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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 AIR LIQUIDE AMERICA)
CORPORATION, AIR PRODUCTS AND)
4 CHEMICALS, INC., THE BOEING) Docket No. UE-001952
COMPANY, CNC CONTAINERS,) Volume II
5 EQUILON ENTERPRISES, LLC,) Pages 118 - 201
GEORGIA-PACIFIC WEST, INC.,)
6 and TESORO NORTHWEST, CO.,)
Complainants,)
7 vs.)
PUGET SOUND ENERGY,)
8 Respondent.)
-----)
9 In the Matter of)
) Docket No. UE-001959
10 Petition of Puget Sound) Volume II
Energy, Inc., for an Order) Pages 118 - 201
11 Reallocating Lost Revenue)
Related to any Reduction in)
12 Schedule 48 or G-P Special)
Contract Rates.)
13 -----

14 A prehearing conference in the above matter
15 was held on December 22, 2000, at 1:35 p.m., at 1300
16 South Evergreen Park Drive Southwest, Olympia,
Washington, before Administrative Law Judge DENNIS MOSS

17 The parties were present as follows:

18 PUGET SOUND ENERGY, INC., by STAN BERMAN (via
bridge), Attorney at Law, Heller, Ehrman, White &
19 McAuliffe, LLP, 701 Fifth Avenue, Suite 6100, Seattle,
Washington 98104-7098.

20 PUGET SOUND ENERGY, INC., by JAMES M. VAN
21 NOSTRAND (via bridge), Attorney at Law, Stoel Rives,
LLP, 600 University Street, Suite 3600, Seattle,
22 Washington 98101-3197.

23 THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by ROBERT D. CEDARBAUM, Assistant Attorney
24 General, 1400 South Evergreen Park Drive Southwest,
Post Office Box 40128, Olympia, Washington 98504.

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1 AIR LIQUIDE AMERICA CORPORATION; AIR PRODUCTS
AND CHEMICALS, INC.; THE BOEING COMPANY; CNC
2 CONTAINERS; EQUILON ENTERPRISES, LLC; GEORGIA-PACIFIC
WEST, INC.; TESORO NORTHWEST COMPANY; CITY OF
3 ANACORTES, by MELINDA J. DAVISON (via bridge), Attorney
at Law, Davison Van Cleve, 1300 Southwest Fifth Avenue,
4 Suite 2915, Portland, Oregon 97201.

5 AIR LIQUIDE AMERICA CORPORATION; AIR PRODUCTS
AND CHEMICALS, INC.; THE BOEING COMPANY; CNC
6 CONTAINERS; EQUILON ENTERPRISES, LLC; GEORGIA-PACIFIC
WEST, INC.; TESORO NORTHWEST COMPANY; CITY OF
7 ANACORTES, by JOSEPH C. ARELLANO and DANIEL M. RICKS
(via bridge), Attorneys at Law, Kennedy, Watts,
8 Arellano & Ricks, LLP, 1211 Southwest Fifth
Avenue, Suite 2600, Portland, Oregon 97204.

9
BELLINGHAM COLD STORAGE, by TRACI A. GRUNDON
10 (via bridge), Attorney at Law, Davis Wright Tremaine,
LLP, 1300 Southwest Fifth Avenue, Suite 2300, Portland
11 Oregon 97201.

12 PUBLIC COUNSEL, by SIMON J. FFITCH (via
bridge), Assistant Attorney General, 900 Fourth Avenue,
13 Suite 2000, Seattle, Washington 98164.

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24 Kathryn T. Wilson, CCR

25 Court Reporter

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P R O C E E D I N G S

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JUDGE MOSS: We are now on the record, and we are convened this afternoon, being the 22nd day of December, year 2000, in the matter styled Air Liquide America Corporation and others against Puget Sound Energy, Docket UE-001952, and that proceeding is consolidated with a petition of Puget Sound Energy in Docket Number UE-001959. We'll shortly take appearances. I have before me a motion to compel depositions. Aside from that, I'm not certain what other business the parties wish to raise with me.

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This hearing is in response to a request from the Complainant. I had the Complainants try to connect with all the parties in the proceeding, and I understand that Complainants' counsel did contact what was described to me as the principle parties, and everybody was on board for doing this today at this time. We did rush an order out last night; although, because all this occurred after five o'clock and our record's center closes at five o'clock, that notice was further sent out by facsimile transmittal first thing this morning. So we are here on rather shortened notice.

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It does sound to me or appear to me that what I would think of as the principle parties, the

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1 complaining parties and the Respondents, are
2 represented. Staff is represented. Public Counsel is
3 on the line, and we do have a couple of intervenors
4 participating as well. So with all that said, I think
5 we can go ahead and take appearances. Ms. Davison,
6 will you please enter your appearance?

7 MS. DAVISON: Thank you, Your Honor. This is
8 Melinda Davison. I'm appearing this afternoon on
9 behalf of Complainants. I assume I don't need to
10 provide a list of all of them since I've entered an
11 appearance before.

12 JUDGE MOSS: That is sufficient.

13 MS. DAVISON: Also with me in the room are
14 cocounsel Joe Arellano and Dan Ricks. They are also
15 representing Complainants in this matter, and I will
16 let them provide you with their addresses and numbers
17 since this is the first entry of appearance for them.

18 MR. ARELLANO: Joe Arellano speaking. I'm
19 with the firm of Kennedy, Watts, Arellano & Ricks, LLP,
20 here in Portland. Our address is 1211 Southwest Fifth
21 Avenue, Suite 2600, Portland, 97204. My office
22 telephone number is (503) 228-6191. Fax number is
23 228-0009. My e-mail address is arellano@kwar.com.

24 MR. RICKS: Good afternoon. This is Dan
25 Ricks, Your Honor. My office affiliation, telephone

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1 number, and fax number are identical to Mr. Arellano's.
2 My e-mail address is ricks@kwar.com.

3 JUDGE MOSS: For Puget Sound energy?

4 MR. BERMAN: Stan Berman of Heller, Ehrman --
5 I've previously entered my appearance into the
6 record -- representing Puget Sound Energy. With me I
7 have James Van Nostrand of the firm Stoel Rives, who is
8 also representing Puget Sound Energy.

9 JUDGE MOSS: You had previously mentioned
10 Ms. Harris.

11 MR. BERMAN: Ms. Harris is also in the room
12 with us but not entering an appearance on the record.

13 JUDGE MOSS: We have on the line Mr. Brian
14 Walters for the Public Utility District of Whatcom
15 County, and off the record, I ascertained he is not
16 counsel but rather is on the staff and had been asked
17 to listen in, participate if necessary on behalf of
18 that party today. So Mr. Walters, we have the Whatcom
19 County Public Utility District address and phone
20 information. That would be good for you?

21 MR. WALTERS: Yes, it would, Your Honor.

22 JUDGE MOSS: I will note your appearance for
23 the record and you need give us nothing further. Ms.
24 Grundon?

25 MS. GRUNDON: This is Traci Grundon on behalf

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1 of Bellingham Cold Storage Company.

2 JUDGE MOSS: Your appearance has previously
3 been entered into the record by your cocounsel.

4 MS. GRUNDON: That is correct.

5 JUDGE MOSS: Mr. ffitch?

6 MR. FFITCH: Simon ffitch, assistant attorney
7 general with the office of Public Counsel of the
8 Washington Attorney General. I previously entered our
9 appearance.

10 JUDGE MOSS: Thank you, and Mr. Cedarbaum?

11 MR. CEDARBAUM: Robert Cedarbaum representing
12 Commission staff, and my address and so forth is also
13 on the record.

14 JUDGE MOSS: Have I missed anyone?
15 Apparently not. Well, how do we wish to proceed this
16 afternoon? I'm going to ask you, Ms. Davison, since
17 you were the one who started this process off. What is
18 it?

19 MS. DAVISON: Thank you, Your Honor. It
20 occurred to me in looking over the order that was
21 issued in this proceeding styled Prehearing Conference
22 Order Notice of Hearing Order, and also based on
23 conversations that I had with counsel to other parties
24 that it would probably be in everyone's best interest
25 to have this conversation and talk a little bit about

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1 the format for the hearing on the 29th of December, and
2 the things that I am particularly interested in
3 discussing today are the issues of whether or not there
4 will be live witnesses that give direct testimony or
5 whether direct testimony should be in a written format,
6 and witnesses available for cross-examination, or
7 alternatively, one reading of the rules of the
8 emergency proceeding is that it could be approached for
9 the hearing that we simply have oral argument and
10 prepare prefiled written briefs upon which we asked the
11 Commission to rule. I was interested in getting your
12 input and discussion of the parties of how we should
13 mechanically proceed with the hearing.

14 My second area of concern that I would like
15 to discuss is the use of our time for that one-day
16 hearing. I'm very concerned that there may be lots of
17 issues to cover, and to the extent we could prepare a
18 schedule or time frames or whatever is appropriate to
19 make sure that we get through hearing in the one day as
20 designated by the notice of the order.

21 JUDGE MOSS: Let me put the question back to
22 you, Ms. Davison. I think it's clear as Complainant
23 you carry the burden of proof here. I will say this at
24 this juncture: The Commission has not found that an
25 emergency exists. It is proceeding on a highly

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1 expedited basis at the Complainant's request and trying
2 to be as accommodating as it can, but one of the
3 purposes of the hearing on the 29th is to give you an
4 opportunity to present evidence to show that an
5 emergency situation exists that would require immediate
6 action under the emergency adjudication statute, and in
7 like kind, to give Puget Sound Energy an opportunity to
8 present evidence that no such emergency exists and that
9 the Commission should proceed under its ordinary
10 statute adjudications or authority, and, of course,
11 others may have some authority on those subjects as
12 well and may wish to put on some evidence on those
13 points. So that remains to be ascertained.

14 As we tried to set forth and capture in the
15 prehearing order, the purpose of the hearing on the
16 29th is to determine whether there is such an emergency
17 as would warrant immediate action, and as outlined in
18 the prehearing order, the various issues associated
19 with that, including, very importantly, by what legal
20 authority the Commission can grant the relief that you
21 purport to be the minimum relief necessary to extricate
22 the public from this emergency situation, which is, I
23 believe, the way the statute brief reads. Again, the
24 question back to you is, what is it that you believe is
25 required to carry your burden?

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1 MS. DAVISON: Thank you, Your Honor, and I
2 appreciate the opportunity to present to you at least
3 what are my thoughts regarding how the hearing could
4 possibly go on Friday the 29th. I agree with you, Your
5 Honor. We do have the burden of proof, and I see that
6 there are two issues that we need to address as the
7 Complainants in this hearing. The first issue is, is
8 there an emergency, and I would propose that we would
9 have a few witnesses, not a lot, but a few live
10 witnesses to address that issue directly and to present
11 live direct testimony on the issue of whether there is
12 an emergency.

13 I think the second part of this is that if
14 the Commission does find that there is an emergency,
15 was there appropriate emergency remedy, and I would
16 propose to have one or two witnesses address that
17 issue. I would see that these witnesses would be
18 subject to cross-examination, and perhaps after we were
19 done with the live witness evidentiary portion of the
20 hearing, we could summarize it with oral arguments by
21 counsel. That would be my proposal on how to proceed
22 on Friday.

23 JUDGE MOSS: It's your thought that you would
24 address in oral arguments all of the various legal
25 issues that are set forth in the prehearing order? In

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1 other words, you say you want to put on some witnesses
2 regarding what remedy you advocate, but, of course, a
3 pressing matter of concern for the Commission is by
4 what authority it would implement such a remedy, as you
5 may propose.

6 MS. DAVISON: Your Honor, I would recommend
7 that we address that both in writing as well as through
8 oral argument to give the commissioners the opportunity
9 to ask the questions about our submitted written
10 product.

