

INTERSTATE COMMERCE COMMISSION

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1 awfully darn close.

2 So it's a little bit of -- it's a little
3 bit disingenuous to be saying that the raising of this
4 common interest privilege is premature now, when
5 certainly the questions seem to be directed precisely
6 toward the things that --

7 JUDGE NELSON: Does this joint -- its
8 common privilege or joint defense -- what do you call
9 it?

10 MR. DiMICHAEL: Common interest because
11 although it is --

12 JUDGE NELSON: Common interest?

13 MR. DiMICHAEL: -- it started out as a
14 defense matter, it has been broadened by --

15 JUDGE NELSON: That could be Plaintiffs as
16 well.

17 MR. DiMICHAEL: It can be Plaintiffs as
18 well, it can be civil and not --

19 JUDGE NELSON: Does the common interest
20 give you anything that work product doesn't?

21 MR. DiMICHAEL: It is an extension of the
22 common -- excuse me, it's an extension of the work

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1 product privilege to persons on the same side of a
2 case.

3 I admit that you have to satisfy the work
4 product requirements first. But what it says is if
5 it's a work product to you, just because you happen to
6 hand it off to someone who is not you but on the same
7 side of the case, that still -- that still protects
8 the privilege.

9 JUDGE NELSON: Anything else?

10 MR. DiMICHAEL: I think that's it, Your
11 Honor.

12 JUDGE NELSON: Very well. Let's hear now
13 from the Applicants.

14 MR. LIVINGSTON: Your Honor, the
15 Applicants were served with many, many discovery
16 requests, and many of those requests ask the same
17 kinds of questions we are asking here.

18 And when we receive requests, if the
19 request sought some privileged material, we asserted
20 the privilege with respect to the material that was
21 privileged. And we would produce the material that,
22 otherwise unobjectionable, was not privileged.

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1 JUDGE NELSON: I recall this.

2 MR. LIVINGSTON: And that -- and we would
3 serve our objections. Everybody knew what we were
4 doing. If they had --

5 JUDGE NELSON: And we've been through work
6 product issues.

7 MR. LIVINGSTON: That's right. And if
8 they have a problem with the --

9 JUDGE NELSON: And we've been through
10 attorney/client --

11 MR. LIVINGSTON: And even the settlement -
12 -

13 JUDGE NELSON: -- and even the so-called
14 settlement privilege.

15 MR. LIVINGSTON: And there were disputes
16 and arguments. And when the requesting parties said
17 well, you've asserted -- UP and SP, you have asserted
18 a privilege that we don't think is a valid privilege,
19 we're going to take it to the Judge.

20 Well, we have asked questions and it may
21 be that some of the questions that we have asked --
22 they would have a document that's covered by the work

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1 product document that they should assert a privilege
2 on or may want to assert a privilege on.

3 Or they may have documents that are
4 responsive to these requests that are also covered by
5 attorney/client privilege.

6 And there is a joint defense privilege. We
7 don't dispute that there is a joint defense privilege
8 in proper circumstances where there are properly
9 defined common interests, and the document otherwise
10 satisfies either the work product or the
11 attorney/client doctrine.

12 Then the doctrine doesn't lose its
13 privileged status if it's shared in a common defense
14 or common interest situation that meets all the
15 requisite legal requirements.

16 And if they have documents that we've
17 called for that are privileged -- and deliberative
18 process privilege is another privilege that has been
19 asserted that that --

20 JUDGE NELSON: We've dealt with them
21 before --

22 MR. LIVINGSTON: -- then they should

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1 assert the privilege.

2 JUDGE NELSON: -- when there were
3 contests. They arose in the context of more specific
4 disputes about specific things

5 MR. LIVINGSTON: But if they assert a
6 privilege over us --

7 JUDGE NELSON: Didn't they -- well, you
8 weren't here for a lot of this. Maybe Mr. Norton can
9 remember it.

10 MR. LIVINGSTON: Well, he would confirm
11 that that's --

12 JUDGE NELSON: Or Mr. Rosenthal has been
13 here throughout. Didn't we have a number of these
14 disputes in a more focused context of this, Mr.
15 Norton?

16 MR. NORTON: Absolutely, Your Honor. And
17 that is the way that it traditionally is handled.

18 JUDGE NELSON: This is bothering me here.
19 And I know it's a point in your letter, but --

20 MR. LIVINGSTON: This is -- this is
21 conventional in any kind of discovery process. One
22 party asks a question: give me some documents.

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1 And the other side says, well, I've got
2 some documents, but they're privileged. I'll assert
3 the privilege.

4 And then the party that made the request
5 has to make a judgement as to whether the privilege is
6 properly asserted.

7 And if he thinks it's not, think it's
8 important, he can take it to the Judge.

9 And here, if they assert a privilege on a
10 document and we think it's validly asserted, we won't
11 be in here arguing about it.

12 Or if we think it's a matter that is --

13 JUDGE NELSON: How do we get from -- from
14 here to there?

15 MR. LIVINGSTON: Well, there is absolutely
16 no reason to be arguing these privileges in the
17 abstract. If they have privileges to assert, they
18 should do what we did. They should assert them.

19 And then if we're troubled by their
20 assertion of privilege, we will talk to them first.

21 If that fails, and we're still troubled,
22 and we think their privilege is not valid, then we

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1 will bring it to Your Honor.

2 But that may never happen. And when it
3 does happen, it will happen in concrete instances.

4 And there is no sense trying to make a
5 ruling now in the abstract. Your Honor can rule that
6 documents properly covered by the work product
7 privilege are not discoverable. But we all know that.

8 We're not seeking documents that are
9 properly privileged. But if they have documents that
10 they exchanged with a governmental entity or with
11 another party that aren't subject to the privilege and
12 are relevant and meet our requests, we want them.

13 JUDGE NELSON: That is consistent with my
14 approach to the case thus far.

15 MR. LIVINGSTON: I don't think our
16 approach uses --

17 JUDGE NELSON: I know you haven't always
18 been here, but I have often talked about not wanting
19 to make advisory opinions and rulings in the abstract
20 and so forth. And --

21 MR. LIVINGSTON: In fact, there is no
22 useful ruling --

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1 JUDGE NELSON: I may be right or wrong,
2 but at least it's the way we've been doing things.

3 MR. LIVINGSTON: There is no useful ruling
4 that can be made int eh abstract. Your Honor could
5 declare that privileged material is not discoverable,
6 but we all know that privileged material is not
7 discoverable.

8 JUDGE NELSON: What about this factor of
9 time? Mr. McBride says that -- or I guess would say
10 that he's suffering a chilling impact of all this in
11 the meantime. And for him to go through conventional
12 discovery and objections and thrash it out with me, he
13 would be chilled for days or weeks.

