voting trust.

24 Both SP and Santa Fe objected on grounds of
25 relevancy but then gave a reply that seemed to relate only to

1 the value of the S-P-T stock. We called Southern Pacific
2 on June 21 trying to clarify our request and then SP
3 responded by letter dated June 25 which is the first of
4 the exhibits, Your Honor, that we have here.

5 (Document proferred.)

6 MR. PRETTYMAN: It is DRGW-C-1, a letter from
7 Michael A. Smith to Kendall Sanford which says that although
8 it is purporting to respond to the clarification that they
9 renew, of course, their objection and then say there is no
10 separate valuation of S-P-T agreed upon for jointly established
11 or determined by the parties. The merger agreement addresses
12 only the total combined enterprises of Southern Pacific
13 Company and Santa Fe Industries.³ There is no provision in
14 that agreement dealing with valuation of independent
15 components of the combined total.

16 This letter, I think, is very unclear. It seems
17 to focus on whether there is a single final valuation agreed
18 upon. So we wrote to both SP and Santa Fe on July 6 which
19 is DRGW-C-2 and DRGW-C-3.

20 (Documents proferred.)

21 MR. PRETTYMAN: We call to their attention that
22 there is an apparent misunderstanding here and you will see
23 in the third paragraph the request clearly covers preliminary
24 studies as well as the final version and it also covers
25 papers prepared for purely internal use as well as documents

1 that were supplied to or received from consulting organizations
2 such as investment banking firms. In short, it covers every-
3 thing you have that relates to the value of S-P-T Company.

4 We called attention to the fact in the next to last
5 paragraph that you had said at our last hearing that you could
6 see the relevancy of this material.

7 Then there was a letter from Michael A. Smith
8 to Thomas B. Leary, my partner, on July 13 where Mr. Smith
9 says that he has checked with Morgan Stanley, the investment
10 banker who worked with the Southern Pacific Railroad
11 Company, and Southern Pacific is now prepared to respond to
12 DRGW's discovery request number "8" concerning the valuation
13 of S-P-T as a separate entity requesting however that in
14 order to get this material we sign an appropriate protective
15 order which is attached. We have not yet received a
16 response from Santa Fe.

17 I will return to that order in just a moment.
18 There was one final letter to Mr. Smith from Mr. Leary
19 dated July 20 that we have marked DRGW-C-5 which questions
20 the appropriateness of the protective order and says that
21 we will take it up at this hearing.

22 (Document proffered.)

23 MR. PRETTYMAN: We make two points here, Your
24 Honor. First of all, it seems clear to us that the
25 applicants had to have had these properties and their assets

1 valued, they had to have a basis for the ratio between the
2 companies and I think their last response indicates that the
3 do, in fact, have some materials to give to us. As you,
4 yourself, noted it is obviously relevant.

5 We do not think that they are entitled to any
6 protective agreement. The valuation of the S-P-T Company
7 was undertaken by their bankers for and in anticipation
8 of the voting trust which in turn was the first step toward
9 the application in this proceeding.

10 It was prepared in other words as the first step
11 to precisely what we are contesting here and they now claim
12 that it is confidential. Unless it is protected by some
13 special privilege that I am not aware of I don't think it is
14 protected at all. Certainly if it is protected, they are
15 not entitled to, for example, in paragraph four of the
16 proposed agreement which says that if we intend to use any
17 of these materials any place either in the hearing or in
18 written testimony or in a brief, we have got to give them
19 sufficient notice to allow them to come in and petition you
20 for a protective order or if we don't give that written
21 notice in advance, we have to give either prior notice at
22 least 48 hours in advance and then not oppose their
23 petition to you.

24 I think that is entirely unreasonable. Then,
25 of course, in paragraph five it restricts access to only

1 those individuals who happen to sign this thing and we
2 can't tell in advance the people who are going to have to
3 qualify to look at the materials. It may be that cross-
4 examinatio develops, for example, that something unexpected
5 will happen where we will have to consult with people that
6 we had not anticipated.

