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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

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4 BELLINGHAM COLD STORAGE) Docket No. UE-001014
COMPANY and) Volume III
5 GEORGIA-PACIFIC WEST, INC.,) Pages 132 - 238
Complainants,)
6 v.)
PUGET SOUND ENERGY,)
7 Respondent)

)

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16 The parties were present as
17 follows:

18 BELLINGHAM COLD STORAGE COMPANY,
19 by John A. Cameron, Attorney at Law, Davis, Wright,
Tremaine, 1300 S.W. Fifth Avenue, Suite 2300,
Portland, Oregon 97201.

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GEORGIA-PACIFIC WEST, INC., by
21 John Wiley Gould, Attorney at Law, Land, Powell,
Spears, Lubersky, 601 S.W. Second Avenue, Suite 2100,
22 Portland, Oregon 97204-3158.

23

24 Barbara L. Nelson, CSR
25 Court Reporter

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PUGET SOUND ENERGY, by Markham A.

2 Quehrn, Attorney at Law, Perkins Coie, One Bellevue
3 Center, 411 108th Avenue, N.E., Suite 1800, Bellevue,
4 Washington 98004-5584, and Stan Berman, Attorney at
5 Law, Heller Ehrman, 701 Fifth Avenue, Suite 6100,
6 Seattle, Washington 98104-7098.

7

8 SCHEDULE 48 CUSTOMERS, by Melinda
9 Davison, Attorney at Law, 1300 S.W. Fifth Avenue,
10 Portland, Oregon, 97201.

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12 THE COMMISSION, by Robert
13 Cedarbaum, Assistant Attorney General, 1400 Evergreen
14 Park Drive, S.W., P.O. Box 40128, Olympia, Washington
15 98504-0128.

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17 PUBLIC COUNSEL, by Simon ffitch,
18 Assistant Attorney General, 900 Fourth Avenue, Suite
19 2000, Seattle, Washington 98164.

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1 CHAIRWOMAN SHOWALTER: Good afternoon.
2 We're here on Cause Number UE-001014, and we're here
3 to hear a motion for relief on the part of the
4 complainants, which means that we're here to hear
5 their motion as to whether they are entitled to
6 relief without further evidentiary hearings or do we
7 need to have further evidentiary hearings in order to
8 resolve the disputes here.

9 I want to let any interested parties,
10 either on the bridge line or in the audience, know
11 that this is a public hearing, but it's a
12 quasi-judicial hearing. It is more like a court
13 hearing. It is not like a city council hearing,
14 where various people are entitled to speak.

15 And in this particular hearing, we've
16 received briefs and other information, which we have
17 read, and primarily, we will be using this hearing
18 for an opportunity for the bench to ask questions of
19 legal counsel.

20 And because it's a quasi-judicial hearing,
21 we have the assistance of our Administrative Law
22 Judge, Bob Wallis, and I'm going to turn this matter
23 over to him, because he will be in charge of the
24 procedures.

25 JUDGE WALLIS: Thank you, Chairwoman

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1 Showalter. I would note for the record that this is
2 oral argument in the matter of the emergency motion
3 filed by the Bellingham Cold Storage Company and the
4 Georgia-Pacific West, Inc. versus Puget Sound Energy,
5 in conjunction with Docket UE-001014. The argument
6 is being held before the Commissioners and me, Bob
7 Wallis, in Olympia, Washington, on July 28th of the
8 year 2000.

9 With that, I'm going to turn the matter
10 back to the Commissioners to pose the questions that
11 they have for parties and to allow the parties to
12 respond. Chairwoman Showalter.

13 CHAIRWOMAN SHOWALTER: I'll begin. The
14 issues have been joined in the briefs, and I think
15 I'd like to concentrate first on Bellingham Cold
16 Storage and Georgia-Pacific's responses, if any, to
17 Puget's response that was filed. And I don't know,
18 Mr. Cameron, Mr. Gould, which of you would like to
19 entertain these questions first, and the other might
20 want to chime in.

21 MR. CAMERON: I'd be happy to start.

22 CHAIRWOMAN SHOWALTER: Okay. First of all,
23 do you agree with the standard that Puget has laid
24 out, I think it's on page five of their brief, that
25 in order to receive relief on an emergency basis, you

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1 need to demonstrate that there's no genuine issue of
2 material fact, and that, as a matter of law, you're
3 entitled to relief. Is that the standard that we all
4 think we're operating under here?

5 JUDGE WALLIS: If you'll excuse me here,
6 I'm going to ask all counsel who are speaking to
7 bring the microphone very close to your mouth. We
8 want to be very conscious that we do have people
9 listening in on the bridge line and there are people
10 in the back of the room who sometimes have difficulty
11 hearing unless we speak right into the microphones.
12 And for the benefit of people on the bridge line, if
13 you would state your name before you state your
14 comments, that would be very helpful.

15 MR. CAMERON: Would you like to go around
16 and ask for appearances before we commence or --

17 JUDGE WALLIS: That would be appropriate.
18 Let's begin with the Movants, and I'd like you to
19 state your name and the name of the party that you're
20 representing only.

21 MR. CAMERON: Very well. My name is John
22 Cameron, with the firm of Davis, Wright, Tremaine,
23 here representing Bellingham Cold Storage Company.

24 MR. GOULD: John Gould, for Georgia-Pacific
25 West, Inc.

1 JUDGE WALLIS: For the Respondent.

2 MR. QUEHRN: My name is Mark Quehrn. I'm
3 here on behalf of Puget Sound Energy, and I will also
4 be joined by Mr. Stan Berman, who's here to address
5 some issues on behalf of Puget Sound Energy.

6 JUDGE WALLIS: Would you spell his last
7 name for us, please?

8 MR. QUEHRN: I can try. I believe it's
9 B-e-r-m-a-n.

10 JUDGE WALLIS: Very well. For Commission
11 Staff?

12 MR. CEDARBAUM: Robert Cedarbaum, Assistant
13 Attorney General.

14 JUDGE WALLIS: Public Counsel.

15 MR. FFITCH: Simon ffitch, Assistant
16 Attorney General.

17 JUDGE WALLIS: And for intervenors. And I
18 am really serious about asking that you grab a
19 microphone and speak right into it. Otherwise,
20 people just can't hear what you're saying.

21 MS. DAVISON: My name is Melinda Davison,
22 with the law firm of Davis and VanCleve, and I'm here
23 on behalf of what we're calling the Schedule 48
24 customers, and that list is Air Liquide, Air
25 Products, the Boeing Company, Equilon Enterprises and

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1 Tesoro Northwest Company.

2 JUDGE WALLIS: Let me ask if there are any
3 other persons present in the room who are appearing
4 in a representative capacity? There are none.

5 Now, with all that, Mr. Cameron, do you
6 have the Chairwoman's question in mind?

7 MR. CAMERON: I believe I recall it, Your
8 Honor. And I believe the Chairwoman paraphrased the
9 standard that applies in her opening comments, and
10 that is whether complainants were entitled to relief
11 without further evidentiary hearings.

12 I want to begin by stating what's not at
13 issue today, because last week at the prehearing, we
14 went through a number of different issues, only one
15 of which is germane today. We are not here to
16 discuss problems with West Coast energy markets, nor
17 with the alleged problems with the Mid-Columbia
18 Index. We're not here to change the pricing formula
19 whereby non-firm energy is priced under the contract;
20 neither are we here to talk about transmission
21 service issues that arise under the contract.

22 Instead, we are here today only to ask for
23 implementation of a single existing provision in each
24 of our power -- our special contracts. And that is
25 the provision entitled Optional Price Stability on

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1 page six of each of those contracts. It refers to
2 optional price stability services, which will be
3 customized to the customer's needs, services
4 including guarantee on average commodity price, price
5 caps, and collars on non-firm prices.

6 That is a provision that was included in
7 the contract. It has yet to be implemented. We have
8 attempted to reach closure through negotiations with
9 --

10 CHAIRWOMAN SHOWALTER: Mr. Cameron, can I
11 stop you? I really do want to concentrate on some of
12 my questions. We have read the briefs.

13 MR. CAMERON: Okay.

14 CHAIRWOMAN SHOWALTER: I would like to ask
15 some questions about whether there are material facts
16 or not?

17 MR. CAMERON: Can I answer? I will answer
18 that question immediately. The issue is our
19 entitlement to optional price stability, as proposed
20 by us, on reaching impasse with the company. And the
21 standards for summary judgment are no material issues
22 -- no material facts at issue and right, legally, to
23 the remedy. We believe that there are no material
24 issues and -- material facts at issue, and we have a
25 legal entitlement to a provision already provided for

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1 by contract.

2 MR. GOULD: I agree with your expression of
3 the standard.

4 COMMISSIONER HEMSTAD: Well, in your
5 answer, you're asserting a fact. And I find it
6 interesting when you say you have reached an impasse
7 with the company. How do we know that? Or how do
8 you reach that conclusion, and does the company agree
9 with that conclusion?

10 MR. CAMERON: Well, I can say factually, we
11 have struggled mightily to negotiate such a
12 provision. I can say that the issue that I believe
13 separates us is a legal issue, and that is the extent
14 to which implementation of optional price stability
15 creates a concern, we believe unfounded on the part
16 of Puget, that it might be viewed as akin to retail
17 wheeling, subjecting them to certain requirements as
18 imposed by the Federal Energy Regulatory Commission.

19 So that the difference of opinion is legal,
20 not factual, in our opinion.

21 CHAIRWOMAN SHOWALTER: Is it necessary, to
22 grant relief on this emergency motion, that you
23 persuade us of -- or that we accept facts, including
24 that the price that you're currently paying is too
25 high or that you can't afford to pay it? Are those

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1 facts relevant to our granting emergency relief. You
2 certainly allege them in your motion and affidavits.
3 So are we to accept, in your opinion, that the
4 current price you pay is unfair and unreasonable, for
5 purposes of this motion?

6 MR. CAMERON: No, I'm -- well, I'm not
7 asking you to address the issue of the Mid-Columbia
8 price per se. That is, the price derived pursuant to
9 operation of the Index. I believe, as a matter of
10 law, we're entitled to optional price stability
11 because we were promised it by contract.

12 CHAIRWOMAN SHOWALTER: Okay.

13 MR. CAMERON: As to the facts, I believe
14 that the facts relevant to your consideration today
15 relate to the problems being experienced financially
16 by both customers stemming from uncontroverted
17 volatility and unprecedented price rises in spot
18 energy markets.

19 CHAIRWOMAN SHOWALTER: Let me ask a
20 question on that, then. Assume for the moment that
21 the prices you are paying are reasonable. That is,
22 that -- then are you entitled to emergency relief on
23 the contract provision that you say allows or
24 requires negotiated optional stability? Are you
25 entitled, as a matter of emergency relief, to that

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1 provision now, without a hearing, if the price you're
2 paying is reasonable, or do you have to show that
3 it's not reasonable as a matter of fact?

4 MR. CAMERON: I think we're entitled to the
5 provision, because the contract provides it.

6 CHAIRWOMAN SHOWALTER: Without a hearing,
7 without further evidentiary hearings.

8 MR. CAMERON: Without hearing. We
9 demonstrate an immediate need for it, because of the
10 unprecedented volatility of prices and the facts
11 found on the affidavits related to the -- well, to
12 the established fact. It's already happened. The
13 plants have shut down, operations have been
14 curtailed, people have been put out of work, at least
15 temporarily. Those, I believe, are the only facts
16 germane to today's discussion, and those, I believe,
17 are uncontroverted.

18 So we need not get into the question of how
19 the Mid-Columbia Index operates, whether it's set by
20 a group of bishops or anyone else. It is the
21 volatility and the price increases that are troubling
22 us. If you look at optional price stability, the
23 words speak to our dilemma. Guarantee on average
24 commodity price, price caps. If we had those things,
25 which were promised to us by contract, we might be

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1 able to manage our way out of this dilemma.

2 CHAIRWOMAN SHOWALTER: What about the facts
3 alleged from Puget that they offered you those
4 things? They offered you, say, a contract for 20
5 mill power at one point, 28 mill power at another
6 point, and a cap of 70 mill for the summer at another
7 point, and they say you failed to take advantage of
8 them.

9 MR. CAMERON: Well, those discussions
10 occurred, as we understood them, in the context of
11 settlement, but be that as it may, what has been
12 offered to us in the past are financial hedge-type
13 products, which are no different than what we could
14 obtain from Enron or any other trader in the market.
15 It is our opinion that financial hedges carry a
16 premium over and above physical products.

17 Also, with regard to 20 mill or other lower
18 price products, those were tied to long-term
19 contracts, 16 years. That's not what we're talking
20 about here. That is, conditions were imposed
21 unrelated to price that we found unacceptable.

22 CHAIRWOMAN SHOWALTER: Is it relevant to
23 this emergency motion that you didn't either accept
24 their offers or go out and get other hedge documents?
25 I mean, hedge instruments?

1 MR. CAMERON: I do not believe it's
2 relevant that we didn't accept those offers, which,
3 again, we believe were settlement offers and
4 privileged, so we're not particularly pleased that
5 they were mentioned. We did go out and procure other
6 hedges, both BCS and Georgia-Pacific procured hedges
7 for the month of July at astronomical prices that
8 have skyrocketed their costs. These are not
9 sustainable financial hedges in terms of the
10 continued operations of these companies.

11 COMMISSIONER HEMSTAD: So as I understand
12 the logic of your motion here today, number one is
13 volatile prices, and you would have to assert that as
14 a fact that is not in dispute, that we are
15 experiencing unprecedented volatile pricing in your
16 markets.

17 MR. CAMERON: Yes, sir.

18 COMMISSIONER HEMSTAD: Number two, there's
19 a contract provision that deals with price
20 instability. Number three, there's an impasse in
21 implementing that contract provision with the
22 company. And number four, you are proposing a remedy
23 as to how, then, such a provision should be crafted.

24 MR. CAMERON: Yes, sir. Making as few
25 modifications to the contract as possible, simply

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1 proposing to plug in a longer term price in lieu of
2 the daily volatile spot price and continuing all
3 other charges.

4 COMMISSIONER HEMSTAD: And is it your
5 position that the customers then have the right to do
6 that crafting?

7 MR. CAMERON: Well, the provision speaks of
8 optional price stability services customized to the
9 customer's needs. And speaking for the customers, we
10 have customized them to meet our needs, but we have
11 stepped forward, we believe, to take full financial
12 responsibility for anything done pursuant to this
13 exhibit. That is, we will pay the price that's
14 pegged.