14 MR. LIVINGSTON: Well, I don't --

15 JUDGE NELSON: What do we do about that?

16 MR. LIVINGSTON: I do want to address
17 that. But let me just polish off this one privilege
18 issue. And that is, I'm not even sure we have a
19 dispute here with the Department of Justice.

20 They have said that much of the material
21 we've asked of them they regard as subject to various
22 privileges, such as the deliberative process

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1 privilege.

2 That may well be so. And when we see --
3 they may well have documents that are covered by the
4 privilege and we may not challenge the privilege.

5 But he has also acknowledged that they
6 will be producing some information that's responsive
7 to these discovery requests when they submit their
8 evidence.

9 I don't see them as asking for an advance
10 protective order without any -- first looking to see
11 where the privilege is being asserted.

12 Let me talk bout this chilling effect,
13 this First Amendment argument. Your Honor has been
14 presented by Mr. McBride with an extraordinary
15 proposition.

16 The argument apparently is that our asking
17 them questions, our request for information, has
18 chilled them because they say we've asked for things
19 that involve their First Amendment rights.

20 Well, the First Amendment -- we're not
21 doing anything to chill their First Amendment rights.

22 If they want to speak in the Utah

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1 Legislature or any other legislature, they are free to
2 do so. And there's nothing -- we're not doing
3 anything to stop them, and there's certainly nothing
4 that the Government is doing to stop them.

5 And of course, the First Amendment only
6 operates on the government.

7 The First Amendment doesn't protect a
8 party from having to respond from discovery. If the
9 First Amendment protected you from having to respond
10 to discovery, I don't think that Applicants would have
11 to produce anything.

12 When we were subject to discovery -- the
13 First Amendment is not a protection against discovery.
14 You can engage in protected speech. You can engage in
15 speech to the Utah Legislature, and that's undoubtedly
16 protected speech, and you cannot be punished for it.

17 JUDGE NELSON: They rely on NAACP v.
18 Alabama, which they say did involve discovery.

19 MR. LIVINGSTON: That's a very narrow
20 circumstance in which the Supreme Court, in a rather
21 unusual case from the 1950s where there was evidence
22 that a history of reprisals and threats were at

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1 discovery itself, answering the questions that were
2 posed, would invade First Amendment rights.

3 And the Coors case talks about this also,
4 you know, the same kind of Civil Rights context.

5 There's a high burden of proof on the
6 plaintiffs in those cases to show that there is a
7 reasonable probability that disclosure would subject
8 them to reprisals or harassment.

9 There is no evidence at all -- there are
10 some accusations that people feel chilled. We don't
11 know the names. We don't know why they feel that way.

12 There is certainly not a shred of evidence
13 that Applicants have ever done anything improper.

14 JUDGE NELSON: Mr. McBride says in his own
15 case that he's afraid to go over and talk to the
16 Department of Justice and make notes now.

17 MR. LIVINGSTON: Well, Your Honor, as I
18 understood what Mr. McBride was saying, he was afraid
19 that that might not be privileged.

20 He has to make his own judgements as he
21 conducts his law business as to when he's doing
22 something that's covered by the attorney/client or

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1 work product or the common defense privilege and when
2 they are not.

3 And we all make those judgements. You
4 can't get an advance ruling that everything he does is
5 privileged and he can do whatever he wants and talk to
6 anyone, or his client can, and submit documents to the
7 Department of Justice and not ever have them
8 disclosed.

9 There's no rule of protection against that
10 kind of disclosure.

11 We have produced in this case a
12 presentation or the notes Mr. Roach made for his
13 presentation to the Department of Justice.

14 Now, there is privilege that will apply to
15 presentations to third parties. We don't dispute
16 that. And there may well be material that WSC has
17 that is privileged where they have dealt with
18 governmental parties, which is not subject to
19 discovery in this case.

20 And if they have that kind of material,
21 they ought to assert the privilege. And we will then
22 -- we will look at their assertion. If we think it's

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1 valid, we won't challenge it and the issue will never
2 come up.

3 But they can't come into a court and say
4 we're immune from discovery because the First
5 Amendment. The First Amendment doesn't protect you
6 from discovery.

7 It protects your right to speak, but it
8 doesn't protect your right to give a document to
9 someone and then say well, I'm not going to turn that
10 document over in discovery because I would be chilled
11 if I did.

12 That is an absolutely un-novel and
13 unprecedented theory in a commercial case like this.
14 The only cases that I'm aware of where that kind of
15 restriction on discovery has been permitted are the
16 civil rights cases where there has been real evidence
17 of real threats and real reprisals.

18 This is not -- this is a railroad merger
19 case. This is not the NAACP being investigated by the
20 State of Alabama in the 1950s.

21 JUDGE NELSON: Don't you think railroads
22 have a potential to threaten or abuse shippers.

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1 MR. LIVINGSTON: Your Honor, I don't think
2 there's any evidence -- I know there is no evidence
3 that that has occurred in this case. I think the
4 shippers could conceivably threaten and abuse other
5 shippers and other railroads.

6 But that -- there's no evidence of that.

7 JUDGE NELSON: Well, is it true of one --

8 MR. LIVINGSTON: You can't come to court
9 and say I'm worried about that and I'm going to -- I
10 don't want to have to respond to discovery.

11 JUDGE NELSON: Take the two-to-one
12 posture. At those points, isn't there a potential for
13 abuse of that relationship?

14 MR. LIVINGSTON: There is going to be a lot
15 of evidence in this case, already been a lot of
16 evidence, there will be a lot more about what the
17 economic effects of the merger are and how it affects
18 the balance of power among shippers and railroads and
19 whether there is adequate competition or whether there
20 is not.

21 Our position is that this merger, as it's
22 been presented with the BN settlement agreement, is --

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1 provides more than adequate competition to protect the
2 interests of shippers and the interests of the public,
3 and that there will be no lessening of competition.

4 JUDGE NELSON: So your position really is
5 that they haven't made out a threshold showing of the
6 feared intimidation or the chilling?

7 MR. LIVINGSTON: They haven't -- well,
8 they haven't even come close to making out a
9 threshold. There is no evidence.

10 There's a lawyer's letter in there,
11 lawyer's statements that are unsupported by any
12 evidence, absolutely no evidence.

13 But it would be extraordinary in a case
14 like this, unheard of, to think that such a showing
15 could be made.

16 We have simply asked them if you made a
17 presentation to a governmental body -- I think that's
18 one of the things we've asked for, the same thing that
19 Mr. Lubel asked us on behalf of the KCS.

20 Now, if they put up a big fancy study that
21 says this merger is no good for the following reasons,
22 and they're handing it out to public officials, is it

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1 a violation of the First Amendment for us to say we'd
2 like a copy of that and to have it turned over?

