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BEFORE THE WASHINGTON UTILITIES AND

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TRANSPORTATION COMMISSION

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AIR LIQUIDE AMERICA)
CORPORATION, AIR PRODUCTS AND)

4

CHEMICALS, INC., THE BOEING) Docket No. UE-001952
COMPANY, CNC CONTAINERS,) VOLUME III

5

EQUILON ENTERPRISES, LLC,) Pages 202 to 300
GEORGIA-PACIFIC WEST, INC.,)

6

AND TESORO NORTHWEST CO.,)
)

7

Complainants,)

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vs.)

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PUGET SOUND ENERGY,)
)

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Respondent.)

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A Motions Conference in the above matter was

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held on January 3, 2001, at 4:40 p.m., at 1300 South

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Evergreen Park Drive Southwest, Olympia, Washington,

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before Administrative Law Judge DENNIS MOSS.

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The parties were present as follows:

17

THE COMMISSION, by DONALD T. TROTTER,
Assistant Attorney General, 1400 South Evergreen Park
18 Drive Southwest, Olympia, Washington 98504-0128.

19

PUGET SOUND ENERGY, INC., by STAN BERMAN,
Attorney at Law, Heller Ehrman White & McAuliffe, LLP,
20 701 Fifth Avenue, Suite 6100, Seattle, Washington 98104.

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BELLINGHAM COLD STORAGE COMPANY, by TRACI
GRANDON, Attorney at Law, Davis Wright Tremaine, 1300
22 Southwest Fifth Avenue, Suite 2300, Portland, Oregon
97201.

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Joan E. Kinn, CCR, RPR

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Court Reporter

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AIR LIQUIDE AMERICA CORPORATION, AIR PRODUCTS
AND CHEMICALS, INC., THE BOEING COMPANY, CNC CONTAINERS,
EQUILON ENTERPRISES, LLC, GEORGIA-PACIFIC WEST, INC.,
and TESORO NORTHWEST COMPANY, by BRADLEY VAN CLEVE and
by MELINDA DAVISON via bridge line, Attorneys at Law,
Davison Van Cleve, P.C., 1300 Southwest Fifth Avenue,
Suite 2915, Portland, Oregon 97201.

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1 P R O C E E D I N G S

2 JUDGE MOSS: All right, we are convened in
3 what I believe is the third motions conference in the
4 matter styled Air Liquide, et al. against Puget Sound
5 Energy, Docket Number UE-001952. It's about 4:40 in the
6 afternoon. The parties have completed some deposition
7 work here at the Commission today, and I'm going to take
8 appearances here momentarily.

9 I made the commitment I believe it was
10 yesterday that we would take up this afternoon after the
11 parties completed that deposition work the subject of
12 any remaining discovery disputes or discovery disputes I
13 should say that are ripe at this point in time, and in
14 particular I understand from an off the record
15 discussion I had with the parties about a half an hour
16 ago that there remain some issues concerning the
17 Respondent's expedited motion to compel that was filed
18 on January 2nd.

19 I have had an opportunity overnight to review
20 the motion and the attachments that I received late
21 yesterday afternoon, and I am prepared to hear some
22 brief argument from both sides this afternoon and then
23 proceed through those data requests and rule on them.

24 So, Ms. Davison, I believe you are on the
25 phone line.

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1 MS. DAVISON: Yes, I am, Your Honor.

2 JUDGE MOSS: And I want to confirm that you
3 can hear me.

4 MS. DAVISON: I can, Your Honor.

5 JUDGE MOSS: All right, and we will take
6 appearances. We will just note your appearance for the
7 record, Ms. Davison, and I will note also that Mr. Van
8 Cleve is here for the Complainants.

9 Mr. Berman?

10 MR. BERMAN: Stan Berman, Your Honor,
11 representing Puget Sound Energy.

12 JUDGE MOSS: Ms. Grandon.

13 MS. GRANDON: Traci Grandon, Your Honor, on
14 behalf of Bellingham Cold Storage.

15 JUDGE MOSS: Mr. Trotter.

16 MR. TROTTER: Donald T. Trotter, Assistant
17 Attorney General for Commission Staff.

18 JUDGE MOSS: All right. It's your motion,
19 Mr. Berman, and I have already heard some argument on
20 it, although as you appreciate, I was unable to consider
21 this in any detail yesterday, in part because I didn't
22 have all the attachments. Is there anything you want to
23 add to the arguments you have made through your written
24 motion then orally?

25 MR. BERMAN: Your Honor, I will just address

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1 it briefly. The basics here are that we have requested
2 broad categories of information from each of the
3 Complainants, and for the most part, the information
4 that we were provided were SEC annual reports and
5 quarterly reports that we could have downloaded from the
6 Internet. So in terms of bulk, the information looked
7 quite substantial. But in terms of substance, much was
8 missing.

9 We have identified requests where information
10 was not produced. We have been informed by Ms. Davison
11 in our discussion since then that there are a number of
12 documents that are to be produced that were highly
13 confidential, and they have noted in some of the
14 requests that there are documents that will be produced
15 that are highly confidential. I have not had an
16 opportunity to review those documents as of yet, but I
17 don't want to delay obtaining the documents that they're
18 simply withholding and don't intend to produce at all.

19 And as you look through the responses, you
20 will see that there are numerous responses in which they
21 have simply interposed an objection and refused to
22 produce information. One thing that Your Honor noted in
23 the discussions yesterday was that Your Honor had
24 limited some of the information that was produced by
25 Puget Sound Energy when you granted motions to compel

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1 directed to Puget Sound Energy to information concerning
2 the year 2000. If Your Honor believes that our requests
3 seek information that is too extensive in some respects
4 because it requests a number of years, we would not
5 object to Your Honor limiting the information to
6 information from the year 2000.

7 There are some aspects of the information
8 where I think that pre 2000 really is vital when it
9 comes to looking at what optional price stability and
10 hedge provisions have been employed by these facilities
11 in the past year. But when it comes to, or excuse me,
12 have been employed by these facilities since Schedule 48
13 or the Special Contracts have been entered into.

14 But when we look at broader corporate
15 information, I have to concede that the breadth of
16 information we have requested is quite significant and
17 that limiting it to a year's worth of information would
18 probably for the most part give us the types of
19 information that we need.

20 Also, Your Honor, prior to our discussions on
21 the record, I noted to you that I have been informed
22 through calls back to the office that a suggestion was
23 made that rather than deposing, or excuse me, rather
24 than subpoenaing CFO's of the various companies that we
25 might instead have the local comptrollers of the local

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1 facilities appear. My first instinct on that offer is
2 to say that it doesn't address the concerns we had,
3 which is to look at a corporate perspective.

4 It is the Complainants' view that a corporate
5 perspective is irrelevant. They want to look at things
6 on a facility by facility basis in contrast to Puget's
7 view, which is that if a company's costs have gone up by
8 a fraction of a percent, they don't want to look at it
9 that way, they want to look at what the costs at a
10 particular facility are.

11 We think it's important to look at things on
12 a corporate wide basis. That's why we sought the CFO's
13 of the various companies. But I have not yet, I have to
14 admit, done the research that you had referenced
15 yesterday concerning issues concerning service and the
16 like, and accordingly I would defer pursuing the
17 subpoena part of our pleading at this time.

18 JUDGE MOSS: All right, thank you.

19 Ms. Davison, will you be arguing for the
20 Complainants?

21 MS. DAVISON: Yes, I will, Your Honor.

22 JUDGE MOSS: Go ahead.

23 MS. DAVISON: Thank you. I would like to
24 respond to several issues that Mr. Berman has raised and
25 also some points that I would like to briefly reiterate

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1 that were made yesterday.

2 First, I have repeatedly made an offer to
3 Respondent PSE to stipulate to the facts that they are
4 seeking to obtain through the CFO's. I continue to just
5 simply not understand why it is that we need to
6 stipulate to these facts. They don't have to prove
7 them. But it appears as though they want to engage in
8 this extensive discovery and the burden of producing
9 CFO's from some very large corporations for other
10 reasons rather than to prove the facts that I'm willing
11 to stipulate to.

