

INTERSTATE COMMERCE COMMISSION 04/12/96

FINANCE DOCKET # 32760

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1 CCRT in this case. Have they made a filing?

2 MR. ESTES: I beg your pardon?

3 JUDGE NELSON: Has it made a filing in
4 this case?

5 MR. ESTES: It has made a filing.

6 JUDGE NELSON: What does it say?

7 MR. ESTES: The filing essentially is a
8 compilation of roughly 180 statements from various
9 shippers throughout the country and the conclusion
10 that's drawn from that compilation, Readers' Digested
11 statements is that the merger should be rejected as
12 filed.

13 JUDGE NELSON: Is there a copy of the
14 filing here?

15 MR. ESTES: I have it here, Your Honor.

16 JUDGE NELSON: I'm sure I have one in the
17 office. I have great boxes of --

18 (Laughter.)

19 -- I haven't even begun to go through
20 them. May I look at a copy of it?

21 MR. ESTES: Yes sir.

22 MR. LIVINGSTON: May I respond to one

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1 thing you said? We're not interested, I don't
2 believe, in finding out whether Member A paid \$10 or
3 \$200. We want to find out if nonmembers --

4 JUDGE NELSON: Which interrogatory are we
5 looking at here? In the context of Mr. Estes'
6 organization?

7 MR. LIVINGSTON: Let me see.

8 JUDGE NELSON: 10-4?

9 MR. LIVINGSTON: 6, I think.

10 JUDGE NELSON: 10-6.

11 MR. LIVINGSTON: No.

12 JUDGE NELSON: I see it. Document
13 request. Which one are we looking for?

14 MR. LIVINGSTON: No. 4, top of the page.

15 JUDGE NELSON: It says "identify the
16 financial contributors to CCRT and the amounts
17 contributed."

18 MR. LIVINGSTON: Right. And for that,
19 Your Honor --

20 JUDGE NELSON: And that's membership dues
21 is what we're talking about?

22 MR. ESTES: Well, that's a source of

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1 income for us. But Your Honor, if CCRT receives money
2 from the Sheik of Oman, I mean what relevancy does
3 that have to the issue that would be before the Board?

4 MR. LIVINGSTON: Receiving money from the
5 Sheik of Oman, I think actually the Commission would
6 like to know that, but -- or if they're receiving
7 money from railroads or other shippers. We don't --
8 he doesn't need to disclose the contributions of
9 individual members.

10 JUDGE NELSON: This submission was in two
11 volumes?

12 MR. ESTES: Yes, the first one is the
13 substantive one.

14 JUDGE NELSON: Let me just take a quick
15 look at this.

16 (Pause.)

17 So Appendix I is Volume II?

18 MR. ESTES: Yes, that's correct.

19 JUDGE NELSON: Statements of shippers,
20 public officials and others?

21 MR. ESTES: That's correct.

22 JUDGE NELSON: That's Volume II.

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1 MR. ESTES: What you have is the
2 statements of the shippers and a synopsis of actual
3 statements.

4 JUDGE NELSON: I see. Appendix I is the
5 back part of Volume I.

6 MR. ESTES: That's right.

7 JUDGE NELSON: So I don't know what Volume
8 II is.

9 MR. ESTES: Volume II --

10 JUDGE NELSON: Oh, newspaper articles.
11 All right, so Appendix I, several hundred pages long,
12 consists of statements of people, shippers, primarily
13 and their names and their addresses and all the rest.
14 There's no secrecy about this. It tells you exactly
15 who they are.

16 MR. LIVINGSTON: There's a question about
17 --

18 JUDGE NELSON: The inference to me is
19 these people are financing this.

20 MR. LIVINGSTON: That's the issue and I
21 think it's perfectly obvious how Mr. Estes has reacted
22 that the members of the coalition are not the ones who

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1 are providing all of the financing. If they are
2 providing all of the financing and this is an
3 organization financed by its members and we have a
4 membership list and that's the end of the matter, but
5 I don't think he's saying that. He's saying that
6 they're getting financing from other sources. That's
7 certainly the inference that I draw in his statement.

8 JUDGE NELSON: I don't know that.

9 MR. LIVINGSTON: He can confirm that.
10 He's right here, whether or not they're getting
11 financing from sources outside the membership.

12 MR. ESTES: Well, as I said, Your Honor,
13 I think it's totally irrelevant whether it's today or
14 tomorrow or next year, financial sources of this
15 corporation, resources of this corporation any more
16 than I think it's legitimate to inquire into the
17 financial resources of the Union Pacific or the
18 Southern Pacific because they're irrelevant
19 considerations.

20 MR. LIVINGSTON: Your Honor, if this has
21 been financed by the railroads or by some other large
22 shipper, I think that goes to the weight that should

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1 be accorded the statement.

2 JUDGE NELSON: Can you tell us whether
3 there's railroad money in this? You don't have to
4 answer the question. It just helps if you can make
5 any representations that can clear the air.

6 MR. ESTES: There is some railroad money.

7 JUDGE NELSON: Some railroad money.

8 MR. LIVINGSTON: Well, some Your Honor
9 could mean --

10 MR. ESTES: We have a significant
11 contribution program from members.

12 MR. LIVINGSTON: Well, we still don't know
13 whether some means 99 percent or 9.9 percent or .9
14 percent or some place in between.

15 MR. ESTES: Well, if the question is a
16 credibility of the evidence to the submission I think
17 that credibility stands on its own merit.

18 MR. LIVINGSTON: We now know that --

19 JUDGE NELSON: Anything you might want to
20 volunteer in terms of general proportion of
21 contributions, to what extent the money is railroad,
22 to what extent it is shipper. You don't have to do

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1 that at all. I'm not directing you to at this time.

2 MR. ESTES: I understand.

3 JUDGE NELSON: Anything you can volunteer
4 early would be helpful.

5 MR. ESTES: I want to check that because
6 I want to be correct and not mislead the court.

7 JUDGE NELSON: Do you have time to check
8 anything and be able to tell us -- we could take a
9 recess?

10 MR. ESTES: I can check.

11 JUDGE NELSON: Anything you can tell us
12 voluntarily does a couple of things. It helps clear
13 the air, first of all, with me, and gives us some
14 credibility and some ways to proceed short of
15 compelling things. Maybe get you a better result than
16 you'd get if you'd go hammer and tongue with me on
17 every question and every answer. It's the way some
18 others have proceeded in this issue that you've seen
19 this morning and sometimes when there are
20 representations we can clear the air, things can go
21 away, things can get focused.

22 Why don't you see during a break if you

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1 can talk to the client and see if the client will
2 authorize you to say anything regarding financing.
3 And at this moment you don't have to. It's purely
4 voluntary, but we'd appreciate anything they authorize
5 you to say.

6 Let's skip Mr. Estes for now and see
7 whether he can help us later on.

8 MR. LIVINGSTON: But just to aid him in
9 his input, what we would be satisfied if he would tell
10 us who the nonmembers are who are contributing and the
11 amount and percentage, the amount they're contributing
12 and the percentage of the total pie they're paying
13 for.