3 Where is the chill? Are they afraid that
4 they don't want these things to see the light of day?
5 That's one of the purposes of discovery

6 JUDGE NELSON: And they have the right to
7 petition the government for redress of grievances.

8 MR. LIVINGSTON: Indeed they can. They
9 can petition until their hearts' content. We are
10 seeking discovery. We aren't seeking to prevent
11 anybody from petitioning.

12 And there have been no shortages of
13 petitions here.

14 JUDGE NELSON: Do you have cases that
15 teach that discovery is not the equivalent of
16 encroachment on First Amendment rights?

17 MR. LIVINGSTON: We cite the Noerr -- some
18 cases under the Noerr-Pennington doctrine in our
19 letter.

20 The Noerr-Pennington doctrine --

21 JUDGE NELSON: That's a different story.

22 MR. LIVINGSTON: No.

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1 JUDGE NELSON: That's the antitrust --

2 MR. LIVINGSTON: No, I think it is the
3 same story. There is a case where the Court said the
4 activity that's being challenged is protected by the
5 First Amendment that joint activity -- the activity of
6 competitors jointly petition.

7 JUDGE NELSON: I see the point. So --

8 MR. LIVINGSTON: But you can have
9 discovery. I'm sure the Department of Justice would
10 be the very first one to say there's an exception to
11 Noerr-Pennington.

12 You can't have competitors jointly
13 petitioning whether the purpose is a sham. There are
14 a lot of cases about what is and what is not a sham.

15 And when you're trying to determine
16 whether the joint petitioning activity is a sham --

17 JUDGE NELSON: I get to --

18 MR. LIVINGSTON: -- you have discovery.

19 JUDGE NELSON: The antitrust offense is,
20 itself, rooted in the Constitution.

21 MR. LIVINGSTON: The conduct -- you may
22 ultimately be found to be protected by the First

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1 Amendment. And therefore, the antitrust laws do not
2 apply to the parties --

3 JUDGE NELSON: From what you say --

4 MR. LIVINGSTON: -- but they need to
5 disclose what they have --

6 JUDGE NELSON: That has nothing to do with
7 discovery.

8 MR. LIVINGSTON: It has nothing to do with
9 discovery. That's correct. We are not chilling their
10 activity. We are not barring their activity.

11 They can First Amendment themselves until
12 their hearts' content. We just want some discovery.

13 JUDGE NELSON: How about this matter of
14 the money?

15 MR. LIVINGSTON: Everybody knows who is
16 funding the Applicants. I'm here because I'm paid by
17 the Union Pacific Railroad. These lawyers are here
18 because they're paid by the Southern Pacific.

19 Everybody knows who is paying Mr. Billiel
20 and who is paying Dow Chemical. And the Board will
21 know who's speaking to them. They'll know when we're
22 up, who's speaking to the Board and who is funding it.

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1 But with the WCS, we don't know. We know
2 the members, but we don't know the funding. I think
3 we're entitled to know that.

4 I think it goes to -- it's relevant
5 information. It goes to their credibility. It goes
6 to questions of bias and creditability in the most
7 conventional and ordinary sense.

8 Now, I think the Board would be interested
9 as well to know --

10 JUDGE NELSON: What do you have --

11 MR. LIVINGSTON: -- who is speaking to it
12 and --

13 JUDGE NELSON: What do you have to
14 substantiate the suggestion that they may be a front
15 for a railroad?

16 MR. LIVINGSTON: I don't know if they are
17 a front for a railroad, and I have no basis for
18 questioning the representation that was made in open
19 court by Mr McBride.

20 And if it turns out that it's not by a
21 railroad, but by -- Your Honor, if the members, in
22 fact, are supporting WCS, if WCS gets -- is supported

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1 by the members of the Coalition --

2 JUDGE NELSON: It's called --

3 MR. LIVINGSTON: -- why are they -- then
4 why are they unwilling to say so?

5 JUDGE NELSON: We have heard -- we have
6 heard that the membership consists of coal producers,
7 mine operators, I guess --

8 MR. LIVINGSTON: We have a list.

9 JUDGE NELSON: -- and utilities. And we
10 have a list.

11 MR. LIVINGSTON: Right. And if they are
12 the ones who are funding it, why are they not willing
13 to tell us that?

14 The fact that they are going the last
15 ditch on this issue suggests to me that there is
16 another funding source.

17 Now maybe it's not a railroad. I don't
18 know what it is. But why can't they tell us?

19 Maybe the answer is easier. maybe the
20 answer is all members of the Coalition are chipping
21 money into the pot and things are just as they seem.

22 The membership and the funding sources are

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1 the same. Maybe that's the answer. If that's the
2 answer, fine.

3 Maybe it's not the answer. Whatever the
4 answer is, I think we're entitled to know. This may
5 even turn out to be a tempest in a teapot.

6 It may be that the membership is funding
7 itself. If that's the fact, that's the fact But let's
8 find out.

9 The suggestion that the service of
10 discovery requests in this proceeding had any impact
11 on the Utah Legislature or that it was improper for
12 the companies to be presenting their position to the
13 Utah Legislature is hard to take seriously.

14 We served all this discovery at the same
15 time. It had nothing to do with the Utah Legislature.

16 JUDGE NELSON: I don't think Mr. McBride
17 is even making that claim.

18 MR. LIVINGSTON: And I can't believe --

19 JUDGE NELSON: At least not in so many
20 words.

21 MR. LIVINGSTON: And I -- and --

22 JUDGE NELSON: He's saying he lost in the

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1 second house of the Legislature --

2 MR. LIVINGSTON: It doesn't have anything
3 to do with the fact that --

4 JUDGE NELSON: -- which may or may not
5 have had anything to do with the discovery.

6 MR. LIVINGSTON: -- the fact that we
7 asked them some questions. They provided you with a
8 recent case from the Sixth Circuit.

9 This is a case -- this is a prior
10 restraint case. This is a case where a court,
11 District Court, said to, I think, to Business Week,
12 don't publish.

13 You're planning to run a story. I order
14 you not to. That is a prior restraint. There are
15 plenty of -- this is not a prior restraint.

16 We haven't told anybody not to publish. We
17 are asking questions in discovery and we're trying to
18 get answers. It has absolutely nothing to do with the
19 Sixth Circuit case.

20 Your Honor, I think that's all i have to
21 say. I would -0- Paul, do you have anything to add?

22 MR. CUNNINGHAM: Not right now.

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1 MR. LIVINGSTON: I really think it's quite
2 unnecessary to have a protective order here, that we
3 ought to have these discovery matters handled in the
4 ordinary way.

5 In fact, Western Shippers Coalition has,
6 in fact, already served us, we have just received,
7 their objections to our interrogatories and document
8 requests.