12 JUDGE MOSS: Ms. Davison, let me stop you
13 right there for just a minute, the hour is late.
14 Mr. Berman said that he wants to defer any further
15 argument on the subpoena, so that issue is not on the
16 table right now. If he pursues that issue, then we will
17 take up the argument and hear from both sides at the
18 appropriate moment in time. What we're concerned about
19 right now are the data requests.

20 MS. DAVISON: I understand that, Your Honor,
21 but it also relates to the data requests. I'm willing
22 to stipulate to the fact that they want to obtain
23 through these data requests dealing with these huge,
24 huge amounts of information they're seeking from very
25 large corporations, I'm willing to enter into a factual

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1 stipulation that says that yes, these corporations are
2 financially able to pay PSE's electric bill, yes on a
3 corporate wide basis the electric bill at these
4 individual facilities is not significant. The facts
5 that Mr. Berman wants to seek through this extremely
6 broad and burdensome discovery, I'm willing to stipulate
7 to. I don't understand why that isn't an acceptable
8 response.

9 The documents that Mr. Berman is seeking
10 through these data responses literally would consume
11 rooms full of material if we produced all of it. We can
12 not produce those materials by the hearing on Monday,
13 and it appears to be Mr. Berman's strategy is to try to
14 ask very broad requests that we can't possibly respond
15 to in any kind of timely basis, certainly not within
16 five business days, and now we're less than five
17 business days from the hearing. They're facts that we
18 simply are not asserting in this emergency hearing. I
19 do not believe that this is relevant to this case.

20 What is relevant is whether the individual
21 facility that is served by PSE can financially operate
22 or can operate for any extended period of time based on
23 the high rates that they're being charged. That is one
24 issue of many in this case. In an attempt to facilitate
25 the proceeding, we filed an issues list yesterday, and

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1 you will see that there are a variety of issues that
2 we're seeking to address in the hearing of January 8th.
3 I would say that I believe that his motion to compel is
4 premature. I had a conversation with Todd Glass of his
5 office about an hour ago. I indicated to Mr. Glass that
6 I had staff work very late last night to get all of the
7 documents ready to go that we had withheld due to the
8 highly confidential nature of those documents, and I
9 have asked him repeatedly to provide me with affidavits
10 pursuant to the amended protective order, and I will
11 send those documents out immediately as soon as I get
12 the affidavits. Mr. Glass indicated to me that they
13 were having a difficult time figuring out who should
14 sign the affidavit. We're not trying to withhold
15 relevant information relating to the facilities that PSE
16 serves. We just don't have the protections in place
17 that we need to have before we send out this very, very
18 sensitive confidential information.

19 JUDGE MOSS: Well, the way I think I see
20 things shaping up here, Ms. Davison, is I've got a set
21 of data requests and a set of objections, and I need to
22 rule on the objections, and I'm prepared to do that this
23 afternoon. Now to the extent that you believe that you
24 have in your possession responsive documents and the
25 Respondents have not made appropriate arrangements to

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1 receive those as to which you assert highly confidential
2 status, then if that fact persists until the time of the
3 hearing, then that will certainly bear on what impact
4 there may be from the failure to provide responses to
5 discovery.

6 In like manner, if the parties can not work
7 out a stipulation which is by its very nature an agreed
8 document, there are perhaps other options. I don't
9 really know what you might do. One possibility would be
10 for you to file some statement of admission that you
11 think satisfies Mr. Berman's need for facts. I don't
12 know what facts he wants to prove, but I do believe that
13 he is entitled to construct a defense for his client on
14 all the matters that are relevant in this proceeding.

15 And I will say that on having reviewed the
16 data requests and the objections and responses to those
17 last night, I find that much of the data that is sought
18 does appear to me to be relevant or calculated to lead
19 to the discovery of admissible evidence, and therefore
20 will be -- I will rule shortly that these objections are
21 overruled and that you must provide this data.

22 Now if you can achieve some other means of
23 satisfying the Respondent's need to develop a full
24 defense to the allegations of the complaint, then you
25 certainly have my blessing. I hope you can do that.

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1 But if because of the press of time and so on and so
2 forth, whatever reasons there may be, the parties can
3 not achieve a fact stipulation, then that just can't be
4 achieved. And again, there may be some other possible
5 avenues by which you can seek to protect your clients'
6 interest under the circumstances.

7 It does occur to me that if you wanted to
8 make some sort of an offer in terms of facts related to
9 these points as you understand them to be, then we could
10 take those up at the hearing and consider whether we
11 feel the need for anything more. And if we don't, then,
12 of course, the failure to respond fully to the discovery
13 becomes less important of an issue. But, of course, you
14 might not want to be in that posture at the time of the
15 hearing. I don't know.

16 But the rules of discovery are what they are,
17 and they permit a party to discover material that is, as
18 I described a moment ago, I won't restate the standard.
19 And as I looked through the material last night and I
20 look at the data requests, and I might note that some of
21 these are virtual mirror images of the data requests
22 that the Complainants interposed, and to the extent
23 there were objections, I believe I overruled them in
24 letting you develop this sort of information that you
25 believe is necessary for your client or clients. So,

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1 you know, I have to be balanced in governing these
2 proceedings as the presiding officer, and that is what I
3 intend to do.

4 So, you know, we've got today is Wednesday,
5 we've got two more business days, a weekend, and then we
6 go into a hearing, and we've got to do our best. I
7 think it should be apparent to you from the second Bench
8 Requests that were entered by the Commission today that
9 the Commission itself has a strong interest in seeing a
10 record that includes company specific data. I speak,
11 for example, to the hedges and other types of financial
12 and physical instruments, well, physical hedges I should
13 say, that might be possibilities or could have been
14 pursued by the companies. This is something the
15 Commission is interested in hearing about on a company
16 by company basis. And I think much of the discovery
17 goes to that sort of thing on a company by company
18 basis.

19 And I grant you there's a, and Mr. Berman has
20 acknowledged that this is broad, it is a burden. I
21 would certainly not want to be faced with the prospect
22 of responding to all of this discovery in a short time
23 frame for all of these clients, but that is the burden
24 you have taken on by pursuing the complaint, and so
25 that's where we are.

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1 Now what I want to do is just go through
2 these data requests, and it may be a little repetitive
3 because the same data request applies to multiple
4 parties, but I just want to go through them and rule on
5 them on the objections to the extent there are any, and
6 then we will all know where we stand.

7 MS. DAVISON: Thank you, Your Honor. I would
8 like to make two points very clear for the record.
9 First one is that I understand that you have made
10 rulings in this case regarding our motions to compel,
11 but I want the record to clearly reflect that PSE to
12 this day is not forthcoming in providing us with
13 documents that are responsive to our data requests. PSE
14 has not responded to any of our data requests on time.
15 We are still in daily contact with PSE trying to get
16 documents from them, and we don't have them. So, you
17 know, to the extent that there is a balancing here, we
18 certainly do not have the data that we need from PSE at
19 this moment in time.

20 The other point that I would make to you,
21 Your Honor, is that there are many questions, and I
22 would like to go through them point by point and have a
23 clear record on them, that we physically can't respond
24 to. It's literally boxes and boxes and boxes of
25 material that we simply can not produce it physically

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1 even if we had a staff of a dozen people working on them
2 full time. The breadth of these requests are so
3 burdensome and so broad, we can't possibly respond to
4 them.

5 JUDGE MOSS: Well, we're going to help you
6 out a little bit, because Mr. Berman has suggested
7 consistent with some of my prior rulings that limiting
8 most of these requests to a one year period is something
9 that would be acceptable, and it is my intention to do
10 that.