15 If we come up with an offer for a term
16 extending beyond the existing contract, we will
17 extend the special contract, as well, or we will sign
18 an irrevocable agreement to accept assignment of the
19 contract when our special contract does expire. If
20 you find any coyness regarding our assumption of full
21 responsibility for price, it is only because of our
22 sensitivity to Puget's concerns about retail wheeling
23 implications, which, again, we find unfounded.

24 COMMISSIONER HEMSTAD: The fact that Puget
25 disagrees with your crafting of that provision, is

1 what, not relevant or --

2 MR. CAMERON: I believe it boils down to an
3 issue of law. And that is whether optional price
4 stability is, in fact, a buy-sell transaction, which
5 under two FERC presidents might be considered akin to
6 transmission service by the Federal Energy Regulatory
7 Commission.

8 COMMISSIONER HEMSTAD: But I guess the
9 point I'm trying to get to is what you are proposing
10 is, well, at least not on its face, self-evident as
11 the only solution that -- assuming all the other
12 premises are acceptable, that that's the only
13 drafting solution that would be appropriate. Public
14 Counsel has suggested something different. I would
15 assume if we get to that point, the company would
16 suggest that we would be making other kinds of
17 suggestions, so how are we to deal with them. We sit
18 here and we make the decision as to what the
19 provision should look like.

20 In other words, we act as -- well, then, as
21 an arbitrator among the interests here to come up
22 with phrasing that will accomplish what you seek
23 here, and then -- and that follows as a matter of
24 law.

25 MR. CAMERON: I -- well, I am prepared to

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1 address this afternoon Mr. ffitch's points regarding
2 our proposed exhibit, which I think are explainable.

3 COMMISSIONER HEMSTAD: I wasn't really
4 getting into the details of it; I was just -- you
5 know, it doesn't axiomatically follow, does it, that
6 only your proposal is the one that would be
7 appropriate?

8 MR. CAMERON: I don't think it's -- I don't
9 think anything is axiomatic about this. Our
10 proposition is that we're not here to address or
11 fight over Mid-Columbia Index pricing of energy.
12 Instead, we are trying, on behalf of these customers,
13 to minimize our daily exposure to it by substituting
14 prices relating to longer term, stable supplies.

15 My understanding is that the company
16 opposes that notion not because factually it's a bad
17 idea; it is because, instead, they feel that legally
18 they cannot do so without subjecting themselves to
19 the label of retail wheeling. That, I believe, is
20 the only issue here today.

21 I would say that we have gone through this
22 exhibit and attempted to make it clear that the
23 customers are attempting to exert no authority or
24 control over Puget's resource decisions or resource
25 operation decisions. We would leave that entirely to

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1 them. They do not have to go out and acquire the
2 source of power associated with the offer. They can
3 do what they please. We're just looking for a
4 different price indicator, one tied to a more stable,
5 reasonably priced market.

6 CHAIRWOMAN SHOWALTER: I'm trying to see
7 how you square your proposal with the rest of the
8 terms of the contract. That is, the contract, the
9 default position is you pay the Mid-C Index, which
10 was non-firm and is now pegged to the firm index.
11 And the contract says, The customer -- and I'm
12 quoting. The customer bears all the risk for price
13 movements in the market price and will receive
14 non-firm energy service in absence of the election of
15 related option services.

16 And then there are some example of what
17 optional services are, which we described as the
18 hedge or the collar or the cap. They seem to be the
19 types of things that you pay an additional amount for
20 in exchange for some stability. But they don't, in
21 general, seem to contemplate the replacement of an
22 index or the replacement of the basic mechanism.

23 Now there's another part of the contract
24 that allows the two parties to mutually agree on
25 another index, which you have done, and was filed and

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1 approved here a couple weeks ago. But it seems to me
2 now what you are asking is for this election of
3 related optional -- or of optional services to be
4 something that either you can unilaterally ask for or
5 we can unilaterally impose, and isn't the question
6 whether there have been either reasonable offers or
7 good faith negotiations or if there is some point at
8 which you can demonstrate that Puget has, you know,
9 thwarted that provision or not cooperated or in some
10 way not participated in the contract, which I think
11 would be a factual matter, maybe we can -- maybe we
12 get to your question.

13 But you are here today asking for emergency
14 relief with no hearing, asking us to adopt the
15 optional service that you elect, which -- and if that
16 were the intent of the contract, it seems to me it
17 would say something quite different. It would, in
18 its terms, give you some kind of unilateral right to
19 select something else. But of course, if it did
20 that, the rest of the contract wouldn't be worth very
21 much.

22 MR. CAMERON: I don't think there's any
23 conflict between this provision and the rest of the
24 contract. It is true that the basic contract ties
25 price to the Mid-Columbia Index. When these

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1 contracts were negotiated back in 1996, wholesale
2 markets were much more immature than they are even
3 today. We struggled to come up with a pricing
4 indicator, starting with California/Oregon border,
5 then moving to Mid-C, and then there were several
6 problems with the Mid-Columbia Index.

7 Optional price stability, we wrote the --
8 as we agreed to this provision, is optional on the
9 part of the customer, and again, the language speaks
10 to being customized to the customer's needs.

11 CHAIRWOMAN SHOWALTER: Does that include
12 you determine the price, for example?

13 MR. CAMERON: No, ma'am. We do not claim
14 to determine the price. Instead, we shopped for
15 third party prices. Again, looking to the
16 competitive market, but not just that segment of the
17 market, the daily volatile spot market index. We're
18 looking for competitive longer term options. Again,
19 we believe putting the company at no risk, because we
20 agreed to pay everything associated with that
21 alternative supply.

22 Again, we are trying to customize to the
23 customer's needs. It's not our intention to exclude
24 financial hedges or derivatives. It is just our
25 opinion that physical supplies provide greater value,

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1 greater stability to the purchaser, which is us.
2 Guarantee on price, price caps, they all fit within
3 the rubric we're trying to achieve here.

4 CHAIRWOMAN SHOWALTER: I wanted to ask you
5 about --

6 MR. CAMERON: And we do apologize for
7 putting you through this today. We appreciate your
8 scheduling this on short notice, but we are very fast
9 approaching the end of July. August bodes to be even
10 worse than July. We do face critical production
11 decisions, which affect crops coming to market,
12 seafoods, and of course, 2,000 or more jobs in
13 Bellingham. That's our immediacy. That's why we are
14 before you to today and not proceeding at a more
15 leisurely pace.

16 CHAIRWOMAN SHOWALTER: I wanted to ask you
17 about some other parts. You talk about or you
18 analogize, I think, to interim rate relief and state
19 that utilities are sometimes entitled interim rate
20 relief. But in those cases, it's our practice, I
21 think our uniform practice, that interim rate relief
22 is subject to refund. That is, or subject to a
23 trueup later, which wouldn't help you any, if --
24 depending on how -- on the outcome of the case.

25 MR. CAMERON: Let me address that by saying

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1 I appreciate the concerns Mr. Cedarbaum raised. When
2 we came before you in the motion, it was our
3 intention to demonstrate as many different possible
4 statutory bases on which you could act that you might
5 choose.

6 It is our opinion, though, just to
7 recapture the first question of the session, that we
8 are moving for summary judgment on one particular
9 issue, and that is optional price stability, to the
10 exclusion of how the Mid-Columbia Index is calculated
11 or whether it's right or wrong, to the exclusion of
12 the transmission issues. So we believe that your
13 statutory authority, RCW 80.01.040, to regulate in
14 the public interest, the legislative declaration in
15 RCW 80.28.074, to ensure the customers pay only
16 reasonable charges, to permit flexible pricing for
17 electric services, we believe that that's part of the
18 public interest standard you apply under the first
19 statute.

20 We also believe that RCW 80.28.040, which
21 calls for the Commission, after a hearing, finds that
22 any practices or services are unjust, unreasonable,
23 improper, insufficient, inefficient or inadequate or
24 that a service which may reasonably be demanded is
25 not furnished, which we think certainly applies here

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1 under an existing contract provision, that you can
2 fix the same by order.

3 CHAIRWOMAN SHOWALTER: I want to get back
4 to whether there's a factual basis for us to find
5 that now. You are saying that the background of the
6 volatility and the market and whether the market is
7 broken or not is not really the issue. I think
8 you're saying it's as if -- let's say a year and a
9 half ago you came in and said we want this kind of
10 provision under our optional pricing contract and we
11 want it today, without a hearing. And we would say,
12 Well, you want it today without a hearing and without
13 an agreement, I'm going to ask you the question
14 again. Isn't it a relevant fact whether or not you
15 have negotiated or you have been operating in good
16 faith or whether this particular proposal that you
17 have is the most reasonable one or the best one.

18 Aren't these issues that are questions of
19 fact? It's separate from the issue of law, which
20 you've identified, which is can we revise or rewrite
21 or supplement the contract in this way. That's a
22 separate issue. But let's say we have that
23 authority. What is the basis for saying that you
24 have to have it today? Isn't it these other facts
25 that you're saying are not really relevant. It seems

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1 to me that they are, but they are, in fact, in
2 dispute.

3 MR. CAMERON: Well, I think the fact that
4 our employees lost work in July and may lose work
5 again in August is certainly a relevant fact in terms
6 of the immediacy of the need for relief.

7 But looking at the exhibit we proposed, I
8 want to tell you that what we have established is a
9 protocol for relief. It is not self-implementing.
10 It establishes a procedure whereby the customer and
11 the company cooperate to seek valid and complete
12 third party offers for various terms, shopping for
13 the best price. It then calls for a procedure
14 whereby Puget itself decides what it will do with
15 that offer, whether it will procure power or provide
16 our needs from some other source, electing to use
17 only the price, terms and conditions to determine our
18 obligations under the special contract.

19 Now, if the offer extends for a term beyond
20 the current term of the special contract, we will be
21 back here with an amendment to the contract and you
22 will review that and determine the justness and
23 reasonableness of what's being proposed at the time.
24 What we're trying to do today is only get a process
25 in place now whereby we can work our way out of the

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1 current dilemma and avoid any further perturbations
2 in market prices that could drive us to the wall, as
3 we are now.

4 Now, don't view this as away of walking
5 away and doing secret deals or anything else that
6 will be outside your purview. It's not intended to
7 be a confidential provision of the contract, and the
8 process, as I said, will lead to many opportunities
9 for us to be back explaining what we have done.

10 CHAIRWOMAN SHOWALTER: Mr. Gould, you have
11 other comments to add?

12 MR. GOULD: Yes, John Gould. I didn't want
13 to interrupt. I agree with the standard announced on
14 summary judgment. The two salient facts under the
15 contract provision that we are seeking to implement
16 are whether there is a customer need. The answer to
17 that is yes. It's shown in Bench Request Nine and
18 also our affidavits from Cunningham and Thomas. The
19 need is uncontested. It could have been
20 controverted by a counter-affidavit, and it was not.

21 CHAIRWOMAN SHOWALTER: Well, does that mean
22 any customer who is in bad financial straits is
23 therefore entitled to relief? We have many, many
24 customers, residential, business, and industrial, who
25 pay higher rates than you've been paying, who are in

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1 financial difficulties. But that would be a fairly
2 low threshold, if that were the --

3 MR. GOULD: Do they have the similar
4 provision that we have? Do that have the entitlement
5 to a guarantee on an average commodity price? Are
6 they seeking to implement the same contractual
7 provision we are?

8 CHAIRWOMAN SHOWALTER: Well, I'm sure we
9 have a range of customers, but some took the risk of
10 the market and some --

11 MR. GOULD: No, my answer, Madame
12 Chairwoman, in the first instance, is do they have
13 the same contractual provision that we have, and
14 therefore, the right to assert it. You see, that's
15 the contractual language that I'm quoting to you,
16 that we have a customer need.

17 CHAIRWOMAN SHOWALTER: Well, okay.

18 MR. GOULD: Second, I think there is more.
19 I think it's implicit, at least, in that need that
20 there be something about the circumstance that
21 triggers the need. No, not just an ache in your
22 pocketbook.

23 CHAIRWOMAN SHOWALTER: Okay.

24 MR. GOULD: And that uncontroverted fact, I
25 would assert to you, is the volatility of the current

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1 market. What is controverted is what causes it. And
2 we're not dealing with that today.

3 CHAIRWOMAN SHOWALTER: So does that mean
4 that for customers who have elected to bear the risk
5 of the market, which is now volatile --

6 MR. GOULD: Right.

7 CHAIRWOMAN SHOWALTER: -- and who have a
8 need --

9 MR. GOULD: Yes.

10 CHAIRWOMAN SHOWALTER: -- that that group
11 of customers has a right, depending on what is in
12 their contract, to relief?

13 MR. GOULD: Yes, under their contractual
14 provision, yes. What does the contractual provision
15 say? In our case, it says -- this is Section I of
16 the schedule RFP -- RTP. It's an attachment to the
17 complaint.

18 CHAIRWOMAN SHOWALTER: What did you say,
19 section --

20 MR. GOULD: Section I, Roman numeral I,
21 Schedule RTP, for the power sales agreement. They're
22 the same for both Bellingham and G.P., and you have
23 the Bellingham. You have it.

24 The language, shall I quote it? Quote,
25 Optional Price Stability. Price of these optional

00158

1 price stability services will be customized to the
2 customer's needs. Those services could include
3 guarantee on an average commodity price, price caps
4 on the non-firm prices, or collars on the non-firm
5 price. What we're seeking is the guarantee on an
6 average commodity price. Now --

7 CHAIRWOMAN SHOWALTER: Actually, when I
8 asked Mr. Cameron, does the price matter, I didn't
9 mean the price that you get; I meant the price that
10 Puget charges. In other words, their --

11 MR. GOULD: Well --

12 CHAIRWOMAN SHOWALTER: Is there --

13 MR. GOULD: Your larger question, I think,
14 was -- and both you and Commissioner Hemstad asked
15 this question, why our proposal. And I'm going to
16 answer it this way. Why our proposal, because it
17 defines itself out of the circumstances. It answers
18 our need and it sets up a process by which we can
19 fulfill that need. The process is that there be a
20 quest by Puget to go out and find contracts and then
21 to propound them to us, and then we have the choice
22 of selecting it or not.