9 And it looks like they actually copied some
10 of these objections from some of our pleadings.

11 And they -- they -- it's a number of
12 objections. And we will examine those and in a few
13 days or so, we will get responses to all the
14 interrogatories and we will examine those.

15 And if we're dissatisfied, we will go to
16 them and say --

17 JUDGE NELSON: Under the guidelines --

18 MR. LIVINGSTON: -- here is what we would
19 like more.

20 JUDGE NELSON: -- are there time limits
21 upon the Intervenor when they must respond?

22 MR. LIVINGSTON: To the discovery

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1 requests?

2 JUDGE NELSON: Yes, one --

3 MR. LIVINGSTON: I think --

4 JUDGE NELSON: The discovery requests that
5 have caused this controversy.

6 MR. LIVINGSTON: I believe that they are
7 subject to the same limits we were, which is you have
8 to give your projections up in five business days,
9 which they've done by March fourth, and 15 days for
10 responses.

11 And I think we met the 15 day deadline in
12 virtually all cases. There may have been one or two
13 cases, because of weather or something, that we had a
14 short extension.

15 I don't think they have asked us for an
16 extension, so I assume they are --

17 JUDGE NELSON: Is the dispute ripe for
18 adjudication in the conventional way?

19 MR. LIVINGSTON: No, because they haven't
20 asserted a privilege. They haven't -- when we get
21 their responses, and we see what it is they're
22 asserting a privilege to, we will have to make a

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1 judgement as to whether we think they are asserting a
2 privilege that's not valid.

3 JUDGE NELSON: I see. When will these --

4 MR. LIVINGSTON: And we will talk to them
5 and if we are --

6 JUDGE NELSON: Suppose I were to direct
7 this response, when would it be due?

8 MR. LIVINGSTON: Well, February 26th, 15
9 days -- next Tuesday.

10 MR. McBRIDE: Next Thursday, I think.

11 MR. LIVINGSTON: Next Thursday.

12 JUDGE NELSON: Is it 15 calendar days?

13 MR. LIVINGSTON: Yes, it's 15 -- when were
14 these served?

15 MR. McBRIDE: They were served on Monday,
16 February 26th. So it's Tuesday, March 13th.

17 MR. LIVINGSTON: we'll get the responses.
18 They'll be -- I assume they'll be putting documents
19 into a depository. We'll want to look at those.

20 I think in many cases, in the disputes in
21 this case, the parties didn't come to Your Honor until
22 some time after the responses were filed. I think

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1 that was the case, for instance, in the first KCS
2 dispute which triggered all -- which was the very
3 first one

4 And we filed the objections, we filed the
5 responses. There was some communications between the
6 parties.

7 They even made a quick trip to the
8 depository, and then they promptly noticed up a
9 hearing.

10 And the same sort of practice ought to
11 follow here. My guess would be that there would be -
12 - that there, in many cases, will be no disputes.

13 There are sure to be some and we will have
14 to deal with those when they come. But I don't see
15 how we can deal with them in the abstract.

16 And there is certainly no basis for a
17 protective order that says you don't have to reveal
18 your funding sources or anything you say to a third
19 party.

20 It's not subject to discovery over an
21 order that's -- and that's what they want. They want
22 an order that says they can say anything to a third

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1 party that they want, in writing or not, and never
2 have to disclose it in discovery.

3 It's an extraordinary request. No basis
4 for that.

5 All the parties in this case, the Union
6 Pacific and Southern Pacific especially, but all the
7 parties in this case have to reckon with the fact that
8 when they do things, write things down, speak to third
9 parties, there may someday be a discovery allegation.

10 We all have to deal with that, and we all
11 have to think about whether what we're doing is
12 privileged and so forth.

13 These parties also, many of them, are
14 seeking -- are here as applicants in their own right.
15 They want trackage rights, they want this, they want
16 that.

17 And they are also petitioners for those
18 things, just as we all. It should be subject to the
19 same discovery obligations, which we, in all the
20 parties have to make judgements as they conduct their
21 affairs as to when they're speaking to a third party,
22 ask is this going to be privileged, is it not?

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1 You can't -- you can't come down and get
2 an advanced ruling from a judge every time you're
3 thinking about wanting to speak to the Department of
4 Justice. You have to make your own legal judgements.

5 That's what lawyers are for. That's what
6 we do. That's what the other lawyers have been doing.
7 A protective order that says well, you can just say
8 whatever you want to anybody, and legislation, any
9 government official, and there would never be any
10 discovery, that would be an improper ruling in our
11 judgement.

12 JUDGE NELSON: Mr. McBride?

13 MR. McBRIDE: Thank you, Your Honor.
14 First of all, there was some suggestion, perhaps in
15 your question to Mr. Billiel, that would the redaction
16 of an informer's identify do it?

17 And I would submit to you that the kind of
18 things that I have represented here would be the same
19 representation that we would make.

20 But if we redact the identify of the
21 informer in the case of some of these utilities in
22 providing me with information, the information -- I

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1 think the Applicants would quickly be able to figure
2 out who the informant was.

3 So under the Roviaro case that the
4 government had, and we cited --

5 JUDGE NELSON: You can delete not only
6 names, but identifying details.

7 MR. McBRIDE: That's right. And at that
8 point, there's nothing to convey. Secondly --

9 JUDGE NELSON: Well, I would have to see
10 the document to really understand that.

11 MR. McBRIDE: Well --

12 JUDGE NELSON: That's very hard to deal
13 with in the abstract.

14 MR. McBRIDE: And what I'm also telling
15 you is that I don't have a lot f these documents. I
16 have communications which they've asked me about in
17 interrogatory number one from these utilities, which
18 I then used in discovery

19 And I would have divulge them under
20 interrogatory number one.

21 Now, they have the burden. I want to make
22 clear that under the case law, when I assert colorable

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1 First Amendment rights, as I clearly have, they have
2 the burden of showing a compelling need for this
3 information.

4 JUDGE NELSON: Where is that --

5 MR. McBRIDE: And Mr. Livingston has got
6 this neat and clean situation: well, let me just put
7 in my objections and then maybe they'll talk to me
8 about it and maybe they'll --

9 JUDGE NELSON: How long would it take you
10 to get it into that conventional posture?

11 MR. McBRIDE: It's in that posture. And
12 let me just say first of all, I am not negotiating my
13 client's First Amendment rights with counsel for the
14 Applicants here.

15 This is not a -- debating kind of issue.
16 But in any event, the matter is ripe because, as he
17 acknowledged, we served our objections the other day.

18 And if we filed our responses next week,
19 they would be the same objections.

20 JUDGE NELSON: We don't have a log or a
21 Vaughn index? We don't have any materials here to
22 look at?

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1 MR. McBRIDE: I don't have the documents.
2 I have -- I am representing to you --

3 JUDGE NELSON: I'm not even in love with
4 the request themselves. Mr. Lubel said they're
5 "general, searchings for everything to do with
6 everything."