7 We think the agreement is uncalled for, Your Honor,
8 particularly if some agreement were entered into with
9 respect to these two paragraphs.

10 MR. SMITH: Your Honor, my name is Michael Smith
11 and I am the guy who wrote those letters and so let me try
12 to respond to this. In the first place I am a little surprised
13 that this sort of thing has to be raised in front of the
14 entire group of this prehearing conference and take everybody's
15 time up.

16 This is exactly the same protective order that
17 we have agreed to and everybody else in this case on a whole
18 range of confidential business information including the Rio
19 Grande with respect to the computer tapes that we have
20 provided for our consultants in 1983 traffic data. The
21 reason we are trying to get this matter protected under a
22 protective order is that the report from the investment
23 bankers that deal with valuation of independent business units
24 of Southern Pacific is highly confidential business
25 information.

1 I am surprised that this has to come up now. We
2 have never discussed this before.

3 JUDGE HOPKINS: Have you tried to talk back and
4 forth on this?

5 MR. SMITH: No. I sent this to them two weeks ago
6 and we should have discussed this on the phone. I am willing
7 to work out a slight modification in the protective order,
8 but I don't think there is anything unusual and I don't see
9 the need to take up the time of this hearing.

10 JUDGE HOPKINS: Why haven't you people discussed
11 this on the phone?

12 MR. PRETTYMAN: We have discussed it on the phone
13 but we keep getting responses that are not responsive to the
14 request.

15 JUDGE HOPKINS: I am talking about letters back
16 and forth. That is one of the problems I have always found.
17 What is wrong with someone just picking up the telephone
18 instead of waiting another week and sending a letter back
19 to the other person, I am afraid that is the problem with
20 a lot of the work that lawyers do. They too often just send
21 letters back and forth instead of picking up the phone and
22 talking to somebody and trying to work it out.

23 MR. PRETTYMAN: Your Honor, you will notice that
24 one of the letters refers to a June 21 telephone call and it
25 just created more confusion.

1 JUDGE HOPKINS: Is this the last telephone call you
2 have had with them, June 21?

3 MR. PRETTYMAN: Yes, Your Honor.

4 JUDGE HOPKINS: I would advise you to try to discuss
5 this with them. I am perfectly willing if you need a
6 telephone conference with me at a later time because you can't
7 work it out, inform me about that but it is true with the
8 large numbers of people we have here today, there is no
9 reason for everybody else to have to listen to the arguments
10 back and forth on it.

11 MR. PRETTYMAN: Perhaps I can discuss it with him
12 during the recess, Your Honor, and if we are still at
13 loggerheads, maybe you can resolve it.

14 JUDGE HOPKINS: If there is any question, I will
15 try and work it out but I think like a lot of other things
16 as I said before, I think lawyers have a tendency to write
17 too many letters instead of talking to each other.

18 Is there anything else we need to discuss before
19 the recess?

20 MR. RAKER: We have worked out a schedule here
21 that essentially takes what the applicant has suggested
22 in terms of the government testimony and put that back. I
23 have spoken with the government and they indicated the amount
24 of time, DOJ and DOT, how much time they wanted after they
25 received the applicants testimony, the testimony in opposition

1 to the responsive application. They said that they wanted two
2 weeks.

3 We have a schedule. Now what I am not sure about
4 is what is the more orderly way of doing it? Whether the
5 thing to do is indicate now to Your Honor and to all the
6 parties what that is or whether we should attempt to gather
7 everyone around the table in the recess and as far as I am
8 concerned, it is up to Your Honor.

9 JUDGE HOPKINS: I think it is better to work the
10 whole thing out at a recess rather than have it done by
11 roundtable discussion now. I think a recess would give you a
12 better idea for everybody to discuss all the problems.
13 Why don't we take a half hour recess. I hope my watch is
14 correct, it will be about 20 after eleven, I guess.

15 (Whereupon, a short recess was taken.)