11 JUDGE MOSS: So are you considering then a
12 pretrial brief?

13 MS. DAVISON: I am, Your Honor, and I was
14 considering requesting the permission to file it on the
15 Thursday before the hearing.

16 JUDGE MOSS: Anything else before I hear from
17 others?

18 MS. DAVISON: That's it. Thank you, Your
19 Honor.

20 JUDGE MOSS: When you say "a few live
21 witnesses," are you literally talking three or less?

22 MS. DAVISON: Your Honor, I don't have it
23 confirmed, but I am thinking about three witnesses on
24 the -- and probably one, possibly two witnesses on the
25 remedy.

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1 JUDGE MOSS: Do you have a witness list?

2 MS. DAVISON: Your Honor, I do not have a
3 witness list. I'm working on that right now, and I'm
4 struggling with the holidays, but I will have a witness
5 list next week, and I'm happy to provide that just as
6 soon as I get my witnesses confirmed.

7 JUDGE MOSS: Let's hear from Mr. Berman.
8 What do you contemplate will be required from your side
9 in light of what you've heard from Ms. Davison's
10 suggestions, and you have the opportunity to put on
11 your defensive case with respect to these issues as
12 well.

13 MR. BERMAN: One of several comments. First
14 of all, there had been mention of several different
15 witnesses, but we've yet to hear who those witnesses
16 are, whether those are the same as the people who
17 submitted affidavits in support of the amended
18 complaints or not. As you know, and as you referenced,
19 I believe, earlier in the discussion, we've submitted a
20 motion to compel depositions and have sought deposition
21 testimony from both the people who submitted affidavits
22 in support of the Complainants and from any other
23 unnamed witnesses that the Complainants's may be
24 intending to present at hearing.

25 We feel that we would be severely prejudiced

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1 if we were not able to elicit information prior to the
2 hearing in order to determine what it is these folks
3 have to say. These are highly complex matters, and to
4 be presented in the first instance with this
5 information at hearing would be unfair and prejudicial
6 to the Company. So it's unquestionably the case that
7 we would want to at hearing cross-examine any witnesses
8 that are put on by the Complainants. But we definitely
9 would want an adequate opportunity to have discovery
10 from those witnesses, and I've not heard any mention of
11 my opportunity to get that discovery.

12 JUDGE MOSS: Maybe we should take that up
13 first, and it may affect some other authorities with
14 respect to how we proceed a week from today. I think
15 I've heard your essential argument on this. If you
16 have anything to add, I'll give you the opportunity to
17 do that. I've read your motion, and did you have
18 anything else you wanted to add on that?

19 MR. BERMAN: The one other thing I would add
20 is I don't know if the Complainants were intending to
21 put the people who submitted the affidavits on as live
22 witnesses or not, but whether they are live witnesses
23 or not, they are effectively asking them as witnesses
24 in support of the amended complaints, and we feel it's
25 appropriate that we have an opportunity to both obtain

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1 information that underlies those affidavits to see
2 whether what's in those affidavits holds up, whether
3 it's a complete story or not, and we would want the
4 opportunity to cross-examine those witnesses. We think
5 it's inappropriate to rely on affidavits alone without
6 giving us an opportunity to cross-examine the people
7 who submitted the affidavits. So I would add that to
8 what I said earlier, but I think our motion to compel
9 pretty succinctly states the case.

10 There is something of a Catch 22 here that
11 everyone should be aware of. We recognize that under
12 the rules of the Commission, there are certain time
13 limits related to things like depositions, but given
14 the emergency circumstances that have been alleged by
15 the Complainants and the emergency procedures that have
16 been established to have a hearing as early as December
17 29th, we think that it would be highly inappropriate to
18 hold us to certain time limits while not holding the
19 Complainants to those time limits.

20 JUDGE MOSS: I think as far as time limits
21 and time requirements are concerned, we are going to
22 have to be fairly liberal to shorten our modified time
23 periods, which we do have statutory authority to do,
24 and today's prehearing is a good example where I
25 literally gave less than 24 hours notice of a

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1 prehearing, which is something I would not ordinarily
2 dream of doing. So that point is well taken, and I
3 certainly don't feel that I need to take argument on
4 that point.

5 As far as the motion to compel is concerned,
6 of course the time is very short here, so there have
7 been no opportunities for Complainants to file any sort
8 of written response. Ms. Davison, this is your
9 opportunity to respond to the motion to compel and the
10 argument that Mr. Berman has made today.

11 MS. DAVISON: Your Honor, I guess I didn't
12 realize that I was going to be faced with a prepared
13 oral argument on this motion to compel. I can
14 certainly tell you I can explain informally my response
15 to that, but I've only had this motion to compel before
16 me for a few hours this morning, and I've been working
17 very hard on trying to get discovery out the door, so I
18 do not have a prepared response to the motion to
19 compel.

20 I believe that many of the facts that are
21 contained in this motion to compel are either
22 misleading or they certainly don't state the full
23 extent of what I conveyed to Mr. Berman on the
24 telephone, but having said that, I'm happy to tell you
25 what my initial reaction was to the motion to compel to

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1 the request for depositions and the subpoenas to have
2 all these various witnesses appear on the 29th, if you
3 believe that's appropriate.

4 JUDGE MOSS: I want to hear about it. We
5 need to decide. We've got seven calendar days between
6 now and the hearing. The hearing is set on the date
7 you requested, and things are going to have to move
8 quickly, and frankly, if the parties can't work it out
9 between themselves in about 30 minutes, I'll work it
10 out for them. I don't know how else we can get through
11 this and get ready in a week. I'm here to hear what
12 you have to say, and I'm going to rule on the motion.

13 MS. DAVISON: Thank you, Your Honor. I
14 received the subpoenas at roughly six o'clock on
15 Wednesday evening. It was a 34-page fax. As soon as I
16 received the subpoena, I proceeded to contact
17 Mr. Berman to explain to him several of the
18 difficulties that I saw with his request for
19 depositions as well as his subpoenas to make these
20 parties available at the hearing. I indicated to him
21 that I did not believe that first, the CFO's of these
22 companies were the appropriate witnesses to subpoena to
23 this hearing on the 29th. I believe that such a tactic
24 was perhaps harassing in nature in that these
25 individuals are CFO's of very large corporations and

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1 I'm quite confident would not have any information
2 about the specifics of this case and would simply be an
3 extreme inconvenience on their part as well as wasting
4 the very valuable time on the 29th.

5 JUDGE MOSS: Did you identify to Mr. Berman
6 alternative witnesses who are not knowledgeable about
7 the financial circumstances relevant to your
8 complainants?

9 MS. DAVISON: Mr. Berman indicated to me that
10 he would be talking to his clients further about the
11 need to bring the CFO's in for this hearing and that he
12 would get back to me and let me know what his client's
13 response was to that, and I have not heard anything
14 further from Mr. Berman on the issue of the CFO's.

15 JUDGE MOSS: Mr. Berman, speak to us.

16 MR. BERMAN: I have not addressed the issue
17 of this CFO's subpoena in my motion to compel because
18 that was an issue that I had told Ms. Davison that I
19 will look into. Our view on what Ms. Davison had
20 offered me with respect to CFO's was that she would be
21 willing to enter into a stipulation that basically said
22 that these are really huge companies; that they have
23 very healthy financial balance sheets; that those
24 companies are companies that are quite capable of
25 paying the electric bills that they face; that these

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1 are electric bills that do not impact in any
2 significant way the bottom lines of these companies,
3 and she said that she could stipulate to that and there
4 would be no problem in getting such a stipulation. She
5 said if we could live with that, then we could just get
6 past the CFO issue.

7 JUDGE MOSS: Let's get this resolved now, if
8 we can.

9 MR. BERMAN: With respect to that issue, I've
10 had discussions with the companies since that phone
11 call, and our view on that is that, in general, if we
12 could get a stipulation like that, that would get us a
13 good part of the way. It doesn't get us all of the way
14 because there are other issues we wanted to explore.

15 We believe that these are sophisticated
16 companies that engage in hedging and risk-management
17 activities for many aspects of their business, and we
18 wanted to explore with these chief financial officers
19 the issue of what type of hedging and risk management
20 they do, other components of their costs to find out if
21 they simply made a business decision with respect to
22 their electric power costs, that they would endure the
23 risk related to market increases and the cost of that
24 power.

25 I've been struggling trying to figure out how

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1 it would be possible to frame a stipulation that would
2 cover that area, but it's an extremely important area
3 to us because it really relates to the whole issue of
4 whether what we have here is an emergency or what we
5 have here is simply the impact of some business
6 decisions that were made by these companies, and those
7 business decisions have in this one instance gone awry.
8 We are concerned about that. I would be willing to
9 work a bit harder on reaching a stipulation on those
10 issues, perhaps a stipulation that something to the
11 effect that these large companies engage in risk
12 management all the time in many aspects of their
13 business but have chosen not to do so on this
14 particular area because they were comfortable with the
15 level of risk in the electric market. That might be
16 satisfactory.

17 JUDGE MOSS: So as far as that aspect of it
18 goes, what I'm hearing is that there should be some
19 continued work as between Complainants and Respondent
20 to ascertain whether an appropriate stipulation can be
21 crafted and entered into. So we'll put that one to the
22 side and let you all continue to work on that, and I
23 will expect to hear back if there is a continuing
24 problem in this area. Is that fair enough on that
25 point?

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1 MR. BERMAN: I think that's fair. We will
2 try to get a stipulation to the effect I've just
3 described. If we can't do that, you will hear back
4 from us.

5 JUDGE MOSS: Ms. Davison, is that a
6 satisfactory approach to you?

7 MS. DAVISON: Yes, Your Honor. I certainly
8 am willing to enter into a stipulation. I did not
9 characterize it quite in the way Mr. Berman
10 characterized it.

11 JUDGE MOSS: You all work out the details
12 later, if you can. That takes care of that aspect of
13 it. The motion to compel depositions goes to those who
14 have previously testified in the proceeding via
15 affidavit, and I guess the John Does are there as well,
16 so let's go on with argument about that. What's the
17 problem with producing the affiants for deposition,
18 Ms. Davison?

19 MS. DAVISON: Thank you, Your Honor. Under
20 WAC 480-209-480 (6)(b), it states that a party who
21 intends to depose a witness will give at least five
22 days notice to the Commission and all parties prior to
23 the scheduled conference, and that is designed to be
24 five business days excluding holidays.

25 JUDGE MOSS: That contemplates more normal

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1 circumstances, so you don't need to spend a lot of time
2 on argument. What other problems were there?

3 MS. DAVISON: The problem with that is that
4 we did not receive notice until Thursday. I
5 immediately got on the phone to try to locate the
6 whereabouts of the various individuals that Puget Sound
7 Energy seeks to depose, and virtually all of them, with
8 maybe one exception, they are either physically
9 located, in terms of their residence, outside of the
10 State of Washington, or they have traveled somewhere
11 outside of the Seattle area for a vacation or for the
12 holidays.

13 I think that it is virtually impossible, Your
14 Honor, to meet the requirements set out or what had
15 been requested of us in this notice of deposition. In
16 the first place, to require people to appear for a
17 deposition on the 26th of December would require them
18 to travel on Christmas day. Then for people who appear
19 on the 27th of December for depositions would require
20 folks to get an airline ticket on the 26th of December,
21 a day that I'm quite confident there are few, if any,
22 seats available on airplanes.

23 I believe that given the time frames involved
24 here and the very short notice during holidays that it
25 is virtually impossible for to us meet the requirements

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1 that PSE is requesting here, and then the last point
2 that I would raise with regard to these depositions is
3 that the rule requires, it speaks to the issue of who
4 can be deposed. Only witnesses identified by the party
5 as prospective witnesses may be deposed, and all the
6 people that PSE has identified as potential witnesses
7 from their perspective, I would submit to you, Your
8 Honor, would take probably two- or three-day hearings
9 as opposed to a one-day hearing, so we have absolutely
10 no intention of calling that many witnesses. It would
11 be impossible to get to the hearing if we did so, and
12 finally, there are all sorts of legal and technical
13 deficiencies associated with the subpoenas.