7 You could have done a much more focused
8 job in that regard. And sometimes in this case we've
9 gone down and rewritten and focused on things.

10 Like for example, the competition between
11 the coals from Wyoming and wherever else it was, and
12 we've had a lot of them. That's something worth
13 talking about in the case.

14 And then we can see what they have and what's
15 privileged and what isn't.

16 MR. McBRIDE: And they're pretending that
17 they think that I'm not going to give them any
18 discovery responses.

19 JUDGE NELSON: But every piece of paper in
20 the world?

21 MR. McBRIDE: Your Honor observed last
22 Friday at the hearing that I gave them my consultant's

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1 prior study before my objections were even due on the
2 competition on these coals.

3 And I'm going to show you another --

4 JUDGE NELSON: Mr. McBride, I'm not happy
5 with the posture of the case --

6 MR. McBRIDE: I understand.

7 JUDGE NELSON: -- insofar as it seeks me
8 to make -- requests that I make these sweeping rulings
9 here, important rulings about documents I've never
10 even seen, on requests that are, themselves, overly
11 broad in my view.

12 MR. McBRIDE: Let me explain, Your Honor -

13 -

14 JUDGE NELSON: Can you suggest a procedure
15 to --

16 MR. McBRIDE: Yes.

17 JUDGE NELSON: -- get us out of this bind
18 so that we can do a more meaningful job?

19 MR. McBRIDE: My client tells me he's a
20 note-taker, right? Now, I said in my letter that I
21 will answer their interrogatory number two, which has
22 to do with some representations we say were made by a

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1 representative of Applicants to our client group.

2 And my client says he has notes about
3 that. I'll provide it because it was Applicants and
4 my client group out in Salt Lake City in November of
5 1995.

6 JUDGE NELSON: Okay, I'm not asking you
7 what you will produce with regard to other
8 interrogatories.

9 MR. McBRIDE: Right. But --

10 JUDGE NELSON: What can we do about this
11 precedence --

12 MR. McBRIDE: -- he also has notes, I
13 believe, of meetings with governmental officials. He
14 has met -- I don't know if he has a note of every one
15 of these meetings, but he has met with the Governor of
16 Utah. He's met with the Attorney General of Utah.
17 He's met with Legislators.

18 If he's got notes, those we're going to
19 claim protection on, a petition for redress
20 agreements. And so that's one category

21 Now let me, though, tell you that it's not
22 as Mr. Livingston is telling you --

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1 JUDGE NELSON: In the past, we've done
2 that by a log.

3 MR. McBRIDE: Well, I understand. But I
4 can't possibly do this by next week anyway I'll tell
5 you that.

6 And the biggest problem here which all
7 these parties are concerned about is they've created
8 the dilemma we're facing here because this isn't
9 premature.

10 We're trying to put our cases together
11 under the schedule that they urged, that I tried to
12 get extended, that they opposed, and that the Board
13 wouldn't extend.

14 We have a deadline of March --

15 JUDGE NELSON: Nothing we can do about
16 that.

17 MR. McBRIDE: Well, except -- yes, there
18 is. If Your Honor, please, with all respect, under
19 order number one from the Commission, it says,
20 "Discovery on responsive and inconsistent
21 applications, comments, protests and requests for
22 conditions shall begin immediately upon their filing."

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1 We haven't filed anything.

2 This discovery was premature on us because
3 is we never filed anything, what am I going through
4 all of this for and what relevance does it have?

5 But if I file on March 29th, then their
6 discovery requests are appropriate. It's the requests
7 themselves that are premature, not my objections.

8 Because I had to object, as they
9 indicated, on the schedule that's been ordered. And
10 yet, this is all having a chilling effect on me now.

11 Now let me -- there's another example.

12 JUDGE NELSON: Well, let me see if I
13 follow this. What they should be doing, as you say,
14 is making these requests in light of whatever filing
15 you make.

16 MR. McBRIDE: Correct. Because if I don't
17 file anything, there's no relevance to any of it.

18 JUDGE NELSON: And if you file one that
19 seeks conditions, the discovery can be linked up to
20 the request of conditions.

21 MR. McBRIDE: Correct, correct. And if I
22 may also explain this to you --

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1 JUDGE NELSON: What is it the railroads
2 have to file? What are they doing now --

3 MR. McBRIDE: They say they're so busy --

4 JUDGE NELSON: -- the Applicants?

5 MR. McBRIDE: -- you know, that they had
6 to do all this stuff. We're the ones who are busy.

7 JUDGE NELSON: They're placing the ball in
8 your court right now.

9 MR. McBRIDE: Right.

10 JUDGE NELSON: You have to make these
11 submissions.

12 MR. McBRIDE: We have to put our case on
13 on March 29th? Do you know what they're doing? They
14 defend a few depositions. They answer some
15 interrogatories which evidently Ms. Rinn and Ms.
16 Harris are the ones responsible for. That's why we
17 have to fax to them.

18 Now, I'm not saying they're not busy.
19 Sure, they've got things to do. We're all busy
20 lawyers.

21 But the ball is in our court. It's not in
22 their court.

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1 JUDGE NELSON: Then after you file on
2 March 29th, they then have reply or rebuttal, don't
3 they?

4 MR. McBRIDE: In 30 days because that's
5 what they demanded. You know, now if they can't deal
6 with discovery and put their rebuttal testimony
7 together in the 30 days that they demanded, they're
8 hoisted by their own petard.

9 JUDGE NELSON: So I suppose the answer is
10 that they need to get this discovery cranking now so
11 that they'll have the materials or not --

12 MR. McBRIDE: That's their argument --

13 JUDGE NELSON: -- in that 30 day period.

14 MR. McBRIDE: -- because of the box they
15 put themselves in on the schedule --

16 MR. KILLORY: Your Honor?

17 MR. McBRIDE: -- when the Commission
18 ordered otherwise and said no discovery until we file.

19 MR. KILLORY: Your Honor, I don't mean to
20 interject, but Conrail has notified your court that
21 this is the subject of our motion that we're bringing
22 forward on Friday.

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1 I mean, this whole issue of prematurity
2 you can decide --

3 MR. LIVINGSTON: I would second that.
4 Conrail has put down for the hearing here on Friday
5 this question of whether we ought to -- Applicants
6 ought to be engaged in discovery.