23 CHAIRWOMAN SHOWALTER: Does it change the
24 amount of money that Puget would collect absent the
25 optional service?

00159

1 MR. GOULD: Yes.

2 CHAIRWOMAN SHOWALTER: Doesn't, then, that
3 shift the risk of the market from you to them?

4 MR. GOULD: It does in the sense of the
5 contract, yes.

6 CHAIRWOMAN SHOWALTER: But doesn't the
7 contract say the customer agrees to bear all the risk
8 of the market absent the election of the price
9 stability option?

10 MR. CAMERON: I disagree. Let me go back
11 one second. You asked what about other customers,
12 and I appreciate your concerns about opening the
13 floodgates, but I would tell you, having endured,
14 along with Doug Thomas and Jim Cunningham, what's
15 happening in their industries, I would very much hope
16 that you would entertain any request made by any
17 other customer in this situation.

18 What are we requesting? We're not trying
19 to shift any dollar responsibility to Puget,
20 certainly not to other customers. We are here to
21 tell you that we're willing to pay dollar for dollar
22 the consequence of everything done under our
23 proposal. If you look at --

24 CHAIRWOMAN SHOWALTER: Compared to the
25 current contract?

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1 MR. CAMERON: I'll get to that, I'll get to
2 that. If you look at our optional pricing stability
3 exhibit, Section 1.5, and I have extra copies if you
4 don't have them handy.

5 COMMISSIONER HEMSTAD: Sorry, is that --

6 MR. CAMERON: It's an exhibit --

7 CHAIRWOMAN SHOWALTER: To their motion.

8 MR. CAMERON: Exhibit to the motion, yes,
9 sir. Thank you. Section 1.5, which is found on page
10 two of our proposed exhibit, in it you'll see a
11 formula. At bottom, I submit to you that the only
12 thing -- I apologize. I'll wait till you're there.

13 CHAIRWOMAN SHOWALTER: Okay, I'm there.

14 Are you there yet?

15 MR. CAMERON: I believe that all we are
16 attempting to do, if you look at that formula, you
17 will see, to the right of the equal sign, the word
18 nominated offer price. If you look at the special
19 contract, you'll see a reference to the Mid-Columbia
20 Index. The only thing we are attempting to do with
21 this exhibit is to substitute the nominated offer
22 price as a variable in replacement for the
23 Mid-Columbia Index.

24 Everything else in the contract remains the
25 same. Everything in that formula describes the other

00161

1 charges, markup for profit, other things imposed by
2 Puget. We would not propose to change any of that at
3 all.

4 CHAIRWOMAN SHOWALTER: Can we stop on that
5 point, then. If you're proposing -- it seems kind of
6 like a heads, I win, tails, you lose. You get the
7 Mid-C price if that's good for you, but you can elect
8 or nominate another price if that's better for you.

9 MR. CAMERON: Not on a daily basis. If we
10 elect -- let's say we shop for an offer that's a
11 three-year fixed price for a block of power. We're
12 on the hook for three years. Even though our special
13 contract expires next May, we would re-up, we would
14 extend that contract to make it coterminous with the
15 offer, so we will pay dime for dime throughout the
16 term of that offer.

17 CHAIRWOMAN SHOWALTER: Okay. Well, let me
18 compare those two. Let's say you want the nominated
19 offer price for, let's say a year, whereas it would
20 have been the Mid-C Index. And let's say it turns
21 out it's better for you to do the nominated price, so
22 you do it. Otherwise, you wouldn't do it.

23 MR. CAMERON: Yes, ma'am.

24 CHAIRWOMAN SHOWALTER: Doesn't that, by
25 definition, mean that Puget's going to get less?

00162

1 That is, they will be minus the Delta between the
2 Mid-C index and your nominated price?

3 MR. CAMERON: We are not intending to put
4 them at risk.

5 CHAIRWOMAN SHOWALTER: Well, no, my
6 question was, if you compare the two situations, by
7 the very amount that the nominated price is better
8 for you, isn't it true that, by that very amount,
9 it's less for Puget?

10 MR. CAMERON: I don't believe so, for two
11 reasons. One, right now they are shopping the
12 short-term market for us. They are not planning for
13 the loads of any other non-core customers, our two
14 clients, plus schedule 48, plus ARCO, so they go to
15 the market and they buy on a daily basis. We're
16 saying go to the market on a longer term basis or not
17 at your option, and we will pay, dollar for dollar,
18 the cost of the alternative supply.

19 CHAIRWOMAN SHOWALTER: That would be if
20 they're short on power. What if they're long? What
21 if they have power of their own?

22 MR. CAMERON: If they are -- well, this all
23 begins when we solicit an offer from a third party.

24 CHAIRWOMAN SHOWALTER: Maybe as a
25 theoretical matter, in that situation, if they have

00163

1 their own power to give you at the Mid-C price.
2 MR. CAMERON: I'm trying to get -- I
3 appreciate that. At the time we get an offer, Puget
4 decides for itself whether they've got a contract
5 with a third party offer or supply our needs from any
6 other resource available to it or some other
7 contracts, for all we care. All we're taking is the
8 offering price. They have the absolute certainty of
9 knowing that there's an offer out there made by a
10 legitimate third party, a complete offer that they
11 can accept and completely cover their risk. But if
12 they're long on supply or they want to play the
13 market, they are completely at their -- it is
14 completely within their discretion to do that. We
15 are not trying to constrain their source of supply.
16 We are not trying to tag our electrons to any third
17 party offer. We're just trying to pick a better,
18 more stable price determinant. So we don't think
19 they'll ever be at risk. If they fear risk, they can
20 accept the third party offer. If they don't see a
21 risk because they view themselves as long on
22 resources, then they're free to serve it with their
23 own resources and earn that same markup and recover
24 their transmission and other charges per contract
25 formula.

00164

1 What I would tell you that is that they
2 sell Centralia off, as they attempt to sell Colstrip,
3 as the Mid-Columbia hydro contracts expire, they are
4 moving into a situation where they are short on
5 supply. Our concern, at bottom, is determining our
6 own price and supply future not tied to that daily
7 index. That's all we're trying to cure. Again, we
8 will never find a block of power that exactly meets
9 our needs, kilowatt-hour per kilowatt-hour, minute by
10 minute. We're looking for blocks. Around the edges,
11 maybe off-peak at night. We'll still be buying that
12 non-firm energy pegged to the Mid-Columbia price, but
13 a lot less of it with a lot less volatility for our
14 clients than we face right now, where every last
15 kilowatt hour is pegged to that price. That's all
16 we're trying to do.

17 CHAIRWOMAN SHOWALTER: Just one more
18 question before we let Puget have a word here, and
19 that is the question of non-firm power. Reading what
20 -- I'm looking at the wrong person. Bellingham Cold
21 Storage, I was thinking of, actually. Cold storage
22 seems to be an industry that's absolutely dependent
23 on reliable power. And I'm wondering how it took the
24 risk to begin with, to get non-firm power, in
25 addition to taking the risk of the market.

00165

1 MR. GOULD: John Gould. You're looking at
2 me. I think you mean that for Mr. Cameron.

3 CHAIRWOMAN SHOWALTER: I'm sorry.

4 MR. CAMERON: I think I can address that
5 this way. You're quite right. We do need dependable
6 power. We do have some ability to shift load
7 off-peak. It's not a great ability. You can see our
8 dependence on reliable power from our load factor,
9 which is 40 to 50 percent. We freeze, we process
10 when the crops come in, because if we don't, they
11 spoil.

12 Looking at this region in the past, during
13 times of peak processing, it's usually a time of
14 hydro richness, or a fair amount of it. There is
15 little risk of curtailment during the summer. This
16 current aberration is somewhat at a loss to explain,
17 because this is the time of hydro abundance, and yet
18 prices are through the roof. The real time of
19 curtailment on the Puget system is wintertime. Of
20 course, if you're running a freezer in the
21 wintertime, open the windows if the power goes off.

22 I believe that's the situation. There is
23 perceived to be low risk in summer when we are really
24 producing full out, and the risk is manageable in
25 winter, when on occasion we have those worst

00166

1 nightmare type storms that will cause interruptions
2 for a period of time. But you just keep the freezers
3 closed and they can stay cold in that winter
4 environment.

5 CHAIRWOMAN SHOWALTER: Mr. Gillis, do you
6 have questions? You're leaning forward.

7 MR. GILLIS: No, that's all right.

8 CHAIRWOMAN SHOWALTER: Let's hear from
9 Puget.

10 MR. QUEHRN: Thank you, Chair. I'd like to
11 take just a minute or two to respond to some of the
12 answers that have been provided to your questions.
13 And in so doing, I guess I would like to begin with
14 an affirmation that I think we all agree that we're
15 operating under a standard of review that requires
16 two things.

17 It requires, first of all, that there be no
18 dispute of an issue of material fact, and were that
19 standard to be satisfied, then the relief that is
20 requested is relief that would need to be required,
21 as a matter of law. That is the standard that we
22 argued in our brief and I think that is the standard
23 that we agreed upon is applicable today.

24 One of the first questions that the Chair
25 asked Mr. Gould went to the question of what is it

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1 that are the material facts that you're relying upon
2 in support of your motion.

3 And I believe, if I understood Counsel
4 correctly, he said, Well, we're not really here today
5 to talk about the index or the market. We're not
6 bringing this motion on any sort of factual
7 allegations that the index is broken or the market is
8 broken. And indeed, I think Counsel went on to say
9 this is simply a question of what we're entitled to
10 under the contract.

11 Before we turn to the contract. I would
12 actually like to move for the record that we
13 therefore strike the affidavit of Mr. McCullough that
14 was offered in support of this motion. It is purely
15 and simply and completely about the index and the
16 market, and by counsel's own admission, I believe it
17 is irrelevant to your consideration of this motion.

18 With respect to the contract -- and before
19 I go to the contract, I would make one other note. I
20 don't mean to jump immediately to the desired remedy
21 without talking about the merits. I want to go back
22 to the merits. And I think it was another one of the
23 questions that the Chairwoman asked, was on what
24 basis would we determine that the existing rate is
25 unfair, unjust, and unreasonable, and we want to get

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1 back to that.

2 But if we go back to the contract, this, I
3 think, becomes a much simpler case for us to look at
4 and consider. All of the discussion of the contract
5 that we've heard from the moving party has been
6 quotations from the definition section. And indeed,
7 if we go back to the definition section, and what was
8 read into the record by counsel for the moving party,
9 there is a provision that says optional price
10 stability. And it does say the price or prices of
11 these optional price stability services will be
12 customized.

13 If one then turns the page --

14 CHAIRWOMAN SHOWALTER: Where are you
15 reading?

16 MR. QUEHRN that is Section I.

17 CHAIRWOMAN SHOWALTER: Of the RTP schedule?

18 MR. QUEHRN: Correct. If you then turn the
19 page of the schedule and go to Section III, where
20 that definition is implemented, I would call your
21 attention to the line item under Component that says
22 optional price stability, and that's on page seven of
23 the special contracts.

24 CHAIRWOMAN SHOWALTER: Can you wait just a
25 minute, while we all find this?

1 MR. QUEHRN: Certainly.
2 CHAIRWOMAN SHOWALTER: Okay. First you
3 were reading from the definitions of --
4 MR. QUEHRN: -- of the schedule.
5 CHAIRWOMAN SHOWALTER: Optional price
6 stability. And then second, you were reading --
7 MR. QUEHRN: If you turn the page, I
8 believe it is page seven.
9 CHAIRWOMAN SHOWALTER: Okay. Does
10 everybody have that yet?
11 COMMISSIONER HEMSTAD: No.
12 CHAIRWOMAN SHOWALTER: Can you wait just a
13 minute?
14 MR. QUEHRN: Certainly.
15 CHAIRWOMAN SHOWALTER: When you find it,
16 it's page six and seven. I think we all have it now.
17 MR. QUEHRN: Okay. If you look at Section
18 III and read down where it lists every component of
19 this contract, you will see that optional price
20 stability is again called out. If you then read
21 across the column, there is a word there that talks
22 about how this is to be implemented. And that word
23 is negotiated; not unilaterally imposed.
24 CHAIRWOMAN SHOWALTER: Well, let me stop
25 you there, then, because taking your point here that

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1 this is to be negotiated, how do we determine whether
2 there has either been negotiations or been good faith
3 negotiations or what are we to do about that issue
4 factually, I guess?

5 COMMISSIONER HEMSTAD: Take a break. Where
6 is the term negotiated?

7 CHAIRWOMAN SHOWALTER: The chart, the
8 table.

9 COMMISSIONER HEMSTAD: I have it.

10 MR. QUEHRN: Thank you. The question that
11 you're asking in the context of a proceeding that's
12 to be decided on the basis of affidavits, the facts
13 you have before you in Mr. Gaines' affidavit is that
14 there has been and continues to be negotiation. We
15 have heard that fact disputed by the moving party.

16 And I'm reticent, I'm sorry, Chair, to
17 introduce anything that would look like new evidence
18 into the record today, because this isn't an
19 evidentiary hearing.

20 CHAIRWOMAN SHOWALTER: It's not.

21 MR. QUEHRN: You essentially have a
22 disputed fact before you on that issue.

23 CHAIRWOMAN SHOWALTER: Maybe this is
24 another way to get at the question. If we were to
25 deny the motion today and this proceeded to the

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1 factual hearing schedule that's already been
2 determined, would you think it would be appropriate
3 for us to hear evidence in an evidentiary hearing on
4 whether or not there had been negotiations and good
5 faith negotiations in order for us to fashion some
6 sort of remedy if there had been some sort of failure
7 on this provision?

8 MR. QUEHRN: Certainly in light of the fact
9 that the contract does provide for negotiation of
10 this provision and you, as the Commission, have
11 authority over this contract, I think the inescapable
12 conclusion is that you would have reason, in an
13 evidentiary hearing, to inquire into those types of
14 negotiations. And we could bring our witnesses in
15 and talk about it and they could bring their
16 witnesses in and talk about it.

17 CHAIRWOMAN SHOWALTER: So you're not taking
18 the position that, since it says negotiated, that's
19 sort of the end of the matter. Either you do
20 negotiate and mutually agree on something or you
21 haven't, and we don't really get to inquire. You
22 think there is some zone of appropriate inquiry on
23 our part as to whether there have been reasonable
24 negotiations?