16 JUDGE HOPKINS: Back on the record. Before we
17 go any further, the reporter tells me that she doesn't have
18 the transcript order forms here but if you would like to have
19 a copy of the transcript, sign your name. She has a yellow
20 page there for you to sign.

21 All right. What have we worked out?

22 MR. MOATES: I think we have an agreement on the
23 schedule, Your Honor. It is going to end a little later
24 than the one before but that is the inevitable consequence
25 I think.

1 The schedule now would be as follows starting
2 really with the hearings. We all know that the responsive
3 applicants have to complete their applications on September 10.
4 When I am done with the dates I would like to come back and
5 request, Your Honor, that we set a date for filing requests
6 for cross-examination recognizing the new October 1 date
7 but let's pass that by for the moment.

8 The hearings then would commence on October 1.
9 Non-government parties would file their opposition evidence
10 as indicated on November 19. I should say these are all
11 dates certain. None of these dates will be predicated on
12 some other event.

13 Cross-examination which was item six on the
14 applicants' schedule before, cross-examination of protestants'
15 witnesses in phase two would commence on January 7, 1985.
16 The non-government parties would file their opposition evidence
17 and their responsive application cases, item number seven,
18 on February 18, 1985.

19 The government would then file its evidence in both
20 the case-in-chief and the responsive cases a month later on
21 March 18, 1985. There would be cross-examination of non-
22 governmental parties' witnesses opposing the responsive
23 applications, that is kind of a mouthful but that means
24 primarily our witnesses, starting on April 8, 1985.

25 Then there would be the cross-examination of the

1 governmental parties again in all dockets, I would say, item
2 number ten, would commence on April 29, 1985. The responsive
3 applicants would file their rebuttal evidence on May 27, 1985.
4 Cross-examination of that evidence would commence on June 17.

5 Primary applicants would file their rebuttal
6 evidence on July 1 and cross-examination of primary applicants
7 rebuttal evidence would commence on July 24, 1985.

8 JUDGE HOPKINS: Has this been agreed to by all
9 the parties or all sides here in this case? Generally
10 agreeable?

11 MR. KHARASCH: Yes, Your Honor.

12 JUDGE HOPKINS: Thank you. I see no problems with
13 it. It is worked out generally within the schedule that I
14 have had in mind. It looks to me like we are finishing
15 within a reasonable period of time, too. It is going to keep
16 us busy for a while but that is the way it is.

17 The point you raised about the notification of
18 cross-examination.

19 MR. MOATES: We think that is an important point,
20 Your Honor. There are a lot of parties here and obviously
21 we have not been able to talk to all counsel for all parties
22 about precisely what they may have in mind by way of cross.
23 The applicants have more than 40 witnesses supporting the
24 initial application.

25 So we think that there should be a date fixed today

1 sufficiently in advance of the scheduled October 1 hearing date
2 whereby parties seeking to cross-examine applicants' witnesses
3 would file requests pursuant to Your Honor's prehearing order
4 to specify the material facts in dispute as to which the
5 parties believe cross-examination to be necessary.

6 Also we are pleased with Mr. Kharasch's statement
7 that the protestants intend to coordinate their cross-
8 examination and we certainly hope that that is the case
9 so if necessary and appropriate a primary cross-examiner
10 might be appointed for particular witnesses and the amount of
11 duplicative cross-examination would be kept to a minimum.

12 We would ask that an appropriate date in late
13 September or early October and I don't have a particular one
14 to propose would be set for the filing of requests. We
15 think it needs to be sufficiently --

16 MR. NELSON: No.

17 MR. MOATES: I am sorry. I misspoke myself. It
18 has to be in September. Then the September 4th date that we
19 had proposed is a good date whereby parties would indicate
20 who they are going to cross-examine or who they seek to
21 cross-examine and an estimate perhaps of the amount of time
22 that the cross would take and what the subject matter of the
23 cross-examination would be.

