

INTERSTATE COMMERCE COMMISSION 04/12/96

FINANCE DOCKET # 32760

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1 MS. FELASCO: Your Honor, it's the  
2 Department's position that to the extent that our  
3 witnesses rely on any of these communications, we will  
4 produce them in the work papers that we're filing  
5 tomorrow. That's been our position.

6 JUDGE NELSON: Well, what's your position  
7 about this question of whether the redress clause in  
8 the First Amendment creates a discovery privilege?

9 MS. FELASCO: I am not familiar with those  
10 cases.

11 MR. McBRIDE: What I'm telling you, Your  
12 Honor, is we have been focused on the exceptional  
13 case.

14 JUDGE NELSON: It seems like the  
15 Department doesn't care.

16 MR. McBRIDE: No.

17 JUDGE NELSON: That would be an entity of  
18 government that would be normally in here siding with  
19 you.

20 MR. McBRIDE: Two things, Your Honor. She  
21 didn't say she didn't care. The first thing she said  
22 was if they rely on it in their public testimony,

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1 they'll produce it in the work papers. In other  
2 words, if a communication --

3 JUDGE NELSON: That's a different story.

4 MR. McBRIDE: -- becomes public, then it  
5 wasn't maintained in confidence. That's what she  
6 said. She didn't say if somebody came to her and just  
7 said they're concerned about threat of reprisal and  
8 they don't make that public, that she's going to  
9 produce it in her work papers.

10 And in their letter of March 4th to Your  
11 Honor, they said they were asserting the informer's  
12 privilege.

13 JUDGE NELSON: I recall that --

14 MR. McBRIDE: Yes.

15 JUDGE NELSON: -- about people who come in  
16 and talk to them.

17 MR. McBRIDE: Yes. And what I'm telling  
18 you is the overwhelming body of law is from cases like  
19 the Eleventh Circuit and their own case, the Coors  
20 case, the court said such things as the presumptive  
21 privilege we must afford First Amendment claims. In  
22 all cases the presumption in that case was speech and

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1 association, speech and association.

2 JUDGE NELSON: Let me ask Ms. Felasco  
3 again. I'm looking for some help here one way or the  
4 other, Mr. Felasco. And so far you're not giving me  
5 any. What can you tell me about this issue on behalf  
6 of the Department?

7 MS. FELASCO: Your Honor, I believe that  
8 we would prefer to keep confidential communications  
9 confidential because parties rely on us to come in and  
10 give us that information.

11 And to the extent that our experts rely on  
12 it in their testimony, we will go ahead and produce it  
13 as work product but perhaps we would prefer to keep  
14 confidential to allow parties to come in and talk to  
15 us. That's how we get our information.

16 JUDGE NELSON: That is consistent with  
17 your earlier position of the informer privilege,  
18 so-called informer.

19 MR. LIVINGSTON: Your Honor, may I be  
20 heard on that?

21 JUDGE NELSON: Sure.

22 MR. LIVINGSTON: First of all, there's no

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1 showing that when Conrail made its presentation or  
2 presentations, plural, to the Department of Justice  
3 that there was an undertaking of confidentiality.

4 But, beyond that, I am quite certain -- I  
5 have been in civil litigation against the government  
6 on occasion, as most of the lawyers here probably have  
7 at one time or another. And if the government serves  
8 you with a discovery request and some of the documents  
9 that are called for are documents you sent to the  
10 Governor of Utah, I think the Department of Justice  
11 would not allow you to assert a First Amendment  
12 privilege and withhold those documents from discovery.

13 I can't imagine that the Department of  
14 Justice in its civil litigation when it is seeking  
15 discovery would give any credence to this First  
16 Amendment claim when it is seeking discovery.

17 JUDGE NELSON: As a practical matter,  
18 what's the difference between finding that there's a  
19 qualified privilege or there isn't one? Don't we  
20 still have to get down to burden and need and all  
21 those things?

22 MR. LIVINGSTON: Well, we don't do that,

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1 I don't believe, because the issue today, the issue  
2 that's raised, is the First Amendment issue.

3 MR. KILLORY: Wait a second. Wait a  
4 second. The issue you brought to the table here is  
5 for every party. And it's not just a First Amendment  
6 issue. That's wrong. We have a serious burden  
7 objection here.

8 JUDGE NELSON: So that if I were to rule  
9 that there's a qualified privilege, you're not  
10 prepared to go forward today to back it up?

11 MR. LIVINGSTON: We'll go forward today if  
12 we have to if there are further objections to be made.  
13 An issue that was presented, I thought, by the --

14 JUDGE NELSON: This is your discovery.  
15 They'll be happy if you never get --

16 MR. LIVINGSTON: I understand. We want to  
17 get to the end of it and get --

18 JUDGE NELSON: Coming into another --

19 MR. LIVINGSTON: Well, I don't want to sit  
20 here and say, "Well, here's one objection. If that  
21 doesn't work, Judge, here's another one," and then  
22 there's no end to it. But put that to one side.

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1           On the First Amendment side, just looking  
2           at the First Amendment, virtually all communications  
3           by private citizens in this country are covered by the  
4           First Amendment. We have free speech in this country.  
5           There are very few limits on what can be said.

6           Even a memorandum within a company from  
7           one vice president to another is protected speech.  
8           The files of the parties are full of documents that  
9           have been written in the exercise of a First Amendment  
10          right. Those are not immune from discovery simply  
11          because they were protected speech or because the  
12          person who wrote them hoped that they would be held  
13          confidential or --

14          JUDGE NELSON: No one is contending --

15          MR. LIVINGSTON: -- prayed that they would  
16          be confidential or even --

17          JUDGE NELSON: Livingston, you're beating  
18          a dead horse here or a straw man at best. No one is  
19          contending for absolute immunity.

20          MR. LIVINGSTON: But that --

21          JUDGE NELSON: The question is: Is it  
22          ordinary discovery or is it a qualified privilege?

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1 MR. LIVINGSTON: The qualification, if  
2 there is one, is: Is this case at all like the NAACP  
3 situation or the Ku Klux Klan situation in the Coors  
4 case, where the argument actually was rejected in an  
5 attempt to avoid discovery?

6 Here is Conrail. Can it seriously be  
7 contended that Conrail's going to be chilled if it has  
8 to produce documents that it voluntarily gave the  
9 government officials?

10 It knew when it got into this case as a  
11 party that it would be subject to discovery. It knew  
12 when it handed out documents to government officials  
13 that there was a possibility that that would be called  
14 for in discovery and would have to be produced. It  
15 knew it when it did it.

16 Applicants have had to produce documents  
17 of that kind, including Mr. Roach's notes of  
18 presentations to the Department of Justice.

19 There is not any case that supports this  
20 First Amendment claim in this context. This is an  
21 absolutely extraordinary and unsupportable assertion.

22 MR. McBRIDE: Two things, Your Honor.

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1 First of all, Mr. Livingston keeps trying to change  
2 the question. He talks about documents we handed  
3 government officials and then suggesting we're somehow  
4 trying to immunize them from discovery. That's  
5 exactly wrong. It's what I told you when I showed you  
6 the Kingsley Group study. We're talking about notes  
7 of the meetings with them.