25 MR. QUEHRN: I think certainly, in terms of

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1 what the contract was intending to provide in this
2 provision, the intention was that the parties would
3 negotiate bilaterally and not necessarily bring the
4 Commission into the middle of those types of
5 negotiations. I guess, again, in the context of a
6 proceeding where a complaint has been filed and the
7 allegation is is that something is unfair, unjust, or
8 unreasonable, I can only conclude in that context
9 that you would definitely have reason to inquire into
10 those negotiations.

11 But no, not that it's your responsibility
12 or burden to undertake or supervise those
13 negotiations in the first instance.

14 COMMISSIONER HEMSTAD: If I can pursue
15 that. It's elementary contract law that an agreement
16 to agree is not an agreement. Is it your position
17 that the optional price stability provision is not
18 that, but that it is an enforceable language?

19 MR. QUEHRN: I think the language is
20 enforceable, and I guess I would just analogize to
21 collective bargaining agreements. An agreement to
22 negotiate, I believe, is enforceable, subject to
23 provisions of good faith and fair dealings. And that
24 doesn't mean that it suggests that anyone can say,
25 this is the agreement, as is being proposed here, but

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1 it certainly does mean that the contract that was
2 approved has a provision in there where the parties
3 are obligated to negotiate in good faith.

4 COMMISSIONER HEMSTAD: But when the
5 customers then elect to use or to pursue at least the
6 optional pricing stability provision, that triggers a
7 duty to negotiate on the part -- in good faith on the
8 part of both parties. And would you concede that if
9 there -- if there is, in fact, an impasse, that then
10 this Commission would have the legal capacity to
11 impose a solution?

12 MR. QUEHRN: If the solution that you're
13 referring to is that the parties be directed to
14 negotiate in good faith, I think that's, again, a
15 fair reading of the contract and we would meet our
16 obligation, as we've tried to meet our obligation.

17 COMMISSIONER HEMSTAD: Well, I'm trying to
18 get to the point.

19 MR. QUEHRN: I'm sorry, maybe I don't
20 understand the question.

21 COMMISSIONER HEMSTAD: If the parties
22 proceed to negotiate or have been negotiating under
23 that provision in good faith and cannot agree, then
24 what?

25 MR. QUEHRN: If the parties proceed to

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1 negotiation and cannot agree, then they have reached
2 a situation where I don't think they provided a
3 remedy in the contract.

4 COMMISSIONER HEMSTAD: And that's the point
5 I'm trying to get to. You're at impasse, cannot
6 agree. What -- is there no remedy?

7 MR. QUEHRN: I think the remedy in that
8 instance would then fall back on whether operating
9 under the existing contract is something that is
10 unfair, unjust, and unreasonable, which is an issue
11 that is a factual issue that hasn't been established
12 in this proceeding.

13 COMMISSIONER HEMSTAD: So you could go
14 backwards or go back and look again at the original
15 agreement, and if it's fair, just and reasonable, it
16 will be enforced. If it is not, then I guess would
17 you agree that this Commission would then have the
18 authority to write a provision for the parties?

19 MR. QUEHRN: Certainly not without first
20 hearing evidence and making a determination that the
21 existing rate is unfair, unjust, and unreasonable.

22 COMMISSIONER HEMSTAD: Yes, that would be
23 the factual issue.

24 MR. QUEHRN: And the scope of your remedial
25 powers, I guess, is certainly outside of what we

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1 briefed for purposes of this hearing today.

2 I think where I left off, as we were
3 talking about what the contract actually says with
4 respect to how it's implemented, rather than just
5 reading the definition, the next point I would like
6 to make, to be very clear, I think, as we established
7 in our answer as reflected in the affidavit of Mr.
8 Gaines that we filed in support of our answer, we do
9 not agree that this -- that the proposed exhibit, the
10 proposed relief that the moving party is suggesting
11 you grant implements this contract. It changes it
12 radically.

13 The contract we signed is not a buy-sell
14 agreement that essentially functions as an agreement
15 to provide retail wheeling. In our answer, we went
16 through section-by-section and pointed out some of
17 those variances, and I won't bother to go through
18 them now, unless you would like me to. But to make
19 it very clear, that is an issue, a material issue of
20 fact that is in dispute. This is not an exhibit to
21 the contract. It was not an exhibit to the contract.
22 Never agreed to it as an exhibit to the contract. It
23 bears no resemblance to other times when we have
24 implemented optional price stability provisions and
25 other similar arrangements.

1 It is purely and simply, as counsel for the
2 moving party suggested, their proposal. Nothing
3 more, nothing less. And it is certainly not a
4 proposal that we agree to and it is not a proposal,
5 again, that we believe can be implemented without
6 opening some serious public policy questions with
7 respect to retail wheeling, as well as violating our
8 existing contract and impairing our rights under the
9 contract and also raising some of the issues that
10 have been noted by Public Counsel and Staff as to
11 other ramifications.

12 CHAIRWOMAN SHOWALTER: Are there types of
13 options that you think would not contravene those
14 element that you just mentioned?

15 MR. QUEHRN: I think the -- again, the
16 affidavit of Mr. Gaines gave an example of the type
17 of mechanism that we think could be used to implement
18 price stability relative to this contract. Again,
19 I'm somewhat reticent to speculate beyond that. A,
20 I'm not the expert; and B, I'm trying to be very
21 mindful of the record that we have before us, which
22 is the affidavits that have been submitted. So yes,
23 I would point to that as certainly an alternative.

24 Another issue that I would like to address,
25 certainly with appropriate sensitivity, we have heard

00177

1 and we have read about the financial consequences
2 that moving parties are facing because of some
3 decisions that they've made. And certainly, my
4 client is sensitive to those consequences and we
5 certainly do not mean to suggest that they're not
6 serious consequences.

7 They are consequences, however, if you go
8 back to the original contract which says they bear
9 market risk, consequences that they assumed in the
10 beginning and consequences over the course of
11 dealings of this contract, that they had the
12 opportunity to hedge against and chose not to do so.

13 Moreover, what we are talking about in
14 terms of what I understand to be the only basis, the
15 only factual basis for concluding that our rate is
16 unjust, unfair and unreasonable is prospectively
17 there may be plant closures and job losses. I would
18 suggest that there are other options available to
19 prevent those losses. They could hedge again, as
20 they did in June. They could pursue optional price
21 stability, as we've proposed.

22 And it's simply not the case, as again, as
23 the Chairwoman has pointed out, that simply because
24 there are financial consequences, unfortunate as they
25 may be, of a given rate, that that necessarily means

00178

1 that that rate is unfair, unjust or unreasonable,
2 particularly when it's a rate that they agreed to and
3 agreed to bear those risks.

4 I think at this point, what I would like to
5 do, rather than slide into my full presentation,
6 unless that is what is requested by the Commission,
7 is just end again on these two fundamental responses
8 to the answer to the questions that were provided by
9 the moving party.

10 We do not even get to the remedy section
11 unless there is facts and evidence that show that
12 this existing rate is unfair, unjust and
13 unreasonable. And I have yet to hear any evidence in
14 support of that.

15 Secondly, to the extent we reach the
16 remedial portion of the question and understand it in
17 a way as I believe the moving parties narrowed its
18 motion, the issue is whether or not this exhibit or
19 this proposal is mandated by the contract. It is
20 not. The contract clearly calls for negotiation.
21 This has not been negotiated and it is fundamentally
22 different from the contract we entered into. Thank
23 you.

24 MR. GOULD: Madame Chairwoman, John Gould,
25 to that point. We are not trying to try the matter

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1 of whether or not the index is unjust or unreasonable
2 today. We are trying only to implement a contractual
3 right. We have worked through that and shown you
4 that passage. The question is whether our proposal,
5 in the form of an implementation proposal, is one
6 that you should summarily adopt today. And the
7 answer is yes, and here's why.

8 That proposal arose out of the
9 circumstances of impasse on the negotiated
10 implementation of it. How do we know that? We know
11 that from the affidavit of Bill Gaines, page -- point
12 four.

13 CHAIRWOMAN SHOWALTER: Didn't they have
14 another proposal? In other words, Puget also
15 submitted the swap idea.

16 COMMISSIONER HEMSTAD: But this is a
17 different issue, the question of is there an impasse.

18 MR. GOULD: Is there an impasse, yes. The
19 answer is yes, there is an impasse, and it's proved
20 by that affidavit, by that Gaines affidavit, point
21 four on page two and three. He also, at the end of
22 his affidavit, and I'd ask you to look at that a
23 moment, if you'd like. Page two. I said page three.
24 Page two and three.

25 CHAIRWOMAN SHOWALTER: Why don't you wait a

00180

1 minute till we all get it.

2 MR. GOULD: Yes.

3 CHAIRWOMAN SHOWALTER: Page two of Bill
4 Gaines?

5 MR. GOULD: Page two of the Gaines
6 affidavit, Point Four starts out, I'm aware of the
7 financial swap transactions, blah, blah, blah, and
8 then little one, little two, little three, little
9 four, which are attempts to tender the complainants
10 some power under that provision, in effect. Now, I
11 would tell you that the very fact that those were not
12 accepted shows the impasse.

13 CHAIRWOMAN SHOWALTER: Well, I'm not sure
14 it does, because negotiations go on before impasses
15 are reached.

16 MR. GOULD: They weren't executed. They
17 weren't executed. They're left out there hanging.
18 We have no resolution of the issue, is all I'm
19 saying.

20 CHAIRWOMAN SHOWALTER: That may be.

21 MR. GOULD: That's the impasse.

22 CHAIRWOMAN SHOWALTER: I don't know if
23 nonresolution --

24 MR. GOULD: For two reasons, I'm not going
25 to speak to the facts of that. One, I'm not

00181

1 qualified -- although I know the facts, I'm not
2 qualified as a witness to speak to them. You haven't
3 asked for that. Second, there was a matter of
4 confidentiality. But I will say this, that that does
5 show that there were negotiations, but they have not
6 been consummated. You can assume that by the fact
7 nothing's done on it.

8 Second, on page nine, nine of that
9 affidavit, his very last sentence, Bill Gaines' last
10 sentence says, The proposal -- that's the
11 Complainants' proposal -- does not comport with the
12 financial swap transaction discussed above. And that
13 instrument is Attachment A; right? Now, I'm not
14 testifying, when I ask you to turn to Attachment A
15 and look at it for a minute, as an example of what
16 Puget, the vice president in Puget, Bill Gaines,
17 apparently believes is a proper response to this
18 contractual right of ours.

19 Look at page two, point number nine at the
20 top, the thing called floating point determinant for
21 settlement periods. The floating point determinant
22 is the index, the Mid-C Index.

23 Now, I will argue and tell you what it is
24 that means. It means that what Puget is offering is
25 a swap contract as a hedge under the optional price

00182

1 stability, and what that amounts to is a tieback to
2 the index, which we have told you, in uncontroverted
3 affidavit, is volatile, extremely volatile.

4 CHAIRWOMAN SHOWALTER: Could I stop you on
5 that volatility question of fact?

6 MR. GOULD: Yes, yes.

7 CHAIRWOMAN SHOWALTER: Or issue of fact.
8 Here is an analogy. I invest my money in treasury
9 bonds and I know how much I invested and I know what
10 I'm going to get back at the end. You take the same
11 amount of money and you invest it in a dot-com, and
12 it goes way up, you're doing great, and it goes way
13 down and not doing so well. But as of, say, March
14 2000, which is the evidence we have in the record
15 here, you're still ahead of the game. You're still
16 doing better than the tortoise over here.

17 My point is does volatility alone tell us
18 anything?

19 MR. GOULD: Well --

20 CHAIRWOMAN SHOWALTER: Now, by the way, we
21 have it only till March, because Georgia Pacific
22 didn't respond to our bench request number nine,
23 which would have given us, I think, information
24 through July. But from what we have, you're several
25 million dollars to the better for having, quote, done

00183

1 the dot-com.
2 MR. GOULD: I have a copy.
3 CHAIRWOMAN SHOWALTER: Maybe I didn't get
4 it.
5 MR. GOULD: I personally served it.
6 CHAIRWOMAN SHOWALTER: Okay. Maybe I
7 didn't get it.
8 MR. GOULD: Let me just give you a copy of
9 it.
10 CHAIRWOMAN SHOWALTER: All right.
11 MR. QUEHRN: Could I have a copy, too,
12 please. I haven't seen it.
13 MR. GOULD: Well, I don't have any copies.
14 CHAIRWOMAN SHOWALTER: Maybe we could have
15 somebody come and make copies. I don't believe --
16 MR. CAMERON: May I ask if you received the
17 one from --
18 CHAIRWOMAN SHOWALTER: Yes, we did. I
19 think my point on the factual question is what does
20 volatility alone tell us. The stock market is twice
21 as volatile today as it was two years ago.
22 MR. GOULD: No, I understand the question .
23 CHAIRWOMAN SHOWALTER: Markets are
24 volatile. So what do we do with that fact?
25 MR. GOULD: On affidavit by Mr. Cunningham

00184

1 and Mr. Thomas, it tells you that they have an
2 operational system out of control. Now, when will it
3 resolve? Don't know. What's the price tomorrow?
4 Don't know. What's the price in two months? Don't
5 know.

6 CHAIRWOMAN SHOWALTER: But we do know that
7 plenty of people in the country on the West Coast are
8 paying these prices. I'm not saying they're happy
9 about it, but there is a market out there for --
10 people are paying them.

11 MR. GOULD: They may well be until excused,
12 certainly, that's right. But on the other hand,
13 schedule 48s are here watching these motions to find
14 out whether they need some relief, and other people
15 certainly are affected. You know from newspaper
16 accounts and whatnot that people are studying the
17 problem.

18 The problem, in a nutshell, and this,
19 again, I would assert is uncontroverted. What is
20 controverted are the causes. What is uncontroverted
21 is the unprecedented volatility. And when it will
22 end, no one knows. Now, because of that, we simply
23 must do something, these mill managers believe, these
24 business managers believe, to stop the bleeding.

25 CHAIRWOMAN SHOWALTER: Okay. But does

00185

1 paying a price that's volatile equal an unfair price?
2 MR. GOULD: Well, I'm trying to avoid the
3 use of unfair, unjust, and unreasonable, because that
4 is not the state of this proceeding. I know that,
5 for the moment, you believe it is. I believe it is
6 not.

7 CHAIRWOMAN SHOWALTER: All right. Well --
8 MR. GOULD: I believe that under 80.28.040,
9 you have the ability to look at the provision, the
10 contractual provision that has not been properly
11 implemented and to implement it.