11 In terms of your comment on balance, all I
12 can do is effect balance through my rulings. As the old
13 saying goes, I can lead a horse to water, but I can not
14 make it drink. If you all don't conform to the rulings
15 that I make, both sides, that's something that will come
16 up as we go along, and it may lead to rulings adverse to
17 a party for a failure to produce appropriate responses
18 to discovery.

19 There are various sanctions provided in the
20 Commission's discovery rule for a failure to adequately
21 respond, and this may unfortunately develop into a
22 proceeding where those sorts of sanctions have to be
23 imposed. And I hope it does not go there, but that is
24 what may happen if either side is failing to respond
25 adequately to the requirements of the Commission's rules

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1 and the prior orders in this proceeding that govern its
2 conduct.

3 So by balance, that is what I can achieve,
4 and I can do nothing more, I think. So I will do my
5 best, I will continue to do my best to effect that sort
6 of balance, to consider carefully objections that are
7 interposed, and to rule carefully and appropriately I
8 hope on each of them. And that's all I can do, and so
9 that is what I intend to do.

10 So let's get started. We're looking here at,
11 and Mr. Berman I'm going to rely on you a little bit to
12 if I include one that shouldn't be included or skip one
13 I shouldn't skip. I have marked my copy with the ones I
14 think we need to take up based on the motion, and you
15 will need to correct me if I miss any or perhaps begin
16 to address one that doesn't need to be addressed any
17 longer in light of subsequent developments.

18 And, Ms. Davison, of course you will have an
19 opportunity to speak to the individual ones as well,
20 although I don't really think we need extensive
21 arguments on these, but I'm not going to cut people off
22 either, at least not before midnight.

23 All right, I'm looking at the Puget Sound
24 Energy's first set of data requests to Air Liquide
25 America Corporation, and I have Data Request Number 2 as

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1 the first one as to which there is a motion to compel.
2 It calls for quarterly earnings reports since November
3 '96. The response is that Air Liquide is not currently
4 in possession of any documents specifically responsive
5 to PSE's data request. Now I understand that Air
6 Liquide is a French corporation and is not traded on the
7 U.S. stock exchanges; is that right?

8 MS. DAVISON: That is correct, Your Honor.
9 There are no documents that respond to Data Request
10 Number 2. Air Liquide does not have quarterly earnings
11 reports, nor do they have earnings reports on a site
12 specific basis. There are no documents.

13 JUDGE MOSS: Do they have any comparable
14 reports that they are required to file with the French
15 authorities?

16 MS. DAVISON: I do not know.

17 JUDGE MOSS: Okay, well, they would probably
18 be in French anyway likely, don't you think,
19 Ms. Davison?

20 MS. DAVISON: I would assume.

21 JUDGE MOSS: Well, I studied French, but I
22 don't think I can rely on that for reading corporate
23 documents. I didn't do real well.

24 All right, well, if the documents don't
25 exist, they don't exist. I do wish to remark, however,

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1 with respect to the comment in your response that
2 corporate financial data is irrelevant to the issues in
3 the proceeding that I do not agree, and so that comment
4 will apply to the extent that objection is interposed
5 elsewhere.

6 All right, Number 3, cash flow statements.
7 All right, grounds here are that it's overly broad,
8 unreasonably burdensome, and irrelevant to the issues in
9 the proceeding. Well, I think to the extent such
10 documents exist and pertain to the facilities in
11 Washington, they would be relevant. On these I don't
12 know that corporate cash flow statements would be
13 particularly relevant.

14 So is there anything available on these that
15 you know of, Ms. Davison, in the way of records that
16 reflect the cash flow situation at the Washington based
17 facilities for Air Liquide during the year 2000?

18 MS. DAVISON: Your Honor, I was told by Air
19 Liquide that there are no such cash flow statements.

20 JUDGE MOSS: Well, that, you know, that
21 should be your response then, that there are no
22 responsive documents, rather than interposing an
23 objection. That would save some time.

24 MS. DAVISON: Your Honor, I didn't provide
25 the responses. I'm sorry, these were provided by a very

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1 senior counsel at Air Liquide.

2 JUDGE MOSS: All right, well, you can convey
3 my remark to that person.

4 MS. DAVISON: I will, Your Honor.

5 JUDGE MOSS: Data Request Number 4 asks for
6 documents, analyses relate to the actual or potential
7 savings achieved by the Complainant by taking service
8 under Schedule 48 from November '96 through the current
9 date.

10 I assume you would want that information for
11 the full period, Mr. Berman?

12 MR. BERMAN: Yes, Your Honor.

13 JUDGE MOSS: And it's objected to as vague,
14 overly broad, and unduly burdensome. I find none of
15 those objections well taken.

16 MS. DAVISON: Your Honor --

17 JUDGE MOSS: After the objection as stated,
18 the response indicates that Air Liquide agrees to
19 provide the requested data to the extent it exists and
20 is available. Has it been provided?

21 MS. DAVISON: Your Honor, there are two
22 responses I have with regard to this data request.
23 Number one, this is information that is in Puget Sound
24 Energy's own files. For most of these clients, PSE
25 provided this data to each individual company over a

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1 period of time. They are the ones that are in a better
2 position than we are to calculate the difference between
3 Schedule 49 and Schedule 48.

4 Air Liquide is under very restrictive orders
5 from the Department of Justice as it relates to
6 antitrust concerns, and to the extent that they have any
7 documents that are responsive to this, they're willing
8 to provide it under the highly confidential invocation
9 because of the antitrust concerns with Air Products.

10 JUDGE MOSS: All right, that seems like a
11 legitimate concern. So, Mr. Berman, to the extent you
12 want this data, they're saying they will provide it, but
13 you do need to designate somebody and get those
14 affidavits in. They have the right in the first
15 instance to designate documents as highly confidential.
16 You may later challenge that, of course. All right,
17 that takes care of Number 4.

18 Number 5, copies of corporate policies,
19 procedures, and other documents related to financial
20 hedging or other price risk management strategies
21 related to energy costs. If none exists, explain why.
22 There is an objection interposed that it's overly broad,
23 unduly burdensome, and irrelevant to the issues in this
24 proceeding. I do not find any of those objections to be
25 well taken. The further response is that Air Liquide

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1 agrees to provide. Again, there seems to be some sort
2 of an antitrust or confidentiality concern.

3 So I take it, Ms. Davison, the offer stands,
4 they need to get somebody's signature on an affidavit,
5 and you will provide that post haste?

6 MS. DAVISON: That is correct, Your Honor.

7 JUDGE MOSS: All right, Mr. Berman, do you
8 understand the ruling?

9 MR. BERMAN: Yes, Your Honor.

10 JUDGE MOSS: Number 6.

11 MS. DAVISON: I would caveat that to the
12 extent we have those documents, but yes.

13 JUDGE MOSS: Well, of course, there's always
14 the caveat that if you don't have something, you don't
15 produce it, we understand.

16 MR. BERMAN: Your Honor, I would just respond
17 to that that I would hope that when they say to the
18 extent we have such documents that not mean to the
19 extent counsel has the documents. It's to the extent
20 the corporation has the documents. They have a duty to
21 seek and obtain such documents if they exist.

22 JUDGE MOSS: Do you understand that,
23 Ms. Davison?

24 MS. DAVISON: Of course I understand that.

25 JUDGE MOSS: All right, well, it doesn't hurt

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1 to keep the record clear. I like to give parties an
2 opportunity to make things clear on the record, and I
3 extend that opportunity to both sides. So it's just
4 like we sometimes allow the objection on hearsay in
5 administrative proceedings, even though we allow hearsay
6 evidence in those proceedings and you all have probably
7 heard my hearsay speech 1,000 times. We nevertheless
8 allow any objection to be interposed, because counsel
9 sometimes need to protect themselves on the record in
10 the event of a later appeal. That's the sort of thing
11 we're doing here, and I know it's late, but let's don't
12 get our noses too out of joint here. I will try the
13 same. I'm tired and irritable too.