8 And, secondly, if I may, in this Coors  
9 case, as I keep coming back to, even though I can't  
10 cite an issue for redress of grievances clauses, Your  
11 Honor, it's observed it's in the Constitution. And,  
12 as the courts say over and over again, First Amendment  
13 claims are entitled to a presumption of privilege.

14 And, quoting from the Supreme Court, they  
15 said, "Freedoms such as these are protected not only  
16 against heavy-handed frontal attacks, but also from  
17 being stifled by more subtle governmental influences,"  
18 talking about chilling effect.

19 And the point is this, Your Honor. In the  
20 Ku Klux Klan case, they had done some film and it had  
21 Mr. Coors evidently referred to in it or pictured in  
22 it. And they were showing it all over the United

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1 States. And then they claimed they didn't have to  
2 give a copy of the film. The court said, "That's  
3 ridiculous because you've been making it public."

4 How could that be any more different than  
5 these notes, which no one else but me has ever seen?

6 JUDGE NELSON: Well, I am going to find  
7 that the redress clause of the First Amendment creates  
8 a qualified privilege against discovery, a privilege  
9 which can yield an appropriate showing of need,  
10 relevance burden, balancing of all the other factors.

11 My thinking is that there are probably  
12 plenty of occasions when people want to talk in  
13 confidence with congressmen, governors, agencies, et  
14 cetera, that's an entirely legitimate confidence, and  
15 that we ought to at least start out by respecting it.  
16 I think it can yield, and we'll see how it yields in  
17 this case.

18 So let's turn now to the question of the  
19 balancing of factors we need in order to see what this  
20 stuff is all about, why you want it, what's so  
21 important about it, and any questions of burden.

22 Is Conrail the only one that has burden

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1 problems here?

2 (No response.)

3 JUDGE NELSON: I don't hear anyone else.

4 All right.

5 Let's start off with let me see the  
6 material. Is there an objection if I look at Mr.  
7 McBride's papers?

8 MR. LIVINGSTON: No, Your Honor.

9 MR. McBRIDE: I may have a duplicate here.  
10 It may be a lighter burden for you, Your Honor.

11 JUDGE NELSON: I can't read this  
12 handwriting here, which I cannot read.

13 MR. McBRIDE: As I told you, Your Honor,  
14 the client has been concerned about this from the  
15 beginning.

16 JUDGE NELSON: It is the client's  
17 handwriting?

18 MR. McBRIDE: Yes, it is. I think I could  
19 read some of it, but obviously we're in camera.

20 JUDGE NELSON: Every page is handwritten?

21 MR. McBRIDE: Not quite, Your Honor. Near  
22 the back you'll find the sheet I was talking about

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1 which was faxed to the Chief of Staff of the Governor  
2 of Utah, which is typewritten. It might be the  
3 easiest place to start.

4 JUDGE NELSON: We'll start with that one.  
5 We're looking at this typewritten sheet of paper?

6 MR. McBRIDE: The one just before it. I'm  
7 sorry. There were two typewritten ones. Right there.  
8 You just had it. That was what I was referring to  
9 earlier.

10 JUDGE NELSON: I'm looking at the last  
11 page. You described this before as what?

12 MR. McBRIDE: I described this to Your  
13 Honor as some recommendations by my client to the  
14 Chief of Staff of the Governor of Utah as to  
15 negotiating strategy with the senior officers of Union  
16 Pacific Railroad about this merger.

17 JUDGE NELSON: As a result of this, what  
18 happened, if anything? Can you tell us without  
19 blowing any secrets?

20 MR. McBRIDE: As I understand it, Mr.  
21 Lewis was supposed to meet with the governor. And I  
22 believe Mr. Davidson did instead, the same Mr.

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1 Davidson referred to in a memorandum. I'm basing that  
2 on what I understand. I wasn't present.

3 JUDGE NELSON: There was no meeting with  
4 Mr. Lewis?

5 MR. McBRIDE: Not that I'm aware of. I  
6 know he's met with other governors, but I believe Mr.  
7 Davidson met with Governor Leavitt. I believe Mr.  
8 Dolan, the Vice President of Law, also did. And I  
9 think there was more than one meeting, but I'm not  
10 sure of that.

11 JUDGE NELSON: Well, just thinking out  
12 loud about it, the first paragraph seems to me not to  
13 have anything to do with anything. It has to do with  
14 how to approach a man in a meeting that was never  
15 held.

16 MR. McBRIDE: I'm saying I believe that a  
17 meeting with the senior officers of Union Pacific was  
18 held. And part of the strategy was who to meet with.

19 JUDGE NELSON: Read the first paragraph.

20 MR. McBRIDE: I'm sorry. I don't have --

21 JUDGE NELSON: The first paragraph deals  
22 with Mr. Lewis.

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1 MR. McBRIDE: Right. But it's advice  
2 about who to meet with. You see? That's what it's  
3 about.

4 JUDGE NELSON: The second one is, the  
5 second paragraph.

6 MR. McBRIDE: The first is background  
7 about why you ought to meet with who we ought to meet  
8 with.

9 JUDGE NELSON: I understand.

10 MR. LUBEL: Your Honor, I might just  
11 interject here as an example that the applicants  
12 didn't produce any documents relating to any such  
13 meetings that they had with these officials.

14 JUDGE NELSON: With any governors? They  
15 didn't?

16 MR. LUBEL: If I'm wrong, they can correct  
17 me. I know they produced a lot of documents, but I  
18 don't think they did. I've got a very short memory on  
19 this.

20 MR. McBRIDE: But, in any event, Your  
21 Honor, I'm not suggesting to you that the first  
22 paragraph is so harmful to us.

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1 JUDGE NELSON: No.

2 MR. McBRIDE: I'm just suggesting to you  
3 it's obviously in confidential communication. I've  
4 not made any claim that we're going to be harmed by  
5 this communication other than the chilling effect on  
6 our constitutional rights.

7 JUDGE NELSON: The first two paragraphs  
8 seem to me the kind of thing about which if you  
9 thought about it, you'd want in confidence, but if you  
10 think more about it, you wouldn't care if it was in  
11 the New York Times, the first two paragraphs, except  
12 insofar as they make it troublesome the next time you  
13 want to write something like that because the next one  
14 may not be the kind of thing that can be in the New  
15 York Times.

16 MR. McBRIDE: That's the first point.

17 JUDGE NELSON: I know that.

18 MR. McBRIDE: The second point is Mr.  
19 Jordan's deposition is noticed for April 24th in this  
20 proceeding. If they get these notes and if you can't  
21 read them and they can't read them, guess how we're  
22 going to be spending my day.

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1 JUDGE NELSON: I in my ignorance of this  
2 case could have figured out what Paragraphs 1 and 2  
3 said from what I have seen in documents.

4 MR. McBRIDE: Right, right.

5 JUDGE NELSON: On the other hand, they are  
6 part of the train and the kind of thing that when you  
7 originally think about it, you want confidence.

8 MR. McBRIDE: And if my client agrees with  
9 Your Honor's view of the world, then that just shows  
10 our credibility.

11 JUDGE NELSON: Now, the third paragraph,  
12 the first sentence of it --

13 MR. McBRIDE: Of which, Your Honor?

14 JUDGE NELSON: The third.

15 MR. McBRIDE: Yes.

16 JUDGE NELSON: Talking out loud with you,  
17 I'm trying to think my way through this.

18 See that word that's underlined?

19 MR. McBRIDE: Yes.

20 JUDGE NELSON: That part looks like  
21 litigation strategy.

22 MR. McBRIDE: You bet.

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1 JUDGE NELSON: And so I would want to  
2 think about why they have any right to probe that.