7 MR. KILLORY: Under the ICC's orders that
8 set the rules for this proceeding, Your Honor.

9 MR. LIVINGSTON: Right. And that's the
10 issue that has been argued here for the last couple of
11 minutes. And so I would urge you --

12 JUDGE NELSON: Is that --

13 MR. LIVINGSTON: -- to wait until Friday
14 on that one, .

15 JUDGE NELSON: That's a request that says,
16 in effect, that all this discovery is premature?

17 MR. LIVINGSTON: That's what Conrail --

18 MR. KILLORY: All discovery by Applicants.
19 That's right, Your Honor.

20 JUDGE NELSON: So that if they're right --
21 if Conrail is right on that, that gets rid of this
22 we're talking about today.

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1 MR. McBRIDE: Except for my chilling
2 effect problem.

3 MR. LIVINGSTON: I would urge Your Honor
4 to hold the Conrail issue until Friday when it is
5 scheduled.

6 MR. McBRIDE: And I will only raise the
7 chilling effect which has now gone on for over a week
8 about specific discovery requests. And I told Your
9 Honor, contrary to Counsel's statement here or
10 argument that I am going to answer some of these
11 discovery requests.

12 I am not standing in the way. And the
13 point was, I've got another study. I don't know
14 whether it's been given to the governmental officials
15 by my client yet or not.

16 But if it has been, they're going to get
17 it because --

18 JUDGE NELSON: Do you have any suggestions
19 as to how we can get this issue, these issues, into a
20 more precise focus?

21 MR. McBRIDE: Yes.

22 JUDGE NELSON: A) in terms of the requests

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1 themselves, which may be overly broad; B) in terms of
2 your response so that we may have something concrete
3 to look at, even in in camera inspection of certain
4 documents?

5 What's the best way to proceed to bring
6 that about?

7 MR. McBRIDE: Two -- there are two ways to
8 do it. Either Your Honor takes the time to go through
9 these specific discovery requests, request by request,
10 to say that is clearly work product or First Amendment
11 or --

12 JUDGE NELSON: I've done that before, Mr.
13 McBride.

14 MR. McBRIDE: I'm sorry?

15 JUDGE NELSON: I've done that before.

16 MR. McBRIDE: Yes. That's one way. I'm
17 just answering your question.

18 JUDGE NELSON: Yes.

19 MR. McBRIDE: You asked me how we could do
20 it. We can go down this -- the seven, I think it is,
21 discovery requests that I have objected to, right?

22 JUDGE NELSON: Right now we could do that?

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1 MR. McBRIDE: Well, they're in my letter.
2 That was why I put --

3 JUDGE NELSON: But the documents aren't
4 here.

5 MR. LIVINGSTON: The requests, Your Honor,
6 won't tell you --

7 JUDGE NELSON: So if I say I want to look
8 at a document, do you have any of them in here?

9 MR. McBRIDE: No.

10 JUDGE NELSON: All right.

11 MR. McBRIDE: My client --

12 JUDGE NELSON: Then what am I supposed to
13 do?

14 MR. McBRIDE: My client has them. I have
15 notes that I took in depositions, you know, and that
16 indicate some conversations with some of the counsel
17 here. Do I have to bring all of those in?

18 JUDGE NELSON: Not now.

19 MR. McBRIDE: We're going to be at this
20 for a long time.

21 JUDGE NELSON: I'm trying to get your
22 suggestion as to how to get this in a better posture.

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1 MR. McBRIDE: No, I understand that.
2 Here's the other way.

3 JUDGE NELSON: Right now, you're not
4 helping me.

5 MR. McBRIDE: And here's the other way we
6 could do it.

7 JUDGE NELSON: You're telling me there's
8 no way.

9 MR. McBRIDE: Here's the way we could do
10 it. You could rule that political speech is not the
11 proper subject of discovery, that our communications
12 with other parties are confidential unless disclosed,
13 so long as they're subject to common interest, that
14 the source of our funding and the identify of those
15 contributing are not the proper subjects for
16 discovery, that communications with the government are
17 protected under the First Amendment and other
18 privileges, and that even Applicants concede we
19 shouldn't have to answer questions about
20 communications with our own members.

21 JUDGE NELSON: I am at the point in the
22 morning's events where I have to go to up to my office

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1 to take a conference call on an FERC case.

2 And I'm going to ask you to please remain
3 here, if you would. We will just take a recess. I
4 will conduct that conference call, and be back with
5 you as soon as I can.

6 MR. LIVINGSTON: Thank you, Your Honor.

7 JUDGE NELSON: Thank you.

8 (Whereupon, the proceedings went off the
9 record at 10:14 a.m. and resumed at 10:57 a.m.)

10 JUDGE NELSON: Please be seated. I am
11 going to decline to rule on any of the issues
12 presented by Mr. McBride's letter at this time.

13 And there are two reasons for my actin
14 here. First is that I believe I need more time to
15 read the cases, reflect on the issues, and try to get
16 some feeling for what's in the cases.

17 For example, this matter of the chilling
18 effect: I don't have any feeling for what that
19 threshold showing is. What Mr. McBride has to show or
20 not show in order to invoke these doctrines, whether
21 it's enough that it's in a lawyer's letter.

22 You all may note these things, because I'm

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1 going to have you back here and we're going to get the
2 case in sharper focus. And these are some other
3 things I'll want the parties to address.

4 What's work product and what isn't? We at
5 FERC here have some precedent that I have used in
6 other cases to actually require affidavits from the
7 preparing lawyers if the parties don't agree that
8 something is work product.

9 And we lay a factual foundation for the
10 invocation of such claims. Do I want to do that here?
11 I have no idea.

12 This matter of the, what I call parity,
13 that it follows that the questions which the
14 Applicants got asked. They, therefore, have the right
15 to ask the Intervenors. I don't know if that follows.

16 I can see distinctions, but I don't know
17 whether they're meaningful distinctions or not. And
18 I have not thought that through.

19 The issue of the financial contributions:
20 I'd like to be able to read at least Buckley.

21 This matter of the fear of retaliation:
22 what do the cases say about the details requisite for

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1 such a showing? What about this requirement of a
2 pattern of threats? So far, I don't hear that here.

3 This relationship of the joint privilege -
4 - what's it called?

5 MR. McBRIDE: Common interest.

6 JUDGE NELSON: Common interest, and what
7 it's implication is for discovery, I don't have a
8 feeling for.

9 The question of why the informer interest
10 isn't protected by deleting names and identifying
11 details, cases that have been cited that I've had no
12 chance to read.

13 I've been in hearing for four days in the
14 Tennessee Gas Pipeline case, which involves issues
15 very far from what we have here, and have had no
16 chance to deal with the library.

17 A case was even submitted this morning,
18 decided what, yesterday?

19 MR. McBRIDE: Correct.

20 JUDGE NELSON: That I certainly have had
21 no chance to read. All of these matters came up very
22 rapidly.

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1 I got the Applicants' response only
2 yesterday at 4:30. And I do not feel ready legally to
3 make what looked like important and sweeping rulings.