14 All right, Number 6, copies of corporate
15 policy. Didn't we just do that one?

16 MR. BERMAN: No, Your Honor, this one is
17 somewhat --

18 JUDGE MOSS: Oh, other factors of production.

19 MR. BERMAN: Yes, Your Honor, this is
20 different, and you will note that this response, unlike
21 the prior one, does not state that they actually intend
22 to produce the documents. It just says that there's
23 some note about the antitrust concerns, but they object.

24 MS. DAVISON: Your Honor, may I get to the
25 bottom line with this one?

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1 JUDGE MOSS: Well, I will let you do that, go
2 ahead.

3 MS. DAVISON: Mr. Berman asked Mr. Clancy,
4 who is in the same line of business as Air Liquide,
5 about whether they hedged other factors of production,
6 and Mr. Clancy pointed out to Mr. Berman that their
7 production is air, and he doesn't know how you would
8 hedge air. So I don't think this question makes any
9 sense as it applies to the air separation companies.

10 JUDGE MOSS: Well, that may be, but, you
11 know, again, if that's the answer, that's the answer,
12 and that doesn't make the question objectionable.

13 MS. DAVISON: Well, Your Honor --

14 JUDGE MOSS: I guess that's where, you know,
15 I --

16 MS. DAVISON: Your Honor, we don't believe
17 that it is relevant to this proceeding whether other
18 factors of production are being hedged or not. These
19 are very large companies with very complex operations,
20 and this issue isn't about, you know, other aspects of
21 their production. This is about electricity.

22 JUDGE MOSS: Well, I can see the argument
23 that Mr. Berman might want to make out on behalf of his
24 client on the basis of a discovery request such as this.
25 He would appreciate the opportunity to be able to show

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1 the Commission that while these companies hedged on
2 other cost factors in their production, they have failed
3 to do so on electricity, and there is some inference
4 that the Commission can draw from that. I think it's
5 fairly obvious where this data request goes, and to that
6 extent, it has some relevance.

7 But again, to the extent the answer is, well,
8 the only other factor of production is air, and air is
9 free, I guess, I'm not really sure that's true, maybe it
10 is, I don't know, I'm not familiar with the air products
11 industry in any intimate detail, that's the answer, and
12 it's a simple, straightforward answer, and it would save
13 us the trouble of having this discussion if you would
14 just give that answer and we could move on. So if
15 that's the answer, give it.

16 And if there's some other answer, then I want
17 you to make an effort to provide it by confirming with
18 the client that that's the only other factor of
19 production that they would consider hedging or have any
20 need to hedge. I don't know, if the only raw materials
21 are energy and air, then I guess that's all there is to
22 it.

23 MS. DAVISON: That's all there is to it.

24 MR. BERMAN: Your Honor, I would just confirm
25 that this request is not a facility specific request.

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1 It asks for corporate policies, and the witness, well,
2 first of all, we did not get to ask any questions of any
3 witnesses from Air Liquide. I think that counsel has
4 confused Air Liquide with Air Products.

5 MS. DAVISON: No, I didn't, I said U.S. Air
6 Products.

7 MR. BERMAN: I don't know anything about Air
8 Liquide and have not had an opportunity to obtain any
9 testimony from an Air Liquide witness. They withdrew
10 the affidavit of the Air Liquide witness who had been a
11 part of this proceeding. But as counsel had said, this
12 is a large multinational company with complex
13 operations, and there's more than air and energy to
14 their operations.

15 MS. DAVISON: Your Honor, to the extent that
16 Air Liquide is engaged in other businesses completely
17 unrelated to the air separation business, I think we are
18 getting very, very far afield, and it feels extremely
19 remote that that would have anything to do with anything
20 in this case.

21 MR. BERMAN: Your Honor, as you were saying,
22 this goes to the issue of looking at whether Air Liquide
23 Corporation engages in hedging policies with respect to
24 the various commodities or other products that they're
25 involved in. I should say it's not just commodities.

00227

1 As a multinational company, it's to be expected that
2 they engage in -- that they use derivative products to
3 protect against foreign currency price fluctuations,
4 interest rate fluctuations, and other issues related to
5 their corporate dealings.

6 And learning that information would be highly
7 relevant to analyzing the choices that they made with
8 respect to not taking the optional price stability under
9 Schedule 48, which would have likewise locked in prices
10 for that particular aspect of their production.

11 JUDGE MOSS: I'm going to modify my ruling on
12 this, because it does seek corporate level, and I think
13 we have to consider or I have to consider the
14 practicalities of litigation. And at this juncture
15 without prejudice to the opportunity for PSE to pursue
16 this further if the need to do so is indicated either in
17 the phase one or phase two portions of the proceeding,
18 what I want, Ms. Davison, what I'm going to require here
19 is a narrative response stating whether there are
20 corporate policies or procedures related to financial
21 hedging or other price risk management strategies
22 related to any factor of production. And to the extent
23 there are such policies or procedures, then a narrative
24 response should describe them both in terms of what they
25 are and how they have been implemented in the past year

00228

1 or two. All right, clear enough?

2 MS. DAVISON: Yes, Your Honor.

3 JUDGE MOSS: All right, let's move on to 7.

4 All analysis and documents related to the actual or
5 potential acquisition of a financial hedge or other
6 product, procedure, or transaction intended to manage
7 price risk of energy cost since November '96. If
8 available, provide such documents on a site specific
9 basis for the site served by Puget Sound Energy. And
10 this one is objected to on the grounds of over breadth,
11 unreasonable burdon, and irrelevancy.

12 We had one fairly similar to this one a
13 minute ago, didn't we? That was 5, that's corporate
14 policies. What's the difference between 5 and 7,
15 Mr. Berman?

16 MR. BERMAN: Your Honor, rather than asking
17 about policies, this asks about actual acquisitions of
18 hedge products. And because it was looking to actual
19 specific acquisition of products, it did limit itself to
20 energy costs. So we asked for policies related to all
21 costs, but we asked for actual information about actual
22 hedges for energy costs. And we asked on a corporate
23 wide basis, because it was truly relevant if they use
24 hedges on facilities all throughout the world but chose
25 not to do so at the facilities served by Puget Sound

00229

1 Energy.

2 JUDGE MOSS: All right. I suppose I will
3 give you an opportunity, Ms. Davison, if you want to
4 argue this objection, over breadth, unreasonable burden,
5 or irrelevant.

6 MS. DAVISON: Your Honor, it's the same point
7 I made earlier, which is to ask for financial hedges for
8 every single facility that Air Liquide owns world wide I
9 believe is irrelevant to the issues in this case. We
10 are willing to provide the documents on a site specific
11 basis. That's what's at issue here. It feels very
12 punitive, very burdensome to have to produce documents
13 from hundreds of facilities world wide, and I fail to
14 see the relevance in this proceeding.

15 Your Honor, we're willing to talk about it in
16 a narrative if that will suit PSE or WUTC in evaluating
17 the issues in this case, but I fail to see relevance
18 beyond whether or not Air Liquide facilities served by
19 PSE puts out financial hedges.

20 MR. BERMAN: Your Honor, to assist, I would
21 suggest that my offer at the beginning could apply here.
22 That is, with respect to world wide facilities, we could
23 limit the response to the year 2000. Whereas for the
24 site specific information, we would go back to the
25 commencement of Schedule 48. I think that would limit

00230

1 by quite a bit the breadth of the request.

2 MS. DAVISON: Well, I don't see that limiting
3 it by quite a bit. You know, if we're having to go out
4 and get documents from hundreds and hundreds of
5 facilities, you know, it's still extremely broad. It
6 would take us weeks to do this.