3 The next sentence, a nice sentence, you  
4 want to give them that one?

5 MR. McBRIDE: No.

6 (Laughter.)

7 JUDGE NELSON: The final sentence is your  
8 position.

9 MR. McBRIDE: I don't want to exactly  
10 corroborate that, Your Honor, but --

11 JUDGE NELSON: Based on my understanding,  
12 clearly consistent with your position.

13 MR. McBRIDE: You heard my representations  
14 to you this morning.

15 JUDGE NELSON: Yes. I wish I could show  
16 him this so he could see that there's much ado about  
17 nothing here. But, as often happens in these fights,  
18 he thinks that because of your opposition, that there  
19 are some smoking guns in these papers. I'd love to  
20 show him this.

21 There's virtually nothing here, Mr.  
22 Livingston, in the sheet that I can read. Now, there

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1 is all of this handwritten stuff. I don't --

2 MR. LIVINGSTON: Your Honor, my suspicion  
3 is that what you say may well be correct about the WSC  
4 documents. And I would be willing on those documents  
5 to abide Your Honor's judgment without looking at  
6 them.

7 JUDGE NELSON: They're the kinds of things  
8 that if you and I wrote, we would want to write them  
9 thinking they were confidential.

10 MR. LIVINGSTON: I'm willing on those --  
11 what is it, a half a dozen pages?

12 JUDGE NELSON: I can't read the  
13 handwritten ones. I can't characterize them.

14 MR. LIVINGSTON: I understand. I'm  
15 willing to abide by Your Honor's judgment on the  
16 typewritten document.

17 And I think, really, the serious issue  
18 here -- and it's gotten a little bit lost -- is the  
19 Conrail presentation, particularly to the Department  
20 of Justice and Kansas City Southern.

21 MR. KILLORY: The only issue here was the  
22 First Amendment. Now we've lost the serious issue.

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1 JUDGE NELSON: Well, I'm dealing with  
2 right now Mr. McBride's material.

3 MR. KILLORY: Right.

4 JUDGE NELSON: Can you help me at all on  
5 that one sentence that has that underlined word in it,  
6 the material that follows the --

7 MR. McBRIDE: Yes, I can.

8 JUDGE NELSON: Why don't we say what the  
9 underlined word is? That's not going to tell --

10 MR. McBRIDE: "Without," "without," yes,  
11 sir.

12 JUDGE NELSON: That "without" clause I  
13 don't --

14 MR. McBRIDE: If Your Honor please, I  
15 think this is a reference, a layman's reference, to  
16 the UP/BN settlement agreement. And the effort was at  
17 seeking a fix to that agreement that would not somehow  
18 become a precedent in other merger proceedings because  
19 you see the claim is in this case, for example, that  
20 the mills per gross ton mile level --

21 JUDGE NELSON: Oh, this is referring to --

22 MR. McBRIDE: The settlement agreement for

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1       trackage rights.

2               JUDGE NELSON:  -- the blessing of the  
3       BN/Santa Fe agreement to the extent that it then  
4       becomes a precedent somewhere else?

5               MR. McBRIDE:  Exactly.

6               JUDGE NELSON:  This is really nothing here  
7       of any significance, Mr. Livingston, I assure you.  
8       this typewritten sheet.

9               MR. McBRIDE:  Now, that next typewritten  
10       sheet, which you put your hand on first, which has the  
11       client's notes to me on it, even which I'm sharing  
12       with you in camera, the note I think will indicate to  
13       you that what this was was the client's effort --

14               JUDGE NELSON:  Can we reveal the word  
15       that's stamped in the upper right-hand corner of this?

16               MR. McBRIDE:  Yes, please.  I was getting  
17       to that.

18               JUDGE NELSON:  It says "Draft."

19               MR. McBRIDE:  Yes.  That's exactly --

20               JUDGE NELSON:  It appears to be a letter  
21       that was never sent.

22               MR. McBRIDE:  Exactly right.

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1 MR. LIVINGSTON: Well, then what they  
2 called for, Your Honor --

3 JUDGE NELSON: That's even lower --

4 MR. McBRIDE: No, no. Mr. Livingston, I  
5 appreciate your qualification on that, but it's not a  
6 draft pleading or verified statement in this  
7 proceeding. And I felt -- and you may tell me I can  
8 take it off the table. But I want to be completely  
9 honest to Your Honor and the record and opposing  
10 counsel here.

11 This was a communication to the governor  
12 of a draft of the letter that the client was hoping  
13 the governor would send. And that's why I did not  
14 feel, even though it's a draft, that I could withhold  
15 it from discovery. The letter was never sent.

16 Now, you tell me whether. If that doesn't  
17 qualified in discovery, I'll be happy to take it back.  
18 But it's a communication to a public official called  
19 for by one or more of those discovery requests.

20 MR. LIVINGSTON: Your Honor, if it was  
21 never sent, then -- I'm not sure we're on the same  
22 page, but it doesn't seem to me we have any interest

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1 in that.

2 JUDGE NELSON: On its face it was never  
3 sent.

4 MR. LIVINGSTON: Right. So that leads --

5 MR. McBRIDE: It was sent to the governor.  
6 The governor never sent it to the Surface  
7 Transportation Board.

8 JUDGE NELSON: It's a draft of a letter  
9 that says, in effect, "Governor, how about sending  
10 this letter to" so and so? And the governor, for  
11 whatever reason we know not, never sent the letter.

12 MR. LIVINGSTON: They were soliciting?  
13 They were soliciting?

14 JUDGE NELSON: Soliciting stuff. I don't  
15 know if that's going to get you anything. So they're  
16 soliciting a letter that never got mailed.

17 MR. McBRIDE: Now, as to the handwritten  
18 documents, I should inform Your Honor -- and Mr.  
19 Livingston knows this -- that we redacted --

20 JUDGE NELSON: And the note here, can I  
21 reveal this note? It's to you. It's an  
22 attorney-client note.

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1 MR. McBRIDE: Yes.

2 JUDGE NELSON: The word that's underlined  
3 in the handwritten note --

4 MR. McBRIDE: Yes.

5 JUDGE NELSON: -- corroborates it was not  
6 sent, the client tells Mr. McBride.

7 MR. McBRIDE: Right.

8 JUDGE NELSON: Anything else in this small  
9 package? Do you want me to struggle with the  
10 handwriting?

11 MR. McBRIDE: Well, I wanted to just tell  
12 you one thing, for example, in here. One of these  
13 pages is some notes of a meeting.

14 JUDGE NELSON: Which one?

15 MR. McBRIDE: I think in Your Honor's copy  
16 it's yellow highlighted by the client, by the way.

17 JUDGE NELSON: Yes. All right.

18 MR. McBRIDE: That page, only the portion  
19 highlighted, I provided to Mr. Livingston pursuant to  
20 agreement between us that the provision of it would  
21 not constitute a waiver by either my client or his of  
22 any rights, claims, or privileges we may have here

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1 because I concluded upon review of that and the client  
2 in preparing his verified statement wanted to provide  
3 that because a dispute had arisen between my client  
4 and the Union Pacific Railroad, Mr. Rebensdorf, about  
5 something Mr. Rebensdorf said. So those words had  
6 been provided. They're quoted in my client's  
7 testimony. It's probably not important to read them  
8 to Your Honor.