14 JUDGE MOSS: Well, I haven't seen any motion
15 to quash the subpoena so I don't know about legal
16 deficiencies and that sort of thing. That issue is
17 really not on the table before me right now.

18 MS. DAVISON: If I may add, you haven't
19 because they have not been properly served.

20 JUDGE MOSS: Ms. Davison, let me pause right
21 here and ask you if it is not in the best interest of
22 your clients to slow this thing down a little bit.

23 MS. DAVISON: Your Honor, I would like
24 nothing more than to slow this thing down a little bit.
25 I am under the same strains and pressures as everyone

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1 else is. And certainly, with the Christmas holidays
2 intervening, it is very inconvenient for everyone, and
3 I appreciate that and I'm very, very sensitive to that
4 fact. The problem is that the emergency that we've
5 described has not gone away, Your Honor, and my clients
6 continue to face extremely high electric prices. Four
7 of these companies are either partially shut down or
8 completely shut down during the holidays, during this
9 period of time which includes through the holidays.
10 That is our problem is we are truly facing an emergency
11 situation.

12 JUDGE MOSS: I'm sure you can appreciate that
13 the reason I ask the question is that as you well know,
14 my job here is to ensure a fair and impartial hearing
15 and to give everyone the due process of law to which
16 they are entitled, and that includes not just your
17 clients but the other side too. The press of time is
18 such that it strikes me that the approach of using
19 depositions to conduct discovery is probably the most
20 efficient process available, and perhaps even an
21 absolutely necessary process under the circumstances.

22 You talked about the affiants have already
23 appeared as witnesses in this proceeding. They filed
24 affidavits in support of the Complaint. That's
25 evidence. It strikes me that the Respondent is

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1 entitled to inquire into the testimony that's already
2 part of the record and that the most efficient way to
3 do that, given the short time available, is to have
4 their depositions, and perhaps we'll have to waive a
5 rule to let it happen, but in terms of time, rather
6 than perhaps have those people come on live, we have
7 their affidavits and we can have the deposition
8 testimony introduced into the record in lieu of live
9 cross-examination.

10 You are right; time is short. I will say
11 this in terms of the one-day hearing. As is typically
12 the case in proceedings in civil court and is often the
13 case before the Commission, we begin a hearing on a
14 certain day and we continue from day-to-day thereafter
15 until the hearing is complete. We start the hearing on
16 29th. We may have to be back here on Saturday. We may
17 be here on Monday. I'm not sure what's going to happen
18 in that regard, but the key point is that we have to
19 give everybody a fair opportunity to present their
20 case, and I haven't even talked to Puget yet about its
21 witnesses, something I intend to do before we are
22 finished today. We may have to do some limiting of
23 witnesses and some limiting of cross-examination to
24 specific issues and that sort of thing, but we
25 obviously have the power to control that sort of thing.

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1 To the extent there is repetitive testimony or
2 evidence -- I'm just struggling here. I'm thinking out
3 loud the best way to proceed.

4 Of course what I would prefer is that you all
5 find some way to cooperate in this phase of things and
6 make that work without having to have me rule on
7 everything, but I have to say that I have under
8 consideration the idea of ordering these depositions
9 and having them be conducted here under my supervision.
10 That is to say, I would make myself available for the
11 duration of the depositions so if there are disputes
12 during the course of the depositions, I will rule on
13 them immediately. I'm just struggling. I don't know
14 how else we can get through this.

15 MS. DAVISON: Your Honor, I did not know that
16 Mr. Berman was going to file a motion to compel this
17 morning. It was my intention to try to contact my
18 witnesses and have more conversation with them about
19 availability and to, as I said to Mr. Berman on the
20 telephone yesterday, to try to discuss this issue
21 today. I didn't realize there was going to be a motion
22 to compel. It was my understanding that we were still
23 talking about the issue and that we were still trying
24 to reach some kind of resolution.

25 Your Honor, I'm struggling with this. I

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1 understand the position you are in and the difficulty
2 of that position, and I certainly do not want to make
3 any suggestion that PSE should be declined their due
4 process. Is it possible we could have these witnesses
5 available for telephone depositions. It's always
6 possible that we could have depositions for a smaller
7 number of individuals next week, but I see a great deal
8 of difficulty with the Tuesday after Christmas and
9 since most of these witnesses are not in the area
10 unless we do it by telephone.

11 JUDGE MOSS: Will telephone depositions work
12 for you, Mr. Berman?

13 MR. BERMAN: Your Honor, I prefer not to do
14 telephone depositions. Among other things, I may want
15 to pull out exhibits, and dealing with written exhibits
16 is extraordinarily difficult if we are dealing with the
17 telephone deposition. If I knew right now what
18 exhibits I would be using, I would be able to get them
19 over the holiday weekend to the witnesses by Tuesday,
20 but given the short time frame that the Complainants
21 have forced us into, I'm not ready yet and will be
22 having to work over the holiday weekend in order to get
23 ready for this. So I'm not sure what written exhibits
24 there would be.

25 In theory, with enough time to get the

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1 information there, I think that would be liveable, try
2 to get that ready for telephone depositions on Tuesday,
3 say, I don't see how that could be done. As Your Honor
4 will note in our motion to compel, we suggested several
5 alternatives if we could not get the depositions done.
6 One was that we move the hearing back to another date
7 so that there would be more of an opportunity to
8 conduct the depositions at a slightly more leisurely
9 pace. We understand the desire of people to be gone on
10 holiday weekends. I would like to do that myself and
11 will not be able to because of this case, but we would
12 be willing for sure to extend the date of the hearing
13 in order to allow more time for these depositions to
14 occur in a more orderly fashion.

15 The other alternative if the affiants will
16 not be available would be to strike the affidavits. If
17 the potential witnesses are not going to be available
18 for deposition, it would be to bar the Complainants
19 from introducing testimony of such witnesses after
20 hearing at the hearing.

21 JUDGE MOSS: You've heard the alternatives,
22 Ms. Davison. Slip the hearing by a few days?

23 MS. DAVISON: I believe that the document
24 problem probably could be resolved through facsimile
25 transmittal of the documents, and I am prepared to make

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1 these witnesses available to the extent I'm required to
2 do so. Again, I need to locate the whereabouts of each
3 individual precisely. I have a good idea about some of
4 them. By the time I received these notices, several
5 people had already left town, and I'm certainly willing
6 to make them available for telephone depositions.

7 JUDGE MOSS: I think Mr. Berman has outlined
8 a problem with that, but perhaps there is a potential
9 solution in the sense that if these individuals can be
10 made available in a place that has a facsimile machine
11 handy, I suppose to the extent you had an exhibit you
12 didn't previously contemplate using, Mr. Berman, you
13 could fax it on the spot. The key thing here is to get
14 testimony that you want and to have the opportunity to
15 inquire, and while it's very tempting to just say
16 Complainants have to make these people available in
17 Olympia on Monday at eight o' clock in the morning on
18 Monday, I have to accept as well taken the point that
19 making travel arrangements on this kind of short notice
20 at this season could be very difficult. In fact, I
21 could almost take judicial notice of that, I suppose.

22 I want the parties to work with me here.
23 Let's be as reasonable as we possibly can, and I'm not
24 saying anybody is not being. I just want to encourage
25 that to continue and perhaps make some of these things

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1 that appear difficult a little bit less difficult. So
2 what about the possibility of exhibits by facsimile as
3 an approach, Mr. Berman?

4 MR. BERMAN: I think that the approach that's
5 been described is probably something that could be
6 worked through. A concern I have is that we were
7 actually planning to do a number of simultaneous
8 depositions during the week because there are at least,
9 I believe it was eight affidavits, or in the case of
10 the City of Anacortes, it was the mayor who submitted a
11 letter, and I should just note for the record that the
12 Complainants purport to have a letter from the mayor of
13 Anacortes, but I have never seen a copy from
14 Complainants that had such a letter, so it's only a
15 theoretical letter, as far as I can tell.

16 MS. DAVISON: Your Honor, I apologize. That
17 is an oversight on our part. We received a letter
18 today requesting the letter, and we were going to serve
19 it on all parties by fax this afternoon.

20 JUDGE MOSS: Should I forgive that oversight,
21 Ms. Davison?

22 MS. DAVISON: I would certainly hope so.

23 JUDGE MOSS: I suppose in similar vein, I
24 should forgive some of these subpoenas and notice of
25 deposition, shouldn't I?

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1 MS. DAVISON: Your Honor, I had only
2 mentioned that I am more than willing to cooperate on a
3 very, very quick basis. I just don't want to promise
4 something that I physically am unable to deliver.

5 JUDGE MOSS: That's very fair that you not
6 promise something that you are physically unable to
7 deliver, but I also think it's not going to do a lot of
8 good to get hung up on some technical deficiencies that
9 in other circumstances might be something we would take
10 a little more seriously in the interest of good orderly
11 process and all that sort of thing. I said what I said
12 just now in the fashion I did to underscore the point
13 that I think we all need to exercise a little judgment
14 and give a little latitude under the trying
15 circumstances of this matter and the difficult
16 circumstances facing not only the Complainants but the
17 Respondent in this rather unsettled energy market that
18 we all find ourselves in.

19 So I hope I made that point clearly enough
20 through this example, and let's talk nuts and bolts
21 about how we are going to work this thing out and make
22 it work the best way we possibly can, so I want
23 Mr. Berman and his cocounsel to have an opportunity to
24 speak to anybody that you are bringing in evidence in
25 the form of testimony through -- that would include

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1 affiants -- any of the witnesses that you identify.

2 You've mentioned the possibility of five live
3 witnesses for our hearing. I certainly want you to
4 identify those to Mr. Berman as soon as their
5 identities are known and to cooperate in the setting up
6 of his opportunity to do preferably live depositions
7 where it is physically possible, or if not a live
8 deposition, then telephone arrangement can be tried,
9 and to the extent that fails, then I suppose I'll be
10 hearing from you all again, and perhaps there will be a
11 motion to strike something from the record or not allow
12 something in or what not, and we'll have to take those
13 things up as they come along.

14 It's going to be in each party's best
15 interest to be as cooperative as possible and make full
16 and fair discovery available, whether through
17 deposition or otherwise, but because of the
18 circumstances of this case, there may be some hard
19 rulings that have to be made in order to get through
20 this.

21 MS. DAVISON: Your Honor, if I may propose or
22 make an offer to Mr. Berman on this issue, I would
23 propose that by the end of the day today, I will
24 identify my witnesses for the hearing on the 29th and
25 that I will make those witnesses available for

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1 deposition, either begin their availability either live
2 in Olympia or by telephone on preferably Wednesday.
3 Although, it does raise the issue I have not seen
4 anything from PSE regarding their witnesses either, and
5 we may very well need to talk to some of their
6 witnesses in advance of the hearing.

7 JUDGE MOSS: Getting started on Wednesday,
8 that strikes me as not leaving a lot of time. Can't we
9 have some of them on Tuesday?

10 MS. DAVISON: If it is possible, I will call
11 -- there is one witness that is, I believe, in town,
12 but again, I'm hesitant to speak for his schedule
13 without confirming for certain. I just don't want to
14 make a promise and be wrong about it, but if it is
15 possible, I will make possibly some witnesses available
16 on Tuesday.

17 MR. BERMAN: If I might suggest, if we could
18 even move the hearing one week, that would allow an
19 opportunity to actually deal with these logistics in a
20 manner that makes some sense. It seems to me that what
21 we are talking about now of learning late, on the
22 evening before Christmas evening that there are some
23 telephone depositions that we have to get ready for on
24 the day after Christmas is kind of a logistical
25 nightmare which makes it difficult to get anything

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1 done. If we could have one more week, we could fit in
2 these depositions.