4 So I am going to defer until I have a
5 little more time to do some reading and think about
6 it, which I can do on Sunday in my role as an adjunct
7 faculty member at the Washington College of Law,
8 American University. I have the use of their library.
9 I will use those privileges.

10 Secondly, as you became aware, I am not
11 happy resolving questions of this magnitude on this
12 record as it stands now.

13 There is altogether too abstract a quality
14 to all of this. Many privileges are qualified.
15 Certainly that's true of work product. I think it's
16 true even of this First Amendment business.

17 I think the letters suggest that there are
18 times when that can even yield.

19 But in order to determine those
20 qualifications, I need to review the totality of the
21 circumstances that surround a particular request of
22 the opposition to it.

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1 I can't do that on this record. I have no
2 feel for any particularized relevance of these
3 materials. I'm dealing with requests which may well
4 be overly broad in the first place.

5 And I'm dealing with responses that seem
6 to sweep within the protections of the First Amendment
7 or Commonlaw doctrines, every piece of paper.

8 Experience tells me that it is better in
9 the sense of justice to know more about what we're
10 doing before I try to do it.

11 And so I'm going to have to do it the old-
12 fashioned way. I have time available Monday and
13 Tuesday I have learned.

14 The pipeline case is going to be in recess
15 those two days.

16 And I will entertain your suggestions as
17 to what you want to do in terms of coming in here on
18 Monday or coming in here on Tuesday. And we could
19 skip Friday and take whatever this -- this prematurity
20 question there was to be on Friday, we could take that
21 on Monday or Tuesday as well.

22 And I entertain -- I open the floor here

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1 for suggestions. But my ruling is that I'm deferring
2 to rule. I am making no ruling right now 1) because
3 I need more time; 2) because I want to get the record
4 in such shape as to enable me to make a better ruling.

5 Now, what suggestions do you have?

6 MR. McBRIDE: My first suggestion, Your
7 Honor, is you go forward with Friday, because that may
8 moot some or all of my controversy. And as Your Honor
9 suggested earlier, you might be able to avoid ruling
10 on some or all of the Constitutional questions if you
11 hear Conrail's request on Friday.

12 And secondly while I'm up, I just want to
13 ask --

14 JUDGE NELSON: That strikes me as piece-
15 meal. I'd rather get all of this behind me.

16 MR. McBRIDE: Well, the touch --

17 JUDGE NELSON: And I can't begin to deal
18 with these cases until Sunday.

19 MR. McBRIDE: I understand. But if you
20 were to rule, for example, hypothetically, that
21 Conrail's objection is well taken and this discovery
22 should be propounded on March 29th or after when we

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1 file our evidence, you might be able to take Sunday
2 doing something else instead of reading a lot of cases
3 because that would encompass our discovery as well.

4 The other point I wanted you to --

5 JUDGE NELSON: Then I have to have you
6 come here Friday and then possibly again Monday or
7 Tuesday.

8 MR. McBRIDE: I don't object.

9 JUDGE NELSON: All right.

10 MR. McBRIDE: I'm perfectly happy to do
11 it. I think the other people are here too. Most of
12 us are working night and day on this case, but Your
13 Honor's ruling may save us some of those nights.

14 JUDGE NELSON: I should add for the record
15 that with regard to the chilling effect, I've
16 considered that and through that if there is one, it's
17 only in effect for the next couple of working days
18 until we get this resolved.

19 And if there isn't one, then it doesn't
20 matter anyway. And I want you to tell your clients
21 and all that I'll pay the most serious attention to
22 these claims.

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1 It would have been easy for me to have
2 gotten rid of them this morning on various grounds,
3 but I'm not doing that. I'm deferring a ruling on
4 them.

5 And we'll consider them in the context of
6 particularized things. I don't rule out the need to
7 look at these documents and get a feel for what they
8 look at and what's in them.

9 I'm not suggesting every box of documents.
10 You may bring in typical things. You might take
11 every tenth page, something of that nature, that we
12 can agree on. You've done that in other cases.

13 MR. McBRIDE: Your Honor, may I raise two
14 other points?

15 JUDGE NELSON: So, your first point was
16 that we should await Friday's issue --

17 MR. McBRIDE: Yes.

18 JUDGE NELSON: -- on the grounds that it
19 could moot this question. And that's an issue that
20 has to do with the timing of this discovery by the
21 Applicants.

22 MR. McBRIDE: That's correct.

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1 JUDGE NELSON: All right, what's your
2 other point?

3 MR. McBRIDE: I have two other brief
4 points. First of all, I was informed only during the
5 recess because as Your Honor may recall, I was not in
6 this case until early January, that the Applicants had
7 said evidently on December 20th, I'm told, that they
8 would produce a privileged log.

9 Seventy-five or so days later, we have not
10 seen one. And so, you know, if we're going to talk
11 about parity here, I mean, we've got some real
12 problems with their claim of privilege that has never
13 been presented in a log.

14 And the last point is a minor point, but
15 it's a point of personal --

16 JUDGE NELSON: All I'll get to is that you
17 don't have to assemble a log if that's what you want.

18 MR. McBRIDE: But I mean, that's part of
19 our problem that I think Conrail is going to present
20 on Friday, which is that we're working on our
21 evidence.

22 And to be distracted by our now doing a

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1 log when they haven't done one that they were going to
2 do two and a half months ago --

3 JUDGE NELSON: Maybe the solution is --

4 MR. McBRIDE: -- certainly seems unfair.

5 JUDGE NELSON: -- neither side needs a
6 lot. If you'll give me some papers to look at, I can
7 tell you what is attorney/client and what is work
8 product.

9 And then we can get into whether they need
10 them and could it come elsewhere and what's the
11 relevance and what are the burdens --

12 MR. McBRIDE: But the --

13 JUDGE NELSON: -- and all of these
14 circumstances.

15 MR. McBRIDE: -- point of a log is to --

16 JUDGE NELSON: And what are the attorneys'
17 impressions, thoughts and so forth.

18 MR. McBRIDE: Yes, Your Honor.

19 JUDGE NELSON: Those have to be --

20 MR. McBRIDE: But the point of a log is
21 sometimes the parties, you know, can bail things out
22 without having to take up the time of Your Honor.

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1 But the last point, since you said you got
2 that letter from them at 4:30 yesterday, I just wanted
3 to tell you -- and I don't think they did this
4 intentionally.

5 But the way fax machines evidently work
6 these days, we're at the bottom of the list since we
7 came in his case late.

8 I was still waiting for their papers at
9 6:30 when I got a call from one of the other counsel
10 who had already received them and read them and was
11 calling to tell me about what was in them.

12 I would just like to have a rule -- and
13 Mr. Rosenthal, by the way, was quite kind, as soon as
14 we called, knowing the thing had been filed to fax it
15 over immediately.