7 MR. BERMAN: I guess one thing I would add to
8 that, Your Honor, is that if, in fact, there are
9 hundreds of boxes of documents relating to energy hedges
10 for their other facilities, that sounds extraordinarily
11 relevant here. I would have expected them to say that
12 they don't use energy hedges anywhere in the world
13 because of some argument, I don't know what it might be,
14 but that would appear to be the contention, that it's
15 not reasonable to use energy hedges. But if, in fact,
16 what counsel is saying is that they use energy hedges
17 all over the world at numerous facilities but have
18 chosen not to do so here, that surely is information
19 we're entitled to.

20 MS. DAVISON: Mr. Berman, I did not say that.
21 What I said is that we would have to go through hundreds
22 of facilities to look for documents. I have no idea
23 whether they hedge in any of their other facilities.

24 JUDGE MOSS: Well, I'm going to require you
25 to make that inquiry, Ms. Davison, because I think it is

00231

1 relevant, and I think that you need to be required to
2 provide the documents to the extent they exist for the
3 Washington facilities.

4 And again, I frankly do not understand why
5 you have chosen to simply interpose an objection when
6 even you acknowledge the relevance of these types of
7 documents for the Washington facilities. Why haven't
8 those been provided?

9 MS. DAVISON: There aren't any, Your Honor.

10 JUDGE MOSS: Then why isn't there an answer
11 that says that?

12 MS. DAVISON: I don't know. I did not
13 prepare the responses.

14 JUDGE MOSS: All right, well, Ms. Davison,
15 that only goes so far. You are representing your client
16 before the Commission in these proceedings, and, you
17 know, my clerk didn't get it done is not an acceptable
18 response.

19 MS. DAVISON: That's not was my response was.
20 My response is that these questions went to individual
21 companies, and I didn't feel the need to tamper with
22 their responses.

23 JUDGE MOSS: Well, I think you have an
24 obligation to ensure that your clients are responding
25 fully and fairly to the discovery, Ms. Davison, if

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1 you're going to be the point person on this. I think
2 that is the responsibility that lead counsel takes in
3 any proceeding, and it was certainly my experience when
4 I practiced on your side of the Bench, and I expect
5 nothing less of counsel who now appear before me. So
6 you need to coordinate more effectively with these
7 corporate counsel and do what needs to be done so that
8 we have a fair and balanced discovery process here.

9 So if documents don't exist for the
10 Washington facilities, then you need to provide a
11 response that says so. I think with respect to the
12 world wide operations, hundreds and hundreds of
13 facilities, again, what I'm going to do is we're going
14 to use as a starting point a narrative response. And
15 when I say that, I mean a detailed narrative response
16 that describes the financial hedging practices that are
17 followed by these companies at the corporate level. And
18 I think particularly it is relevant if there is a
19 corporate policy that provides for the use of financial
20 hedges or other types of instruments or physical hedges
21 for energy or what have you and that practice was
22 departed from here in Washington. That does appear to
23 be relevant.

24 And so we will start with that narrative, and
25 when we get to the hearing, if that's all that has been

00233

1 provided and Mr. Berman makes an argument that persuades
2 the Commission that we need to have the documentary
3 backup in order to have a full and complete record, then
4 we will have to take that issue up at that time. In the
5 meanwhile, I think the narrative may give PSE what it
6 needs to make out its argument during this first phase,
7 so I will limit the requirement for the response to that
8 for the time being.

9 MS. DAVISON: But, Your Honor, if I may
10 respond, I would like the record to be very clear that
11 we had literally dozens of people working very
12 diligently through the Christmas holidays producing
13 documents, and despite Mr. Berman's representation, we
14 have produced substantially more documents than PSE has
15 in this proceeding, and we are being very responsive.

16 JUDGE MOSS: Well, Ms. Davison, all I have
17 before me is a data request and a response that in this
18 instance interposes an objection and nothing else.
19 That's all I have before me. I haven't been in the
20 trenches with you all in the discovery process, for
21 which I am eternally thankful. But, you know, I have to
22 deal with what's before me, and all I have is this bare
23 objection, so that's what I'm dealing with here. Do you
24 understand?

25 MS. DAVISON: I understand that.

00234

1 JUDGE MOSS: You know, I appreciate the fact
2 that everybody is working very, very hard. I'm sure all
3 the parties are working very hard. I see a lot of
4 strained faces around the Commission, people who I know
5 are working on this, and I have also sacrificed my
6 holidays and weekends working on it. And frankly, I'm
7 happy to do so if it promotes this process and the
8 ability of the parties to gain a full and fair hearing
9 of their differences and achieve some form of justice
10 before the Commission. We're all doing the best we can
11 under trying circumstances, but I just deal with the
12 paper that's before me.

13 All right, now Number 8, this is another data
14 request that relates to financial hedges or other
15 products intended to manage price risks and other
16 factors of production. Well, again, I think what we
17 need on this is a full narrative response with respect
18 to the energy aspect and the other factors of
19 production, and that's a good starting point and will
20 require much less time and effort, I think, than with
21 producing all the documents. And I mean that on both
22 sides, it will require far less effort on both sides.
23 So I just hope that I'm being clear enough about what
24 I'm requiring here is a full narrative response. Do you
25 understand what I'm saying by that, Ms. Davison?

00235

1 MS. DAVISON: I understand it clearly.

2 JUDGE MOSS: Okay, well, you do that, see to
3 it that your clients assist in the preparation of that
4 and you supervise that, because some of these corporate
5 counsel may not be directly involved in litigation on a
6 routine basis, as you are and as Mr. Berman is, and you
7 all understand far better than they do the needs of
8 litigation. And so I want you to take a strong hand as
9 lead counsel here in making sure those responses are
10 adequate, and I know you will do that, so that's
11 important.

12 And, let's see, Number 9, okay, again this
13 goes to the energy supply matters, and I think to the
14 extent there are, you know, financial hedges, price risk
15 management tools, so on and so forth purchased or sold
16 by the Complainant, let's, you know, in terms of
17 providing the list, I want you to start with the
18 Washington facilities. And to the extent that, you
19 know, such a list can be developed on a broader basis
20 for the year 2000, then all it's asking for is a list in
21 this instance.

22 MS. DAVISON: I fail to see how question
23 Number 9 couldn't possibly be answered by the other --

24 JUDGE MOSS: Yeah, it probably will be
25 covered so -- in your full and complete response. So

00236

1 it's of the same ilk, so we will hope that that happens.
2 Now, you know, again, I'm making these sort
3 of qualified rulings with the understanding that this
4 dispute might have to be renewed at some point if PSE
5 doesn't get what it feels like it needs to make out its
6 defense, so it's in your best interest too, Ms. Davison,
7 if you know these things don't exist, the documents
8 don't exist, and there's no records and so on and so
9 forth, to say so, and that may avoid the necessity of
10 pursuing this any further. To the extent they do exist,
11 if you make an effort to describe what they are, how
12 they work, how they're employed by the company, that
13 sort of thing, and then again maybe we can avoid the
14 need for further pursuit of this line. And to the
15 extent there's no information at all, then say so.
16 Number 10 looks similar. This is non-energy
17 factors of production. Again, I think we're going to
18 cover this sort of thing with a narrative.
19 So let's look at 11. Okay, this asks for
20 just one quarter of data as to the major factors of
21 production. And this, again, and there's some examples
22 given there, labor, raw materials, energy costs. And
23 again, I think to the extent that the Complainants are
24 asserting that there is an emergency situation here,
25 then the Respondents, I think, should have an

00237

1 opportunity to make out the defense that appears to be
2 evident from the line of data requests here that energy
3 cost is a minor component of the production for some of
4 these folks, maybe not all of these folks, and they need
5 this sort of data.

6 And again, if you can find some other way to
7 satisfy the Respondents on this, maybe an offer of an
8 admission or something like that, you can certainly work
9 with them off the record and see if you all can work
10 something else out. But I, you know, for the -- and
11 let's again, let's start off by limiting this one to the
12 products and services lines that are represented here in
13 Washington. Will that work? All right.