3 Also, what I heard related to the live
4 witnesses, I didn't hear any reference to all the
5 affiants who, Your Honor as noted, are also witnesses
6 who are offering testimony in this case. So we are
7 going to need to cover all the affiants plus the mayor,
8 plus any live witnesses, so we could be talking up to
9 13 individuals here, and the logistics of dealing with
10 that all over Christmas weekend are getting to sound
11 more and more complex.

12 MS. DAVISON: My response to that is I will
13 do everything humanly possible to make -- I will state
14 that affirmatively. I will make the witnesses
15 available either Tuesday or Wednesday that we intend to
16 call as witnesses for the hearing on the 29th. In
17 terms of the difficulty of preparing for the
18 depositions on those days, those were the days that
19 Mr. Berman asked for in his subpoena, so I will be, in
20 effect, complying with the subpoena and notice of a
21 deposition.

22 The other individuals, I guess it will up to
23 Mr. Berman whether he decides to file a motion to
24 strike. Although, I can represent to you that the five
25 witnesses that I have in mind for the hearing, with one

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1 exception, represent individuals who have already
2 submitted affidavits in this case.

3 JUDGE MOSS: How many affiants are there,
4 eight?

5 MS. DAVISON: No. Not every party submitted
6 an affidavit.

7 JUDGE MOSS: How many are there?

8 MS. DAVISON: We have the affidavit of
9 Mr. Clancy --

10 JUDGE MOSS: Don't list them off. Just count
11 them and tell me. You tick them off and tell me the
12 number. Mr. Berman, maybe you know.

13 MR. BERMAN: Your Honor, I thought it was
14 seven, but I could be in error.

15 MS. DAVISON: I'm getting the amended
16 Complaint now.

17 MR. BERMAN: I believe, Your Honor, there are
18 six affidavits attached to the amended Complaint, and
19 that's not counting the letter that doesn't exist or
20 that was not submitted by the mayor.

21 One thing also I would note with respect to
22 that, it was my understanding that adding the City of
23 Anacortes and indicating the approval of the official
24 approvals relating to the City of Anacortes and the
25 fact that that material was not submitted with the

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1 amended Complaint is, I think, quite significant and
2 also relates to the issue of whether we should be held
3 to this extraordinary schedule on what's, in fact, a
4 diminished Complaint. I understand that we should be
5 working hard to sort through the technicalities, but
6 given the logistical nightmare I'm envisioning for next
7 week, I think that's the right way to get through this
8 is to extend time a bit, allow a more reasoned approach
9 to developing a schedule of depositions so we can get
10 through each of these individuals, and then now that
11 I'm hearing this talk about potentially deposing our
12 witnesses, that's going to add more time as well. I
13 think it's hard to see how it's humanly possible to get
14 all that done in next week alone.

15 MS. DAVISON: Your Honor, in the spirit of
16 the season and trying to be as cooperative as possible,
17 I would offer a compromise regarding the timing. I
18 would be willing to move the emergency hearing date,
19 provided that Puget Sound Energy would be willing to
20 stipulate that any remedy we might receive as a result
21 of the emergency hearing would be retroactive back to
22 December 29th.

23 JUDGE MOSS: I'm just going to sit back and
24 let you all duke it out verbally. Mr. Berman I'm sure
25 you want to respond to that.

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1 MR. BERMAN: We're not prepared to answer any
2 stipulation concerning any remedy. We don't believe
3 that any sort of interim remedy of any sort is legally
4 available. So rather than try to sort through what it
5 means to stipulate that it could be available on one
6 date versus another -- the law is quite clear that even
7 after we get through this hearing, and even if the
8 Commission determines that there is some sort of
9 emergency, all that means is that the Commission would
10 have to then establish an expedited schedule to go
11 through all of the other rate case essentials that
12 would be essential in order to determine whether some
13 relief would be necessary.

14 JUDGE MOSS: There is certainly a question
15 regarding the scope of the Commission's authority to
16 order relief and that sort of thing, so I don't really
17 want to get too deeply into that. However, let me make
18 another observation, and that is it returns me to a
19 point that I thought I had deposted of a moment ago but
20 I was premature, and I'm returning to the point of what
21 I referred to earlier as technical deficiencies.

22 If, in fact, Puget is able to make a
23 well-grounded argument that there is a jurisdictional
24 deficiency to the Complaint, Ms. Davison, the
25 Commission has a lot of discretion and can waive a lot

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1 of things, but it doesn't have any decision with
2 respect to injury. They are what they are. And so I
3 want to offer this suggestion. Perhaps what we should
4 do, as was suggested earlier today, is slow this thing
5 down a little bit. Mr. Berman isn't asking for a
6 month-long extension or a six-week extension. He
7 suggested a week. It does appear that the Complainants
8 have at least some flexibility in that regard and are
9 willing to consider letting things slip a little bit
10 for some quid pro quo, and what I want to suggest is
11 that maybe the quid pro quo for everyone is that we not
12 bring this proceeding crashing down on the basis of
13 some technical deficiency, which can be done, I might
14 add. I recall a proceeding in which I represented
15 clients before the FERC many years ago and before a
16 FERC administrative law judge, who for the moment shall
17 remain nameless, but he had a rather stern reputation,
18 and I recall personally being involved in a long
19 weekend's work due to a technical deficiency, and
20 actually, I believe it was subpoenas. So perhaps we
21 can avoid that kind of thing if we do slow this down
22 just a little bit.

23 Perhaps Mr. Berman can agree that everybody
24 understands that the mayor of Anacortes has signed or
25 will sign. In that sense, it is a technical

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1 deficiency, and if the letter was inadvertently left
2 out, it can be furnished and that sort of thing. Can
3 we flow that way? Can we slow this thing down by a
4 week and everybody agree that we are not going to file
5 papers trying to bring the whole thing crashing down on
6 the basis of somebody forgetting to put their middle --

7 (Pause in the proceedings.)

8 JUDGE MOSS: Let's go back on the record. I
9 left some remarks on the table, and I guess I would ask
10 that the parties respond. Ms. Davison, let's start
11 with you.

12 MS. DAVISON: I would first like to respond
13 to the issue of the alleged deficiency in the
14 Complaint. The letter from the mayor of the City of
15 Anacortes was signed on the day of the amended
16 Complaint. The mayor filed that letter independently
17 or his lawyer did with the Commission, so the
18 Commission does have a copy of the mayor's letter.
19 Apparently, that letter was not served on all the
20 parties, and we inadvertently left it out a Attachment
21 A. We will be providing a copy of the letter to all
22 the parties this afternoon.

23 With regard to the issue of the timing of the
24 hearing, I understand, Your Honor, what you are saying.
25 Your message has come across loud and clear, and I

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1 guess the only way I can respond, Your Honor, is I
2 don't have any of the clients in the room with me, and
3 we will obviously abide by whatever your decision is,
4 but I don't have the authority without talking to my
5 clients to agree to a later date for the hearing.

6 JUDGE MOSS: Maybe we should take a recess
7 and give you an opportunity to contact some of those
8 clients. As I'm sure you recognize, it's rather
9 extraordinary for the Commission to agree to do
10 something on such short turnaround anyway. We did this
11 back in August in connection with some matters that
12 were raised then by -- at least one of the Complainants
13 was a party to that proceeding, and the Commission
14 expedited that proceeding and worked very hard to give
15 the Complainants an early day in court, and they were
16 unable to put their case together, and ultimately, it
17 was dismissed. I'm sure you recall the circumstances
18 and events of that; although, at that time, you were
19 not directly involved, as I recall.

20 That's another concern I have is that parties
21 are going to come in here on the 29th underprepared or
22 unprepared, and we are not going to have everything in
23 the record that we need anyway. So again, another good
24 reason, perhaps, to give this thing an extra week or so
25 might be to give everyone the chance to put on the best

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1 possible case so that we have a complete record and
2 that a decision can actually be made. A piece of that
3 coin is that the Complainants have the burden of proof,
4 and if the insistence continues to be that the
5 Commission resolve this matter within a day-long
6 hearing and that sort of thing, you have to query
7 whether that burden can be carried in that sort of a
8 framework.

9 I think there is a lot of reasons to slow the
10 thing down, at least a little bit, to allow the
11 discovery process to take place and everybody to be
12 fully ready. Frankly, I'm reluctant to order it at
13 this juncture, but I have to make the observation that
14 it sure does look like a good idea, and I'm wondering
15 if it might be wise to take a half an hour break and
16 let you see if you can contact at least some of your
17 clients and see if they agree that their own interests
18 as well as the interests of all concerned might be
19 better served. The holidays are a complicating factor
20 here. Even having canceled, as I'm sure many of you
21 have done, holiday plans and so forth, still time is
22 very short. Gosh, we are all going to have to take out
23 a little bit of time to spend with our families, or we
24 are also going to end up single and on the streets. My
25 wife is very understanding, but some of you may not be

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1 in that lucky position.

2 What do you think about taking a half an
3 hour? Ms. Davison? Did we lose you?

4 MS. DAVISON: Yes, Your Honor. There was a
5 loud and we lost connection. Noise what I was.

6 JUDGE MOSS: You missed my great speech?

7 MS. DAVISON: I'm sorry, Your Honor. What I
8 was suggesting was maybe we should take a half an hour
9 recess and give you an opportunity to talk to some of
10 your clients. It may turn out they will perceive it to
11 be and you will perhaps perceive it to be and share
12 with them that it is in their best interest to slow
13 this down at least a little bit to allow the process to
14 go forward in a somewhat more orderly and sane fashion
15 so that everybody has the best opportunity to put on a
16 well-considered case, and there will be some prospect
17 that the Commission will have such a record at the
18 conclusion of the hearing that it can actually make
19 some decisions.

20 Let me add just a couple of points before we
21 get off this idea. You mentioned at the outset this
22 afternoon, Ms. Davison, the question of pretrial
23 briefs, or at least that's what I was hearing you say,
24 oral argument, these sorts of things. I have to tell
25 you that I have frankly considered ordering pretrial

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1 briefs, and I was hesitating to do that because it is
2 the holiday season, and I suspect people's plans have
3 already been pretty much ruined by all of this, and I
4 was hesitant to do something or require yet another
5 procedural step that might ruin them even more. I
6 guess all I'm trying to say, Ms. Davison, I think there
7 is a lot of good reasons to slow this thing down by a
8 week, reasons that both support the interests of your
9 clients as well as others, as we've heard today. I
10 think you were probably still off the line, and I'm
11 risking repeating myself by saying that I think it's
12 necessary that we go forward in a way that protects
13 everyone's interest, and if we can't do that, then it
14 may be necessary for me to order a continuance, even
15 over the objection of you and your clients, and I
16 really don't want to do that. I would far prefer that
17 everyone recognize what a wise judge they have who is
18 suggesting that it might be in all of their best
19 interest to slow things down. So what do you think
20 about taking a 30-minute recess to give you an
21 opportunity to get on the telephone, Ms. Davison?

22 MS. DAVISON: Your Honor, I'd be happy to do
23 that. I'm sure I will be asked the question of what
24 the alternative hearing date will you. I know you
25 haven't had an opportunity to check calendars. Do you

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1 have any sense of what that might be?

2 JUDGE MOSS: I think it's fair to say we will
3 make arrangements to have it on whatever day we can. I
4 think, Mr. Berman, you had mentioned slipping things a
5 week, and that might allow sufficient time for all of
6 this to take place, and that sounds all right with me.
7 What date would that be? Does anybody have a calendar
8 handy? That would move it from the 29th day of
9 December until the 5th day of January.