24 That would permit us, of course, to consult with
25 the parties seeking to conduct cross and to use Your Honor's

1 good offices if necessary to organize the sequence of cross-
2 examination and if looks like we have ten weeks of cross-
3 examination rather than four, we may have to make some
4 appropriate arrangements for bifurcation or what have you.

5 JUDGE HOPKINS: May I suggest before Mr. Kharasch
6 or anybody says anything on that, and I keep using Mr.
7 Kharasch as the basis, is there any way that Mr. Kharasch
8 could somehow coordinate these requests so that we wouldn't
9 be faced -- he would be told as to how many people want to
10 cross-examine, who they want to cross-examine.

11 MR. KHARASCH: We could clearly manage it among
12 the railroad parties because we have been talking that way
13 already.

14 I wanted to speak a little bit to the details.

15 JUDGE HOPKINS: Go ahead.

16 MR. KHARASCH: It just seems to me, Your Honor,
17 that yes, of course, there should be notices to the witnesses
18 and two weeks ahead of each hearing it seems to me quite
19 correct, a list of what witnesses should be called should be
20 provided them. That is for the witness' convenience and
21 everybody's convenience.

22 I really would hesitate and I would urge against
23 getting into one of these letter writing marathons so that
24 we start having motion practice on witness calling. It is
25 pretty clear what the subjects are. Your Honor has rather

1 strictly indicated and we hear you, no arguing with the
2 witnesses and stick to what is proper cross-examination.
3 I don't see what am I going to say about a witness that
4 the witness who did a computer study, the subject is the
5 validity and the assumptions of this computer study. Now
6 I have generated a piece of paper. Are the applicants
7 supposed to write in and say, "No, that is not enough state-
8 ment." I hesitate to have more motion practice but I
9 certainly agree with the applicants that we should list the
10 witnesses and get them early and coordinate.

11 I don't know how we can deal with the other
12 parties. Maybe we could share the work on our side.

13 MR. MOATES: The problem, of course, Your Honor
14 and I have been involved in a number of these large cases,
15 the problem we face and we all sit here and talk today about
16 our good intentions and I am sure we all mean it, but when
17 we get into the hearings and there are some parties and
18 perhaps not the major parties who are nonetheless attending
19 a particular phase of the case, the attorney is here and he
20 listens to the cross-examination and gets some bright ideas
21 and he decides that he is going to have some questions, too.
22 The next thing you know you have three, four, five or six
23 other counsel --

24 JUDGE HOPKINS: Don't you think I could handle that,
25 Mr. Moates?

1 MR. MOATES: I would hope that we would be--

2 JUDGE HOPKINS: I think I could handle that.

3 MR. KHARASCH: Could you set an order, Your Honor,
4 perhaps if you would like to that would be an order and I
5 understand that government people generally want to go last,
6 they would like to hear the other which is agreeable, if we
7 would have at least an order we could coordinate because we
8 are a manageable group, the protestants cross could be
9 coordinated.

10 JUDGE HOPKINS: Excuse me. I guess I didn't
11 understand exactly what you were saying.

12 MR. KHARASCH: You would set an order of cross-
13 examination. When a witness is called he would be first
14 examined by the protestant railroad.

15 JUDGE HOPKINS: Do you mean if I would or if the
16 parties would?

17 One of the problems I find with that is quite
18 often the parties themselves know the best ones to pick out
19 who they want to cross-examine and when they want to cross-
20 examine them and quite often, that can be worked out. If
21 you notify the applicant as to whom you want to cross-examine,
22 then I think most of the time it can be worked out as to the
23 timeframe that the witnesses are available, et cetera, and I
24 think that can be coordinated between you and the applicants
25 once they know who you want to cross-examine.