14 JUDGE NELSON: He'll tell you whatever he
15 wants to tell you, unless I order him to tell you
16 something, but if you can work out an agreement
17 without involving me, so much the better.

18 MR. LIVINGSTON: All right.

19 JUDGE NELSON: If you will get an idea of
20 the general picture is, what you can tell us and what
21 you can't, we can go from there.

22 This looks like a lot of little

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1 statements.

2 MR. ESTES: Your Honor, primarily, there
3 are some larger ones, but primarily smaller shippers.

4 JUDGE NELSON: Who would be your bigger
5 ones?

6 MR. ESTES: There is a statement in there,
7 I believe from Shell and there's a statement in there
8 from Huntsman and Tetra Chemical, so there are some
9 larger statements, but primarily smaller railroads and
10 shippers and essentially located west of the
11 Mississippi, although not exclusively, but
12 essentially.

13 JUDGE NELSON: You could say -- there's a
14 lot of little people in this country who get affected
15 in big ways by big railroads and they don't always
16 have the strength individually to do business.
17 They're not like the plastics or the chemicals or
18 these other things, the co-producers of the utilities
19 and if they want to get together, get common resources
20 and find money and participate in the case that no one
21 individual could do, putting aside the Shells of the
22 world, you can make an argument that those are the

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1 very kinds of people for whom this protection ought to
2 exist the most and you might find a receptive guy here
3 in that respect. You can help me through to a
4 conclusion like that.

5 My father was a small businessman in New
6 England. If he was fighting with railroads, I don't
7 know, but he could never have afforded to conduct some
8 campaign against the Union Pacific. He could have
9 afforded to join a group of many shippers who shared
10 concerns and kicks in a membership fee and whatever.
11 That's one picture.

12 On the other hand, if we've got all these
13 little guys taking a free ride and it's really Mr.
14 Lubel's client that's got the checkbook out, then
15 maybe there's a different picture.

16 But you see if you can't tell me something
17 that will help you get to home plate on this. We'll
18 see where we go.

19 I'm going to defer until we get some
20 communication from Mr. Estes, any request for orders
21 to produce with regard to his membership. We may be
22 in a whole different category anyway.

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1 MR. LIVINGSTON: The next item --

2 JUDGE NELSON: What's next?

3 MR. LIVINGSTON: Involves Kansas City
4 Southern and there are essentially two issues, both of
5 which involve computerized information.

6 JUDGE NELSON: Mr. Estes, do you want me
7 to hold your materials up here for now, in case we
8 need them later?

9 MR. ESTES: Yes, please.

10 MR. LIVINGSTON: The situation as I
11 understand it is this, I think Mr. Lubel and I operate
12 on even ground when we're talking about computers.
13 They put in a witness, Ploth, who relied on some
14 computerized data.

15 JUDGE NELSON: I think I remember this.

16 MR. LIVINGSTON: Having to do with the
17 Department of Defense records of shipments of one kind
18 or another and those, that DOD data had, in turn, been
19 put together and mounted on a computer by a witness
20 named Nunn who has also submitted a statement on the
21 behalf of Kansas City Southern.

22 The data themselves, the DOD data, as I

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1 understand it are public data, but Nunn, the witness
2 who put this in her computer and developed software to
3 make analyses of the data, she is refusing to produce
4 the software, even though the information, even though
5 there's a protective order that would prevent anybody
6 from making commercial use of the software. We need
7 the software from Nunn.

8 JUDGE NELSON: Back up to the beginning.
9 The DOD data, what are they?

10 MR. LIVINGSTON: This has something to do
11 with traffic and it's relevant to the statement being
12 submitted by Ploth and Nunn which is part of the KCS
13 --

14 JUDGE NELSON: I thought Nunn and Ploth
15 were KCS witnesses.

16 MR. LIVINGSTON: KCS witnesses.

17 JUDGE NELSON: They are saying, what's the
18 substance of their position? Mergers should be
19 condoned?

20 MR. LUBEL: I can help you on this.

21 MR. LIVINGSTON: Yes, let Mr. Lubel --

22 MR. LUBEL: Just as to what that is and

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1 it's very interesting.

2 JUDGE NELSON: Before we get to that,
3 what's the essence of your position with regard to the
4 proposal?

5 MR. LUBEL: I don't think we have a
6 dispute here.

7 JUDGE NELSON: I would have guessed that
8 you've fallen in love with it.

9 MR. LUBEL: First, Ms. Nunn has not
10 refused to make available --

11 JUDGE NELSON: The way it had to be, Mr.
12 Lubel.

13 MR. LUBEL: What they produced, the
14 information --

15 JUDGE NELSON: Before that even. There is
16 a party known as the KCS.

17 MR. LUBEL: Yes.

18 JUDGE NELSON: And has it got a position
19 about the UP/SP merger?

20 MR. LUBEL: Certainly.

21 JUDGE NELSON: What is that position?

22 MR. LUBEL: I really defer to Mr. Mullins

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1 to articulate that better than myself, but our
2 position is that we are opposed to it unless certain
3 conditions are granted in certain areas of the
4 country, particularly the -- emanating from Houston
5 and St. Louis, New Orleans, Houston South.

6 JUDGE NELSON: Conditions that would do
7 what?

8 MR. MULLINS: Yes, Your Honor, these
9 conditions that Kansas City Southern requested would
10 alleviate the anti-competitive effects that would be
11 created. We are arguing that by the merger of Union
12 Pacific/Southern Pacific, that these two railroads,
13 for example, serve the Houston and St. Louis market
14 and they're the only two railroads that serve the
15 Houston and St. Louis market. By merging, you're
16 going to monopoly and we are saying that as a monopoly
17 on those routes, that shippers would face increased
18 rates.

19 JUDGE NELSON: So?

20 MR. MULLINS: And therefore, the
21 Commission to alleviate the anti-competitive effects
22 of the merger must order another railroad be allowed

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1 to serve that market and this is what happens in the
2 railroad merger cases all the time. If the ICC, not
3 the STB, finds there's competitive effect in a certain
4 area, they allow another railroad to come in and serve
5 that market.

6 JUDGE NELSON: You mean in addition to the
7 BN/Santa Fe?

8 MR. MULLINS: No. We've argued that the
9 BN/Santa Fe trackage rates agreement is an inadequate
10 substitute --

11 JUDGE NELSON: Won't work when there ought
12 to be a whole new railroad?

13 MR. MULLINS: That's right. In fact,
14 we're saying there's two parallel lines, for example,
15 between Houston and St. Louis right now. One is a UP
16 line and one is an SP line and we're saying that the
17 --

18 JUDGE NELSON: All right, I don't need all
19 these details right now. You're seeking conditions
20 that would open up a chance for more railroads to come
21 in these 2 to 1 situations?

22 MR. MULLINS: Yes. In other words, a

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1 second railroad.