10 MS. DAVISON: So I should call back in in 30
11 minutes?

12 JUDGE MOSS: We'll just leave the
13 teleconference bridge line on. Does that work for
14 everybody, 30 minutes okay?

15 MR. FFITCH: I hesitate to speak up as maybe
16 I will just confuse things further, but just an
17 observation that whether or not we address the
18 emergency adjudication question here, obviously, there
19 is a complaint case filed. The Commission can schedule
20 that in the ordinary course on whatever schedule the
21 Commission thinks is appropriate, so it conceivably can
22 schedule complaint cases on a fairly expedited basis,
23 and it just struck me that maybe that's the direction
24 that this proceeding is going, rather than staying in
25 the zone of the emergency adjudication, and if that's

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1 the case, then perhaps, Your Honor, that gives the
2 Commission some more flexibility on the scheduling
3 front.

4 JUDGE MOSS: Whichever way we proceed, I
5 think that we can exhibit adequate flexibility, but I
6 think for now, we need to get over this hurdle of this
7 emergency hearing to determine whether there is an
8 emergency, and if the Commission should act under the
9 emergency adjudication statute. That's really the
10 purpose of this phase one is to make that
11 determination, and the other part of that being what is
12 the minimum necessary relief and what legal authority
13 does the Commission have to effect that relief.

14 I appreciate your comments, and I would say
15 that is a matter yet to be determined as to which
16 statutory authority we will proceed under, but for now,
17 I would like to get over the hurdle of whether we can
18 put this hearing that is scheduled for the 29th off
19 until the 5th and give everything and everybody an
20 opportunity to work through this in a more orderly,
21 thorough, and deliberate fashion.

22 MR. FFITCH: I would just request or suggest
23 that purely looking at Public Counsel's calendar that
24 January the 8th or that following week is much more
25 open than the 5th in terms of getting ready for the

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1 hearing, but I'd just throw that out for general
2 informational purposes.

3 JUDGE MOSS: And Ms. Davison can take your
4 remarks into account as she discuss this with her
5 clients.

6 MR. CEDARBAUM: Just so people don't lose
7 sight of it, the staff is participating in this case,
8 and as you might imagine, we are kind of short staffed,
9 and we have fewer lawyers and fewer staff than I think
10 other parties have working on the case, but we will do
11 what the Commission wants us to do. I wanted everyone
12 to understand that point so people remembered that
13 staff was planning on participating in this case in all
14 respects. We may have witnesses. We will present
15 legal argument on the issues the Commission presented,
16 and we will comply with whatever schedule the
17 Commission has ordered, and right now, it's ordered a
18 hearing on the 29th. But it would certainly seem to us
19 to make sense to let it slip that week so that we can
20 prepare and the Commission can have an adequate record
21 to proceed on, but like I said, we will do whatever is
22 ordered that we do, but the delay seems to make sense
23 as well.

24 JUDGE MOSS: Anybody else want to comment on
25 this before we take our recess?

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1 MS. DAVISON: Your Honor, the last thing I
2 would like to just ask of Mr. Berman is that I will try
3 to reach my clients. I'm a little skeptical,
4 particularly the ones that are on the East Coast. I
5 will do my best to track everybody down as quickly as I
6 can, but I'm also wondering if Mr. Berman is willing to
7 ask his clients about our offer of stipulation that we
8 could really slow this thing way down and maybe give
9 ourselves many, many weeks breather if his client is
10 willing to stipulate that if we receive any remedy
11 through this process that that remedy will be effective
12 back to December 29th.

13 JUDGE MOSS: I don't know whether Mr. Berman
14 cares to do that or not, but whether or not he does, I
15 just want to throw into the mix here as possibly a
16 complicating factor, but I'm going to through throw it
17 in anyway because I think it would be less than fully
18 candid not to, and that is again this question of what
19 authority the Commission has under these circumstances.
20 Mr. Berman stipulating to do something that the
21 Commission may be powerless to do isn't going to do you
22 a whole lot of good. One of the issues we have under
23 consideration is what can the Commission do as of what
24 date and that sort of thing. So I want to caution the
25 parties, it's a fundamental principle of law that you

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1 cannot contract to do an illegal act. The fact that
2 you have a contract to do it doesn't make it legal. So
3 I think maybe what ought to be asked here is if -- I'll
4 stop there. Mr. Berman, did you want to respond? I
5 think you sounded pretty firm on this point before.

6 MR. BERMAN: Your Honor, I was firm before
7 and I'm still firm. It's correct that from our
8 perspective under the law, there is no ability to offer
9 relief until after all the findings required for relief
10 under the statutes are met, and to stipulate that
11 relief would be available at some backward date would
12 be inconsistent with what the statute provides. We are
13 not willing to do that.

14 MR. CEDARBAUM: I guess I just wanted to add,
15 and this picks up with what Simon ffitich mentioned.
16 What he was getting at is there is this underlying
17 complaint against a rate, and I guess I would just have
18 people -- I think there is a distinction here between
19 the underlying complaint and emergency relief. I think
20 the legal issue the Company is discussing has to do
21 with the emergency relief the Complainants have asked
22 for, but I think the Complainants should think about
23 the notion that if we just had a complaint before the
24 Commission, not proceeding on an emergency basis, and
25 we went through the normal statutory procedures, I

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1 think it's relatively clear the Commission, once it
2 determines what a just and reasonable rate is can make
3 that retroactive to the date of the Complaint, and if
4 that's something that gets us past all of these issues
5 and past the timing that we've been discussing, you may
6 want to consider that. I just wanted to bring that up.
7 If it has anything to bear on what we are discussing
8 fine, if not, that's fine to.

9 JUDGE MOSS: At this point, we are slipping
10 over into some of the substantive parts of the case.
11 The concern today is procedural. This is a prehearing
12 conference. We might decide motions and that sort of
13 thing, but we've got to keep our eye on the ball here,
14 and in terms of parties making trade-offs and
15 stipulations and one thing and another, those probably
16 should be on procedural matters. We can allow the
17 thing to slip a little bit in order to insure that we
18 have a full and complete record and insure fairness, to
19 insure that the hearing exhibits, all of those
20 qualities that a hearing must exhibit before the
21 Commission can legally act.

22 That's the concern that I have is that time
23 is just very short for that possibility to be realized,
24 and I think that should be the focus of the parties for
25 purposes of our prehearing today and the focus of

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1 discussion with clients about the possibility of
2 slipping things by a week should be the procedural, the
3 process requirements of the case as opposed to trying
4 to extract what are effectively substantive
5 concessions.

6 In terms of the relief that comes out of this
7 case, if any, ultimately, the Commission is going to do
8 what the Commission thinks is just and has a basis to
9 determine is a just result, and it's just like refunds
10 in a rate case. That's a matter of Commission
11 discretion. The law does not compel that refunds be
12 ordered if a rate ends up being less than that filed
13 for or less than what is effective on an interim basis
14 or what have you. It doesn't compel it. It gives the
15 Commission discretion, and the Commission will exercise
16 its discretion appropriately, and to that extent,
17 having a stipulation such as the one you've asked for,
18 Ms. Davison, probably doesn't do you a whole lot of
19 good anyway, because the Commission is ultimately going
20 to effect a just result as it sees it to be, and there
21 is this question of whether stipulating to something
22 the Commission is otherwise powerless to do is
23 something the Commission would ever approve or could
24 legally approve, I frankly have some serious doubts.

25 So with all that food for thought, I feel

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1 like I'm beginning to ramble a little bit here, and I
2 hate it when I do that, so maybe this would be a good
3 moment to take that recess, and then we can come back
4 on the line at 3:30 and wrap this thing up. Is that
5 agreeable to everyone?

6 MS. DAVISON: Yes. Thank you, Your Honor.

7 MR. BERMAN: That's agreeable to Puget Sound
8 Energy, Your Honor. Just one note I'll make is that I
9 would second the comment by Mr. ffitich that January 8th
10 I think is in many ways more sensible than January 5th
11 given that the week that the 5th is in, like next week,
12 is a four-day week with a holiday weekend in the
13 middle, and I envision there could be scheduling
14 problems in that week as well. So moving us into the
15 week of the 8th seems like a very intelligent way to
16 move us out of these holiday weekends and give enough
17 time to do these preparations that we have discussed.

18 JUDGE MOSS: I'll just observe in that
19 connection, because different counsel have different
20 preferences. It was always my preference to start
21 hearing on a Monday because that gave me the weekend to
22 work with relatively few distractions. Given the sort
23 of intensity, if you will, of the effort here, that
24 might be a thought well taken, and I'm not going to
25 opine one way or the other as to what's better for

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1 everyone else. The 8th is the day we could go ahead
2 and kick it off on that Monday. I'm willing to
3 schedule that. If the best we can do is the 5th, then
4 I'm willing to schedule that too.

5 We'll be in recess until 3:30. I'm going to
6 leave the teleconference bridge line on, so you just
7 call back in whenever you are ready. I'll be back here
8 about 3:25 or so. We will go on promptly at 3:30.

9 (Recess.)

10 JUDGE MOSS: Let's do a little roll call and
11 see if everyone is here. Ms. Davison, are you back?

12 MS. DAVISON: Yes, Your Honor.

13 JUDGE MOSS: Mr. Berman?

14 MR. BERMAN: Yes, Your Honor.

15 JUDGE MOSS: And Mr. Cedarbaum is back, and
16 Mr. Ffitch?

17 MR. FFITCH: Yes, Your Honor.

18 JUDGE MOSS: Ms. Grundon?

19 MS. GRUNDON: Yes, Your Honor.

20 JUDGE MOSS: Mr. Walters?

21 MR. WALTERS: Yes, Your Honor.

22 JUDGE MOSS: Is there anyone else who wishes
23 to enter an appearance who previously hasn't entered an
24 appearance today? Hearing nothing, then I think we are
25 in good shape to go forward. Ms. Davison, do you have

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1 anything to report?

2 MS. DAVISON: I do, Your Honor. What I heard
3 from the clients I was able to contact in that short
4 period of time, I heard the pretty strong expression
5 that they remain in a very severe emergency situation;
6 that just simply agreeing to slip the date of the
7 hearing was something that I heard a lot of reluctance
8 to agree to. I think upon pushing my clients further
9 on this issue of the scheduling of the hearing, I
10 received, I think, some feedback or some suggestions in
11 terms of issues that perhaps we could probe a little
12 further this afternoon.

13 One of the concerns that was expressed is
14 that we would agree to delay the hearing, and then we
15 would be inundated by discovery requests from Puget.
16 We already have over 350 that we are working on
17 responding to and that we already have a list of I
18 don't know how many depositions, and that we would end
19 up spending the entire time just responding to more
20 discovery and more depositions, and that it would
21 certainly do nothing to help prepare for our case but
22 perhaps help PSE prepare for their case.

23 Perhaps a compromise can be reached here.
24 What we would like to see is if there is an agreement
25 to delay the hearing that the delay be very, very

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1 limited in duration. I'm told that the emergency team
2 for the governors will be reassembling next week and
3 that there is a view that we will be in a very, very
4 serious emergency again as early as the first of
5 January, and if we do delay it, then it should be very,
6 very limited in duration. Perhaps we could come up
7 with some kind of ground rules for much more orderly
8 discovery, talk about the scope of discovery and some
9 dates. We are very concerned about depositions that go
10 on for days and days and days.

11 We will propose that we have two days of
12 depositions for all of the witnesses for our side of
13 the case, and those will be individuals that we would
14 intend to call as witnesses at the hearing, and that in
15 exchange, we would have two days of depositions of the
16 witnesses that PSE intended to call on their side for
17 the hearings, and then again, I think we need to talk
18 about what the scope of the discovery is with regard to
19 this particular issue on the emergency, that from our
20 perspective, this is not the time to squeeze the entire
21 case into a one-week period of time, but as we have
22 said repeatedly, this is a phased approach, and
23 hopefully, we could get some agreement about what is
24 within the realm of the scope.