1 I think you can coordinate that as to a list as
2 to generally the order in which they would appear for
3 cross-examination. If I pick out, for example, the president
4 of so-and-so first, et cetera, et cetera --

5 MR. KHARASCH: It is not the witnesses. It is
6 who goes first --

7 JUDGE HOPKINS: You are talking about --

8 MR. KHARASCH: That's right. We don't see a lot
9 of problem, I think, on our side that we would coordinate
10 the protestant railroad cross-examination of the president
11 of the Santa Fe but the problem is with having so many counsel
12 in.

13 JUDGE HOPKINS: Why don't you submit something to
14 me indicating what you think would be the best order in
15 which you want to cross-examine these witnesses.

16 MR. KHARASCH: I would say generally protestant
17 railroads first, other parties in bet. a and DOT and DOJ--

18 JUDGE HOPKINS: You are not talking about specific
19 names though of individual characters. You are just talking
20 about the style.

21 MR. KHARASCH: Normal order of cross-examination.

22 JUDGE HOPKINS: Why don't you submit something to
23 me and then I will put all of this out in an order indicating--

24 MR. KHARASCH: No. Your Honor suggested could we
25 coordinate with --

1 JUDGE HOPKINS: With the other parties, I know it is
2 difficult.

3 MR. KHARASCH: -- the City of San Francisco and
4 they have a particular question and they want to go on that
5 question and they want a witness on that question.

6 JUDGE HOPKINS: I keep using you as the one to work
7 on this, Mr. Kharasch, because you have volunteered your
8 services it appears, but I think you could be used all I
9 am saying as the coordinator if parties did wish to
10 cross-examine on any particular witness.

11 But I also do agree that there should be notifica-
12 tion at least two weeks ahead of time as to the number of
13 witnesses, as to which individual witnesses there is a
14 request for cross-examination and I think it advisable for
15 any of the parties to notify the Commission as to whom
16 they wish to cross-examine.

17 I do have some questions. I know I put it in here
18 as to what you should say when you request cross-examination,
19 why you want to cross-examine a witness. I can see its
20 usefulness but also I do not want to have that used as a basis
21 for the other side arguing, "Well, you said you only wanted
22 to cross-examine him on this particular point and therefore,
23 I am not going to let you cross-examine on any other
24 particular point." I can see a usefulness and I would
25 prefer and I would ask that the parties still indicate why

1 they generally want to cross-examine the individual witnesses
2 so you would generally have an idea what was requested.

3 But I will be honest with you, I am not going to
4 thrown them out if they do try to cross-examine, go across
5 and ask for something other than what they requested.

6 MR. MOATES: In that light, Your Honor, we very
7 much endorse your comments and we certainly wouldn't contem-
8 plate making those kinds of motions but for the same kind of
9 planning purpose, we would request that a good faith estimate
10 of the amount of time that counsel thinks he will spend with
11 a witness be included not for the purpose of our jumping up
12 one minute past the appointed time and contending that they
13 have outdone it, but clearly it is important especially in
14 this first phase when we have so many witnesses and so many
15 parties so we can get some idea for our own purposes of
16 scheduling witnesses and determining whether bifurcation
17 will be necessary.

18 JUDGE HOPKINS: I think the main protestants can
19 do that generally but one of the problems I find with that
20 though, I have seen it with other cases in the past where
21 somebody says "two days" or "eight hours," et cetera,
22 et cetera, and really it doesn't make much sense. When you
23 get right down to it, it might be one hour. It might be a
24 half an hour. I can see some usefulness in it and I don't
25 see anything will be lost by doing it.

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1 Mr. Raker.

2 MR. RAKER: Your Honor, could we have a rule that
3 all witnesses should have with them their workpapers?

4 JUDGE HOPKINS: I should think that is what the
5 applicant would have anyway because if somebody questions
6 them on their workpapers, they better have them available.

7 MR. RAKER: I just wanted to make sure that there
8 was no question on that.

9 JUDGE HOPKINS: Is there any question on that?

10 MR. STEPHENSON: Your Honor, I think we can have
11 workpapers available in Washington, D. C., but some of the
12 witnesses have volumes and volumes.