2 JUDGE NELSON: Namely yourself?

3 MR. MULLINS: What we have said that that
4 should be up to the STB to order divestiture of a
5 parallel line and Conrail can come in and offer to buy
6 it, we can come in to offer to buy it, BN/Santa Fe can
7 come in and offer to buy it.

8 JUDGE NELSON: I understand the position.
9 Now we come to these two witnesses.

10 MR. MULLINS: These witnesses have
11 produced evidence that is in evidence that UP, SP and
12 BN/Santa Fe will bid on Department of Defense traffic.
13 Department of Defense says I have a movement of 100
14 tanks and I'm accepting bids from the railroads as to
15 who can move my tanks.

16 JUDGE NELSON: Yes.

17 MR. MULLINS: UP puts in a bid, SP puts in
18 a bid, BN/Santa Fe puts in a bid, some trucks put in
19 some bids and we're showing that by this data, this
20 bid data that SP is in fact a winning bidder and in
21 fact oftentimes undercuts UP's bid by probably 30 to
22 40 percent and if the two of them are allowed to

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1 merge, that the bid will automatically, the DOD will
2 suffer competitive harm.

3 JUDGE NELSON: Bids are evidence of
4 competition.

5 MR. MULLINS: It's the first time that I
6 have seen a real bid evidence in an STB case in my
7 eight years.

8 JUDGE NELSON: I understand this, so this
9 is the competition, the loss of which you want the
10 protection?

11 MR. MULLINS: That's correct.

12 JUDGE NELSON: I understand that. Now the
13 records that are in dispute are DOD records of these
14 biddings?

15 MR. MULLINS: Let me explain. What
16 happens is DOD has these biddings on tapes, computer
17 tapes and they -- pursuant to the Freedom of
18 Information Act about ten years ago by various
19 parties, the Department of Defense was ordered to
20 produce these things. So every so often, I believe
21 every quarter, I'm not exactly sure, but I believe
22 it's every quarter, they submit these tapes and say

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1 the public can come and look at these tapes and --

2 JUDGE NELSON: So everyone can find out
3 who bid what?

4 MR. MULLINS: That's right. That's
5 correct.

6 JUDGE NELSON: On various proposals.

7 MR. MULLINS: And Nell Nunn has
8 established a business, one of our witnesses, has
9 established a business where she takes these tapes,
10 loads them onto her computer, runs a software program,
11 a methodology rate methodology, whatever she invented
12 in order to figure out what the bids are because it's
13 not just right out there. You have to sort of process
14 the tapes in order to figure out what the bids are.

15 JUDGE NELSON: She decodes --

16 MR. MULLINS: She decodes it essentially,
17 decodes the tapes. And then she sells her service to
18 SP or UP or BN/Santa Fe or Conrail. She says hey, SP
19 you want to come in and bid on this traffic next time.
20 I could help you figure out what everyone else bid so
21 that you can come in and --

22 JUDGE NELSON: The FOIA has produced a

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1 release which is itself so encoded the cottage
2 industry gets hired?

3 MR. MULLINS: That's exactly right.

4 JUDGE NELSON: It would never have
5 happened in the old days.

6 (Laughter.)

7 MR. MULLINS: And such a cottage industry

8 --

9 JUDGE NELSON: This happened after 1975?

10 MR. MULLINS: It did, yes.

11 JUDGE NELSON: When I was Assistant
12 General Counsel for Manpower and Health and Public
13 Affairs, FOIA responsibility, along with the
14 procurement.

15 MR. MULLINS: She has developed a
16 proprietary methodology.

17 JUDGE NELSON: All right, assume this is
18 the story, the applicants want her translation
19 machinery.

20 MR. MULLINS: They want her methodology
21 and her software --

22 JUDGE NELSON: Why don't they pay her her

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1 fees?

2 MR. MULLINS: That's exactly right, that's
3 the whole point.

4 JUDGE NELSON: She's a commercial
5 salesman, she's available for hire, hire her.

6 MR. LUBEL: If I might --

7 JUDGE NELSON: Why is that so difficult?

8 MR. LUBEL: These are her work papers. We
9 have produced her work papers.

10 JUDGE NELSON: All right.

11 MR. LUBEL: To back up her statement.

12 JUDGE NELSON: If you have her services,
13 they can't also hire her?

14 MR. MULLINS: I don't know whether they
15 started to hire her or not. She's available for her.
16 They can ask her to do the same thing for them.

17 MR. LUBEL: Your Honor, if I might just
18 follow up --

19 JUDGE NELSON: What's wrong with that
20 solution?

21 MR. LIVINGSTON: Your Honor, Ms. Nunn was
22 a witness in this case. She's been hired by KCS and

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1 submitted testimony in which she uses her software.
2 She's not the only witness in this case who submitted
3 testimony using computer data and using proprietary
4 software. It has been a common occurrence.

5 There is a protective order and we have
6 turned over software to other parties. There's a
7 protective order that says that if anybody who gets
8 this high confidential stuff, the software, can only
9 use it for purposes of this case and they can't make
10 commercial use of it. It's fully protected under the
11 protective order.

12 There is no justification --

13 JUDGE NELSON: How much money is involved?

14 MR. MULLINS: You mean --

15 MR. LIVINGSTON: There's no paper
16 substitute.

17 JUDGE NELSON: To make her happy. What we
18 have here is a pocketbook consideration.

19 MR. MULLINS: It's very -- she started
20 with something like \$50 an hour and he's incorrect
21 when he says Nell Nunn put in the testimony --

22 JUDGE NELSON: How many hours does it take

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1 her to give him the hardware?

2 MR. MULLINS: I have no idea. What
3 happens is we have two witnesses. We have Bill Ploth
4 who took the raw data that she gave Bill Ploth and
5 Bill Ploth is the one that provided the statement, so
6 Bill Ploth is the one that talks about the bidding
7 information, what they bid. They can go hire Nell
8 Nunn.

9 JUDGE NELSON: Let's stick to the point.

10 MR. MULLINS: It's not very much money.

11 JUDGE NELSON: I don't know that. What I
12 think we've got here is a private entrepreneur that
13 doesn't want to give away something for nothing.

14 MR. MULLINS: Exactly.

15 JUDGE NELSON: She's given it to you and
16 she wants to get paid to give it away.

17 MR. MULLINS: She gave it to one of our
18 witnesses.

19 JUDGE NELSON: If we're talking about \$10
20 million that's one case. If we're talking \$2,000
21 that's another one, so I'm trying to get an idea of
22 what you've got here.