12 CHAIRWOMAN SHOWALTER: Maybe a better way
13 to put it, does a volatile price equal an emergency?

14 MR. GOULD: Yes. I would say that. I
15 would say that -- I would say that you could make a
16 determination that unprecedented volatility of the
17 kind that we've shown, and that bench exhibit shows,
18 Bench Number Nine for G.P. shows that from May
19 through December, that volatility will reach -- will
20 average 268 percent from variant, from an average.
21 Now, that's the kind of volatility we're talking
22 about. Unprecedented.

23 We're not talking causes here. I'm not
24 talking about whether anybody's a crook, whether
25 that's enough hydro, whether there's enough

00186

1 generation. I'm just saying that it is extremely
2 volatile and there's a repair mechanism in the
3 contract and it should be implemented. And the
4 reason it should be implemented is that it's wreaking
5 havoc into that, and under the provisions of your
6 pour, you have the power, under 80.27.040 to fix any
7 act that's insufficient, inefficient, or inadequate,
8 and to fix it using anything that's -- shall fix the
9 standard of the acts, service to be thereafter
10 furnished, and shall fix the same by rule or order.
11 It's a broad power to, under circumstances of special
12 pleading, of this nature, that you have the power to
13 fix.

14 What I was trying to concentrate on,
15 though, was the issue of whether or not there was
16 evidence of record of impasse. Yes, there is. And
17 why it is that you should implement our proposal
18 instead of simply ordering the people to negotiate
19 further in good faith.

20 And the answer is that according to Bill
21 Gaines' affidavit, the proper repair is to effect a
22 swap. And where I was going with that was to show
23 you that under the definition of that instrument,
24 Attachment A, the swap is tied to the very volatility
25 that is doing us harm.

1 CHAIRWOMAN SHOWALTER: So this gets back to
2 your premise that if volatility is the source of the
3 problem ==

4 MR. GOULD: Yes.

5 CHAIRWOMAN SHOWALTER: And the source of
6 the grounds for your motion?

7 MR. GOULD: Yes, and the harm, as it
8 affected on the affidavits of the mill managers.

9 CHAIRWOMAN SHOWALTER: I would like to hear
10 from Mr. Cedarbaum, maybe beginning with this
11 question that we're on. In your view, does
12 volatility of the market alone, without a finding
13 that the price that is volatile is somehow
14 unreasonable, is volatility alone a grounds for
15 emergency relief, along with the relief requested, of
16 course.

17 MR. CEDARBAUM: I think my answer to that
18 question is no. And that is the -- and let me just
19 try to back up on a couple of points that I think
20 I've heard this afternoon and try to tie them into
21 the answer to that question. There were two general
22 issues being discussed. One is the Commission's
23 authority under the optional price stability
24 provision of the contract to order the parties to do
25 something and device a remedy from that, and two,

00188

1 whether or not you're being asked first to find
2 whether or not the current contract results in a rate
3 that's unfair, unjust, unreasonable and insufficient.
4 And both of those two points, I think Staff
5 is in agreement with the company. The first point
6 being that there is a provision in the contract which
7 states that the optional price stability services
8 should be customized to the customer's needs, but
9 then they're to be negotiated. That's the part
10 Counsel for Puget picked up on, which I think is
11 important.

12 And so it seems to me that the Commission
13 does have the authority to order these parties to go
14 ahead and negotiate that provision, and if they
15 reached an impasse and they failed to do so, then the
16 remedy is to come back before the Commission in a
17 complaint proceeding like we have today, and I think
18 the underlying basis or issue that needs to be
19 addressed in that proceeding is whether or not the
20 current special contract results in a rate that is
21 unfair, unjust, unreasonable and insufficient. On
22 that point, I would disagree with Counsel for the
23 customers. Looking at that issue, to come back to
24 this volatility point --

25 CHAIRWOMAN SHOWALTER: Before you go to

00189

1 volatility, are you saying that unless the contract
2 without the negotiated option is unfair and
3 unreasonable and is shown to be so, that there's no
4 particular remedy due to an impasse, but that only if
5 there is an impasse and the consequence of not
6 ordering negotiation would be an unfair rate, then?
7 Would we step in?

8 MR. CEDARBAUM: Let me see if I -- let me
9 answer the question I think I've heard. The contract
10 has a provision in it. We know that by looking at
11 it, for optional price stability, which is to be
12 customized to the customer's needs by negotiation.
13 It seems to me that the Commission can order that
14 contract provision to be enforced. You can enforce
15 it, you can tell the parties to implement it. That
16 doesn't mean that you write the contract for them.
17 It just means you order them to go negotiate. If
18 they fail, if they reach an impasse, I mean, if
19 they're successful, great, this case goes away.

20 If they fail and they reach an impasse, the
21 fact that they've reached an impasse I'm not sure is
22 particularly relevant. What they do is they come
23 back before the Commission and say, We haven't
24 reached agreement under that negotiation provision of
25 the contract. We now need you to find, speaking --

00190

1 I'm assuming the customers would be saying this, that
2 our special contract is unfair, unjust and
3 unreasonable.

4 You have to find that and then you have to
5 develop a remedy for it, which is a new provision.
6 But tied up in that is, I think, a body of contract
7 law which, quite frankly, I haven't had the time to
8 research completely yet. But it looks at issues such
9 as rescinding a contract, excusing performance of a
10 contract, those sorts of factual issues that I think
11 you would have to be looking at in this determination
12 of what is unfair, unjust, and unreasonable. And
13 that would not just be volatility of the market.

14 So that's why I'm trying to come back to my
15 original statement. I don't think volatility, in and
16 of itself, is enough, or is the fact that --
17 obviously, these customers are, according to the
18 affidavits, have some dire straits coming. But just
19 the inability to pay and just the fact that they
20 might have to shut down in and of itself isn't enough
21 either, picking up on your point that there are lots
22 of customers out there who haven't negotiated their
23 rates. They're just taking service under tariff.

24 We would be in a position of having to give
25 them rate relief just because they're a senior

00191

1 citizen on a fixed income and they can't pay their
2 electric bill.

3 So I think all those types of issues would
4 have to be looked at to determine whether or not the
5 current rate is unfair, unjust, unreasonable, and
6 what to replace it with. I see those as an awful lot
7 of factual issues that are going back and forth
8 between the parties.

9 COMMISSIONER HEMSTAD: I follow your
10 sequence. Backing up, just so I'm clear, is it your
11 view that there is not sufficient evidence in front
12 of us from the affidavits to conclude that there is,
13 in fact, an impasse?

14 MR. CEDARBAUM: An impasse. I don't know
15 what the evidence I have -- the affidavits are Mr.
16 Gaines says they made three offers and they were
17 turned down. Mr. Gould has characterized what all
18 that means. I'm not sure what the answer to that
19 question is. But, again, if they reached -- if it is
20 true that they've reached an impasse, then the remedy
21 is not to reform the contract now; it's to determine
22 whether or not the current contract is unfair, unjust
23 and unreasonable first, at least.

24 MR. GOULD: Madame Chair, in response, and
25 with great respect to Mr. Cedarbaum, he simply is

00192

1 leaving a great part of the statute unread with that
2 kind of analysis. Again, I'm referring to RCW
3 80.28.040.

4 COMMISSIONER HEMSTAD: I was going to come
5 back to that.

6 MR. GOULD: Yes.

7 COMMISSIONER HEMSTAD: It has --

8 MR. GOULD: Upon certain findings -- excuse
9 me.

10 COMMISSIONER HEMSTAD: It has a phrase in
11 there, after hearing.

12 MR. GOULD: Yes.

13 COMMISSIONER HEMSTAD: Would you say this
14 is that hearing?

15 MR. GOULD: I think it is. I think it's
16 sufficient for that purpose. What is left out of
17 this statute is -- or what's only being partially
18 left in this statute by Mr. Cedarbaum's
19 interpretation are a bunch of findings that you can
20 make by way of proceeding for our relief. It is
21 exactly this. I read it very poorly last time. Let
22 me just try it again.

23 Quote, Whenever the Commission shall find
24 after hearing that any act of any electrical company
25 is insufficient, inefficient or inadequate or that

1 any service may be reasonably demanded is not
2 furnished, the Commission shall fix the problem.
3 Now, what I left out of that reading were
4 the words "unjust, unreasonable, improper," but those
5 are disjunctive. They aren't the only test. And
6 what we're asking you -- with great respect to Mr.
7 Cedarbaum, but what we're asking you is to implement
8 that statute as I read it, in its parsed form, to
9 find on the evidence before you, and I cited to you
10 Mr. Gaines' affidavit in that regard and my
11 interpretation, and the key point of that affidavit
12 really is the swap business, because he is saying
13 there, and I am saying to you that they are deeming a
14 swap to be an adequate offer under that contractual
15 provision, and I'm asking you to find it is
16 inadequate.

17 CHAIRWOMAN SHOWALTER: Because of the
18 volatility of the Index?

19 MR. GOULD: Because of the -- I hear you
20 saying only the volatility in the back of your mind.
21 Unprecedented volatility, unprecedented volatility.
22 The mileage that the parties have made under their
23 special contracts vis-a-vis staying on tariff has
24 been great, but it's being eaten away at a rapid rate
25 because of that volatility, as that bench exhibit

00194

1 shows, number nine. That's the whole point.

2 MR. QUEHRN: Madam Chairwoman.

3 MR. GOULD: Excuse me, please. That is the
4 point. Now, we're not talking about any volatility.
5 That's the reason for the affidavit of McCullough.
6 He is perplexed. He's an expert in the field and is
7 perplexed about the reasons. I think that there's
8 disagreement about the reasons. Certainly, Bill
9 Gaines doesn't agree with Mr. McCullough. But the
10 point is that there is great unprecedented
11 volatility.

12 CHAIRWOMAN SHOWALTER: But inherent in the
13 dispute over why it's volatile --

14 MR. GOULD: Yes.

15 CHAIRWOMAN SHOWALTER: -- are also some of
16 the issues of whether even unprecedented volatility
17 is --

18 MR. GOULD: Is adequate?

19 CHAIRWOMAN SHOWALTER: Yes, because plenty
20 of people are paying it, and actually the rates are
21 rates that other people in the rest of the country,
22 who haven't been so fortunate, have been paying. And
23 I'm not saying it's a thrill to pay it. It certainly
24 isn't. But in terms of a legal standard, there is
25 this question of is there a market. Well, you know,

00195

1 you could say there is or isn't a market, depending
2 on what your definition is, but we can add up the
3 number of kilowatt hours bought and sold every day in
4 the Northwest or the West at those prices.

5 MR. GOULD: Well, as a matter of fact,
6 that's a good point, because the volumes on those --
7 in this particular index are not very great, as we
8 showed you in the affidavit by Mr. Gaines.

9 CHAIRWOMAN SHOWALTER: The volumes?

10 MR. GOULD: The volumes. You see, here's
11 the --

12 CHAIRWOMAN SHOWALTER: I think we --
13 MR. GOULD: Here's the problem. It is by
14 no means certain that Puget is supplying the
15 companies on purchases under that index. We don't
16 have any evidence on that subject. All it is is a
17 pricing mechanism.

18 CHAIRWOMAN SHOWALTER: Right, but we do
19 know how many people are trading on those indexes.

20 MR. GOULD: We do inferentially, by the
21 volumes. And the volumes are relatively low. The
22 volume, as the affidavits will show, those are
23 megawatt hours. There are something in the order of
24 1,000 megawatts or 2,000 megawatts that are traded in
25 that market on average.

1 CHAIRWOMAN SHOWALTER: Isn't that about two
2 Seattles' worth?

3 MR. GOULD: Well, it's not -- it may or may
4 not be robust enough to avoid problems. That's the
5 problem. But I'm not arguing whether it's a
6 manufactured or manipulated market today. That's for
7 another day. I'll have some evidence about that
8 subject. That's not the point. The point is that it
9 is simply out of dormant, our expert says apparently
10 for unknown reasons. Mr. Gaines says, Well, there
11 are some reasons. But it is uncontroverted that it
12 is anguish and it is -- the word was unprecedented.
13 I adopt that word. It's unprecedented, and it
14 entitles these complainants to relief. That's what
15 we're asking you to do.

16 COMMISSIONER HEMSTAD: Well, I take it you
17 differentiate yourself -- or the two complainants
18 here, from the rest of the say West Coast customers
19 who are subjected to the market environment, because
20 you have a contract remedy. Is that a fair
21 statement?

22 MR. GOULD: Well, Commissioner, I don't
23 know enough about Schedule 48 to tell you whether
24 they --

25 COMMISSIONER HEMSTAD: Okay. I don't want

00197

1 to get into that. I don't need to get into that, but
2 --

3 MR. GOULD: You mean other customers?

4 COMMISSIONER HEMSTAD: Anyway, your point
5 is that you're relying on a provision of the
6 contract?

7 MR. GOULD: Today we are, yes. Solely
8 that, that's correct, yes.

9 COMMISSIONER HEMSTAD: And someone else
10 who's impacted by a volatile market, let's say not a
11 Schedule 48 --

12 MR. GOULD: They have to have their tool to
13 get into you, yes, precisely.

14 COMMISSIONER HEMSTAD: But you're relying
15 on your contract?

16 MR. GOULD: That's correct. And we're
17 saying that that has been, under the statute, there
18 has been an inadequate implementation by Puget of
19 that provision. And we're saying that it --

20 MR. CAMERON: If I may be heard about the
21 --

22 CHAIRWOMAN SHOWALTER: Actually, I think
23 Mr. Quehrn wanted to respond, and then we'll hear
24 from you, Mr. Cameron.

25 MR. QUEHRN: A couple of items recently

00198

1 stated I think warrant some further discussion.
2 First of all, with respect to Mr. Gaines' affidavit
3 and what it actually does say, the paragraph that was
4 being referred to, and I'll just read from it, it
5 says, Indeed the history of the special contract
6 shows that on at least three separate occasions, PSE
7 offered price stability options to BCS and G.P.
8 However, they turned down all three proposals under
9 the optional price stability provisions of the
10 special contracts.

11 What Mr. Gaines has testified to is that
12 good faith offers made by PSE have been flatly
13 rejected by the moving party. I don't know that you
14 could make the legal conclusion that that is an
15 impasse any more than you could conclude that we are
16 somehow obligated to accept what they want to impose
17 upon us.

18 My client is and still stands ready to
19 continue good faith implementation of the provisions
20 of the special contract.