13 JUDGE HOPKINS: I know, and there is no place to
14 store them in this building. That is one of the problems.

15 MR. STEPHENSON: We would have to make arrangements
16 somewhere else in town.

17 JUDGE HOPKINS: That is something that we are going
18 to have a problem with here. This hearing room generally
19 would be the one used but it is also used for the Commission's
20 conferences these days and the Commission's oral arguments,
21 et cetera, because they have taken away hearing room "B" from
22 us so this is the only large hearing room we have.

23 I know in the past and I think it would be advisable
24 again if the parties could have a place where they could
25 question their witnesses, et cetera, or prepare the witnesses

1 while they are at it depending on when it is the applicants'
2 witnesses, you could possibly use that anti-room. I
3 understand the other anti-room possibly would be available,
4 too. So we can work that out.

5 On storage of material, et cetera, I don't know
6 what the Commission will have on its docket at this time. I
7 is possible there won't be any major problem at all.

8 MR. NELSON: May I suggest that one way to control
9 the storage problem instead of just carting around volumes
10 of materials would be to have some kind of advance notifica-
11 tion of specific identified workpapers that the cross-examiner
12 wants to use for cross-examination purposes and then limit
13 it to that.

14 JUDGE HOPKINS: I don't think where it would be any
15 problem. I think the parties could generally work that out.
16 I think that really is a feasible alternative as long as you
17 have them in an area where they can get them within an hour
18 or two. If you have them in a hotel closeby, there is no real
19 problem but if you know ahead of time, the protestants for
20 example, that you specifically want to have the witness refer
21 to such-and-such a workpaper, I don't see any reason why
22 you couldn't notify them the day before.

23 Now if there is something that comes up accidentally,
24 of course, then we are faced with the problem you are going to
25 have to get it. I am not saying that you have to bring in

1 every document every day but you generally should know
2 yourself what probably you are going to be asked anyway.

3 MR. KHARASCH: Could we be off the record for a
4 moment, Your Honor?

5 JUDGE HOPKINS: Yes. Off the record.

6 (Discussion off the record.)

7 JUDGE HOPKINS: Back on the record.

8 MR. STEINER: My question is, are the states going
9 to be considered governmental parties?

10 JUDGE HOPKINS: Yes, they are.

11 MR. STEINER: Along with DOJ and DOT?

12 JUDGE HOPKINS: I have always considered the
13 states would be considered governmental bodies.

14 MR. STEINER: Thank you, Your Honor.

15 JUDGE HOPKINS: Of course, if they are protestants,
16 if they are shipper witnesses, they should be considered
17 part of the protestants rather than governmental bodies. We
18 have that problem. I believe there are a few shippers in
19 here that are also protestants.

20 Any other matters that can be raised? We are not
21 going to be able to cover everything in any order or any
22 prehearing conference today, we are not going to be able to
23 cover every problem that will come up.

24 Yes, Mr. Prettyman.

25 MR. PRETTYMAN: Your Honor, with record to the

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1 matter I brought up before the recess relating to DRGW's
2 discovery request number "8", SP is going to call me on
3 Friday. Santa Fe is going to call me on Monday in an attempt
4 to resolve the matter and if we can't, we will be in touch
5 with Your Honor by phone.

6 JUDGE HOPKINS: Better to give the telephone company
7 some money rather than the postal service. I guess I
8 shouldn't say that.

9 Mr. Moates.

10 MR. MOATES: I wonder if it would be appropriate
11 to raise the issue of the transcript. I think the parties
12 are going to be interested in a daily transcript for what is
13 clearly going to be a lengthy and substantial record. The
14 young lady doesn't have her order sheet here today but if
15 memory serves, daily transcript is normally \$9.75 per page
16 which is a bit steep for any party.

17 JUDGE HOPKINS: Are you stating for the record
18 to have me do something about it because before you go any
19 further, it is not a matter that I can take care of. It is
20 a matter that you would have to work out with Alderson but
21 if you want to get it all on the record, that is fine.