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1 MR. LUBEL: Your Honor, I think her
2 concern is and this involves the second issue, I
3 think, Mr. Livingston is going to raise. Her concern
4 is that if she turns over her proprietary software,
5 and if the railroad employees are able to look at it
6 and see how she manipulates the data, they won't need
7 her services. They'll say oh, that's how she did it.
8 Now that raises the second issue. We have designated
9 her information as highly confidential, meaning only
10 outside consultants and lawyers can see it. I
11 believe, and correct me if I'm wrong, Mr. Livingston,
12 I believe they also want to declassify the information
13 as just confidential meaning the railroad employees
14 would be able to see it and maybe --

15 JUDGE NELSON: Then we have three
16 problems. One is this simply a case of she wants
17 money?

18 MR. LIVINGSTON: No.

19 JUDGE NELSON: It's not that?

20 MR. LUBEL: If it comes out --

21 JUDGE NELSON: I misunderstood that. Next
22 problem. She's unhappy with the existing protections

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1 such as they are, the existing protective order for
2 material turned over. She wants a stronger
3 protection?

4 MR. LUBEL: No, Your Honor. We have
5 designated her work papers, all the information I
6 believe is there, at least her work papers are there.
7 That's designated highly confidential and they're
8 satisfied with that. I think --

9 JUDGE NELSON: Who is they?

10 MR. LUBEL: They is Ms. Nunn. Ms. Nunn is
11 satisfied that this is designated highly confidential.
12 The problem is they want to declassify it as to
13 confidential, number one.

14 JUDGE NELSON: This is the software?

15 MR. LUBEL: No, this is her work papers.

16 JUDGE NELSON: What has this got to do
17 with it?

18 MR. LUBEL: It's her work papers.

19 JUDGE NELSON: You're mixing me up.

20 MR. LUBEL: This is the information she
21 has provided.

22 JUDGE NELSON: Now we have a witness who

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1 has a proprietary stake in something called software,
2 some kind of machinery that translates these DOD
3 records.

4 You want her to put that machinery to work
5 to translate the records for you?

6 MR. LIVINGSTON: We want in machine
7 readable form, her software and her data, so that we
8 can perform the same operations on the data that she
9 has performed.

10 JUDGE NELSON: I am unable to follow this
11 without understanding what the data are, what her
12 problems are, what it is you want to do.

13 MR. MULLINS: Your Honor, they can hire
14 someone who does a similar thing. They can take the
15 tapes from DOD and run their own methodology. There's
16 this cottage industry out there. Go hire somebody to
17 take the DOD tapes and do what they want to do with
18 them.

19 JUDGE NELSON: Where is her office?

20 MR. MULLINS: Kansas City.

21 JUDGE NELSON: The printouts are here.

22 MR. LUBEL: That raises --

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1 JUDGE NELSON: If this is so important --

2 MR. LIVINGSTON: This -- the situation is
3 this. She has a proprietary program that she has
4 developed, I don't think even for this case, but at
5 some prior one, that she markets. Her husband put in
6 a verified statement in this case, Mr. Ploth. She
7 provides him with data which he relies on.

8 Part of the work papers in this case and
9 part of the underlying data, we are entitled to see
10 the data and the software.

11 Now she's entitled to make sure that we
12 don't take her software, she makes a living off of it,
13 and convert it to commercial use.

14 JUDGE NELSON: Let's begin with the KCS
15 filing. Show me a piece of paper in there to which
16 this relates. Maybe I'll get it.

17 Do you have your filing here?

18 MR. MULLINS: No, Your Honor, we didn't
19 bring a copy.

20 MR. LUBEL: But it does have charts.

21 JUDGE NELSON: I'll go upstairs in my
22 office and find it. Tell me what it looks like.

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1 MR. MULLINS: It's red and green --

2 (Laughter.)

3 JUDGE NELSON: How about if you go up
4 there. Do you have any objection if Mr. Mullins comes
5 up with me and goes through those boxes? He knows
6 what he's looking for.

7 MR. LUBEL: We can show him the statement.
8 Your Honor, let me make one statement for the record.
9 Ms. Nunn has not formally refused to give them the
10 software.

11 JUDGE NELSON: Mr. Lubel, you're way ahead
12 of me. I don't even understand what we're talking
13 about. I've got to go about this in my own slow
14 Bostonian way which is to begin at the beginning and
15 then I'm going to ask Mr. Livingston what statement it
16 is that he wants to probe. I want to understand its
17 relevance and what it is, and then we'll get through
18 all this and if I still don't understand it -- other
19 parties are seeking production and you can subpoena
20 her here and have her explain it to me.

21 MR. LUBEL: Your Honor, I just want to
22 make sure the record is clear. We've been trying to

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1 get in touch with Ms. Nunn since they made this
2 request to ask her if she would give it to us and
3 she's been traveling and will be back in town on
4 Monday. She might tell us on Monday, sure, I'll send
5 it to you.

6 We don't know. They have overstated it in
7 saying --

8 JUDGE NELSON: She's going to be here
9 Monday?

10 MR. LUBEL: No, she's going to be in
11 Kansas City on Monday and we'll get in touch with her
12 and say can we have your software. She has not told
13 us that she won't give it to us. She has said that
14 she wants all her information kept highly confidential
15 which is her second issue, but this may be a nonissue
16 is she says sure, as long as you keep it highly
17 confidential, I'll give you the software.

18 I just want to make clear that we haven't
19 been able to get in touch with her.

20 JUDGE NELSON: So there are two questions.
21 One is whether she'll give it to you at all and the
22 second is on what terms?

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1 MR. LIVINGSTON: We pass on the second
2 issue. A machine readable form of what is done here.
3 That has been --

4 JUDGE NELSON: Look, he's noticed this in
5 discovery. She's your witness and you're telling me
6 you can't talk to her?

7 MR. LUBEL: She's been out of touch.
8 She's been traveling. We gave them her work papers.
9 They then called us. I don't know, Your Honor. We
10 called and they said she'll be back in town on Monday.
11 Ever since they asked us for this, earlier this week,
12 we called her and said is Nell there? We want to see
13 if we can get the tapes. They said she won't be back
14 until Monday.

15 JUDGE NELSON: You have a lot of material
16 in discovery in this case. It's a two-way street, Mr.
17 Lubel. The idea that we've got an issue properly
18 noticed here that's ripe for adjudication and you
19 can't help us because you can't talk to the person,
20 that's not too persuasive.

21 MR. LUBEL: I'm not trying to be
22 persuasive, Your Honor. I'm just trying to tell you

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1 the facts. I tried to call this lady and I can't find
2 her.

3 MR. LIVINGSTON: The fact is we have been
4 told, as I understand it, that she has refused to
5 provide the software, claiming it's proprietary that
6 she's not satisfied with the protections provided by
7 the protective order.

8 JUDGE NELSON: As you know, I don't have
9 the power to impose sanctions. I went through that.

10 MR. LIVINGSTON: She didn't have to
11 participate in these proceedings --

12 JUDGE NELSON: I have the power to
13 recommend sanctions and I'll certainly entertain that.

14 MR. MULLINS: Judge Nelson, she's provided
15 her work papers like the discovery guidelines says.
16 The discovery guidelines say if you're a witness that
17 provides verified statements, produce your work
18 papers. She's done that.