9 Other than that, all of those materials  
10 are confidential notes of communications with  
11 governmental officials about the parties in the  
12 proceeding.

13 JUDGE NELSON: Are these notes of  
14 meetings?

15 MR. McBRIDE: Yes.

16 JUDGE NELSON: That your client had with  
17 --

18 MR. McBRIDE: Yes. Let me give you an  
19 example. The top sheet there. I think you'll see  
20 that that was a meeting that was had with governmental  
21 officials. And at the bottom it refers to the time of  
22 the meeting they were going to have with the governor.

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1 JUDGE NELSON: That name is the name of  
2 the governor?

3 MR. McBRIDE: No. I think somebody in the  
4 governor's office.

5 JUDGE NELSON: That they were going to  
6 meet?

7 MR. McBRIDE: That's right. You see it  
8 says "Gov. Off." --

9 JUDGE NELSON: Yes.

10 MR. McBRIDE: -- after the time? The  
11 point is these are all strategy meetings that --

12 JUDGE NELSON: This is all with reference  
13 to Utah?

14 MR. McBRIDE: That's exactly --

15 JUDGE NELSON: The entire package?

16 MR. McBRIDE: That's exactly right.

17 JUDGE NELSON: What position has Utah  
18 taken in the proceeding?

19 MR. McBRIDE: Utah took the position that  
20 it wasn't filing comments at this time, that it was  
21 very concerned about the competitive impacts on its  
22 shippers, and that it may be filing a brief to that

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1 effect in the case. And the letter was signed by  
2 counsel to the governor and the Attorney General of  
3 Utah or one of his deputies.

4 JUDGE NELSON: When would that brief be  
5 filed?

6 MR. McBRIDE: June 3.

7 JUDGE NELSON: June 3?

8 MR. McBRIDE: Yes. Their letter was late  
9 March. It was in by the March 29th deadline. And  
10 that was their position.

11 JUDGE NELSON: I left in my office the  
12 schedule. What happens after June 3?

13 MR. McBRIDE: Oral argument on July 3, I  
14 believe. But there's one other thing that happens  
15 before June 3, which we're in the middle of right now,  
16 which is relevant.

17 JUDGE NELSON: I'm talking about Utah.

18 MR. McBRIDE: Yes. And Utah may --

19 JUDGE NELSON: Suppose Utah --

20 MR. McBRIDE: -- respond to the Montana  
21 Rail Link responsive application, just as we intend to  
22 do, on April 29th.

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1 JUDGE NELSON: Suppose Utah makes some  
2 filing saying something and at that point we take  
3 another look at these handwritten documents and try to  
4 struggle with them.

5 MR. McBRIDE: Exactly. Now this is where  
6 it fits perfectly with the Department of Justice's  
7 position. Suppose the governor --

8 JUDGE NELSON: They may expose some  
9 things.

10 MR. McBRIDE: Yes. Suppose the Governor  
11 of Utah files something in response to Montana Rail  
12 Link's application and says, "Alex Jordan for the  
13 Western Shippers Coalition told me this merger was the  
14 greatest thing in the world. And on that basis, I  
15 support the merger." Well, then somebody in this case  
16 might have an interest in these notes to see if that's  
17 what he told them.

18 But otherwise if the governor doesn't  
19 divulge these communications or the attorney general,  
20 then they're not properly discoverable without some  
21 minimal showing that --

22 JUDGE NELSON: Is the author the same as

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1 your client in each case?

2 MR. McBRIDE: Yes, Mr. Jordan.

3 JUDGE NELSON: Say if you could read these  
4 that they appeared -- let's make up this case -- Utah  
5 files something taking Mr. Jordan chapter and verse  
6 and say Mr. Livingston suspects that the Governor of  
7 Utah knows personally nothing about this other than  
8 what Jordan told him and wants to attempt to come to  
9 Utah with the background and all of this is Utah  
10 presenting through state letterhead the shippers'  
11 position. They could request the notes to show that.  
12 Say all of that happens. Could we then look at these  
13 notes and assess whether --

14 MR. McBRIDE: I'll tell you what my  
15 position would be there. If the governor said, "I  
16 agree with the Western Shippers Coalition 100 percent,  
17 just like Alex Jordan says," which I think is your  
18 hypothetical, then it would seem to me the notes don't  
19 add anything because all they do is corroborate.

20 But if the governor, as I said a moment  
21 ago, came in and said, "Alex Jordan and Western  
22 Shippers Coalition told me that this is the best

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1 merger in the world and it ought to be approved," now  
2 somebody might want to see these notes and see if  
3 that's what he really told the guy.

4 So it seems to me unless the notes do  
5 something to challenge the credibility of Mr. Jordan,  
6 then they shouldn't be discoverable because they don't  
7 add anything. That's why I was saying earlier: Is  
8 the Surface Transportation Board ever going to care  
9 about what Mr. Jordan's notes of his meetings with the  
10 Governor of Utah say, as opposed to what the facts are  
11 or what the governor's position is or what our  
12 position is?

13 JUDGE NELSON: It's also possible the Utah  
14 filings might effectively waive this privilege by  
15 taking all of these ideas and submitting them --

16 MR. McBRIDE: Exactly. And Mr. Streeter  
17 was --

18 JUDGE NELSON: -- and distributing them to  
19 the shippers.

20 MR. McBRIDE: Yes. Excuse me. And Mr.  
21 Streeter handed up to me his response, the Railroad  
22 Commission of Texas, to discovery in this case. And

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1 he points out to me the Texas Railroad Commission I  
2 think takes a position that -- I won't try to  
3 characterize his own, just as I understand it. He can  
4 characterize it himself. But they're talking about  
5 deliberative process here and how it presumptively  
6 protects their communications and deliberations and  
7 those sorts of things.

8 So it seems to me unless they divulge  
9 them, unless they open the door, to use a common  
10 phrase in discovery, they're not discoverable.

11 JUDGE NELSON: I'm going to give you back  
12 these Utah materials now with the rulings already made  
13 and Mr. Livingston's comments. And I am denying all  
14 discovery at this time into these handwritten Utah  
15 materials.

16 If the State of Utah files something which  
17 the applicants want to contend poses these in a new  
18 and different light in the context of some filing,  
19 certainly without prejudice to their taking a look at  
20 it at that time, without filing, on the one hand, and  
21 the notes, on the other.

22 Now, what was next? Conrail?

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1 MR. KILLORY: Your Honor, we take the same  
2 ruling and apply it to, for example, if the Department  
3 of Justice does just what they say, if there's some  
4 aspect of their filing that relies on some  
5 presentation we made, then I think that's where the  
6 balancing of the qualified privilege says that gets  
7 produced.

8 JUDGE NELSON: Well, you said that you  
9 have other problems.

10 MR. KILLORY: We have an enormous burden  
11 issue. And that would cure the burden because to the  
12 extent that any parties, governors, or Department of  
13 Justice comes forward and presents something --

14 JUDGE NELSON: Do you have your documents  
15 here?

16 MR. KILLORY: We do not, Your Honor.  
17 There are hundreds of people and thousands of  
18 meetings, much as the applicants had. We just --

19 JUDGE NELSON: Are you talking about the  
20 federal or the state?

21 MR. KILLORY: Both. Mostly it's on the  
22 state level, but there are literally thousands of

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1 meetings. We would have to canvass hundreds of  
2 people.