21 Secondly, I would like to look at the last
22 sentence in Mr. Gaines' affidavit, and particularly
23 the last part of the last sentence that says, Without
24 resort to buy-sell transactions or other retail
25 wheeling. And this gets back to a point we discussed

00199

1 earlier. The optional price stability mechanism of
2 the special contracts allow the price to be
3 customized -- that's what it says -- through
4 negotiation. It does not allow the entire form of
5 the contract to be rewritten into a retail wheeling
6 agreement.

7 That is the context, I think the fair
8 context, of the last sentence in Mr. Gaines'
9 affidavit, where, again, we can read it in its
10 entirety. Mr. Thomas asserts that complainants'
11 implementation proposal is fair. This is not true.
12 Their proposal would shift risks and potential
13 penalties to PSE that are neither fair, nor
14 reasonable. Though the proposal does not comport
15 with the financial swap transactions discussed above
16 through which price stability can be provided without
17 resort to buy-sell transactions or other retail
18 wheeling.

19 I'm also, frankly, Madam Chairwoman, I'm
20 getting to be a little bit confused about what
21 evidence and facts moving parties are relying upon.
22 I hear Mr. Cameron say market volatility is not an
23 issue here; we just want to talk about the contract.
24 And I hear Mr. Gould say something else.

25 And I think what this really gets back to

00200

1 is if you look at all of the evidence that has been
2 provided in this proceeding, none of it runs to the
3 fundamental question of whether the existing
4 contract, the existing rate is unfair, unjust, and
5 unreasonable that allows us to even get to a
6 discussion of remedies. And it's noteworthy that
7 counsel for the moving party appears not to want to
8 talk about what is unjust and unfair and
9 unreasonable?

10 COMMISSIONER HEMSTAD: What is your
11 response to the interpretation of 80.28.040 from Mr.
12 Gould, that unjust and unreasonable are a disjunctive
13 and that there are a series of other standards in
14 that section?

15 MR. QUEHRN: I think the short answer to
16 that is much as the way staff addressed it in its
17 memorandum. We don't read the statute that way and I
18 don't think it's been construed that way
19 historically.

20 COMMISSIONER HEMSTAD: You're saying that
21 80.28.040 must be read as a threshold of an unjust
22 and unreasonable provision?

23 MR. QUEHRN: I think in light of case law
24 that we've also cited in our brief. And another
25 point you made, there are two prerequisites that have

00201

1 to be met here that are not. First of all, a
2 hearing, in my view, as you pointed out, there is a
3 necessity for hearing is an evidentiary hearing.

4 Secondly, the statute has been construed to
5 say that once a rate or a tariff or, in this case, a
6 special contract that has the same status as a tariff
7 goes into effect, it is presumptively just, fair and
8 reasonable unless and until a Complainant, through
9 that proceeding, proves otherwise.

10 CHAIRWOMAN SHOWALTER: Mr. Cameron, you had
11 wanted to make a point?

12 MR. CAMERON: Yes, ma'am. And it had to do
13 with volatility, and I dispute the hearing of Counsel
14 for PSE to the extent he thinks Mr. Gould and I have
15 any difference of opinion. To restate it, we are
16 seriously concerned about volatility, unprecedented
17 volatility.

18 As you look at past years, certainly there
19 has been some volatility, but what is occurring right
20 now has no precedent whatsoever. It is that fact
21 which we believe is uncontroverted which, tied to our
22 existing contract entitles us to a remedy under
23 80.28.040. In terms of volatility, and in this case,
24 unprecedented volatility, Madam Chairwoman, I do not
25 accept your analogy of long-term treasuries versus

00202

1 dot-com stocks. I do not believe long-term
2 investments can be equated to annual business cycles.
3 We are talking about a situation in which
4 my client, in particular, Bellingham Cold Storage, is
5 deeply dependent on summer supplies of energy. In
6 the history of this region, prices have been
7 relatively modest, downright cheap. This year, it
8 just buggers the imagination to understand what is
9 going on.

10 We are not today here to talk about why the
11 volatility occurs. That is what we are stepping
12 aside from today. It is the fact of volatility that
13 concerns us. Looking at the West Coast, I agree that
14 the Mid-Columbia Index and other indexes apply up and
15 down the coast, but by and large, the people paying
16 those prices are traders, commodity brokers, other
17 people who have risk management -- or companies that
18 have risk management capabilities.

19 In northern California and in the case of
20 Edison, where CTC charges are still being paid off,
21 the volatility is not visited on the retail
22 customers, residential, commercial or industrial.
23 There are problems in San Diego's service territory,
24 but I think up and down the West Coast, the problem
25 is limited to San Diego and its environs and to your

00203

1 Schedule 48 and special contract customers.

2 And in the case of Bellingham Cold Storage,
3 what we feel by way of price shocks, this
4 unprecedented volatility, is visited on a small
5 business, Bellingham Cold Storage, which does not
6 have the capability to withstand, and through them to
7 our tenants and agricultural cooperatives, through
8 them to farmers and fishers. The retail effects
9 downstream are phenomenally significant, and we think
10 that fact is what you ought to be considering. Not
11 how the Mid-C is composed or how the market is
12 operating, but the mere fact that these industries
13 are facing ruinous energy prices.

14 You look at RCW 80.28.040, and I agree the
15 words are there. It's not -- it's "or" not "and."
16 Any of the criteria apply to trigger action on your
17 part, unjust, unreasonable, improper, insufficient,
18 inefficient or inadequate service or a service
19 reasonably demanded but not provided. The law goes
20 on to state that you can fix the problem by order or
21 rule. That's what we're asking, from factual
22 predicate to statutory basis through to conclusion.

23 MR. GOULD: By the time -- excuse me. John
24 Gould. By the time we go to hearing and gather
25 evidence, even on the expedited schedule, we will be

00204

1 suffering greater and greater harm, as those bench
2 requests number nine show. Those are the prediction
3 of the markets.

4 And the swap that Mr. Gaines has proffered
5 as the appropriate tender to us under our contractual
6 right is nothing more than a tie, because of the
7 floating point determinant, a tie to those volatile
8 markets. That's all it is.

9 MR. QUEHRN: Madam Chairwoman.

10 CHAIRWOMAN SHOWALTER: Let's hear from Mr.
11 ffitch, if he wants to say anything. Then Ms.
12 Davison.

13 MR. FFITCH: Thank you, Madam Chairwoman.
14 Obviously, a large number of issues have been
15 addressed. First of all, I could make a summary of
16 our position, and I'd be happy to do that. Are there
17 any particular questions about our filing?

18 CHAIRWOMAN SHOWALTER: Well, you jumped to
19 the question of remedies fairly quickly in your
20 brief, and I'm wondering if you have any comments on
21 the points that Counsel for Puget is making, that we
22 don't get to remedies until we go through a series of
23 factual and legal determinations?

24 MR. FFITCH: Well, Your Honor, we've --
25 CHAIRWOMAN SHOWALTER: Maybe that's just

00205

1 not your issue.

2 MR. FFITCH: Well, I think to be fair, we
3 had chosen to not brief those and to focus just on
4 policy issues that we felt were raised if the
5 Commission got past those threshold questions.
6 Having now listened to the representations or the
7 arguments of Counsel, I think, as we indicated in our
8 memorandum, they are real issues.

9 I don't think it would be real fair or
10 appropriate, since we did not brief them, for me to
11 comment, but certainly we would not dismiss that part
12 of the case, simply that we chose to address these
13 other questions.

14 I think the other point that Public Counsel
15 really wants to underline here is first to look at
16 the history of the special contracts in Washington
17 state, and the Commission can review its own records
18 of prior proceedings, the representations that were
19 made by industrial customers, including these
20 customers, about the economic risks that they would
21 be facing if they were not permitted to go on to
22 these special contracts.

23 There is evidence in the record, I think,
24 to show that these customers have benefited from
25 these special contracts for the great majority of the

00206

1 period under which the contracts have been in effect.
2 Obviously, the situation has changed, the market has
3 changed.

4 We are cognizant of the allegations of
5 severe potential economic difficulties, particularly
6 the Bellingham Cold Storage situation. We have
7 suggested alternatives which we think address
8 Bellingham's particularly, and also Georgia-Pacific's
9 requested need for some pricing stability, which we
10 think continue to protect customers.

11 And that, I guess, leads me to my final
12 point, which is, as we said in our memorandum, the
13 reason we're here is to continue to urge the
14 Commission to not to be driven, perhaps, or
15 persuaded, perhaps, by exigencies to make decisions
16 which would have long-term negative consequences.
17 Hard cases make bad law, and this is a hard case.

18 CHAIRWOMAN SHOWALTER: Ms. Davison.

19 MS. DAVISON: Thank you. We did not file a
20 written response. I would just like to briefly
21 address a couple of questions that have been posed
22 today that perhaps our experience with our Schedule
23 48 litigation may have some bearing or experience in
24 this area in general.

25 I would like to address a question that

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1 Chairwoman Showalter raised. I think it's a very
2 good question, which is does paying a volatile price
3 equal an unfair price. And then the follow-up
4 question was does a volatile price equal an
5 emergency.

6 And I have a chart. I'm not sure if you
7 can see it that far away, but you can see these
8 bright purple spikes. I would say that if you look
9 at the yellow graph here --

10 MR. QUEHRN: Excuse me. I'm sorry to
11 interrupt, but is this -- was this submitted?

12 MS. DAVISON: No, it's simply -- I was just
13 trying to --

14 MR. QUEHRN: This is not an evidentiary
15 hearing. I object to the entry of that exhibit.

16 MS. DAVISON: Well, I'm not seeking to
17 enter this into evidence. I'm seeking merely to make
18 a point, which I can make verbally, but I thought
19 this --

20 CHAIRWOMAN SHOWALTER: Why don't you make
21 it verbally.

22 MS. DAVISON: I'll make it verbally. That
23 is, I think that what we saw in 1999 constituted
24 volatility. We definitely saw prices going up and
25 down. I think what we are seeing in the year 2000,

00208

1 since May, is way beyond volatility. I think -- I'm
2 not sure what word I would necessarily use to
3 describe the prices that we have seen since May of
4 2000, but I don't think volatility captures that
5 concept. Volatility is simply, as I see it, up and
6 down of prices, but what we are seeing are enormous
7 price spikes. And I think that this situation does
8 constitute an emergency.

9 Having said that, I would remind this
10 Commission that when we were here with our Schedule
11 48 litigation, Puget Sound Energy sought to
12 unilaterally impose a pricing change on Schedule 48
13 customers without our consent. We were very, very
14 opposed to that and we fought that very hard in that
15 litigation. I believe that with the special
16 contracts, I believe that with Schedule 48, there is
17 not an ability of either Puget or a customer to
18 unilaterally impose a particular change on the other
19 party.

20 But I think, going back to my original
21 point, I believe there is an emergency here. I
22 believe the Commission does have the ability to
23 impose short-term remedies and to order the parties
24 to go back and negotiate.

25 CHAIRWOMAN SHOWALTER: On the question of

00209

1 volatility, weren't the price spikes in the Chicago
2 area, I can't remember if it was one summer ago or
3 two summers ago at the moment, but wasn't that some
4 kind of warning that this kind of thing could happen?
5 I agree that these prices here are unprecedented, but
6 the phenomenon is not unprecedented.

7 MS. DAVISON: I think that, yes, you are
8 correct. I think your recollection is correct about
9 the Midwest.

10 CHAIRWOMAN SHOWALTER: Which is it, one
11 year or two years ago? I can't --

12 MS. DAVISON: I think it was two years ago.
13 But I believe that if you look at the trends, and we
14 certainly can -- there's all sorts of abilities with
15 Excel spreadsheets to come up with all sorts of fancy
16 graphs that show the pricing and to plot it for the
17 various years. I'm not sure that you could really
18 look at these charts and predict the purple line that
19 I held up earlier. I think that, as I said, I
20 believe that goes beyond volatility. That's
21 something else. We don't know what that something
22 else is.

23 I think the dire situation is demonstrated
24 by the recent notice that came out of the Federal
25 Energy Regulatory Commission two days ago in which

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1 they have ordered their staff to begin investigation
2 to look into the reasons for these high prices in the
3 power markets. And the FERC has identified several
4 areas of concern that their staff is to investigate
5 and report back in November.

6 JUDGE WALLIS: Ms. Davison, could you tell
7 me briefly what the basis is on which you conclude
8 that the Commission has the authority to grant
9 emergency relief?

10 MS. DAVISON: I would cite the authority
11 that Mr. Gould's been relying on.

12 JUDGE WALLIS: That's 80.28.040?

13 MS. DAVISON: Yes, Your Honor.

14 JUDGE WALLIS: I don't see any reference in
15 that statute to tariffs or prices. Instead, it talks
16 about services. You talk about volatility. When you
17 talk about volatility, are you really talking about
18 high prices? If the prices were, instead of 260
19 percent, for example, if they were 26 percent of the
20 prior prices, would that still be a cause for
21 concern?

22 MR. GOULD: You mean, one-fourth of the
23 average price, would that be a cause for concern?

24 JUDGE WALLIS: Is that -- is the volatility
25 what your ultimate problem is or is it the high

00211

1 prices?

2 MR. GOULD: Well, I mean, I certainly
3 confess that if we had to pay a quarter of our
4 average rate, we would not object.

5 MR. CAMERON: But Puget would probably be
6 here.

7 MR. GOULD: The problem is high prices,
8 yes. It's -- but it's worse. It's not high prices
9 for a few days in Chicago two years ago. And by the
10 way, I don't remember -- I shouldn't say. I don't
11 remember what those prices were. They were
12 phenomenal. But we've had phenomenal rates now since
13 May 22, with some extreme spikes flowing up north
14 from the PX through to the Mid-C Index for reasons
15 that are sort of unexplainable, but nonetheless
16 happened, prices which, you know, went up to 75 cents
17 a kilowatt-hour. And we are looking at a plateau of
18 high prices that appears to be without cessation.

19 JUDGE WALLIS: Once we get into the issue
20 of prices, are we not then, kind of by definition, in
21 a situation where we're looking at whether a rate is
22 fair, just, reasonable?

23 MR. GOULD: Well, we are in the context in
24 which that is the prayer to bust that rate, that's
25 correct. But we're not trying to bust that rate

00212

1 today. It is true that we are trying to replace it
2 with a fixed block of power for a period of time
3 under a contract provision which we are arguing gives
4 us the right to do so.