19 JUDGE NELSON: Mr. Livingston is in here
20 saying whatever it is, work papers, hardware,
21 software, six bananas, whatever you call it, he wants
22 it and she isn't giving it to him. That's all I

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1 understand.

2 MR. MULLINS: She has given it, Your
3 Honor. She has produced her work papers. He wants
4 the backup for this. He wants the computer --

5 JUDGE NELSON: My understanding is that
6 there's something which Mr. Livingston wants which he
7 is not getting and that's what I'm hearing.

8 MR. MULLINS: Obviously --

9 JUDGE NELSON: You know what that is and
10 he's properly noticed it and if the response is not
11 only can we not get her explanation, we can't even
12 communicate with her, knowing this dispute, I'm
13 certainly willing to entertain a suggestion that I
14 made a recommendation to sanctions.

15 MR. LUBEL: What do you want besides her
16 work papers?

17 JUDGE NELSON: You can't play the game
18 that way, ladies and gentlemen. You can't hold out a
19 witness and have that witness submit a statement and
20 have her refusing to turn something over and then be
21 unable to tell me what it is, where she is, whether
22 she can be here, we don't know anything about her and

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1 it's all up in the air. That's not going to work.

2 Whatever you're handing me is not what Mr.
3 Livingston wants.

4 MR. LUBEL: Tell us what he want.. I
5 assume he wants the machine readable form of this
6 information.

7 MR. LIVINGSTON: Machine readable versions
8 of the data which would disclose her software and
9 would allow our people to replicate her work.

10 JUDGE NELSON: Suppose we get Mr. Lubel or
11 Mr. Mullins and this witness and you in here at 8
12 o'clock any day this week to resolve this? We'll find
13 out what the story is, what it is you want, why she
14 won't give it to you and what the terms are in which
15 you'll get it. We'll get her on the stand.

16 MR. LUBEL: I think that would be a good
17 suggestion.

18 JUDGE NELSON: How soon can you have it
19 here?

20 MR. LUBEL: We've been trying to get in
21 touch with her and we'll try and get in touch with --

22 JUDGE NELSON: You pay a price for that

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1 inability to communicate. The inference can be drawn
2 that if you could communicate with her she isn't going
3 to say anything helpful to you, a nonproduction of a
4 witness.

5 You can't have a witness here that
6 disappears.

7 MR. LUBEL: Your Honor, are you suggest
8 that I could contact this woman and yet I purposefully
9 not tried to do that?

10 JUDGE NELSON: Not for one moment. We are
11 suggesting that the witness seems to have disappeared
12 from the face of the earth. That can't be an
13 acceptable litigation position. She may have left you
14 holding the bag in which case you've got to pay the
15 price for it.

16 MR. LUBEL: Your Honor, they came up with
17 a request that was beyond the scope of what we're
18 required to do. We have been trying diligently to
19 respond to that request.

20 JUDGE NELSON: If her position is, you can
21 tell her this, that she's not going to give them
22 something, but she can't tell us what it is or why and

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1 only to tell us where she is, she's going to have to
2 pay the consequences that flow from that decision.
3 Those consequences will reflect adversely, could
4 reflect adversely on your evidence and there could be
5 a recommendation to the Board that the Board draw such
6 an inference.

7 MR. LUBEL: Your Honor, I think we're
8 making much more of this than it should be. We'll
9 find the woman. We'll tell you where she has been.
10 I take it it will be a very reasonable explanation. I
11 don't think we need to create any other inferences
12 from this.

13 JUDGE NELSON: Who said that she wouldn't
14 make available the software? I don't know if she's
15 got objections or not, but where did that come from?

16 MR. LIVINGSTON: That's what I've been
17 advised.

18 MR. MULLINS: She wouldn't make it
19 available under a non-highly confidential -- you all
20 want it to be public, by the way, let alone
21 confidential. If you're willing to stipulate right
22 now that you'll keep it highly confidential, I think

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1 she'll probably produce it.

2 MR. LIVINGSTON: Your Honor, we are
3 willing to have it treated as confidential which will
4 guarantee --

5 MR. LUBEL: No, it's highly confidential.

6 MR. LIVINGSTON: That it will not be made
7 available to people for commercial use of the product.

8 JUDGE NELSON: You're willing to turn this
9 thing over, whatever it is, provided it's treated as
10 highly confidential?

11 MR. LUBEL: It was her work papers that
12 are designated highly confidential and we object to
13 any declassification.

14 JUDGE NELSON: Suppose I enter an order
15 that directs you to produce this stuff with the
16 designation of highly confidential subject to any
17 later request that the applicants may have with regard
18 to the material and we can thrash it out later if you
19 want to then do something. Do you want to put it on
20 the NBC news?

21 MR. LIVINGSTON: We need the machine
22 readable form to make the analyses and if we can get

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1 that, that's step 1.

2 We also need to be able, the data itself,
3 what the bids were all that sort of thing. That's
4 Freedom of Information Act and that would actually
5 help. We need to be able to show that information to
6 people at the company to ask them about it.

7 JUDGE NELSON: In other words, when she
8 translates --

9 MR. LIVINGSTON: We don't need to show the
10 people of the company the electronic software, I don't
11 believe.

12 JUDGE NELSON: Say it's like a translator,
13 Spanish into English and she has a unique system in
14 how she translate it. It's her system that's
15 sensitive, not the translation. So when she comes out
16 with the English version, you can show that to anyone.

17 MR. MULLINS: And in fact, Judge Nelson,
18 their statements are public in our filing. They were
19 not designated confidential or highly confidential,
20 but the results, Mr. Ploth's results, in other words,
21 the output of the machine is public because it's a
22 FOIA. It's public.

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1 JUDGE NELSON: But if she sits and there
2 and thinks, through secret machinery, and says como se
3 dice in Espanol "railroad" and says ah, fierro carro,
4 that process is secret.

5 MR. MULLINS: That's right.

6 JUDGE NELSON: But the translation into
7 fierro carro is public?

8 MR. MULLINS: Right.

9 JUDGE NELSON: In the case I just gave
10 you. Do we understand that, Mr. Livingston?

11 It's the hardware or software, the hocus
12 pocus that translates the DOD records into actual bids
13 that is secret. The bids themselves are not secret.
14 Why is this causing problems?

15 MR. LIVINGSTON: I'm not sure that it is.
16 It is my understanding and I may need to check on the
17 second point, that we need in machine readable form
18 her software so that we can analyze what they have
19 done. They obviously think this is terrific evidence
20 and made that clear at this hearing. We should have
21 a chance to rebut it. We need the machine readable
22 form of her software.

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1 JUDGE NELSON: The problem is then what do
2 you do with it?

3 MR. LIVINGSTON: We also need to be able
4 to show the bid data to company people.

5 JUDGE NELSON: Is there a claim that she
6 hasn't translated the stuff properly?

7 MR. MULLINS: I don't know. I don't know.
8 You ask them that question. That's --

9 MR. LIVINGSTON: The statement, the
10 computerized statement we need to analyze. The only
11 way to analyze it is to get the lady's readable
12 analysis.