3 JUDGE NELSON: Can you tell us what states  
4 or is that confidential?

5 MR. KILLORY: Certainly most of the states  
6 subject to the merger, the Western part of the  
7 country.

8 JUDGE NELSON: Are those states --

9 MR. KILLORY: Texas, Arkansas, Louisiana.

10 JUDGE NELSON: Are those governments on  
11 record with positions in this case?

12 MR. KILLORY: I believe most are, but I  
13 can't say exactly.

14 MR. HUT: There are letters in the record,  
15 Your Honor, also for Conrail from the Texas Attorney  
16 General, from the Texas Railroad Commission, from the  
17 Attorney General of Louisiana, from the Attorney  
18 General of Arkansas, the Attorney General of Missouri,  
19 the Governor of Missouri, all taking positions  
20 essentially opposed to the merger, none of which  
21 purport to rely on any information furnished by  
22 anybody else or do not call into question the same

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1 kinds of preconditions that Your Honor would apply --  
2 the Governor of Utah, for example, made a substantial  
3 filing. These are very short, brief letters of  
4 positions.

5 MR. LUBEL: Your Honor, KCS, we asserted  
6 a burdensome objection on this also.

7 MR. ESTES: Your Honor, if I may --

8 JUDGE NELSON: Let me finish with Conrail.  
9 What is the burden? What's your suggestion at this  
10 time?

11 MR. KILLORY: That I would adopt the exact  
12 same ruling you made applied here that any party --

13 JUDGE NELSON: That really doesn't fit  
14 because that really had to do with Utah filings, which  
15 are --

16 MR. KILLORY: If, for example, the  
17 Department of Justice filing in any way relies on our  
18 material, then that --

19 JUDGE NELSON: How about the Attorney  
20 General of -- where is it? -- Arkansas, whatever, is  
21 to file in opposition?

22 MR. HUT: Your Honor, same point. It's a

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1 one or two-page letter and it doesn't --

2 JUDGE NELSON: Do we have one here as a  
3 typical filing?

4 MR. KILLORY: We do not, Your Honor.

5 MR. HUT: I don't think the applicants  
6 would dispute this characterization. These are real  
7 short.

8 JUDGE NELSON: Do they give reasons?

9 MR. HUT: They do give reasons.

10 JUDGE NELSON: What do they say typically?

11 MR. HUT: Typically they say that this  
12 will lead to a diminution in available competitive  
13 rail alternatives and the BN/SF trackage rights  
14 proposal is not a satisfactory substitute.

15 JUDGE NELSON: So suppose they said that  
16 because you lobbied them to say it. So what, Mr.  
17 Livingston?

18 MR. HUT: That's exactly the point, Your  
19 Honor. There's no probative value. We did not --

20 JUDGE NELSON: You've got these letters,  
21 which are described as short letters that don't say  
22 much except "We don't like it for the following

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1 reason."

2 MR. LIVINGSTON: Well, there are plenty of

3 --

4 JUDGE NELSON: Suppose it turns out that  
5 every one of them was the direct product bought for  
6 causation of this lobbying by the other side, --

7 MR. LIVINGSTON: Your Honor, let me make  
8 a suggestion on --

9 JUDGE NELSON: -- which may well be the  
10 case.

11 MR. LIVINGSTON: Let me make a suggestion  
12 on the railroads parties here, indeed of the other  
13 parties as well, Your Honor. In view of Your Honor's  
14 ruling that you're going to recognize a qualified  
15 privilege here and weigh the burden and other factors,  
16 I think it quite likely in the case of Conrail and KCS  
17 and perhaps the others as well that they make formal  
18 -- "formal" may not be the right word, but written  
19 presentations to, with economic evidence, perhaps even  
20 verified statements or affidavits or reports from  
21 economists to the Department of Transportation here in  
22 Washington and the Department of Justice here in

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1 Washington.

2 Those materials would address the core  
3 issues of the case, clearly are relevant. There can't  
4 possibly -- I'm not asking for every state governor or  
5 every county that they visited or every town or  
6 municipality, just the places right here in  
7 Washington. I'm sure they have those materials in one  
8 place. They probably have them in their offices right  
9 here in Washington, so that they can be produced  
10 promptly.

11 I would eliminate any possible claim and  
12 those materials, it would seem to me --

13 JUDGE NELSON: It is a more focused  
14 request now.

15 Has DOT taken a position in this case?

16 MR. LIVINGSTON: I don't believe they have  
17 taken a position.

18 MR. NORTON: They filed a comment which  
19 did not take a position and they said they would take  
20 a position in their brief in June.

21 MR. LIVINGSTON: DOJ, the deadline for  
22 their evidence, I guess it's today, but nobody has

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1       seen it yet.

2               I think it's tomorrow. It's today. And  
3       even whether they will take a position on that  
4       evidence, sometimes I've been in on these cases where  
5       the Department files its evidence, but doesn't take a  
6       position until it files a brief.

7               JUDGE NELSON: Would it make sense to wait  
8       and see those briefs?

9               MR. LIVINGSTON: No, I don't think it  
10       makes any sense at all. What is important for us is  
11       if they made a presentation with evidence, arguing  
12       facts, making assertions about economic issues, other  
13       issues in the case, those are directly relevant, just  
14       as relevant as if they had had a man in their  
15       strategic planning department write a memo saying  
16       here's the impact of the merger. That would have been  
17       producible. These are just as producible.

18              JUDGE NELSON: What if they did that and  
19       the DOT or DOJ took no action?

20              MR. LIVINGSTON: It is still a document  
21       from these railroads who are intimately involved in  
22       this case, setting forth statements that are directly

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1 relevant in the case.

2 Now if it's 100 percent letter for letter,  
3 verbatim consistent with what the railroads actually  
4 filed, then we won't have learned very much, but  
5 that's true of all the discovery in this case. It's  
6 always the chance that in discovery that some of the  
7 material and indeed probably most of the material are  
8 not going to play a role in the final decision. We  
9 have produced tens of thousands of documents, maybe  
10 it's even hundreds of thousands of --

11 JUDGE NELSON: Where do we get the DOT  
12 material. They're not in this case?

13 MR. LIVINGSTON: Conrail has, I assume,  
14 made a presentation to DOT.

15 JUDGE NELSON: Oh, they know what they  
16 told them.

17 MR. LIVINGSTON: Right. This is not a  
18 request to DOT. This is a request to Conrail. Give  
19 us the presentation we made to DOT and DOJ. In  
20 addition, we've asked --

21 JUDGE NELSON: That's a smaller universe  
22 and then we can get them together and we can look at

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1       them.

2               MR. KILLORY: It takes away the burden,  
3       however, Your Honor. I must say Justice has just  
4       stood up here and said that if there's any connection  
5       in any way that we can rely on this in the position we  
6       take, we'll produce it. Now Mr. Livingston says  
7       essentially we don't trust the judgment of Justice.  
8       You've got to produce everything you ever said to  
9       Justice as an evidentiary matter, even if Justice  
10      totally discarded and doesn't rely on it.