14 Let's see, that was 11, 12.

15 MS. DAVISON: Your Honor, I'm confused about
16 11.

17 JUDGE MOSS: All right.

18 MS. DAVISON: Because it asks for '96 to
19 2000.

20 JUDGE MOSS: Oh, I thought it said as of
21 fourth quarter.

22 MR. BERMAN: Your Honor, it asks for the cost
23 contribution in 2000 and asks if it had changed over the
24 four year period.

25 JUDGE MOSS: So if it's remained relatively

00238

1 constant over the four year period, then all you need to
2 do is say that.

3 MS. DAVISON: All right.

4 JUDGE MOSS: And if it has changed
5 significantly, and, you know, I don't know if the cost
6 of doing whatever you do with air and energy has changed
7 over the last four years, but technology does change in
8 some industries, and maybe there has been a profound
9 change where energy has become more or less important as
10 a factor of production relative to others, I just
11 frankly don't have a clue. I think you can probably get
12 that narrative description that would be responsive to
13 that fairly readily.

14 All right, Number 12, this is going to take a
15 minute to read it here to myself. Okay, again, I don't
16 find these objections well taken. I think that --

17 MS. DAVISON: Every single contract for --

18 JUDGE MOSS: Well, hang on, Ms. Davison,
19 don't get too excited yet, I'm going to condition the
20 response. I don't -- I'm not going to require you at
21 this juncture to provide the contracts. What I would --
22 what I am going to require instead is that you respond
23 to the requests for a narrative response in the first
24 part of the data request.

25 And to the extent the individual, and I know

00239

1 this one, you know, recurs for many other companies as
2 do most of the ones we have been through already, to the
3 extent that one of these companies asserts that, yes,
4 there are contractual obligations that do allow or
5 preclude them from passing through, then they need to
6 describe that. And to the extent that some allow it and
7 some preclude it, they need to say so. If some
8 contracts would allow them to pass through these costs
9 and others would not, then that needs to be described in
10 the narrative response.

11 For now, I'm not going to require the
12 production of all the contracts. It may become
13 necessary at some point down the line to have a sample
14 of those or conceivably even all of them, but I would
15 hope that we don't have to go there.

16 MS. DAVISON: I hope not, because the
17 question asks for every contract that Air Liquide as an
18 entire corporation has for '96 through 2002.

19 JUDGE MOSS: Go ahead, Mr. Berman.

20 MR. BERMAN: Your Honor, I will note just by
21 way of comparison that you will not see Data Request 12
22 listed under Boeing. The reason is that Boeing, I guess
23 perhaps different counsel were involved in preparing it,
24 Boeing conceded that it had various inflation adjusters
25 and cost adjusters in its airplane contracts and that

00240

1 those allowed Boeing to pass on various costs including
2 increased energy costs. And their description of that
3 situation was, I think, a fair response to the question
4 and gave us the information that we needed to understand
5 the impact on Boeing. But these other customers did not
6 respond in that way.

7 JUDGE MOSS: That's helpful then.
8 Ms. Davison, you can look to the response that Boeing's
9 counsel apparently provided, and that would be a good
10 basis then, Mr. Berman says, for other clients to
11 respond.

12 MR. BERMAN: I would also note I have seen
13 press releases suggesting that Air Liquide has imposed
14 surcharges on clients, on customers, relating to energy
15 costs. Again, we haven't been able to depose or
16 question any Air Liquide witness, but it would suggest
17 that there would be information out there relating to
18 the ability of Air Liquide to pass on energy costs to
19 clients or customers.

20 JUDGE MOSS: And to the extent that's true
21 for Air Liquide or others as to whom this data request
22 has been interposed, then the narrative response needs
23 to reflect that, Ms. Davison. But at this juncture, no
24 contract, so we will reserve for another day the
25 argument about the boat load probably of contracts in

00241

1 this instance.

2 MS. DAVISON: It's more than a boat load.

3 JUDGE MOSS: Pardon me?

4 MS. DAVISON: It's more than a boat load.

5 JUDGE MOSS: More than a boat load. Well,

6 there are some pretty big boats out there.

7 MS. DAVISON: It would be a shipping

8 container.

9 JUDGE MOSS: All right, let's look at 13, a
10 list of all Complainants' plant sites. That's probably
11 in their 10-K's, isn't it?

12 MR. BERMAN: Well, I would again remind Your
13 Honor that Air Liquide is not a company that trades on
14 the American stock exchanges, and it does not have a
15 10-K. Getting this information is actually somewhat
16 difficult for some of these entities.

17 JUDGE MOSS: But in general, this would be
18 available in documents filed with the SEC, I would
19 think.

20 MR. BERMAN: For some companies, a list of
21 plant sites may be, but we also asked for other
22 information including how much power they used to get a
23 sense of -- we asked for information about revenues,
24 employees, et cetera. I think that clearly the power
25 consumption is one of the key factors there to get a

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1 sense of the energy needs and demands of the company,
2 the sophistication that the company would have, how
3 they're impacted by energy prices around the country,
4 and so forth.

5 JUDGE MOSS: Okay, well, I do find this one
6 to be a little broad, and so what I will ask you to do
7 if you feel that you want to pursue this one,
8 Mr. Berman, is narrow it by selecting a sample, maybe a
9 sample of states through the United States. I mean if
10 you want to effect some sort of comparison, in other
11 words, and show that in Florida, for example, where
12 electrical costs are high that the rates the companies
13 are paying or the facilities in those states are paying
14 are as high as what's being paid here under this current
15 set of circumstances, you know, I can't say that that
16 line of argument would necessarily be irrelevant. So if
17 you want to develop that, then you can pick the states.

18 MR. BERMAN: Okay.

19 JUDGE MOSS: Narrow it, and then,
20 Ms. Davison, if you fell like, you know, you want to
21 show that yeah, that's all true, but look at Montana
22 where it's even cheaper and so forth, then that will be
23 up to you if you want to develop something along those
24 lines.

25 MR. BERMAN: Your Honor, I would suggest that

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1 I would limit it to the WSCC, that is the Western System
2 Coordinating Counsel states, which basically make up the
3 area west of the Rockies.

4 MS. DAVISON: Mr. Berman, can you send us a
5 new data request?

6 MR. BERMAN: I prefer to get it resolved
7 right now, because if I have to send a new data request,
8 then presumably we're going to hear that it's five
9 business days from now, and that I won't get a response
10 until after the hearing.

11 MS. DAVISON: I will give you the information
12 as soon as I can.

13 JUDGE MOSS: You know, this hearing, a
14 motions hearing this afternoon, really I was willing to
15 do this, I'm going into the evening hours with it,
16 because I do think we need to get this resolved and get
17 this thing moving. So I think if we limit it to the
18 Western States Coordinating Counsel states and --

19 MS. DAVISON: That's a huge number of states,
20 Your Honor.

21 JUDGE MOSS: Well, we're talking what,
22 California, Oregon, Washington, Montana, Idaho, Wyoming.
23 Have I missed any?

24 MS. DAVISON: Nevada.

25 JUDGE MOSS: Nevada and maybe Arizona?

00244

1 MS. DAVISON: Yeah.

2 JUDGE MOSS: That's not such a -- that's not
3 so many. How many is that, eight?

4 MR. VAN CLEVE: It's New Mexico, the entire
5 Southwest, Colorado.

6 MS. DAVISON: Yeah, it's a huge number.

7 MR. VAN CLEVE: Utah.

8 MS. DAVISON: They have a lot of facilities.

9 I can't do this before the hearing, Stan. I don't even

10 think there's such a thing as -- we have to go out and

11 -- I'm willing to take it back to Air Liquide and give

12 them a couple of states. I think that's reasonable.

13 But, you know, 12, 15 states, there's no way I can do

14 that by Monday.

15 JUDGE MOSS: Well, I don't have the list
16 committed to memory obviously, so I don't know how many
17 states are involved. Mr. Berman, maybe you didn't have
18 in mind either. I think you were trying to make a

19 reasonable offer to limit it there. Are there

20 particular states that you would be interested in

21 looking at, like maybe California?