13 MR. LUBEL: Your Honor, let me add one
14 thing. Ms. Nunn has a company and they consider this
15 process to be proprietary.

16 JUDGE NELSON: I heard that a half an hour
17 ago.

18 MR. LUBEL: All I'm saying is that she may
19 want to --

20 JUDGE NELSON: I'm still struggling. I
21 can't make a ruling. I don't think either side is
22 fully prepared.

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1 MR. MULLINS: Judge Nelson, can I suggest
2 we'll go up, we'll get it and you can read it so you
3 can understand exactly what is going on here?

4 JUDGE NELSON: I'm not going to understand
5 that without knowing what it is Mr. Livingston --

6 MR. LIVINGSTON: I don't think Mr.
7 Mullins' statement is going to tell you anything.

8 JUDGE NELSON: What he wants to do with
9 it, what problems are posed by what he wants to do,
10 why she doesn't want him to do, whatever it is he's
11 doing with it. I gather we're past the problem of
12 turning it over. It's something she's afraid he'll do
13 with it. I can't understand that.

14 MR. LIVINGSTON: Her fear is that somebody
15 will take the software and use it commercially and
16 therefore destroy the commercial monopoly that she has
17 on her own --

18 MR. LUBEL: I think it's beyond that, Your
19 Honor. I think the fear is if you declassify it to
20 confidential and let their company people see it,
21 other than the consultants, able consultants that I'm
22 sure they have, they will then see the process and be

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1 able to do it themselves, replicate it themselves and
2 will not need to buy her services.

3 MR. LIVINGSTON: From my understanding it
4 is that she's been unwilling to produce even under the
5 protective order as highly confidential. She's been
6 unwilling to produce at all. That's what I was told.

7 It would be a first step if we could get
8 a machine readable form.

9 JUDGE NELSON: Let's see if we can take
10 that first step.f Do you want to check with your
11 client?

12 MR. LIVINGSTON: I am sure that it would
13 be useful for us to have it in machine readable form
14 even if it were highly confidential.

15 JUDGE NELSON: Can we make this request?
16 The stuff be transmitted in machine readable form?

17 MR. LUBEL: We've been trying to make that
18 request of her since they first asked this of --

19 JUDGE NELSON: That's what you don't know
20 you can do.

21 MR. LUBEL: Right, because I can't find
22 her.

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1 MR. MULLINS: Judge Nelson, what's very
2 interesting about this, they want to challenge this
3 data because they have every right to do in their
4 rebuttal filing on April 29th. They know what their
5 own bids were. UP knows what it bid on this track.
6 SP knows what it bid on this track. If they want to
7 claim that her filing was --

8 JUDGE NELSON: I'm afraid I'm going to
9 have to put this all off until each side can get their
10 facts more in order and let's see when we can do this.

11 We're available if we can do it.

12 MR. LIVINGSTON: The problem is this
13 person put in testimony.

14 JUDGE NELSON: I understand all of that.

15 MR. LIVINGSTON: And we have on the 29th
16 put in our rebuttal.

17 JUDGE NELSON: I understand all of that.
18 You're talking to a man who cannot grasp the problem.
19 And part of that is the lawyering mainly. Your side
20 is not as prepared as it might be, Mr. Livingston.
21 And your side, Mr. Lubel, is woefully unprepared to
22 deal with these issues.

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1 What do I do in this context?

2 MR. LUBEL: In terms of her availability,
3 they first asked us for --

4 JUDGE NELSON: I don't want to know that.
5 That's history. What do we do now? We're here now.

6 MR. LUBEL: In the first place, we try to
7 get in touch with her to see what her position is.

8 JUDGE NELSON: She's reachable Monday?

9 MR. LUBEL: We know she's reachable
10 Monday, given Your Honor's statements, I'll certainly
11 make all effort to find where she is and contact her.

12 JUDGE NELSON: So let's --

13 MR. LUBEL: We were told by her office
14 that she would be back on Monday.

15 JUDGE NELSON: Let's defer the whole thing
16 until Mr. Lubel can talk to this witness and find out
17 more about what's going on, including what she can do
18 and not do, what the fears are, when she can be here
19 to explain all of this to us because I don't think
20 lawyers on either side have done a good job of
21 explaining what the struggle is.

22 It can't be so complicated that you can't

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1 get me to understand.

2 MR. LIVINGSTON: Your Honor, at a minimum,
3 it would seem to me, they ought to commit to giving us
4 the machine readable form of this data if it's highly
5 confidential.

6 JUDGE NELSON: They say they're unable to
7 make that commitment.

8 MR. LUBEL: I can -- I would certainly do
9 it, but I can't -- I haven't talked to her.

10 JUDGE NELSON: It's going to leave you in
11 a difficult litigation position which is that you're
12 going to rely on stuff, the translation of which you
13 can't give the other side. Even under the most --

14 MR. MULLINS: Judge Nelson, we've given
15 them the written form. Their consultants or people
16 can take the written form and do the exact same thing
17 that they want to do. They just want to make it
18 easier --

19 JUDGE NELSON: Perhaps Mr. Livingston
20 could come in with a witness that will explain, if the
21 claim is that you've already got this in some other
22 version, why he or she needs the other third version

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1 or second version. We'll get all that explained.

2 I think what we need for this is
3 witnesses. There are factual issues here that need to
4 be explained. How soon can we set up this proceeding?
5 We have Thursday. Do you want to do it Thursday
6 morning before 9:30.

7 MR. LIVINGSTON: I think that's tantamount
8 to not getting the information.

9 JUDGE NELSON: When do you need it by?

10 MR. LIVINGSTON: We need to get this
11 computer readable information very soon.

12 MR. MULLINS: Mr. Livingston, why can't
13 you start to work on this using the written work
14 papers that we have provided to you?

15 MR. LIVINGSTON: We have provided computer
16 takes to KCS and other --

17 JUDGE NELSON: This is not helping me.
18 The question is when we can meet to get this issue in
19 order.

20 MR. LIVINGSTON: Can we do it this
21 afternoon?

22 JUDGE NELSON: The answer is no because

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1 they can't reach this woman.

2 MR. LIVINGSTON: Monday morning?

3 MR. LUBEL: Yes, we can certainly have her
4 available at the very least by conference call on
5 Monday morning.

6 JUDGE NELSON: I want her on the stand
7 under oath. I don't understand this business. I want
8 to ask her questions myself, bring it in, see what it
9 is. Is it something you can carry with you?

10 MR. LUBEL: I don't know. I'm assuming if
11 it's in machine readable form that it's a disk or a
12 tape.

13 JUDGE NELSON: You don't know.

14 MR. LUBEL: I know if it exists in
15 computer form the universe of forms that it can be on
16 I assume is computer disk or computer tape. I'm not
17 really aware of when she can have it here and say this
18 is what it is.