11             JUDGE NELSON: Justice is filing as we  
12      know today.

13             MR. KILLORY: That's right.

14             JUDGE NELSON: So if we met hypothetically  
15      Monday, we could see what's there, what's in the  
16      filing and let it be produced.

17             MR. LIVINGSTON: It's irrelevant if  
18      Justice files or not. These documents that these two  
19      railroads have written exist. They are documents  
20      written by --

21             JUDGE NELSON: What I'm thinking to do is,  
22      gentlemen, is to have you -- Mr. Killory, gather these

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1 materials with references, DOT and DOJ --

2 MR. KILLORY: As described by Mr.  
3 Livingston.

4 JUDGE NELSON: Bring them in here at a  
5 time we'll fix which by definition will be after the  
6 Justice filing at least, so we'll have the benefit of  
7 that and go at it in the context of that filing and  
8 we'll see what the materials are, how many there are,  
9 what they say --

10 MR. LIVINGSTON: Does that apply to all  
11 the people here? We'll make the same offer.  
12 Apparently, in Mr. McBride's case, he doesn't have  
13 them.

14 JUDGE NELSON: With regard to the two  
15 Cabinet departments. We'll put to one side --

16 MR. KILLORY: -- evidentiary statements  
17 and submissions provided to Justice and DOT.

18 MR. LIVINGSTON: First of all, put the  
19 states to one side. We're talking about the federal  
20 government.

21 JUDGE NELSON: We're talking DOT and DOJ.  
22 And that would include, as we have described the

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1 presentations, white papers, documents given, handed  
2 over, documents sent to DOT.

3 MR. KILLORY: That's unusual. We're now  
4 expanding the universe beyond formal presentation?  
5 We're going to hear notes in a moment. Documents  
6 given, documents received? That's a very different  
7 thing from what he started with which is talking about  
8 presentation.

9 JUDGE NELSON: Documents received from the  
10 government, I'm not going to -- that raises a full  
11 other question.

12 MR. LIVINGSTON: We didn't request that.

13 JUDGE NELSON: It's really documents you  
14 gave these departments. That shouldn't be so hard.

15 MR. KILLORY: And we agree to that, Your  
16 honor. We'll reserve. We're not waiving a joint  
17 party privilege here, but we'll agree to that  
18 procedure, Your Honor.

19 JUDGE NELSON: Well, I haven't ordered you  
20 to produce anything. Bring it in for in camera  
21 inspection.

22 MR. KILLORY: Understood.

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1 MR. LIVINGSTON: And it should include, if  
2 they made an oral presentation --

3 JUDGE NELSON: If there's a note of oral  
4 presentation or notes of that that should be included.

5 MR. KILLORY: We heard notes now. Now  
6 we're getting notes of the meeting now?

7 Is it presentations or is it notes?

8 JUDGE NELSON: What's wrong with that?

9 MR. LIVINGSTON: It's exactly what's in  
10 the discovery requests.

11 MR. KILLORY: Well, what he started out  
12 with is very different than what he's working to which  
13 is now let's get back to the discovery requests.  
14 First he said formal presentations, white papers,  
15 formal statements. Now he wants --

16 JUDGE NELSON: If there's an argument that  
17 reflects lawyers' notes, then we'll talk about it in  
18 the context of work product, attorney-client which may  
19 be applicable. I not directing you to turn over to  
20 the other side a single piece of paper, not one word  
21 of the stuff, just to gather them so we can get an  
22 idea of what they look like and what problems are in

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1 there. Roxanna will have time to field those, but  
2 there are two cabinet departments and we need, I  
3 suppose, entities such as the FRA or the subdivision's  
4 department.

5 MR. LIVINGSTON: Any entity in the DOT.

6 JUDGE NELSON: There is still the FRA  
7 there. I don't know if it has anything to do with  
8 this.

9 MR. LIVINGSTON: As I understand it, Your  
10 Honor, from Mr. McBride, he didn't make any  
11 presentations to DOT or DOJ, so he would not have  
12 anything to contribute in this area. The other  
13 parties who raised this objection other than Conrail  
14 and KCS are Tex Mex, Dow, Kennicott, CCRT and Sierra.  
15 And it seems to me the same doctrine ought to apply.  
16 We will limit the request to DOT and DOJ and they  
17 ought to bring their materials in.

18 JUDGE NELSON: Any problems with coming in  
19 on a date we'll fix with your materials.

20 MR. EDWARDS: On behalf of Tex Mex, there  
21 will be no problem at all.

22 MR. KILLORY: Just give us time to get

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1       them.

2                   JUDGE NELSON:   We'll pick a date.   Ms.  
3       Felasco?

4                   MS. FELASCO:   Yes, Your Honor?

5                   JUDGE NELSON:   I hope that you or your  
6       colleagues will be in at that time, of course, be  
7       familiar with your position.   You'll know what your  
8       substantive position is and be able to offer some help  
9       on the government side as to what to do, if anything,  
10      with any of these documents.   So tell your chief there  
11      that there's a risk that some of these communications  
12      might end up getting turned over so we need to hear  
13      from him or her as to -- through you as to what the  
14      occasions were, the policy arguments and so forth.

15                   And since the Department is represented  
16      here, I think they know what these parties have told  
17      them, but should they -- I guess in your own files  
18      would be able to locate these so it shouldn't be a  
19      mystery to you as to what the railroads have told you.

20                   MS. FELASCO:   No.

21                   MR. LIVINGSTON: Your Honor, we don't have  
22      a dispute with the Department of Justice here and

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1 we're not asking them to produce anything.

2 We would like to be heard --

3 JUDGE NELSON: You may.

4 MR. LIVINGSTON: We don't have a request.

5 JUDGE NELSON: It may turn out that the  
6 railroad submissions related to the Department of  
7 Justice will be urged to be so confidential as to  
8 outweigh these other claims. The Department may roll  
9 in with such an argument.

10 MR. LIVINGSTON: I guess that's possible.

11 JUDGE NELSON: We don't know that.

12 MR. LIVINGSTON: We would like to have  
13 this heard as soon as Your Honor's --

14 JUDGE NELSON: Let's wait and see if we  
15 have other loot then so I can make a judgment about  
16 what to do. I know what my hearing schedule is next  
17 week.

18 MR. LIVINGSTON: Can you put us in next  
19 week?

20 JUDGE NELSON: I'll have to.

21 MR. McBRIDE: I just wanted to confirm for  
22 Mr. Livingston that his understanding of our situation

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1 was correct. We have no such presentations.

2 MR. ESTES: Your Honor, CCRT has no such  
3 presentations.

4 MR. MORENO: Your Honor, Kennicott has no  
5 such presentations.

6 MR. LUBEL: Two points, Your Honor. First  
7 scheduling. We have depositions every day next week  
8 and sometimes we have two and three depositions on one  
9 day.

10 JUDGE NELSON: You want to get into  
11 scheduling now?

12 We have a lot of other issues here.

13 MR. LUBEL: We do. I just wanted to point  
14 out --

15 JUDGE NELSON: Now we're worried when we  
16 want to meet. We have a lot of work to do. In fact,  
17 let me take a break and I'll go get my calendar and we  
18 can -- let's take a break for now and we'll come back  
19 in about 10 minutes.

20 Off the record.

21 (Off the record.)

22 MR. LIVINGSTON: Excuse me, Your Honor.

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1 JUDGE NELSON: That's all right. We're  
2 all set?