25 So that's the feedback and the response I got

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1 back from my clients.

2 JUDGE MOSS: It sounds like there may be some
3 room here for reasonable accommodation. I'll just note
4 a couple of points in connection with your remarks and
5 then we'll hear from Mr. Berman.

6 As I recall, as I made note of your remarks
7 earlier, Ms. Davison, apparently, it's your
8 anticipation that four of the six affiants will be
9 witnesses. So if we had depositions of the witnesses
10 you intend to call at hearing, that would cover
11 two-thirds of the affiants at least simultaneously and
12 largely satisfy the current scope of the deposition
13 notices, subpoenas, or whatever they are. So that's
14 one observation. The other observation is that the
15 concept of having a couple of days set aside for each
16 side to conduct depositions sounds like a good idea to
17 me. Again, we can arrange that so that I am available
18 on a continuous basis to the parties to resolve any
19 disputes that might arise during the course of those
20 depositions, and in terms of the scope of discovery,
21 I'm perfectly happy for us to talk about that this
22 afternoon and see if we can establish some reasonable
23 limits. Maybe the parties can identify parts of the
24 discovery request that are essential and germane to the
25 Phase 1 hearing, and perhaps some of the remainder of

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1 it could be held in abeyance for the Phase 2. I'm open
2 to ideas on those subjects. So those are my comments
3 at the moment, and let me ask Mr. Berman to say what he
4 has to say.

5 MR. BERMAN: Thank you, Your Honor. I guess
6 a few comments. One, we are not willing to waive our
7 right to depose each of the affiants, so that would be
8 all six of them, plus the mayor, so that's seven, as I
9 count. Plus, if there were going to be any witnesses
10 called in addition to those affiants, we would want to
11 depose those folks as well.

12 We would be happy to try to do that, all
13 those seven depositions, within two days. I'm a little
14 concerned about whether that's really realistic to deal
15 with that many witnesses in that period of time. One
16 suggestion I would make in that regard is that if Your
17 Honor intends to be present to deal with any disputes,
18 if there is some dispute, there is some concern that
19 Puget Sound Energy was asking inappropriate questions
20 or was extending the depositions unnecessarily, we
21 would assume you would be there to rule on that matter,
22 so I would prefer to deal with that, and I can assure
23 you that we would act accordingly to try to prevent you
24 from having to be called in, and I think that's more
25 realistic than setting an artificial time limit on how

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1 much time could be spent on the depositions. If they
2 can be done in half an hour each, we would do them in
3 half an hour each, but it's hard for me to predict
4 right now how long each would take.

5 With respect to how many requests have been
6 served, I'm not quite sure where 350 comes from. I
7 would note that we served essentially identical
8 discovery on each of the Complainants, and I would
9 guess that what counsel for the Complainants has done
10 is taken the requests that have been served on each of
11 the Complainants and added up the numbers for each of
12 the Complainants to somehow magnify the scope of the
13 discovery. I think if you were to multiply the
14 discovery that was served on Puget Sound Energy by
15 seven or eight, you would get a large number as well,
16 particularly if you counted subparts and everything
17 else, but what I would suggest with respect to the
18 scope of discovery is that we handle that in due
19 course. You said it's your intention to be available
20 if we need assistance in a motion to compel, and I
21 would propose that if Ms. Davison has a concern with
22 some of our responses or if we have a concern with some
23 of her responses that we present it to you immediately
24 and get a ruling, and that that's the appropriate way
25 in dealing with any disputes concerning discovery.

00173

1 JUDGE MOSS: I think that's right in terms of
2 I will certainly make myself available for that purpose
3 and to help move this process along and keep everybody
4 on track, make myself available through the discovery
5 period. I do think that we can certainly set some
6 aspirational goals, if you will, in terms of some time
7 frames, and that has a tendency to encourage sometimes
8 the focus and honing of inquiry through discovery that
9 just might not otherwise occur.

10 I think under the circumstances of the case,
11 I'm finding myself leaning in the direction of
12 Ms. Davison's suggestion that we specify a couple of
13 days for each side to conduct the depositions it feels
14 are important. I don't know what you have in mind in
15 terms of the scope of the depositions, but I would
16 expect, particularly with regard to affiants who are
17 not going to appear further as witnesses that the scope
18 of the deposition ought to pretty much be limited to
19 what the affidavit contains that you feel you need to
20 rebut or need the opportunity to inquire further into,
21 so those, at least, would be pretty quick, I think.
22 Those affidavits are fairly brief.

23 As far as any witnesses who might come on,
24 then those depositions might take a bit longer.
25 Consider someone such as the mayor of Anacortes. It's

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1 hard for me to imagine there would be a great deal of
2 relevant testimony or evidence that he might possess or
3 that extensive deposition of him would be likely to
4 lead to the discovery of admissible evidence. Again,
5 that would probably be a very short deposition.

6 I guess what I'm looking at here is sort of a
7 blend of the ideas that we can't set aside a couple of
8 days per side to do that process. That in turn might
9 obviate the necessity for a fair amount of written
10 discovery. I think depositions are a very useful
11 discovery tool. I have often wondered why they are not
12 used more often in administrative proceedings. So it
13 may have a couple of benefits for us to proceed in the
14 fashion along the lines Ms. Davison described, but with
15 the other side of the coin being that I think we would
16 not limit that to just the witnesses but to anyone
17 whose testimony is intended to be introduced as
18 evidence into the record, so that would include the
19 affiants. Alternative being, of course, that if the
20 affiant who is not otherwise appearing in the case is
21 not made available for deposition, cannot be cross-examined, I
22 would have to wonder whether we ought to have that
23 testimony in the record at all. It clearly at that
24 point is hearsay, statement by witness outside the
25 hearing.

00175

1 So that's my thinking on the subject. Where
2 does that leave us? Let's assume for half a moment
3 that I say we are going to set two days for depositions
4 for each side with the identity of the deponents to be
5 limited to those who are designated by either side as
6 witnesses or who have put in some sort of an affidavit
7 or otherwise quote, "testified," unquote, in the
8 proceeding. How does that sound, Ms. Davison?

9 MS. DAVISON: Your Honor, that sounds fine
10 with me. We are willing to agree to that, and I would
11 add in response to the concerns of Mr. Berman that we
12 do not agree that the depositions should extend over
13 the two-day period, but we will make as many people
14 available as they sit within those two criteria. So we
15 can have everybody ready to go on a pretty quick
16 turnaround basis, and we also very much appreciate your
17 offer to be available, and we do think that it would be
18 helpful to have these depositions in Olympia.

19 JUDGE MOSS: I want to take a very brief
20 recess for my own purposes here, so everybody stay on
21 the line. This is only going to take me about three
22 minutes, and I'll be right back.

23 (Discussion off the record.)

24 JUDGE MOSS: Ms. Davison, are we talking
25 about the 8th?

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1 MS. DAVISON: Your Honor, I say very
2 reluctantly the week of the 8th.

3 JUDGE MOSS: In fairness to everyone, it
4 poses all kinds of problems. I've had to do all sorts
5 of delicate negotiations outside the room just to make
6 that happen, but I just got on the highest authority
7 that we can, in fact, do it on the 8th, even though
8 that's going to ruffle some feathers, so that's good, I
9 think, a good result, because I think it will give an
10 opportunity for this proceeding to go forward in a more
11 orderly fashion and produce a better record that will
12 permit the Commission to make a good decision, and I
13 think that's really in everybody's best interest. Let
14 me get my calendar. I'm going to have to step out of
15 the room again.

16 (Pause in the proceedings.)

17 JUDGE MOSS: I have my calendar. Let's say
18 we block out the 8th and the 9th just out of an
19 abundance of caution. Nobody objects to that? Hearing
20 no objection, then we'll reschedule the evidentiary
21 hearing to those days. We will start on the 8th. If
22 we can finish, great. If we can't, then I'll have the
23 facilities set up for the 9th as well.

24 In terms of the time for the depositions,
25 Ms. Davison, did you have some specific days in mind

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1 where your witnesses could be made available here in
2 Olympia?

3 MS. DAVISON: I would prefer to do it on
4 either Wednesday or Thursday or Thursday and Friday.

5 JUDGE MOSS: So that would be the 27th and
6 the 28th; is that right?

7 MS. DAVISON: Yes, Your Honor.

8 JUDGE MOSS: Would be your first preference,
9 and then your second preference would be the 28th and
10 29th?

11 MS. DAVISON: That's correct, Your Honor.

12 JUDGE MOSS: Mr. Berman, can you and your
13 colleagues be available to conduct these depositions on
14 those days?

15 MR. BERMAN: Your Honor, I could be. I'd
16 prefer if we did it on the 28th and 29th only because
17 that would give a little bit more opportunity, given
18 the Christmas holiday, to get ready for things. I
19 would also note that a little earlier you referred to
20 goals, and I wanted to be clear that we do feel that we
21 should have a right to take the deposition of each of
22 these individuals. We will do everything in our power
23 to do it in two days, but we would not want to lose the
24 ability to depose each witness who we are entitled to
25 depose if we can't get it all done in two days, and as

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1 you have said, you will be available if anyone thinks
2 we are taking overly long with a witnesses or if there
3 are any concerns or disputes about any of the
4 depositions, so that shouldn't be a problem.

5 JUDGE MOSS: I don't think that will be a
6 problem. I will stay continuously available to, in
7 effect, supervise this process if needed, and I think
8 between your best good-faith efforts and my efforts, if
9 required, then we will able to accomplish a great deal
10 in two days, and we may have to start early and end
11 late, but that's the nature of the beast, and we will
12 deal with that.

13 MS. DAVISON: I just want the record to be
14 abundantly clear that we are agreeing very, very
15 reluctantly to move the date of this hearing, but our
16 agreement was contingent on two days of depositions and
17 not a goal of two days of depositions.

18 JUDGE MOSS: I'm mindful of that, and let me
19 just say that it would be my intention that we would be
20 able to wrap it up in two days, and I'm sure
21 Mr. Berman, with the extra day of preparation, will be
22 able to hone his questions to the point that I feel
23 very confident about the two days, and I would set a
24 very high standard to allow it to go beyond two days.
25 So it's a good point that you make.

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1 I should be perfectly clear that when I say
2 aspirational goal, I'm setting a pretty darn high
3 standard there that would basically be -- the question
4 that I would want to consider was whether it was a
5 denial of somebody's rights to the point of being a
6 disservice to the end of justice before we would let it
7 go beyond that. I always except counsel remarks that
8 they will do their very, very best, and of course, they
9 want to be cautious and have to be cautious, and I
10 think that's what we are hearing from Mr. Berman. I
11 think it can be done in two days, so I think we can be
12 pretty confident about that. In like kind, I think we
13 will expect the same from the other side. In terms of
14 your opportunity to depose Puget's witnesses, we'll set
15 two days for that, and again -- how many witnesses do
16 you have in mind, Mr. Berman; do you know?

17 MR. BERMAN: At this point, we only have one
18 witness in mind. That might extend to two or even
19 conceivably three, but at this point, there is only one
20 who we have in mind, and quite frankly, it's hard for
21 us to imagine how they could spend two days on relevant
22 matters if they are only limiting us to two days since
23 the primary issue here is whether these Complainants
24 face an emergency.

25 JUDGE MOSS: It sounds to me like we could

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1 probably be able to wrap the whole thing up in a couple
2 of days, three days, maybe, given that. Of course,
3 there may be other witnesses involved. Mr. Cedarbaum
4 mentioned earlier that staff may be putting on some
5 witnesses. Do you know at this point, or is it still
6 under consideration?

7 MR. CEDARBAUM: It's still under
8 consideration.

9 JUDGE MOSS: Staff may identify two or three
10 witnesses, and somebody might want to depose them as
11 well, and we would have to take that up and fit that in
12 as well. So let's talk about the 28th and the 29th for
13 deposition dates for PSE to depose Complainants'
14 witnesses on those two days, and then do we spill over
15 into the next week to depose PSE's witnesses; is that
16 the idea?