22 MR. MOATES: What I would like to put on the record
23 is to ask the parties in the hearing room and any parties
24 who may possibly read the record to consider negotiating as a
25 group with Alderson to receive a more favorable group rate

1 and that requires parties who want daily transcript indicating
2 that desire so that the group who negotiates has maximum
3 leverage if I might put it that way.

4 JUDGE HOPKINS: I should think that everyone wants
5 to save money on the whole thing. I don't know whether Mr.
6 Alderson would appreciate that.

7 Are there any other matters that I haven't covered
8 at all that should be discussed now? If anything is left out
9 that you feel a need to let me know about, you can let me
10 know before I put out an order. I will put an order listing
11 these specific dates.

12 MR. MOATES: We have something of a concern, Your
13 Honor, and I am not certain that I can ask you for specific
14 relief. The problem is the service list. I think probably
15 you and the Commission know it is a problem.

16 JUDGE HOPKINS: I always pass that off on poor
17 Ellen.

18 MR. WILSON: I spoke with Ellen about that a little
19 while ago. Our proposed approach would be to prepare a
20 revised service list of actual parties. We believe that the
21 current service list designating as many as 160 active
22 parties may include a number of parties who were interested
23 in the holding company merger but are not, in fact, interested
24 in the railroad merger. Our proposed approach would be to
25 prepare a revised service list of active parties, to distribute

1 it to everyone who is now currently designated as an active
2 party and to ask those parties to reaffirm their interest in
3 the case and if they do reaffirm that they are still
4 interested in being active parties and served with all
5 pleadings and all evidence, then that would be the way it
6 would follow. Otherwise, however, we think many parties may
7 fall off the active service list. It would probably improve
8 the ability to serve everyone both from applicants' standpoint
9 and from protestants' standpoint.

10 JUDGE HOPKINS: You have discussed this with Ellen
11 though?

12 MR. WILSON: Yes, Your Honor.

13 MR. KHARASCH: How many copies of exhibits do you
14 want at the hearing?

15 JUDGE HOPKINS: I have made it a practice never
16 to worry about the number. I have left that to other
17 people and I really don't know what is the requirement on
18 that.

19 MR. KHARASCH: One for the record.

20 JUDGE HOPKINS: No. Do you know how many?

21 MS. GOLDSTEIN: Two.

22 JUDGE HOPKINS: Two.

23 MR. MOATES: We would like three.

24 JUDGE HOPKINS: You are just talking about for the
25 record?

1 MR. KHARASCH: Yes. I presume that you would want
2 one for your own records.

3 JUDGE HOPKINS: I would say for record purposes --
4 what the other parties will need will be something that I
5 can't tell you. I think you ought to work that out for them.

6 MR. KHARASCH: A record copy, a copy for the Judge
7 and three copies -- did we hear three?

8 MR. MOATES: We would like three.

9 JUDGE HOPKINS: I would make a total of five for
10 the Commission's purposes. Now the other situations, you
11 will have to work out on that as to what they need.
12 Normally anybody who needs a copy has the right to a copy
13 of an exhibit. So I can't forestall right now saying, "You
14 don't have a right to a copy of that exhibit." I know the
15 problem and I know the expense. But I am not going to
16 designate for you to only give us ten copies and that will
17 take care of all the other parties in the case.

18 Is there anything further?

19 (No response.)

20 JUDGE HOPKINS: We will be in recess to October 1
21 if I remember the date. I will put out an order as soon as
22 I can indicating the dates in particular, the request for
23 cross-examination dates, et cetera.

24 If there is anything further that anybody thinks
25 of that needs to be in any order you can write with copies

1 to the other side. I will try to get it out as quickly as
2 possible.

3 Everybody go forward with the idea that this is
4 the schedule and you don't have to wait for the order to
5 come out to know that that is the schedule.

6 Thank you very much. We are adjourned.

7 (Whereupon, the prehearing conference was
8 adjourned at 11:50 o'clock a.m.)

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