22 MR. BERMAN: Your Honor, I would be willing
23 to limit it to the Northwest Power Pool plus California.

24 MS. DAVISON: That's --

25 JUDGE MOSS: What states is that?

00245

1 MS. DAVISON: That's bigger.

2 MR. BERMAN: No, it's not.

3 MS. DAVISON: Yes, it is.

4 MR. BERMAN: It eliminates the Southwest.

5 MS. DAVISON: It includes Canada.

6 MR. BERMAN: I would be willing to eliminate
7 Canada, the United States portion of the Northwest Power
8 Pool plus California.

9 MS. DAVISON: Stan, why don't you pick three
10 states.

11 MR. BERMAN: It eliminates basically the
12 Rocky Mountain region and the Southwest region.

13 MS. DAVISON: Stan, why don't you pick three
14 states, and I will try to get the data for three states.
15 I think that's more than reasonable. I'm not even sure
16 how easy it is to compile this information for you.

17 JUDGE MOSS: I guess I want to throw the
18 question back, I don't know how many facilities these
19 various companies have around the country or around the
20 world, but it strikes me that Air Liquide probably
21 doesn't have facilities in all of the states that we're
22 talking about. Do they operate in every state, or
23 what's the -- I mean what's the likely universe of data
24 here? Is it really as huge as you suggest?

25 MS. DAVISON: All I know is they have many

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1 hundreds of facilities throughout the country. I have
2 not figured out exactly what states they're in. I know
3 they're in a lot of states. But I'm willing to, you
4 know, we can provide two or three states that are close
5 by where they have operations.

6 MR. BERMAN: The Northwest Power Pool is
7 relevant because trading occurs within and throughout
8 the Northwest Power Pool. And by finding out what's
9 going on with the other facilities, what facilities they
10 have and where they are, we can potentially obtain
11 information that would suggest how they are exposed to
12 power prices throughout the region. If they truly have
13 many facilities scattered throughout the region, that
14 would be useful and important information for us to
15 know.

16 MS. DAVISON: Can you possibly -- if we send
17 a boat load of information to you, Stan, can you
18 possibly get through it and figure out what it means. I
19 mean why can't you just let us do it for you and provide
20 something reasonable that you can work with.

21 JUDGE MOSS: Well, I think this data request
22 does call for a distillation and specific information
23 with respect to each site, so I mean I don't think this
24 one really calls for documents. Somebody tell me what
25 states we're talking about.

00247

1 MR. BERMAN: Your Honor --
2 MS. DAVISON: It's a huge number.
3 JUDGE MOSS: Well, somebody tell me, I don't
4 know what huge means.
5 MR. GAINES: It's Washington, Oregon, Idaho,
6 Western Montana, and Stan has added California.
7 JUDGE MOSS: All right, well, that doesn't
8 strike me as a huge number. All right, that's going to
9 be the requirement then.
10 MS. DAVISON: What are the states again?
11 JUDGE MOSS: Washington, Oregon, Western
12 Montana, Idaho, and we have added California.
13 All right, that takes care of 13, let's move
14 on to 14. Let's see, analysis and other documents
15 related to the relative efficiency of operations, energy
16 costs, and costs of other factors of production and
17 sites served by Puget Sound Energy compared to plants in
18 other locations since November 1996.
19 MS. DAVISON: There's no such document in the
20 manner in which it's been asked for.
21 JUDGE MOSS: Well, then that should be the
22 answer.
23 MS. DAVISON: All right, I will supplement
24 that.
25 JUDGE MOSS: All right, that -- whoops,

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1 sorry, I got two more pages. 39, and this is a question
2 related to somebody's affidavit.

3 MR. BERMAN: Your Honor, that affidavit has
4 been withdrawn, and I will withdraw this question.

5 JUDGE MOSS: All right, 40, same thing?

6 MR. BERMAN: Same thing.

7 JUDGE MOSS: 41, not the same thing.

8 MR. BERMAN: Not the same thing.

9 JUDGE MOSS: This one says, 41 says, please
10 describe how Air Liquide America Corporation is
11 satisfying customer demands given the temporary closure
12 of its Kent, Washington facility, and provide I think it
13 should say any documents relating thereto. This one is
14 objected to for confidentiality reasons, and Air Liquide
15 -- okay.

16 So again, Mr. Berman, you need to -- they
17 want to assert a highly confidential status on the
18 response. They have offered to make the response, so
19 you will need to get an affidavit to them and deal with
20 it that way.

21 All right, that takes care of Air Liquide.
22 Now I'm going to ask for some help here as we go through
23 the rest of these, and to the extent that I have
24 previously ruled on one of these for Air Liquide, then
25 the same ruling applies for the other companies. To the

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1 extent this is something new, I will take it up and
2 consider it and rule on it accordingly, so I'm looking
3 now -- well, wait a minute, I still seem to be looking
4 to -- oh, this is Air Products, okay. Sorry, I was
5 looking at the wrong part of the caption.

6 Okay, for Air Products and Chemicals, Number
7 2, have we previously taken that one up?

8 MR. BERMAN: Yes, Your Honor.

9 JUDGE MOSS: And 3?

10 MS. DAVISON: Wait, Your Honor, let's go back
11 to 2 for Air Products. It's a different answer.

12 JUDGE MOSS: Yeah, you have 10-Q's for Air
13 Products, right?

14 MS. DAVISON: Yeah, we provided a boat load
15 of 10-Q's, believe me, and also what we're saying here
16 is that any kind of site specific basis because of the
17 restrictions imposed on these air separation facilities,
18 it is incumbent upon PSE to sign the affidavit, and we
19 will produce the data. I believe a motion to compel is
20 premature.

21 JUDGE MOSS: Well, you know, I don't want to
22 get into the technicalities of prematurity in motions to
23 compel and stuff. I just want to resolve this discovery
24 dispute, and we have resolved this aspect of it by my
25 telling Mr. Berman that if he wants this information as

00250

1 to which you have the right in the first instance to
2 assert highly confidential status, then he needs to get
3 you those affidavits. And if he fails to do so and you
4 never produce a response, I can't nor can the Commission
5 hold that against you, and that won't happen. So we
6 understand that, and that's fine. So he will either
7 provide the affidavit or he won't.

8 MR. BERMAN: Your Honor, if I could just
9 clarify one thing, in the response that's written here,
10 Air Products never actually says it intends to produce
11 the document notwithstanding its objection. It simply
12 objects, and then it notes that the information is
13 confidential. I would appreciate it if we could clarify
14 that it will, in fact, produce the site specific
15 information assuming they get the designation of persons
16 who will receive highly confidential information.

17 MS. DAVISON: Mr. Berman, read on, it says
18 information will only be produced subject to a super
19 protective order.

20 JUDGE MOSS: All right, well, we're clear on
21 this now, I think. I think, Ms. Davison, I have
22 understood you to say that once you the get the
23 affidavit, the information will be provided; is that
24 correct?

25 MS. DAVISON: That's what the answer says,

00251

1 yes.

2 JUDGE MOSS: And that's what you say?

3 MS. DAVISON: That's what I say, yes.

4 JUDGE MOSS: Okay, fine, then we're clear,
5 everybody's clear.

6 All right, let's look at 11, is this the same
7 as the previous 11 that we considered?

8 MR. BERMAN: Your Honor, before we get to 11,
9 on Number 3, again that was a suggestion there about
10 super protection, but again I don't believe it
11 specifically said that the information would, in fact,
12 be produced at all or not in a way that I'm capable of
13 discerning. If we could get clarification that the
14 information, I believe you had limited the cash flow
15 information to site specific basis, if we could get
16 clarification that that will, in fact, be produced
17 though subject to the super confidentiality, that would
18 be important.

19 MS. DAVISON: My understanding of Judge
20 Moss's ruling is that to the extent site specific
21 information exists for the year 2000, we will produce
22 it.