17 MR. BERMAN: I think that makes sense, Your
18 Honor.

19 JUDGE MOSS: What day would work well for
20 everybody? This is the week of January 1st.

21 MS. DAVISON: I would propose January 3rd.

22 JUDGE MOSS: Does that work for you,
23 Mr. Berman?

24 MR. BERMAN: Yes, Your Honor.

25 MS. DAVISON: And into the 4th if needed.

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1 JUDGE MOSS: Who knows. The number of
2 witnesses may change or something, and the same rules
3 will apply to both sides in terms of my supervising the
4 matter. I will keep myself available, and if parties
5 are straying into territory where they don't need to
6 stray or being needlessly repetitive or the sorts of
7 things we try to limit, then I certainly will be
8 available to rule on such a concern and will keep it
9 within reasonable bounds. Associating let me make a
10 note here. Complainants to depose PSE witnesses, and
11 we are going to set aside the 3rd and the 4th for that,
12 and we will see. Perhaps only one day will be
13 required, but we will see, and then I've set aside the
14 8th and the 9th as hearing dates. What other
15 management might we consider to keep this thing running
16 smoothly here? Anybody want to offer suggestions for
17 anything else we might do procedurally to facilitate
18 the parties' preparation of their cases?

19 MR. BERMAN: Your Honor, earlier in the
20 discussion, there was a discussion of pretrial briefs,
21 and I can't recall if any specific conclusions were
22 reached before. I have written down a note about the
23 Thursday before the December 29th hearing, and perhaps
24 we should clear up procedurally how that works.

25 JUDGE MOSS: I think it might shorten things

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1 at hearing and perhaps help frame the whole process if
2 we do the prehearing briefs, and flipping back and
3 forth here, we could have those the week before the
4 hearing if that works well for everybody. That will
5 give everybody an opportunity to brief the legal
6 issues, and we probably will get a more focused and
7 thorough discussion that way than we might through a
8 brief oral argument at the conclusion of the hearing.
9 Mr. Berman, do I hear you encouraging that we have
10 those?

11 MR. BERMAN: I think that makes a lot of
12 sense, Your Honor, and if you are proposing January
13 2nd, I think that's a fair date.

14 MS. DAVISON: Your Honor, I would suggest not
15 the day after a holiday but rather the 4th of January.

16 JUDGE MOSS: I guess if we set the 4th, and
17 if you wanted to file on the 2nd, Mr. Berman, you
18 could. Doesn't everybody work through these holidays
19 and weekends? I don't understand you people. One of
20 my law partners back in D.C. decided to move out to San
21 Diego and connected with a firm out there, and he told
22 me quite seriously during the interview that he
23 interviewed with the associates as a group, and they
24 said, "Now, we want to be sure that you are not in here
25 working those East Coast hours when the surf is up

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1 because it's going to make us all look bad." So I
2 guess the two coasts do have different work ethics.

3 I think the 4th works. Let's just do that,
4 and Mr. Berman can have his ready on the 2nd and not be
5 otherwise distracted.

6 MR. FFITCH: I'm assuming the issues to be
7 addressed are those outlined in the Notice of Hearing.

8 JUDGE MOSS: Yes. Definitely those, and if
9 someone identifies an issue that they believe is a
10 critical legal issue that is not listed in the
11 prehearing order, than I think they should bring that
12 to my attention, and that will necessarily bring it to
13 everyone else's attention. Because we may as well have
14 the full picture, and we aren't going to have time for
15 reply briefs. So if you think there is something I've
16 missed here in formulating this list of issues in this
17 prehearing order, you don't need to let us know this
18 minute, but let us know you think it's important and
19 should be briefed, and then other parties will have an
20 opportunity to brief that issue as well. Of course, I
21 was cautionary in the prehearing order saying that it
22 would be these issues, but not necessarily limited to
23 these issues.

24 I've discussed these with the commissioners
25 as late as today, spent a lot of hours on this with

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1 them, and we agree that these are issues that must be
2 addressed.

3 MR. FFITCH: Your Honor, one or two other
4 miscellaneous items. I will just also advise you that
5 we may have one witness for the hearing, Mr. Lazar. We
6 haven't made a final decision about that yet either,
7 but we might well have a witness.

8 JUDGE MOSS: I think we need to have a
9 deadline established for parties to decide if they are
10 going to have a witness or two and who those witnesses
11 are going to be. I think that date should come before
12 the depositions, so I think I'm thinking the 27th that
13 everybody needs to identify their witnesses by then.
14 Is that possible? Is there anybody that's going to
15 tell me that's not possible to do?

16 MR. FFITCH: Your Honor, I would prefer the
17 28th.

18 JUDGE MOSS: Anybody else have a problem with
19 the 27th?

20 MR. FFITCH: I could manage the 27th, Your
21 Honor. I will withdraw that. I understand that's
22 prior to the depositions. We can manage that.

23 JUDGE MOSS: That would be helpful.

24 MR. CEDARBAUM: This is a work in progress
25 for us, so we will make our best efforts to do that,

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1 but I hope if it turns out on the 27th we just haven't
2 been able to land yet that it will be as soon after
3 that as possible, but I would also like to make it
4 clear that I think the depositions that are being
5 scheduled for the Company and the Complainants
6 primarily deal with whether or not there is an
7 emergency. At least that's my impression. The facts
8 with respect to that are most appropriate to come from
9 the Company and the Complainants. I don't that staff
10 has a lot to offer on that issue. I think we will be
11 primarily responding to what we hear. So we may
12 identify a witness, but I may not agree they can be
13 deposed because they may not have information to offer
14 on the issues for the deposition.

15 JUDGE MOSS: Let me just say this. As I see
16 it, and I'm willing to have others comment on this
17 point as well, but as I see it sitting here today, the
18 posture of the case is that this early hearing is for
19 the purpose of determining whether there is an
20 emergency that is of the nature described in the
21 emergency adjudication statute that would warrant
22 immediate action by the Commission.

23 Furthermore, the next issue then is assuming
24 there is such an emergency, what is the minimum action
25 necessary to be taken by the Commission in order to

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1 relieve that emergency. So that's the second issue as
2 to which there would need to be fact testimony, I
3 think, evidence, and then there is the legal question
4 of what is within the Commission's power to do in an
5 emergency relief situation. So we've got two factually
6 based questions that also have some legal issues tied
7 up with them, and then one issue that I think is pretty
8 purely legal in nature. So that's the general scope
9 that I see. Does anybody want to comment on that, or
10 does everybody pretty much see the hearing the way that
11 I do?

12 MS. DAVISON: Your Honor, I believe those are
13 good identification of the issues for the hearing.

14 JUDGE MOSS: Then we've got Phase 2, which
15 will be somewhat broader, perhaps. So I think that
16 what I want to do then is establish the 27th as the
17 date on which parties must identify witnesses. Any
18 party who cannot identify its witnesses by that date
19 should at least submit a statement to that effect
20 explaining why not and when that decision appears can
21 be made, and I know that wasn't very grammatical, but
22 perhaps you all will forgive my lack of grammar and
23 hopefully understand what I said. Then we will have
24 the 28th and 29th for depositions here in Olympia.
25 Again on the 3rd and 4th is depositions, prehearing

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1 briefs on the 4th. Are there other dates we can
2 usefully set that would be helpful?

3 MR. FFITCH: Your Honor, we have Bench
4 requests due on the 27th at this point.

5 JUDGE MOSS: Correct. I don't see any reason
6 to change that, do you?

7 MR. FFITCH: No, Your Honor, not from Public
8 Counsel.

9 JUDGE MOSS: Hearing nothing from anybody
10 else on that point, we'll leave that date in place.
11 Keep mindful that the overall goal here is an orderly
12 proceeding. Are there any other dates that I should
13 consider setting, any other procedural steps that we
14 should impose a deadline?

15 MR. BERMAN: If we could just clarify, Your
16 Honor, with respect to that letter from Anacortes that
17 was not included with the amended Complaint, what date
18 is the Complaint going to be made whole?

19 MS. DAVISON: I believe the Complaint is
20 already made whole because the letter was filed by the
21 City at the time that we filed our amended Complaint,
22 but the letter has now been faxed to all the parties
23 this afternoon.

24 JUDGE MOSS: So you should have the letter,
25 Mr. Berman, when we get off the phone. Mr. Berman,

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1 what about an answer? What sort of time frame were you
2 thinking of in terms of an answer to the amended
3 Complaint?

4 MR. BERMAN: Your Honor, I think it would
5 make sense if we submitted our answer along with our
6 prehearing brief on January 4th.

7 JUDGE MOSS: You would assert your
8 affirmative defenses at that time, I would assume.

9 MR. BERMAN: Yes, Your Honor.

10 JUDGE MOSS: I'm thinking we should have that
11 before Complainants' deposition of your witnesses, so
12 maybe we ought to move that back to the 2nd.

13 MR. BERMAN: So an answer on the 2nd and the
14 prehearing briefs on the 4th?

15 JUDGE MOSS: That's what I was suggesting.
16 Does that work for everybody else? I think that will
17 work best because otherwise, the answer, particularly
18 the affirmative defenses, may open something up that
19 then the Complainants say, Well, we needed to ask about
20 that at the deposition but we didn't know. So I'm put
21 back into the posture of having to decide whether to
22 reopen that process, and I don't want to be put in that
23 position. That ought to give you plenty of time to
24 craft an answer. Again, we are operating here under
25 difficult circumstances. I think that's probably about

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1 the best we can do.

2 MR. BERMAN: I think that's fair, Your Honor,
3 with the one caveat that, of course, if our affirmative
4 defenses may raise certain issues that are beyond the
5 scope of the depositions that are occurring on the
6 following days. Since the depositions are leading up
7 to the emergency hearing, there may well be some issues
8 that we would address in our answer that should not be
9 addressed in the depositions, and we wouldn't want to
10 suggest that it's appropriate for them to inquire into
11 everything in the world at those depositions.

12 JUDGE MOSS: Again, we are in a phased mode
13 here, and your answer is going to be to the entire
14 Complaint, and your affirmative defenses will speak to
15 the entire Complaint. So I think almost certainly it
16 will raise some points that are outside the scope of
17 the hearing and the proceedings we are setting up for
18 the 8th and the 9th.

19 The same thing goes in the other direction.
20 I'm sure that the depositions that you conduct on the
21 28th and the 29th of the Complainants' witnesses will
22 similarly be limited in scope to the matters that we
23 are going to hear on the 8th and the 9th, and I feel
24 we've all understood that as we talked here, but maybe
25 I haven't made that sufficiently clear.

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1 I've marked down on my calendar the 2nd of
2 January as the date for PSE's answer and affirmative
3 defenses and, of course, we have your petition in this
4 case too, but we are not considering that at this
5 phase.

6 MR. BERMAN: I'm not sure what the meaning of
7 that comment, "We are not considering that in this
8 phase." I would certainly note that if the Commission
9 were to determine that it was appropriate to offer some
10 sort of interim relief then we don't think that's
11 appropriate, but if the Commission were determine it is
12 appropriate to offer it some relief, we believe that
13 then they would also have to consider at the same time
14 how the cost of that interim relief would be allocated
15 amongst the various classes of customers of Puget Sound
16 Energy because obviously, it would not be appropriate
17 or legal to simply transfer those costs to Puget Sound
18 Energy shareholders.

19 JUDGE MOSS: I certainly am not in any
20 position to do what would amount to prejudgment. I
21 certainly will comment that your argument is well
22 taken. To the extent that you would want to make out
23 that argument in connection with this first phase, then
24 that question would be relevant. Although, I suppose
25 it is in the form of a petition. If I may put it

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1 crudely, that really is a matter that is more between
2 PSE and the Commission than it is between PSE and the
3 Complainants. So it probably still will not be a
4 matter as to which there needs to be any particular
5 discovery or great deal of discovery.