19 JUDGE NELSON: I understand that.

20 MR. LIVINGSTON: Monday morning is fine
21 with us, Your Honor. 8:30.

22 JUDGE NELSON: That's fine, but I don't

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1 want to do it if we can't have her here.

2 MR. LUBEL: That's right.

3 JUDGE NELSON: And we won't know that
4 until Monday.

5 MR. LUBEL: When we leave her we'll
6 certainly try to track her down.

7 JUDGE NELSON: Why don't we book it for
8 Tuesday morning?

9 MR. LUBEL: I understand she's on vacation
10 and we'll certainly try to track her down.

11 MR. LIVINGSTON: How about Monday
12 afternoon, Your Honor? She could fly here Monday.

13 JUDGE NELSON: I've got the Mojave
14 Pipeline case.

15 MR. LUBEL: I'd also like to point out
16 that Ms. Nunn has a five year old son and I don't
17 think she can just pick up and go without making child
18 care arrangements. I don't know if she can act that
19 quickly.

20 MR. KILLORY: Your Honor, if I could just
21 -- never mind.

22 MR. LIVINGSTON: I think Ms. Nunn --

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1 JUDGE NELSON: What if she's at, in her
2 office, with a representative of the applicants,
3 they've got people there, and you send counsel out
4 there and see if you can't straighten this out.

5 MR. LUBEL: That might be a possibility.

6 JUDGE NELSON: Then she doesn't have to
7 have problems with the son.

8 MR. LUBEL: Again, we still want it to be
9 highly confidential, but --

10 JUDGE NELSON: That's all you have to
11 discuss with her. You've got two questions. One is
12 what can we give the other side, if anything, and two
13 is under what set of restrictions? I am willing to
14 make restrictions tougher than the ones we've got so
15 far for the sake of getting discovery going if that
16 will make you happy.

17 So what are we going to do? WE need at
18 least a meeting. You need to consult with this
19 witness.

20 MR. LUBEL: That would seem to be
21 workable. We tell her, Ms. Nunn, somebody is going to
22 be coming to your office or we want you to meet with

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1 somebody --

2 JUDGE NELSON: Whoever. You tell her, Ms.
3 Nunn, we've got problems here. We've got an
4 evidentiary submission in which you used this device
5 and we got this as a trial. This is an adversarial
6 proceeding. And the other side wants the device.

7 MR. LUBEL: Again, Your Honor, so the
8 record will be clear, this is not where she's refusing
9 to provide the backup for her data. It's just that
10 they wanted a more convenient machine readable form.

11 JUDGE NELSON: I don't know what the
12 difference is.

13 MR. LUBEL: I think they're making --

14 JUDGE NELSON: I don't know what machine
15 readable means.

16 MR. LUBEL: I think it means can be read
17 by computer.

18 MR. LIVINGSTON: Rather than a human.

19 MR. LUBEL: I don't understand their
20 position that there is information that backs up her
21 statement and Mr. Ploth's statement that it is not
22 being provided. They just want it in a forum that

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1 they can use it more easily.

2 JUDGE NELSON: Well, if you've already
3 given it to them in this forum, it can't be so secret.

4 It can't be so proprietary -- what's the
5 fight over?

6 MR. LUBEL: The program itself may have
7 proprietary with respect to it and I understand that
8 their position.

9 MR. LIVINGSTON: I don't believe that has
10 --

11 MR. LUBEL: That's why it should be
12 designated as highly confidential.

13 JUDGE NELSON: What do you suggest as the
14 next available time when we can thrash this out?

15 MR. LUBEL: I'd like to try to get it
16 resolved on Monday, if possible.

17 MR. LIVINGSTON: Let's get the witness
18 here Monday.

19 MR. LUBEL: We'll certainly endeavor to do
20 that to the extent that it's humanly possible.

21 JUDGE NELSON: I'm only available at the
22 beginning of Monday.

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1 MR. LIVINGSTON: We're available --

2 MR. LUBEL: We'll try to work it out. It
3 may all go away, Your Honor.

4 JUDGE NELSON: Let's go off the record for
5 a moment.

6 (Off the record.)

7 JUDGE NELSON: With regard to this dispute
8 about Ms. -- what's her name?

9 MR. LUBEL: Nunn.

10 JUDGE NELSON: Nunn's materials. We're
11 going to meet Tuesday, April 16th at 8:30 a.m. here at
12 the FERC and I expect both sides, KCS and the
13 applicants, to be fully prepared with respect to what
14 the dispute is and isn't, what the materials are. I
15 expect you to be able to put it in English. Pretend
16 as though you were talking to a relatively intelligent
17 teenage son or daughter who may actually know more
18 about computers.

19 (Laughter.)

20 Let's say it's a 62 year old man that
21 cannot even type. Do not even know how to type.
22 Cannot deal with cassettes. Does not know how to

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1 record television programs. Listens to records.

2 (Laughter.)

3 MR. KILLORY: His VCR still blinks "12
4 o'clock."

5 (Laughter.)

6 JUDGE NELSON: There is a VCR. The only
7 guy who knows how to use it is my son who is at
8 college in New York, so deal with computer ignorance.

9 To say to me hardware and software means
10 nothing.

11 Also, showing the thing helps me
12 understand what it is. It looks like a CD. I know
13 what that is for music.

14 If, of course, you can work this out, then
15 we don't need to be here at 8:30.

16 MR. LUBEL: That's the only thing I was
17 going to add, Your Honor.

18 JUDGE NELSON: The best solution, of
19 course, Mr. Lubel and Mr. Livingston is one that you
20 can work out.

21 Mr. Livingston is busy. What's so
22 important over there?

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1 MR. LIVINGSTON: I heard you, Your Honor.
2 We will try to work it out.

3 JUDGE NELSON: Because with me here
4 dealing with computers is really a bull in a china
5 shop. I don't begin to understand what she's done.
6 I thought I understood it when we made the analogy to
7 translation, but now I'm not so sure I do because you
8 can check the translation machinery, and yet produce
9 the versions.

10 MR. MULLINS: Judge Nelson, before the
11 Tuesday hearing, it might help if I point the
12 statements out to you --

13 JUDGE NELSON: Also, another thing I'm
14 having trouble grasping is in the context of bids
15 which are public, as the public knows or should know,
16 that the DOD put up bids for the carriage of tanks and
17 the following people responded, for example, and
18 offered so much money.

19 There's a public purpose served in knowing
20 that and in disseminating that knowledge. It
21 shouldn't lend itself to secrecy or to throwing up
22 obstacles to make it harder for the public to know

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1 that.

2 When you add that policy to the notion
3 that you march into a case with her which she does
4 this stuff and uses this, you've got a very heavy
5 burden and it's attempting to show why you shouldn't
6 give the other side whatever it is they want so they
7 can meet this showing.

8 MR. MULLINS: We're not exactly sure what
9 they want.

10 JUDGE NELSON: The other side has to also
11 show me if all of this is public, and there are the
12 following bids, what it is you need her stuff for?
13 Unless there's some claim by experts that we use the
14 analogy of translation that she had mistranslated the
15 language and some expert can help you explain that to
16 me, if that's what the claim is.