16 But couldn't we have an understanding in
17 the future that if the moving party is the one that
18 ought to see these papers first, that they ought to be
19 put to the top of the list when something like that is
20 filed?

21 JUDGE NELSON: We can take that up later.
22 Let's deal with what we're going to do with all of

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1 this now.

2 MR. KILLORY: Your Honor?

3 JUDGE NELSON: So your suggestion now is
4 as to these issues. Continue to defer until we have
5 the issue of the prematurity thrashed out on Friday.

6 MR. McBRIDE: I am not asking you to defer
7 because I have my chilling effect problem. But you've
8 ruled, and I don't want to reargue that.

9 What I'm suggesting to you is that if ;you
10 heard the prematurity claim on Friday, you might be
11 able to do something else with your Sunday rather than
12 read all these cases in the library.

13 JUDGE NELSON: Why doesn't the chilling
14 effect remain there anyway, knowing that all that
15 means is that sometime later --

16 MR. McBRIDE: Well, it does --

17 JUDGE NELSON: -- these requests are going
18 to come up? What --

19 MR. McBRIDE: I don't know. And I'll tell
20 you why that's not so. Because when they see what I
21 file on March 29th, they may have an entirely
22 different view of what they want to get from us than

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1 they do now.

2 They're shooting in the dark right now
3 with all of these discovery requests.

4 That's why they've got all-documents forms
5 of request without ever having seen a bit of evidence.

6 JUDGE NELSON: All right, other comments.
7 Let's get the Intervenor's side before we get to the
8 Applicants.

9 MR. KILLORY: Your Honor, whatever is
10 consistent with your schedule, whether it's Friday,
11 Monday or Tuesday. It's whatever Your Honor's
12 discretion for Conrail's motion.

13 My only request would be that the
14 prematurity argument goes right to the heart, among
15 other things, of your parity point that you raised.

16 And so I do think it makes sense,
17 consistent with what Mr. McBride said, that Conrail's
18 motion be heard before resuming discussion of this
19 mater, because it may well moot it or it may affect
20 Your Honor's view of when it's disposed of.

21 But in terms of scheduling, Friday, Monday
22 or Tuesday, whatever works best for Your Honor.

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1 JUDGE NELSON: Does it make
2 sense to do it all on Monday, take the first item of
3 business to be the prematurity?

4 MR. KILLORY: It's perfectly fine with
5 Conrail, Your Honor.

6 JUDGE NELSON: I suppose the theory, as
7 Mr. McBride says, then I'm doing a lot of work for
8 what may be nothing.

9 MR. KILLORY: It could save you that --

10 JUDGE NELSON: Yes.

11 MR. KILLORY: -- if you went Friday,
12 that's true, whatever works for you.

13 JUDGE NELSON: Okay. What other
14 suggestions? Mr. Lubel?

15 MR. LUBEL: No, this is on a different
16 point, just for your scheduling. We have on Friday or
17 Monday, whenever it is, we do have two issues.

18 One is the study we've requested from
19 Burlington Northern. The other issue is a request for
20 three top executives from Applicants in Burlington
21 Northern.

22 JUDGE NELSON: That would come up -- would

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1 have come up Friday?

2 MR. LUBEL: Right now, it would be Friday.
3 But you know, we'll do it whenever Your Honor has the
4 next --

5 JUDGE NELSON: You see, I'm also thinking
6 of my management of the pipeline case. And I would
7 like to do as much work as I can with them on Friday.

8 That's another reason I'm thinking of
9 Monday.

10 MR. LUBEL: We have no preference to when
11 it's done. We just wanted you to know it's on the
12 schedule.

13 JUDGE NELSON: Monday and Tuesday are non-
14 days as far as the pipeline case is concerned for
15 reasons of scheduling conflicts, lawyers' absences and
16 so forth.

17 So, they are good days for me to work with
18 you.

19 MR. KILLORY: Your Honor, two things on
20 the schedule. One: Tuesday would, in fact -- if we
21 shift from Friday, Tuesday would work far better.
22 Monday I'm scheduled to be in Los Angeles. I may well

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1 be arguing this motion, but I can get back here on
2 Tuesday.

3 The other point is that in terms of how
4 much work you have to do Sunday night, this issue, I
5 don't know which way this cuts.

6 JUDGE NELSON: If you make it Tuesday, I
7 can do the work Monday.

8 MR. KILLORY: There you go, and that can
9 be our solution. But the issues we're going to raise
10 will no get into weighing and reading of cases and
11 Constitutional law. It's going to be pretty straight-
12 forward.

13 So in terms of increasing your burden, it
14 is --

15 JUDGE NELSON: I'll need to reread the
16 discovery guidelines on the Commission's schedule, I
17 guess.

18 MR. KILLORY: But orders one and six in
19 the guidelines are pretty straight forward, that's
20 right. So if it would work for Your Honor to do your
21 work on Monday and then Tuesday we all reconvene,
22 that's fine.

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1 JUDGE NELSON: Other comments now on --
2 all right, your thoughts?

3 MR. LIVINGSTON: Well, Your Honor, as to
4 the Friday -- for what's scheduled on Friday, whether
5 it will be Friday, Monday or Tuesday, Your Honor's
6 convenience is ours on that issue.

7 On the question of the abstract quality of
8 the current debate, the responses to the discovery
9 requests are due on Tuesday the 12th.

10 I think somebody mis-stated it. Maybe I
11 mis-stated it. But Tuesday the 12th is the due date
12 for the responses.

13 JUDGE NELSON: That's next Tuesday.

14 MR. LIVINGSTON: That's correct. On that
15 same day, the Applicants were served a large number of
16 requests from many parties. So we have a large number
17 of responses that are also due on that day.

18 And that may occasion some dispute. Who
19 knows? It often has in the past.

20 And putting these responses together for -
21 - by us or by WSC or any of the other parties is a lot
22 of work.

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1 I don't deny that. But LeBoeuf, Lamb is
2 a big firm and they are capable of doing the work.
3 And I think that's the work that has to be done. They
4 have to give us their responses. They have to tell us
5 here's what we're going to give you.

6 Here is what we think is privileged, and
7 we're going to object to it. And here's the other
8 stuff that we think is objectionable.

9 And once we get those responses, we'll
10 then be in a position to see whether we think they've
11 not produced things that they should.

12 And that's the process that has been
13 followed in this case up until now, although the
14 Applicants have, up to now --

15 JUDGE NELSON: Well, to follow that out
16 then, Tuesday would be too soon to adjudicate any of
17 this.

18 MR. LIVINGSTON: Not the prematurity
19 argument. That could be heard. But the abstract and
20 the question of whether or not a particular document
21 is privilege or whether work product applies to
22 something in particular, I think we need to see the

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