6 I'm just thinking out loud as I say that,
7 Mr. Berman. Do you see it as I do that that is more a
8 matter as between PSE and the Commission in terms of
9 how the Commission might consider the question if some
10 relief were ordered how that might be handled to keep
11 --

12 MR. BERMAN: I agree with Your Honor that I
13 can't imagine the Complainants having much to say that
14 would be relevant on that issue because I don't see how
15 the Complainants would have any expertise or
16 information concerning those rate-making issues, but I
17 wouldn't want that characterization to go so far as
18 saying we can leave aside that essential issue. If
19 interim relief is to be offered or any relief is to be
20 offered under the Complaint, there will have to be a
21 determination made about how the cost of that relief
22 gets allocated to other classes of customers.

23 JUDGE MOSS: I think it's appropriate that
24 question be on the table, and that's what I meant to
25 say earlier when I said I thought your remarks were

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1 well taken. To the extent that that's an issue that
2 PSE needs to advance to protect its interests, then it
3 should do so. I didn't mean to imply anything to the
4 contrary. Are we clear now?

5 MR. BERMAN: Yes, Your Honor.

6 MR. FFITCH: I think this is an issue that we
7 view as quite important. We probably have a difference
8 of opinion with Puget on the substance of the petition.
9 In the ordinary course, when a petition like that was
10 filed, there would be some further process on the issue
11 as there was in the Avista case. Although, I believe
12 that went to an open meeting, but there is a potential
13 for further process, in any event. So if it's going to
14 be on the table, to use your phrase, in this phase of
15 the case, then it strikes me that is something we might
16 want to address in the prehearing briefs.

17 JUDGE MOSS: I think that's right, Mr. Ffitch
18 because as I'm sitting here thinking about this, I
19 think it certainly bears on the second question, the
20 minimum relief necessary in the event it is shown there
21 is an emergency warranting such action. So to that
22 extent, at least, it's certainly on the table, and I
23 recognize too that it is an issue that's important to
24 Public Counsel. So again, I don't want to try to cut
25 anybody off from their rights and protecting their

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1 rights and interests in the proceeding, and we will do
2 what we have to make sure that doesn't occur.

3 MR. FFITCH: Your Honor, I have one other
4 item for Public Counsel, actually two items for Public
5 Counsel. First of all, on the depositions, I'm
6 assuming that attendance at the depositions by other
7 parties, there is no objection to that should we or any
8 other intervenor want to sit in on a deposition?

9 JUDGE MOSS: Is there any objection to that?
10 Hearing no objection, I don't think you have a problem.

11 MR. CEDARBAUM: If I could just interject one
12 request of the Company and the Complainants that I
13 think the staff will be listening into those
14 depositions to, so to the extent you might come up with
15 a schedule ahead of time of which witnesses and when
16 during those days, if you could circulate that to us at
17 as well so we could plan our day.

18 MR. FFITCH: We would second that request.

19 JUDGE MOSS: That seems like a good way to
20 proceed, in any event.

21 MR. BERMAN: I'm sorry, I didn't hear what
22 Mr. Cedarbaum just said.

23 JUDGE MOSS: Let's me just summarize what he
24 said, which was basically that it would be useful to
25 staff and Public Counsel also if the parties would

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1 circulate a deposition schedule, who is going to appear
2 when sort of thing, and that way, they can decide if
3 there was some deposition testimony they needed to hear
4 and sit in on that. It would make things more
5 efficient overall, and I think it's a good idea.

6 MR. BERMAN: That sounds fair, Your Honor.
7 We will try to work that out with counsel.

8 JUDGE MOSS: The first cut there is for you
9 to work with Complainants' counsel and for
10 Complainants' counsel to work with you to establish a
11 schedule that works for everyone and then circulate
12 that, and you can even -- actually, as I think about
13 it, it would be a good idea to get a copy of that to me
14 as well. I'll need to know what's going on as I sit
15 around waiting for you all to call me in.

16 MR. FFITCH: Public Counsel would be
17 comfortable if the parties wanted to do that by e-mail.

18 JUDGE MOSS: E-mail works fine for me too.

19 MR. CEDARBAUM: Just as a logistical point,
20 you should let us know how many rooms or how big the
21 rooms should be, because if it's going to be here in
22 Olympia at the Commission's offices, we will schedule
23 those rooms for you.

24 JUDGE MOSS: That's a good point. The more
25 advanced notice you can give us on the number of rooms

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1 and all that sort of thing, the better the opportunity
2 we will have to be able to accommodate you in the
3 Commission's offices. There are some alternatives if
4 we get too tight. We can ask the Board of Industrial
5 Insurance Appeals next door to make a room or two
6 available to us, but we will work it out.

7 MR. FFITCH: Your Honor, I have one other
8 item. This is a request in the nature of an oral data
9 request to the Complainants and Puget Sound Energy, and
10 that is a request to serve on Public Counsel and its
11 consultant, Jim Lazar, copy of responses to all data
12 requests. I apologize. I have no support staff due to
13 an illness until next week, and I will follow this up
14 with a written data request, but I wanted to make it
15 orally at this point.

16 JUDGE MOSS: Does that work for everybody?

17 MS. DAVISON: You would like for us to
18 produce two copies, Simon, instead of one; is that
19 correct?

20 MR. FFITCH: If possible, it would be helpful
21 to have one copy go to Mr. Lazar, due to the short time
22 frame.

23 MS. DAVISON: We will do the best we can. We
24 have a huge number of requests we are trying to work
25 through, so if it's humanly possible, we will do that.

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1 If not, we will follow up and give you an extra copy
2 the next day, but we will make sure we get it to you as
3 quickly as we possibly can.

4 MR. FFITCH: If it's between one or two
5 copies, if you want to provide them to Mr. Lazar first,
6 that would be acceptable.

7 MS. DAVISON: We will do that. Your Honor, I
8 had two quick things I wanted to bring to your
9 attention. The first one actually was more in the
10 order of a question to Mr. Berman. We have our first
11 set of data requests. The answers are due today, and
12 we have not received them, and I was wondering if we
13 should still expect to receive them?

14 MR. BERMAN: I believe what is going on is
15 that we are working on them diligently right now. We
16 are expecting to get narrative responses on the fax
17 machines as soon as they are completed, which should be
18 sometime quite soon, and we are going to be putting the
19 document responses into Federal Express tonight so they
20 can arrive at your offices first thing tomorrow
21 morning.

22 MS. DAVISON: You understand they were due
23 today.

24 MR. BERMAN: I do, and if instead you prefer
25 to come to our offices up here and inspect them, we can

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1 probably arrange to make that available for you today.

2 MS. DAVISON: I assume that was your sense of
3 humor. I guess I'm sort of speechless, but all right.
4 I guess we will see what happens. I would only caution
5 you in terms of one thing. In the first case, there
6 were a couple of times where Mr. Harris sent me two to
7 three hundred pages on his fax machine that literally
8 caused my fax machine to jam up and die, so please
9 don't do that to me.

10 MR. BERMAN: That's why we thought it would
11 be appropriate to fax to you the narrative responses
12 but to Fed Ex to you the documents that are being
13 submitted in conjunction with the request.

14 MS. DAVISON: Is that acceptable for me to do
15 the same with my responses?

16 MR. BERMAN: I think would make sense.

17 MS. DAVISON: I will do that. On the due
18 date, I will provide you with the narrative responses
19 and then Fed Ex the documents for the next-day delivery
20 with regard to the actual documents.

21 The second point, Judge Moss, is, as I'm sure
22 you can appreciate, we have two sets of cocomplainants
23 that are under extremely tight antitrust orders issued
24 from the Department of Justice, and those two sets of
25 cocomplainants are Tesoro and Equilon and Air Products

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1 and Air Liquide, many of the questions that have been
2 posed to us from Puget Sound Energy raise issues that
3 very strongly implicate these antitrust orders, and
4 some of the sensitive cost data that is being sought is
5 of a nature that the standard protective order is
6 insufficient to cover the antitrust concerns. I'm not
7 suggesting that we deal with it and find a resolution
8 at this hour of the day on a Friday, but I wanted to
9 bring that to everyone's attention that we will need a
10 protective order in order to be complying with these
11 antitrust concerns along the lines of what we had in
12 the original Schedule 48 case -- Your Honor, you may
13 recall -- with regard to the Arco contract.

14 JUDGE MOSS: Well, yes, I recollect that. It
15 seems to me that what we did in that case was set up a
16 system whereby we limited the persons who could view
17 the highly confidential material in a fashion that was
18 workable for everyone yet afforded a higher level of
19 protection to some particularly sensitive materials.
20 If that's going to facilitate things rather than
21 frustrate things, we can certainly entertain that
22 again.

23 I think it's important that you focus very
24 diligently on identifying the specific information that
25 you are concerned about and the specific needs for a

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1 higher order of protection. Again, this is not an
2 unfamiliar process. It has come up in other cases as
3 you said, and we can do something that will allow the
4 information to be shared so as not to frustrate our
5 efforts to move forward with the case and parties
6 efforts to prepare, but you need to move on that sooner
7 than later. Don't wait until the data responses are
8 due. Go ahead and do that now, and let me know as soon
9 as possible, all right?

10 MS. DAVISON: Yes, Your Honor, I will do
11 that.

12 JUDGE MOSS: So that's your two. Mr. Ffitch
13 had his two. I think Mr. Cedarbaum had something
14 unless it's already been covered.

15 MR. CEDARBAUM: I just want to make sure that
16 the Company and the Complainants had received our
17 written request that we also get copies of all your
18 responses to anyone else's data requests.

19 MS. DAVISON: Yes, Mr. Cedarbaum, we do have
20 that, and we plan on making you a copy. When
21 Mr. Ffitch brought it up, I just wanted to make sure it
22 wasn't overlooked.

23 MR. BERMAN: I'm afraid once again I did not
24 catch what Mr. Cedarbaum said.

25 JUDGE MOSS: He wants to be in the same

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1 posture as Mr. ffitich with respect to receiving copies
2 of data responses, and he believes he sent something
3 around to everybody. Ms. Davison said she got it.

4 MR. BERMAN: I believe I got it too.

5 JUDGE MOSS: That won't be a problem to
6 furnish that to staff, will it?

7 MR. BERMAN: No, Your Honor.

8 MR. FFITCH: Your Honor, I have a question
9 for Ms. Davison.

10 JUDGE MOSS: Go ahead.

11 MR. FFITCH: Ms. Davison, is it adequate to
12 continue to serve Davis Van Cleve as attorney for
13 Complainants? There were a couple of additional
14 appearances today.

15 MS. DAVISON: Yes, that is sufficient. I
16 don't want to burden people unnecessarily, and I will
17 make sure that my cocounsel receive copies, but thank
18 you for asking the question.

19 JUDGE MOSS: Is there anything else that we
20 can accomplish today in terms of expediting things,
21 organizing things, what have you? Is there other
22 business that we need to take up?

23 These are difficult circumstances for
24 everyone, and for my part, I would like to say that I
25 very much appreciate the spirit that I believe has

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1 carried us through this afternoon's prehearing
2 conference, and I do very much, as always, appreciate
3 the high order of professionalism that you folks bring
4 to these proceedings and particularly in these trying
5 circumstances, and among other things, although it
6 certainly is not central, I'm thinking that we have
7 accomplished a lot this afternoon, including hopefully
8 providing an opportunity for people to spend at least
9 Christmas day with their families and friends and so
10 forth. So unless there is any further business that we
11 need to conduct, I'll close on that warm and fuzzy
12 note. Hearing nothing further, then we are off the
13 record.

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15 (Prehearing conference concluded at 4:30 p.m.)

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