17 If she's gone from Spanish into English by
18 some magical device, and there's no claim that she
19 hasn't done it correctly, then we don't need to spend
20 another two hours with what the magic device was. So
21 you've got to explain all of that to me when we get in
22 here on Tuesday and then be prepared to reconvene at

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1 the end of the day and have her be prepared so that
2 she can be here and explain all of this to me.

3 So for now, that's the story with Ms. Nunn
4 and her machine readable hardware, software.

5 What is next?

6 MR. LIVINGSTON: Your Honor, the next item
7 is at the bottom of page 7 which I believe we can pass
8 and go to the item on the middle of page 8 which is --

9 JUDGE NELSON: Minehead coal prices.

10 MR. LIVINGSTON: Minehead coal prices and
11 this involves three parties: Arizona Electric Power,
12 Energy and Wisconsin Public Service.

13 JUDGE NELSON: Mr. Dowd gave me a letter
14 on it yesterday and he's not here.

15 MR. LIVINGSTON: He didn't give me one,
16 but that may be.

17 JUDGE NELSON: He says he sent it by
18 telecopier to Mr. Roach and Mr. Cunningham and also
19 the Restricted Service --

20 MR. LIVINGSTON: They may have. I don't
21 dispute that.

22 JUDGE NELSON: Are there other parties

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1 involved in this besides Mr. Dowd's clients?

2 MR. LIVINGSTON: No. Not at the moment.

3 JUDGE NELSON: Would this Minehead price
4 data be highly confidential?

5 MR. LIVINGSTON: Oh yes.

6 JUDGE NELSON: Well, it's a little hard to
7 answer within him being here. There's nobody here
8 representing that side, is there?

9 (Pause.)

10 Mr. Dowd's letter reflects the fact that
11 he knows about this conference and presumably sent
12 this to BST to be ready for the issue.

13 MR. McBRIDE: He must have thought the
14 constitutional issues were going to take longer.

15 (Laughter.)

16 JUDGE NELSON: I don't know. Well, his
17 objection is that you don't need these prices and that
18 they're confidential by the terms of the contracts.
19 The contracts themselves seem to envision that they
20 can be turned over pursuant to orders so I'm not as
21 troubled about that as to why you need this stuff.

22 MR. LIVINGSTON: I think, Your Honor, it

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1 seems to me that really that's -- he may be going
2 through this exercise out of a feeling that he has to
3 do his best to keep things confidential. There's no
4 question that you have the power to override those
5 contracts.

6 JUDGE NELSON: Why do you need those
7 prices?

8 MR. LIVINGSTON: These minehead prices are
9 relevant in the analysis concerning competitiveness of
10 Colorado Coal and Powder River Basin.

11 JUDGE NELSON: About which there's been a
12 great deal.

13 MR. LIVINGSTON: There's a lot of
14 argumentation on that. One of the issues is minehead
15 prices. There are differences in minehead prices
16 among different mines and applicants and we'll show
17 and have shown and we'll show some more that there are
18 very stark differences between minehead prices in
19 Colorado versus Powder River Basin. And from that
20 various other economic arguments as well.

21 Delivered prices are also important.

22 JUDGE NELSON: He says that's what's

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1 really important.

2 MR. LIVINGSTON: From a utilities point of
3 view that's what they pay at the end, that reflects
4 both the transportation costs and the minehead costs,
5 but when you are looking at the economic competition,
6 you've got to first ask yourself how expensive is the
7 coal to get out of the ground and if the coal in
8 Wyoming costs \$2 a ton -- I'm must making that figure
9 up -- and the coal in Colorado costs \$10 a ton, that
10 tells you something about the competitiveness of this
11 coal. And that's an important fact. But it's not the
12 only fact one looks at, but it's an important fact.
13 It's a relevant fact.

14 These clients of his have all voluntarily
15 participated in this proceeding in an active way and
16 they shouldn't be able to come in and make their
17 arguments to the Commission and conceal the
18 differences in minehead prices.

19 JUDGE NELSON: What is it that you would
20 do with these prices?

21 MR. LIVINGSTON: We would look at them and
22 we would see whether there are differences and the

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1 extent of the differences between the two regions and
2 that may be evidence in the case that we could rely
3 on, but without seeing them I can't tell you exactly
4 what use they will be. That's what discovery is for,
5 to find out.

6 But it does seem to me that these large
7 utilities --

8 JUDGE NELSON: What can we do to protect
9 the concern that Mr. Dowd has? Is there anything?

10 MR. LIVINGSTON: We have a protective
11 order that --

12 JUDGE NELSON: Yes, it's going to turn on
13 the terms of what kind of protection we can give him.

14 MR. LIVINGSTON: There's lot of
15 confidential pricing information that's been disclosed
16 in this case under the terms of the protective order.
17 The Commission entered the protective order.

18 JUDGE NELSON: What if I directed this
19 stuff be turned over. It's highly confidential. It's
20 subject to the maximum protection thus far created in
21 the case and that if he has some special
22 particularized additional objections that he work them

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1 out with you and if he's unable to do that, then he
2 bring that claim to me for the need for additional
3 protection. Do you have problems with that?

4 MR. LIVINGSTON: I have no problems with
5 him turning this over as highly confidential and I
6 will be willing to discuss additional protection. The
7 order as it stands is a very stringent one and it's a
8 little hard for me to imagine what additional
9 protections is involved.

10 JUDGE NELSON: I just wanted to leave that
11 open.

12 MR. LIVINGSTON: Obviously, I want to be
13 able to use the evidence and submit it under seal if
14 it comes to that.

15 JUDGE NELSON: I'm going to direct
16 production of the requested minehead price data, treat
17 it as highly confidential, subject to full protection
18 and if there are additional protections which counsel
19 wants, he shall try to arrange them with you and if
20 there is disagreement, he can bring the matter to me.

21 MR. LIVINGSTON: Your Honor, we are coming
22 to the end. The only matters remaining principally

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1 involve Conrail. There was one dispute with Dow which
2 perhaps we can get out of the way now just to free
3 them up.

4 JUDGE NELSON: I was going to take a break
5 for about a half an hour for lunch. Do you want to do
6 that?

7 MR. LIVINGSTON: As I say, the only
8 disputes left here are with Conrail. We have one to
9 do with Dow which I think we have settled and if we
10 could put that on the record, they won't have to come
11 back.

12 JUDGE NELSON: Let's get rid of that then.

13 MR. LIVINGSTON: And one dispute with
14 Union Carbide and Jerry, is that settled?

15 MR. NORTON: No.

16 MR. LIVINGSTON: Okay. Well, perhaps we
17 can dispose of Dow.

18 JUDGE NELSON: Tape up anything you think
19 you can get rid of.

20 MR. MULLINS: We also have the issue of
21 the depositions and transcripts.

22 JUDGE NELSON: Mr. Konschnik's request.

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