3 MR. LIVINGSTON: Yes, I think --

4 JUDGE NELSON: I was telling the others my  
5 schedule doesn't look too good until Thursday, but we  
6 can discuss that. Do you want to deal with scheduling  
7 right now?

8 MR. LIVINGSTON: We need a little time to  
9 gather anyway, Your Honor.

10 MR. LIVINGSTON: We would have preferred  
11 Monday.

12 JUDGE NELSON: Well, let's go off the  
13 record.

14 (Off the record.)

15 JUDGE NELSON: Let's go back on the  
16 record. We have been discussing scheduling and agreed  
17 to reconvene for such as is left over at 9:30 a.m. on  
18 Thursday, April 18th.

19 Yes sir, Mr. Steel?

20 MR. STEEL: On behalf of Burlington  
21 Northern we have one dispute that potentially could  
22 need to be addressed before Thursday. I think we may

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1 have worked it out with Conrail, but if not, the  
2 opponents disputes are on Wednesday and would it be  
3 possible to at least reserve the possibility, it's a  
4 fairly narrow dispute, it might take less than an hour  
5 to resolve, but I did want to pass that on --

6 JUDGE NELSON: Is it on the agenda for  
7 today?

8 MR. STEEL: No sir. Since we're  
9 scheduling next week, it's the Thursday after their  
10 deposition, unless the dispute is not resolved --

11 JUDGE NELSON: I don't want to give you a  
12 blank check because I don't know how involved it is.

13 MR. STEEL: We don't need a blank check,  
14 I just want to apprise you of the possibility we may  
15 need to ask to see the deposition on Wednesday, if we  
16 can't resolve it.

17 JUDGE NELSON: You need to see me prior to  
18 Thursday is what you're saying?

19 MR. STEEL: We may if we can't resolve  
20 this dispute or the deposition simply needs to be kept  
21 open so we can discuss it on Thursday.

22 JUDGE NELSON: You can deal with me

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1 between 9 and 9:30 or I'm actually here at 8 a.m. on  
2 any of those three hearing days, but the hearing is  
3 committed to the Mojave Pipeline Company at 9:30 a.m.  
4 on Monday, Tuesday and Wednesday.

5 MR. STEEL: I believe we can work it out  
6 with Conrail, but I didn't want to mislead you that  
7 there might not be some need to do it before Thursday.

8 JUDGE NELSON: I have problems -- I intend  
9 to end with Mojave at 4:30 on Monday and again on  
10 Wednesday and I don't have any flexibility that latter  
11 part of the day.

12 On Tuesday, depending on how long Mojave  
13 goes, and how long you want to sit here, I can fit you  
14 in late in that day, 5 o'clock, 5:30.

15 MR. STEEL: I can get it done early in the  
16 morning within an hour if we did 8:30. It's narrow  
17 enough. I am very hopeful we can work it out. It  
18 depends on whether the documents exist. If they don't  
19 exist, there's no problem.

20 JUDGE NELSON: The best solutions are the  
21 ones you come up with, not the ones I have to create.  
22 You know the documents and what the real problems are.

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1 MR. HUT: We'll do our best. I would just  
2 point out that the deposition is provisional and is  
3 scheduled to go to Thursday. If we have to interrupt  
4 more than hour on that day that would be something we  
5 could easily do.

6 JUDGE NELSON: All right, let's take the  
7 next thing on the agenda here.

8 MR. LIVINGSTON: Your Honor, there's an  
9 item at the bottom of the page 5 in the letter which  
10 is next and we can pencil out. We don't need to  
11 resolve that today.

12 The next item is on page 6 which is a  
13 fairly --

14 JUDGE NELSON: Finances.

15 MR. LIVINGSTON: Right, a fairly narrow  
16 issues which is simply whether, we know the membership  
17 of the WSC and also of the CCRT and the question is  
18 simply, the question of finances. Provide information  
19 if there's someone else who is contributing funds.

20 JUDGE NELSON: What do we have, Mr.  
21 McBride, on financing? We have NEACP, membership  
22 lists.

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1 MR. McBRIDE: Buckley v. Valeo.

2 JUDGE NELSON: What is that?

3 MR. McBRIDE: The expenditure of money  
4 constitutes protected speech and we have disclosed our  
5 membership in response to their allegations in their  
6 March 5th letter that we might be a railroad front  
7 organization and I represented to Your Honor that on  
8 March 6th that wasn't true. I was not aware that  
9 prior to my --

10 JUDGE NELSON: With the one correction.

11 MR. McBRIDE: With the one correction  
12 about the Utah railway.

13 Why doesn't that take care of it as far as  
14 any claim that they're a front for railroads?

15 MR. LIVINGSTON: Because they may be  
16 receiving support from others. It's still a question  
17 whether the Commission and applicants are entitled to  
18 know who is supporting these associations.

19 JUDGE NELSON: Oh, I see. You get some  
20 straw, say they hired my mother-in-law who would love  
21 t have some extra money and they'd say "Mrs. Katz,  
22 here's \$1 million. We put it through your bank

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1 account. You go give it to these shippers. Don't  
2 tell them we're really the Boston & Maine Railroad or  
3 whoever it is, Conrail." Is there some straw like  
4 that?

5 MR. McBRIDE: My client is soliciting  
6 money on a daily basis, but I don't know that he's  
7 received a nickel from anybody other than a member.  
8 I don't believe he has.

9 MR. LIVINGSTON: If the members are the  
10 ones who are contributing, he ought to be able to say  
11 that.

12 MR. McBRIDE: That's what I believe the  
13 case to be.

14 JUDGE NELSON: That is the representation.

15 MR. McBRIDE: That is what I believe it to  
16 be.

17 MR. LIVINGSTON: The interrogatory  
18 question asked and it's quoted on page 6, I asked  
19 about information about offers to provide funds to  
20 help finance opposition and Mr. McBride is saying that  
21 his group is entirely self-financed by its members and  
22 not by anybody else and he doesn't have any

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1 information about offers made by other parties to  
2 support opposition. He doesn't have anything further  
3 to report and there's nothing to deal with him on  
4 that.

5 MR. McBRIDE: But we may have the  
6 continuing obligation on discovery. I represent of  
7 course, Your Honor, that I have a continuing  
8 obligation and there are people who are considering  
9 joining the group, supporting the group who may wish  
10 to remain nameless.

11 JUDGE NELSON: You've already told him  
12 more than he asked?

13 MR. McBRIDE: Exactly.

14 JUDGE NELSON: Which is you're not getting  
15 money from railroads. And so far as you know, you're  
16 not getting money from anybody except your members.

17 MR. McBRIDE: Correct, but I don't want to  
18 have the continuing obligation that if my client got  
19 some money today from someone who doesn't want to  
20 become a member, we'd then have to disclose that to  
21 the applicants. It's none of their business and there  
22 are at least two or three companies who are

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1 considering doing that who are not railroads. That's  
2 my concern.

3 MR. LIVINGSTON: Your Honor, I don't want  
4 to talk about things that don't even exist yet, but if  
5 there are people who are not members who are  
6 supporting WSC or WSC has information about that, then  
7 that's what we're seeking.

8 JUDGE NELSON: Well, at the moment, they  
9 don't exist, but if they appear and they're not  
10 railroads which is the representation of Mr. McBride,  
11 well what do you care?