5 MR. CAMERON: Could I address that
6 question, because I believe it's a good one. You
7 stated -- you tried to ferret out the distinction
8 between volatility and high price, and it's true if
9 low price is applied, then Puget might face a
10 situation where they were forced to sell below
11 variable cost, causing them a dilemma.

12 But aside from the question of high price
13 or low price, the volatility, extreme volatility
14 carries this additional burden. And that is it is
15 unbudgetable. A couple days into June, we'd already
16 paid more for electricity than we had for whole
17 months in past years or earlier this year.

18 It is impossible to budget an energy cost.
19 Chief financial officers are required to carry an
20 unknowable liability. My gosh, it could be 10, 20
21 times as high. What am I going to end up owing by
22 the end of the month. How can I possibly balance my
23 books. How can I go forward with production knowing
24 that I may lose a good portion of the net worth of
25 the company. How can I tell customers, who depend on

00213

1 me to process fruits and vegetables, that they have
2 an unknowable liability, as well, if they choose to
3 produce the products, instead of letting them rot.
4 It is a huge dilemma. If it were a high price, but
5 it were a known price, 20 cents guaranteed, then I
6 could make rational decisions to either run or shut
7 down. I can't do either if I don't know where the
8 price is going and there is no reasonable predictor
9 to allow me to even guess.

10 CHAIRWOMAN SHOWALTER: Isn't this exactly
11 why customers buy hedge, collars, caps, et cetera?
12 Isn't it exactly for the purpose of stability that
13 they buy them or they don't go on the market in the
14 first place --

15 MR. CAMERON: We bought a hedge, we did buy
16 a hedge.

17 CHAIRWOMAN SHOWALTER: I know, in July, but
18 --

19 MR. CAMERON: The price quoted this year
20 for August hedges is \$150 a megawatt hour.

21 CHAIRWOMAN SHOWALTER: I assume the price
22 is high, but if either company was interested in a
23 stable price, there were the three offers from Puget,
24 but that wouldn't have been the only way you could
25 have bought a hedge.

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1 MR. CAMERON: Really, all Puget offers --
2 CHAIRWOMAN SHOWALTER: Staying off of
3 Puget, just in general, don't sophisticated buyers of
4 market products seek various hedges?

5 MR. CAMERON: But we're finding that our
6 hedge traders are in a similar quandary. What is
7 their unbudgetable liability in writing this
8 insurance policy against the Mid-C. It carries an
9 enormous price.

10 COMMISSIONER HEMSTAD: I think the
11 Chairwoman's question is why didn't you do it two
12 years ago?

13 MR. GOULD: Well, it's also a credible
14 policy to self-insure, which is what G.P. did and
15 BCS, and that's right. And I think what we're trying
16 to express is not the wisdom or lack of it for
17 failing to do a hedge earlier, but the complete
18 inability to predict the scope of that problem. And
19 that is the -- that is the term that we have -- or
20 that's the problem that we have defined under perhaps
21 this inadequate term volatility.

22 CHAIRWOMAN SHOWALTER: Ms. Davison, have
23 your clients bought hedge instruments or other like,
24 without revealing any confidences, but is that a
25 practice you're aware of?

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1 MS. DAVISON: It's my understanding that
2 some have in the past and I think that some have not
3 and some, you know, have attempted to plot these
4 graphs and try to reasonably predict the future, and
5 we certainly weren't able to predict this price
6 spike.

7 COMMISSIONER HEMSTAD: In any event, it
8 seems to me that's of marginal relevance to what's in
9 front of us here.

10 MR. GOULD: I hope so.

11 COMMISSIONER HEMSTAD: But, actually, I'd
12 like to ask Mr. Cedarbaum at this point to -- maybe
13 we've got to bring this to a conclusion. Do you have
14 any final comments with regard to the issues and so
15 on. And now, in view of the other discussion here,
16 of the relevance of 80.28.040.

17 MR. CEDARBAUM: Thank you. I was going to
18 ask permission to discuss 80.28.040 briefly. I think
19 I have four main points about that. The first is I
20 think Judge Wallis was correct that the statute does
21 speak to standards, practices, acts or services, as
22 opposed to rates, regulations and charges, and
23 certainly the legislature makes that distinction
24 often through the public service laws. The absence
25 of those words in the statute, I think, is important

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1 as to its applicability.

2 Secondly, I think even if we go down to the
3 improper, insufficient, inefficient or inadequate
4 provision that Mr. Gould directed our attention to,
5 what we're still talking about, the insufficient
6 service or inadequate service that is being discussed
7 today is service under an existing special contract
8 that was approved by this Commission, and you're
9 being asked to replace that on an emergency basis.
10 So it seems to me that we're still back to the
11 fundamental issue about do we first determine whether
12 or not the special contract is just, fair, reasonable
13 and sufficient.

14 And so to me, those -- all those standards
15 get wrapped up together. We can go under 040 or we
16 can go under 020, or whichever other statute might
17 apply. It's still a fundamental issue.

18 The third point is, and maybe I have some
19 misunderstanding on just the nature of the procedure
20 that we have today, but we do have an underlying
21 complaint that began all this, under 80.04.110, which
22 discusses a complaint with respect to the justness
23 and reasonableness of rates and is picked up in
24 80.04.120, which talks about hearing after evidence
25 on the complaint. So there are notions of an

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1 evidentiary hearing, which I think would be fair to
2 say, even in 80.28.040, the hearing that is
3 referenced when we're talking about improper,
4 insufficient, inefficient or inadequate, still sounds
5 like an evidentiary process to me.

6 So with respect to 040, it doesn't seem --
7 it either doesn't apply or, if it applies, I think
8 we're still back to the same point.

9 And the final comment, actually, is not
10 about 040, but -- well, indirectly, it is, but the
11 Judge had asked Ms. Davison whether she thought the
12 Commission had the authority to order the emergency
13 relief requested. She said, Yes, under 80.28.040.
14 But I thought her words were the Commission has the
15 authority to order the parties to negotiate. If
16 that's what she said and that's the remedy that she's
17 limited her response to, I don't disagree with that.
18 That, I think the Commission does have the authority
19 to do that. But that's different than establishing a
20 new rate for service.

21 MR. QUEHRN: Thank you, Madam Chairwoman.
22 A couple items. I now, too, have a complete copy of
23 80.28.040, and I just wanted to -- and I think just
24 repeating what Mr. Cedarbaum just said, the
25 disjunctive "or" that was referred to before is

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1 clearly as to service.

2 But I also want to talk about two other
3 issues briefly. Having moved from what their
4 entitled to directly under the contract, I think
5 we're back to equating volatility to emergency. And
6 again, we seem to be going past the first and
7 threshold question of whether or not this rate is
8 fair, just, unfair, unjust or unreasonable.

9 Volatility doesn't necessarily equate to an
10 emergency. If I were to find when I drove home from
11 this proceeding that my house was in ashes because I
12 had done something foolish like left the coffee pot
13 on, I would have a problem, but I also bought
14 insurance. I don't necessarily think those things
15 are going to happen, but markets, by definition, are
16 volatile. There are risks out there in the world
17 that we all face. And when we have opportunities to
18 protect ourself against those risks, prudent people
19 do so.

20 In this instance, the emergency that we are
21 facing is a direct result, as we heard just a minute
22 ago, of companies deciding to self-insure. I'm going
23 to bear that risk. We just heard it a minute ago.
24 Well, when you get to the other end of that, and it's
25 fine while they're on the good side of the risk, but

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1 when you get to the other end of it, all of a sudden
2 there's a problem, yeah, maybe there's an emergency
3 of some sort, not the type of emergency that warrants
4 relief in this instance, but there is an emergency of
5 their own making. We'll agree to that. That doesn't
6 mean they're entitled to the relief that they're
7 asking for in this proceeding.

8 It's clearly and simply a situation that
9 they could have, and one might say should have, but I
10 will say could have protected themselves against.

11 There's one other issue that I don't want
12 to miss the opportunity to address to this Commission
13 that I think is absolutely critical, an issue that's
14 critically raised, not yet discussed, and that is
15 what about the issue of retail wheeling in this
16 instance. We seemed to have moved through the
17 discussions of what the desired remedy of the moving
18 party is without even really undertaking that issue.

19 We have extensively briefed it. But it's a
20 very important issue to us and we want to make sure
21 that the Commission understands that we're not just
22 talking about optional price stability here. We're
23 not just talking about fixing a price under an
24 existing contract that doesn't provide for retail
25 wheeling. We're talking about rewriting the whole

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1 contract and putting it into a context in a form that
2 is fundamentally different and drives serious
3 ramifications not only for one of the contracting
4 parties, at least, but also for other parties.

5 And we would like an opportunity, and
6 again, I have asked Mr. Berman to attend this hearing
7 today to talk further about that issue. And
8 realizing that we've been at this for some time, I
9 certainly do not want to try the Commission's
10 patience, but we do think this is critical issue,
11 needs to be aired, it needs to be discussed, and I
12 would like to at least offer you the opportunity to
13 hear from Mr. Berman on that issue.

14 CHAIRWOMAN SHOWALTER: It's three o'clock.
15 Why don't we just pause for a minute and also have a
16 little consultation, also, on your motion and how we
17 might handle that.

18 MR. QUEHRN: Thank you.
19 (Recess taken.)

20 CHAIRWOMAN SHOWALTER: Let's reconvene
21 here, and why don't we hear from Mr. Berman on the
22 question of how the proposed remedy would affect FERC
23 jurisdiction and other matters.

24 MR. QUEHRN: Thank you.
25 MR. BERMAN: Thank you, Madam Chairwoman.

00221

1 I'm here to speak about just a very limited matter,
2 which relates to the FERC issues that have been
3 raised by the proposal submitted by the applicants
4 here.

5 I guess one way to look at it is to say
6 that the issue here that brings up FERC jurisdiction
7 is the form of the proposal that has been made in the
8 proposed optional stability provision that's been
9 tendered. They have chosen to offer a provision that
10 is essentially a buy-sell transaction. That is, they
11 propose -- and if you look at the proposed exhibit
12 and go to -- if you go to their motion and look at
13 the special contract exhibit on optional price
14 stability, you'll see --

15 CHAIRWOMAN SHOWALTER: Why don't you let us
16 --

17 MR. BERMAN: I'll wait till you get there.

18 CHAIRWOMAN SHOWALTER: Yes, let us get
19 there. Okay. It's the implementation exhibit;
20 right?

21 MR. BERMAN: Yes.

22 CHAIRWOMAN SHOWALTER: Does everybody have
23 that? What page?

24 MR. BERMAN: If you look just at page one,
25 you'll see, if you look at Section 1.1, that the

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1 customer can contact third party suppliers and obtain
2 offers from third party suppliers. And that's
3 provided in Section 1.1. Then in Section 1.3 of the
4 provision, it provides that the customer can nominate
5 supplies from those third party suppliers and say, I
6 want to get power according to the rates, terms and
7 conditions specified in the offer by the particular
8 supplier that I had solicited.

9 That transaction that's described and that
10 they've laid out is a buy-sell transaction. Shifting
11 over to a FERC perspective --

12 CHAIRWOMAN SHOWALTER: Where does the term
13 buy sell -- I mean, how do I key into this phrase?
14 Who's buying, who's selling?

15 MR. BERMAN: The term is a term of art that
16 is used all the time in FERC practice. Basically,
17 what it related to is, in the electric industry, was
18 it arose in a day when electric utilities were often
19 unwilling to engage in wheeling transactions for
20 other utilities. So what they did was they set up
21 an arrangement where they said, Okay, we'll buy power
22 from the third party and we'll resell it to you. And
23 so power went in one end of the system and went out
24 the other end of the system, and there'd be some
25 differential between the buy and sell, which was

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1 effectively the cost of transmission.

2 And so utilities set up these buy-sell
3 transactions. It was a way to effectively provide
4 wheeling to other people, you know, typically for
5 wholesale purposes, but it was a way to provide
6 wheeling even in the days before wheeling existed or
7 was a regular practice or was mandated by FERC.

8 It's also something that existed in the gas
9 side, in the gas transportation industry, that the
10 same sort of practice would occur. That is that
11 there would be a purchase on one side and a resell on
12 another side, and effectively you're moving either
13 gas molecules or electrons as part of the
14 transaction, even though you don't say that that's
15 what you're doing.

16 In the gas side, when FERC basically
17 deregulated gas pipelines or I should say required
18 the gas pipelines offer an assess transmission, FERC
19 found that numerous parties started engaging in
20 buy-sell transactions and it raised complicated
21 jurisdictional questions and questions about whether
22 those transactions fit within the framework that FERC
23 had established for regulating gas pipelines.

24 And after extensive extended debate in many
25 cases and over many years, FERC concluded that it was

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1 going to regulate those buy-sell transactions
2 involving gas pipelines on the theory that those
3 buy-sell transactions, though they may on paper
4 appear to be separate transactions in which someone
5 takes title to the gas molecules and resells title to
6 the gas molecules to someone else, they were
7 effectively just transmission on a FERC regulated
8 pipeline.

9 On the electric side, when FERC made its
10 determination that it was going to regulate
11 transmission services and would regulate not only
12 transmission for wholesale purposes, but also any
13 unbundled transmission for retail purposes, FERC
14 realized that the buy-sell arrangement could arise
15 again. That is, that utilities and customers might
16 work out deals in which the customer effectively
17 arranges a purchase of power from a third party, but
18 rather than calling it a transmission arrangement,
19 where the power goes from the third party to the end
20 use customer, instead, you claim that the power is
21 purchased by the middleman utility and is resold by
22 the middleman utility to the end use customer.

23 And what FERC said, first in its mega-NOPR,
24 and then in Order 888, and then in Order 888-A, is
25 that if you do these buy-sell transactions, we're

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1 going to look through the form of that transaction
2 and we're going to find that that's retail wheeling,
3 that that's transmission service that's being
4 provided, and we're going to regulate it. It's going
5 to be something that has to be done pursuant to our
6 tariffs.

7 There have only been a few cases
8 interpreting that finding in Order 888, but all of
9 those cases, all those situations where FERC has
10 considered the situation, they have in fact found
11 that there was retail wheeling occurring and that it
12 was a buy-sell transaction in name only.