12 MR. LIVINGSTON: It depends on who they  
13 are. Let's say it's a shipper who is acting in its  
14 own name in this case. Take any one. There are a  
15 number of shippers who are active in their own name,  
16 not through coalitions.

17 JUDGE NELSON: What, International Paper.

18 MR. LIVINGSTON: Yes sir, Dow or  
19 Kennicott. What if one of these coalitions is in part  
20 supported by Dow so when the Commission is looking at  
21 Dow's presentation, and this coalition presentation is  
22 really one and the same.

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1           The Supreme Court recently put out a  
2           proposed rule which will require amicus parties to  
3           file papers in the Supreme Court to disclose who are  
4           their financial supporters because the Supreme Court  
5           wanted to make sure that when it gets an amicus brief  
6           by the association of such and such, that it's not  
7           really just a front for the appellant or the appellee,  
8           one of the actual parties in the case that's financing  
9           some amicus operation.

10           It seems to me that the Commission here is  
11           entitled to know where is the financing coming and  
12           we're entitled to ask these parties and it's not just  
13           WSC, but others whether they know of situations where  
14           there's financing of an opposition --

15           JUDGE NELSON: Constitutionally, you have  
16           one claim, but as a technical matter, suppose there  
17           case a time when you did get money from some non-  
18           railroad who is also a party to the case, what  
19           problems would there be?

20           MR. McBRIDE: I don't think that would be  
21           a problem because they would be a party who have taken  
22           the position, they're not concerned about it. There

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1 was one company that approached my client yesterday  
2 concerned about this merger, considered joining the  
3 coalition, considered spending some money and they  
4 haven't taken a public position and if I may remind  
5 Your Honor on page 2 of the Department of Justice's  
6 March 4th letter, the Department wrote "many  
7 individuals contacted by the Department in connection  
8 with this proceeding have expressed concern about the  
9 confidentiality of their communication with us and  
10 some have stated that they have feared retaliation for  
11 discussing their concerns about the proposed  
12 transactions." Those people have the same concern  
13 about being identified as a party in this proceeding  
14 because they depend on these people for essential  
15 transportation and they're very reluctant to oppose  
16 it.

17 JUDGE NELSON: What I see here is a  
18 dichotomy between railroads and shipper parties on the  
19 one hand and shipper nonparties on the other.

20 My thinking here is to direct reduction to  
21 the extent that you've got railroad money or shipper  
22 party money and protect insofar as you've got shipper

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1 nonparty.

2 MR. LIVINGSTON: Your Honor, could I --

3 JUDGE NELSON: Is there some other  
4 category in the world?

5 MR. LIVINGSTON: Maybe I can make a  
6 suggestion as to how to at least resolve it for today  
7 and maybe for all time in the case of Mr. McBride's  
8 client. He is representing here and I think he can  
9 confirm this and I think he said he believed it was  
10 the case, he wasn't certain, if he can confirm the  
11 financing of WSC to date has been by its members and  
12 we have a list of them, that brings us up to date.  
13 And if in the future it receives contributions from  
14 somebody who is not a member, if he would just tell us  
15 that fact that he has received contributions from a  
16 nonmember and tell us the name and then we would  
17 decide whether or not --

18 JUDGE NELSON: Then see where we go with  
19 that.

20 MR. LIVINGSTON: Right. All he needs to  
21 do at the moment is simply confirm that his statement  
22 is correct that the financing to date has been by --

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1 JUDGE NELSON: We have no money from any  
2 railroads except what I date and we have no money from  
3 anybody else except a shipper. If the day comes when  
4 we get money from somebody else, we'll tell you, we'll  
5 tell you we only got money from somebody else without  
6 prejudice to our position to protect identity, amount  
7 and so forth.

8 MR. McBRIDE: I accept the offer, but I'm  
9 not speaking for Mr. Estes --

10 JUDGE NELSON: But someone from your group  
11 --

12 MR. McBRIDE: Yes. I will make the  
13 representation that on information we have received no  
14 money from any one other than Utah Railway and the  
15 other members of Western Shippers Coalition.

16 MR. LIVINGSTON: If he can just confirm  
17 that, if he's not certain.

18 JUDGE NELSON: During the next break you  
19 can talk.

20 MR. McBRIDE: We'll talk.

21 MR. LIVINGSTON: WSC is the only party  
22 where this is ripe. It's not a ripe issue yet, I

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1 don't believe for CCRT or any of the other parties.

2 JUDGE NELSON: Mr. Estes?

3 MR. ESTES: I'm not sure what you mean by  
4 ripe.

5 MR. LIVINGSTON: I don't believe, told  
6 that you have responded to this particular  
7 interrogatory.

8 MR. ESTES: That's correct.

9 MR. LIVINGSTON: so we don't have their  
10 response and we don't have a basis for complaining  
11 about it yet. We'll have to wait and see.

12 JUDGE NELSON: May I ask a question off  
13 the record? Any objection? Off the record.

14 (Off the record.)

15 JUDGE NELSON: Mr. Estes, do you have a  
16 problem with this?

17 MR. ESTES: Well, as counsel said --

18 JUDGE NELSON: You haven't responded yet.

19 MR. ESTES: Right. Nonetheless, yes, I  
20 have a problem because Your Honor, let me just take a  
21 second to tell you about CCRT. It's a Virginia  
22 corporation. It's a nonprofit corporation under the

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1 IRS standard.

2 JUDGE NELSON: What's it's name again,  
3 please?

4 MR. ESTES: Coalition for Competitive  
5 Railroad Transportation. It's chartered under the  
6 laws of Virginia. Its purpose is to advance the  
7 railroad shipper interests of its members.

8 Now Your Honor, that's the reason why  
9 we're participating in this proceeding. Requesting  
10 where the financing backing of CCRT comes from seems  
11 to me to be both unfair and unjust --

12 JUDGE NELSON: Is CCRT an on-going  
13 organization that has other roles and functions or was  
14 it created for this case?

15 MR. ESTES: It's primarily in this case  
16 now. That's correct, Your Honor. Right now that's  
17 what we're concentrating on.

18 However, in many respects if you step back  
19 for a second, as a nonprofit corporation we have a  
20 Board of Directors or a Steering Committee, as they  
21 call it. We have members. Those members pay dues.  
22 A for profit corporation has a Board of Directors and

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1 shareholders and a corporate purpose.

2 Now if we're to draw a distinction between  
3 nonprofit corporations and for profit corporations it  
4 seems to me that we're tipping the scales of justice  
5 just a little bit and we ought to be even handed in  
6 this. I would not for a minute go out and ask the  
7 applicants which of their shareholders are in favor of  
8 their position or how many shares do their  
9 shareholders have. That seems to me is totally  
10 irrelevant just as it's wrong, it seems to me, to ask  
11 CCRT members how much are your dues, how often do you  
12 pay dues and how much have you paid.

13 Are we saying that because we have paid so  
14 much in dues there should be given more weight or  
15 less? Also, Your Honor, it tends to embarrass some of  
16 these members. Some have not paid, some have paid.  
17 I don't want to get into that position. I don't think  
18 it's relevant and I think it's not factual and I think  
19 what's relevant is the facts. I think what's relevant  
20 is the submission -- those submissions, those  
21 statements stand on their own.

22 JUDGE NELSON: What is the position of the

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