13 For instance, in the cases cited in the
14 brief in New York, there was one involving Niagara
15 Mohawk Power and another involving New York State
16 Electric and Gas, that's NIMO and NYSEG. In the NIMO
17 and NYSEG cases, the New York Power Authority was
18 selling power to retail customers in New York. And
19 it was an industrial development thing that was set
20 up to sell inexpensive power from hydro projects in
21 New York to large industrial customers. It was a
22 good thing, the state supported it, the state wanted
23 it to happen. And they went to FERC and they said,
24 Well, let us do this, it's our own thing, FERC, don't
25 get involved. And FERC said, We're going to get

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1 involved, because we don't care how you label it.
2 That is retail wheeling, and it's an unbundled
3 transmission transaction that we have jurisdiction
4 over.

5 The same issue occurred with respect to
6 Potomac Electric Power Company, PEPCO in Maryland,
7 where this time it was an aluminum company, East
8 Alco, which entered into the arrangement. And once
9 again, FERC looked through the shape of the buy-sell
10 transaction and determined it was a FERC
11 jurisdictional transmission arrangement that was
12 created.

13 If you look at the transactions that have
14 been spelled out in the implementation exhibit to the
15 applicants' brief, I think you'll have to agree that
16 these arrangements are a buy-sell arrangement in just
17 the same way that the buy-sell arrangements in the
18 FERC cases are. That is, they don't denominate it as
19 a sale from the third party to the retail customers;
20 they smoosh it up a little, they say that the power's
21 going from one --

22 CHAIRWOMAN SHOWALTER: Excuse me. We're
23 having a hard time hearing. Sorry.

24 MR. BERMAN: They say the power's going
25 from the third party to Puget, and then from Puget to

00227

1 the retail customer, but as far as FERC is concerned,
2 it doesn't matter whether you blur the labels, it
3 doesn't matter what the contracts read. What matters
4 is the substance of the transaction. And the
5 substance of the transaction is that the end use
6 customer has dealt with a third party, has picked out
7 a supply, and has taken that supply and has arranged
8 and nominated to have that supply provided to it. So
9 it's a FERC jurisdictional transaction.

10 CHAIRWOMAN SHOWALTER: So then, let's
11 assume that's the case. Then the implication is
12 what?

13 MR. BERMAN: The implication is that the
14 transmission that's provided has to be provided
15 pursuant to FERC's open access tariffs, and it also
16 just kind of unmasks the arrangement for what it was
17 claimed to be as some other sort of arrangement.
18 It's now clearly a retail wheeling arrangement, and
19 it raises the possibility that someone else will
20 claim that they too should get to use the open access
21 transmission service that's been provided, if it's
22 now being provided to some customers, and it creates
23 a -- well, I guess it's also fair to say that if it's
24 been unmasked as retail wheeling, it also brings us
25 to the other state law-related issues and contractual

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1 issues that I don't think I'm competent to answer,
2 but that my co-counsel would also address.

3 COMMISSIONER HEMSTAD: But the point is if
4 your representation is accurate, the parties here
5 would have to make a filing with FERC to start the
6 process there? Is that at least the narrow
7 procedural issue there?

8 MR. BERMAN: Well, I think that it's fair
9 to say that it would transform the entire arrangement
10 that we have so that, instead of having a contractual
11 arrangement here with the state being able to just
12 order a certain type of service in the form of
13 service and the rates and costs for the service would
14 transform it to something entirely different. We
15 would have a transmission service that would have to
16 be provided pursuant to Puget's open access tariff.

17 I don't know if Puget's open access tariff
18 right now is even suited for retail customers, so it
19 would likely be necessary to make special provisions
20 to deal with retail customers, as many other
21 utilities in those states that have retail access,
22 there have typically been amendments and revisions to
23 tariffs to accommodate the retail access programs, so
24 there would be a need to amend the tariffs and to
25 file service agreements at FERC in order to deal with

00229

1 the new transmission arrangements.

2 COMMISSIONER HEMSTAD: But in amended
3 tariffs, are you talking about state tariffs or FERC
4 tariffs?

5 MR. BERMAN: They would be amended tariffs
6 at FERC, because FERC -- as far as FERC is concerned,
7 FERC has jurisdiction over that transmission service,
8 and it's probably worth noting that on June 30th of
9 this year, the D.C. circuit affirmed FERC's
10 conclusions in Order 888 about the limits of its
11 jurisdiction.

12 CHAIRWOMAN SHOWALTER: The Complainants
13 have requested in their original complaint for us to
14 order PSE to tender a transmission contract
15 incorporating FERC's open access terms and
16 conditions.

17 Are you saying that if we order the
18 proposed remedy requested in the emergency motion, we
19 have effectively granted the original request in the
20 original complaint?

21 MR. BERMAN: I have to admit that I haven't
22 read the original complaint, but based on your
23 characterization, I believe that you're correct.
24 That is, that you would effectively be creating a
25 situation where there is a revision to Puget's open

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1 access tariff, and there would be a service agreement
2 under Puget's open access tariff as revised to
3 accommodate retail access that would govern
4 transmission service for these customers.

5 And they would have to file and submit that
6 revision, both the revision to the tariff and any
7 service agreements to FERC for approval.

8 CHAIRWOMAN SHOWALTER: Okay. Let's hear
9 ever so briefly a response. Do you agree with Mr.
10 Berman's characterization that your proposed remedy
11 here would invoke the FERC jurisdiction and other
12 requirements?

13 MR. CAMERON: This is John Cameron. I do
14 not agree with that characterization. When we
15 crafted the implementation agreement, we took pains
16 to review the FERC decisions, the New York State
17 Electric and Gas, Niagara Mohawk, and the others
18 cited in the brief. What we have attempted to do was
19 establish a benchmark for price, term and condition.

20 Under our implementation agreement, Puget
21 need never go to contract with any third party, and
22 certainly the exhibit does not contemplate us ever
23 going to contract with a third party. Puget can
24 supply our needs however it wishes. As I said
25 before, our only intention is to substitute a single

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1 variable in the pricing formula, getting us off the
2 Mid-Columbia Index price as our sole determinant, and
3 giving us a stable longer term price.

4 I would note, though, listening to Mr.
5 Berman and reviewing the cases, that Puget itself has
6 initiated discussions with BPA for a 300-megawatt
7 buy-sell transaction for its industrial customers.
8 I'm looking at a letter of July 7, from Puget's
9 affiant, Bill Gaines, to Judy Johansen --

10 MR. QUEHRN: Is this part of the record in
11 this proceeding?

12 MR. CAMERON: I'm certainly not here to
13 controvert anything other than to note that --

14 MR. QUEHRN: Is the letter that you're
15 referring to part of the -- was it attached to any
16 affidavits that you submitted?

17 MR. CAMERON: Actually, I just received it
18 yesterday from Bonneville. They are acting on
19 Puget's request for buy-sell transaction on behalf of
20 so-called market-based industrial customers,
21 approximately 300 megawatts of load.

22 MR. QUEHRN: I have not seen the letter. I
23 object to references to the letter and introduction
24 to the letter in this proceeding.

25 JUDGE WALLIS: I think it would be

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1 appropriate not to go into that, Mr. Cameron, and the
2 Commission will not consider it.

3 MR. CAMERON: Very well. Well, I would
4 tell you that they --

5 JUDGE WALLIS: Mr. Cameron.

6 MR. CAMERON: All right. We're not
7 interested in establishing a retail wheeling
8 precedent here. We do not believe this is intended
9 to do so. Picking up on the Chairwoman's comment,
10 this is not an attempt to bootstrap our way into the
11 transmission issue from which we've stood down today,
12 reserving for later determination. It is simply an
13 effort to come up with a new pricing determinant.

14 Again, we do not deal with third parties,
15 we do not deal with the market, neither do we ask
16 Puget to do so. Instead, we are just looking for a
17 price determinant, just as now we look at a price
18 determinant which is the Mid-Columbia Index. Our
19 problem is that that is too volatile in the index
20 indicator. We'd like another one in the context of
21 this contract, as it may be extended, to comprehend
22 longer term, more stable prices.

23 CHAIRWOMAN SHOWALTER: The last item was
24 would each of you, Mr. Cameron, Mr. Gould, respond if
25 you can, orally, if you need to in writing, then in

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1 writing, to the motion to strike Mr. McCullough's
2 affidavit.

3 MR. GOULD: I can respond to that. John
4 Gould. Mr. McCullough's affidavit, page two, top of
5 the page, line one, says --

6 CHAIRWOMAN SHOWALTER: Why don't you let us
7 all get there. Is everybody there? Page two.

8 MR. GOULD: Page two, line one. This is
9 paragraph number four. It says, I quote, I've drawn
10 two conclusions about the present spot market and the
11 Dow Jones Columbia Index, which purports to report
12 the results of that market. A, the spot market is
13 not reflecting historical stimuli, is volatile in the
14 extreme and is acting as though it is controlled by
15 noncompetitive forces. B, the Index, since June 1,
16 1998, is designed in such a way as to invite pricing
17 manipulation.

18 He goes on further in the affidavit to
19 develop those points, stopping, however, short of
20 actual proof of some of the points.

21 The part that is controverted by Bill
22 Gaines is whether or not the current spot market
23 reflects historical stimuli. He does not controvert
24 that it's volatile in the extreme Mr. McCullough
25 himself, in further testimony in this affidavit,

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1 stops short of going to conclusions about actual
2 control by noncompetitive forces, telling you he
3 needs more evidence in that regard. Left is the
4 volatility in extreme.

5 The second point, the Index is designed in
6 such a way as to pricing manipulation is not
7 controverted by Mr. Gaines. Now, what we have said,
8 the reason that ties into the presentation is this.
9 We are, in effect, and I must admit, not very clearly
10 or adroitly, even today, after all the rag, but let
11 me just try it once more. What we are saying in a
12 nutshell, under 80.28.040, is that Puget has failed
13 to insufficiently tender to us our contract right
14 under the optional pricing provision. That's what
15 we're saying in a nutshell.

16 Mr. McCullough's affidavit helps establish
17 a predicate fact for that, the thing called extreme
18 volatility. The other predicate facts are harm to
19 the industries, which is established by affidavits
20 from Cunningham and Thomas, and by bench request
21 number nine.

22 What just happened here in the treatise by
23 Mr. Berman further substantiates the point that we
24 were trying to make about there being impasse on the
25 optional pricing provision negotiations evident of

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1 record, and I cited the Gaines affidavit earlier on
2 that regard.

3 What the Berman treatise does is to tell
4 you the reason for that impasse. And it is that they
5 consistently failed to tender beyond the terms of a
6 swap, a floating point swap. That is to say, it's
7 tied to that volatile market because of the buy-sell
8 implications. That's it in a nutshell. That's the
9 case. I think Mr. Berman just affirmed the impasse
10 for you.

11 CHAIRWOMAN SHOWALTER: Well, it seemed to
12 me he was saying they object to the contract that has
13 buy-sell implications.

14 MR. GOULD: Yes.

15 CHAIRWOMAN SHOWALTER: Maybe that's an
16 impasse over that.

17 MR. GOULD: I'm telling you that anything
18 beyond a swap they define as buy-sell.

19 CHAIRWOMAN SHOWALTER: Well, I don't know
20 if he went that far, because I think there was
21 mention of collars and caps and other things, but --

22 MR. GOULD: Collars and caps are the same
23 thing as swaps when it comes to affirming the
24 volatile index.

25 CHAIRWOMAN SHOWALTER: Okay. I think

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1 that's --

2 MR. GOULD: That's not a step ahead, is
3 what I'm saying.

4 CHAIRWOMAN SHOWALTER: I think that
5 concludes a rather lengthy, but very informative and
6 well-argued set of issues. So thank you all. We'll
7 take this under advisement and issue an order.

8 MR. CAMERON: Could I make one more point,
9 because I've got several people back here, including
10 the mayor, who are pretty frustrated that perhaps we
11 have not conveyed the full measure of where we are
12 today.

13 According to Puget, in some sense within
14 the discussion today, the customers brought the
15 situation on themselves by signing these contracts.
16 Look back to the '90s, please. Remember what was
17 happening. Puget was increasing its rates routinely
18 to the point where rates doubled. We represent
19 clients who are energy intensive, who purchase an
20 awful lot of energy to make their products. They
21 were finding themselves being pushed to the wall by
22 ever increasing rates.

23 Special contracts were not a means to a
24 windfall for these folks, but instead were an effort
25 to recover ground, get back to where they were and

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1 become competitive, using old mills and using small
2 production facilities to freeze and process the
3 region's products.

4 Now, those rates increased on Puget's
5 account because of a number of decisions, including
6 decisions related to cogeneration contracts. And
7 Staff and Public Counsel advocated vigorously that
8 there be huge disallowances associated with that, and
9 Puget told you that they would go to ruin if Staff
10 and Public Counsel's recommendations were fulfilled.
11 As a result, this Commission did not let Puget sink
12 to the bottom of the pond. It kept them afloat.

13 Here we ask you today, where does the
14 public interest lie. We have 2,000 jobs at stake in
15 Bellingham. We have the Bellingham economy rising or
16 falling on this, as well. We have crops, produce,
17 seafoods from the Western Washington economy that
18 have to be processed.

19 If there's a concern about retail wheeling,
20 if there's a concern about any niceties of this
21 provision, you can implement it in a pilot program,
22 firewalls the concerns about retail wheeling by
23 defining a pilot program, as you've done before for
24 retail wheeling pilot programs. You can utilize your
25 interim rate authority, as we suggested on brief and

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1 has been discussed.

2 We need some resolution here, regardless of
3 fault, and I'm suggesting that the fault lies largely
4 with Puget for raising its rates so much in the '90s.
5 We are in a dilemma. We have small businesses, we
6 have small towns, small economies that rise or fall
7 on the decisions you make today.

8 So please remember that Bellingham Cold
9 Storage will be calling its tenants and customers
10 about their production decisions and the horrendous
11 unbudgetable costs they may face for electricity in
12 the month. As a result, products may spoil.
13 Similarly, with Georgia-Pacific, jobs may be lost,
14 family wage jobs we've cited in the affidavit.
15 Please bear these facts in mind.

16 CHAIRWOMAN SHOWALTER: We do have the
17 complete record --

18 MR. CAMERON: Yes, ma'am.

19 CHAIRWOMAN SHOWALTER: -- of these
20 contracts going back to '96, and a record of the
21 events that led to them in the documentation. Thank
22 you very much.

23 MR. CAMERON: Thank you for your time.

24 MR. QUEHRN: Thank you.

25 (Proceedings adjourned at 3:38 p.m.)