23 JUDGE MOSS: That's right, okay, good.

24 MR. BERMAN: Thank you, Your Honor.

25 JUDGE MOSS: And just to be clear, by the

00252

1 way, words can become important. I do, in the
2 protective orders that I prepare for the Commission, I
3 use the term highly confidential. And so the super
4 confidential and super protection is something that
5 crept into an order before my time, and it's just one of
6 those words I don't like. I always think of superman or
7 something. So let's stick with the proper terminology
8 when we're going back and forth on this, because it will
9 be important or it could become important at some point
10 if any of this ever ends up in court, so that's just an
11 aside.

12 All right, can we move on to 11, and the
13 question I had put on the table, is this the same as the
14 11 previously considered?

15 MR. BERMAN: It's the same question, Your
16 Honor, and if your ruling as to what will be produced is
17 the same, then I think we're okay.

18 JUDGE MOSS: My ruling will be the same. To
19 the extent the question is the same, my ruling will be
20 the same, and I don't want to have to go through it
21 every time.

22 How about 12, is it the same as the previous
23 one?

24 MR. BERMAN: It's the same question as
25 previously, Your Honor, and again, we would accept your

00253

1 same ruling.

2 JUDGE MOSS: Okay, well, let me just, maybe
3 we can do this in groups and save even more time. How
4 about 13, 14, and 15. No, we didn't previously take up
5 15, I guess.

6 MR. BERMAN: That's correct, but 13 and 14
7 you have previously ruled on, and we would accept the
8 same rulings, Your Honor.

9 JUDGE MOSS: Okay. Now 15 says, regarding
10 the amended complaint at page 2, lines 12 through 13,
11 list the personnel and related payroll and other savings
12 that are achieved by the existing and potential
13 "closures or reductions in operations", and let's see
14 what the objection is. Okay, if the allegation in the
15 complaint relates only to facilities and operations at
16 Puyallup.

17 MS. DAVISON: That's correct, and we have
18 agreed to produce those, Your Honor, under a highly
19 confidential designation.

20 JUDGE MOSS: Including the material as to
21 which objections are stated here?

22 MS. DAVISON: Yes, we will provide this
23 information related to the facilities pursuant to a
24 highly confidential designation.

25 MR. BERMAN: On that basis, Your Honor, I

00254

1 think we can move on. I think you will notice that
2 again the response does not say anywhere that they
3 would, in fact, produce it even with that protection.

4 JUDGE MOSS: Okay, well, we now understand
5 that that's going to be produced under the highly
6 confidential.

7 All right, how about 38, 39, and 40, have we
8 previously considered those?

9 MR. BERMAN: No, Your Honor.

10 JUDGE MOSS: They're all different? Yeah,
11 you're right, these have do with affidavits. All right,
12 we will have to look at 38, 39, 40 and I guess 49,
13 because this affidavit is still present in the
14 proceeding, is it?

15 MR. BERMAN: Yes, Your Honor.

16 JUDGE MOSS: Okay.

17 MS. DAVISON: Your Honor, to try to
18 facilitate this, 38 is something that we believe is
19 extraordinarily broad given the number of plants that
20 Air Products has throughout the country.

21 39, we said that we will produce documents
22 subject to a highly confidential designation.

23 JUDGE MOSS: Okay, so 39 we don't need to
24 worry about, because we're going to get that affidavit,
25 and you will respond to that one.

00255

1 But 38, you are concerned about the breadth?

2 MS. DAVISON: Extremely broad.

3 MR. BERMAN: Your Honor, we would accept
4 that, this is similar to some of the other ones you have
5 addressed, we would accept in the first instance a
6 narrative response. I would note that it refers to
7 financial hedges or other procedures or transactions.
8 One thing that we're aware of is that Air Products
9 actually operates power production facilities at a
10 number of its plants selling power, we believe, into the
11 market and making money off of high power prices in the
12 West. And to the extent they're able to do that in
13 order to manage price risk, that's extraordinarily
14 relevant, certainly if we find out at the end of this
15 proceeding that Air Products is a net winner out of
16 price increases arising in the electric industry in the
17 United States, which is quite likely, that would be --

18 MS. DAVISON: Are we going to make arguments
19 about our case here, Mr. Berman? Your question doesn't
20 ask for those documents. We're willing to provide the
21 documents you have asked for in 38. You haven't asked
22 for documents related to other power plants.

23 JUDGE MOSS: Well, it says financial hedges
24 or other product, procedure, or transaction intended to
25 manage price risk of energy, so it does seem to be broad

00256

1 enough to --

2 MS. DAVISON: We sell power at another
3 facility. It has nothing to do with our managing price
4 risk. It's the PSE service.

5 MR. BERMAN: Your Honor, if they're operating
6 a power production facility at an Air Products facility
7 in California and they sell power into the California
8 power markets at the high prices in California, which
9 are typically higher than the prices in the Northwest
10 power markets and use that to manage their energy price
11 risks, that's relevant.

12 JUDGE MOSS: Ms. Davison.

13 MS. DAVISON: But Your Honor I --

14 JUDGE MOSS: Ms. Davison.

15 MS. DAVISON: I'm --

16 JUDGE MOSS: Ms. Davison, both because you
17 are on the telephone and because I do not really like to
18 have counsel over talk each other, I'm going to ask you
19 to please hold off until Mr. Berman or I have finished
20 speaking. The reporter can not get a transcript if we
21 are all speaking at once, so please don't interrupt when
22 other people are speaking. I know it's difficult
23 because you're on the phone and you can't see us and
24 maybe our voices drop off, but please make an effort not
25 to do that. Our reporter has been working here hard all

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1 day, and let's don't make this any more difficult than
2 we have to.

3 And, you know, we are getting a little far
4 afield in the argument here, I think, and I'm going to
5 try to step into this and resolve it. I think when
6 Mr. Berman has raised questions with respect to the
7 specific matter which relates to the specific company,
8 and I think we have agreed earlier, or I have ruled
9 earlier to the extent no one wants to acknowledge
10 agreement, that a narrative response is a good place to
11 start with this sort of thing. And I think that what
12 Mr. Berman is suggesting here is that your narrative
13 response should speak to that issue.

14 And if you want to take the position in that
15 narrative response that this activity occurs but is not
16 part of the energy cost risk management strategy, then
17 you can say so. But, you know, that's something
18 Mr. Berman has learned through other means or whatever,
19 and he's got a right to inquire into it. And we may as
20 well get the facts developed before we get into the
21 hearing on Monday. Otherwise we're going to spend a lot
22 of time and a lot of cross-examination when you bring
23 forth the Air Products witness on this. So I think it's
24 a legitimate area of inquiry.

25 And again, if your company asserts in its

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1 sworn response that that's not part of its energy
2 management practice or what have you, then you do. But
3 that's the way to do that, and that's what I expect in
4 the narrative. So that's 38. Again, we're going to
5 have a narrative response, and we will see if it needs
6 to be pursued any further.

7 39 speaks again to the affidavit, asks for
8 documents supporting or relating to the statement that
9 power costs normally represent 60% to 70% of the
10 variable costs at the Puyallup facility.

11 MR. BERMAN: Your Honor, they have indicated
12 they will produce these documents subject to the terms
13 of the highly confidential protective order.

14 JUDGE MOSS: Thank you for reminding me.
15 It's late, and I'm tired, and I overlooked that you
16 already told me that, and, Ms. Davison, you already told
17 me that.

18 MR. BERMAN: That's satisfactory to us in the
19 first instance subject to any potential claims that
20 documents should not be highly confidential.

21 JUDGE MOSS: Okay, well, again, I think, you
22 know, these are big national, international companies.
23 To the extent that there is some strategy that is, you
24 know, being followed uniquely in Washington, that may
25 have a bearing on consideration.

00259

1 And so again, all this, you know, this asks
2 for a very specific set of documents, and if there are
3 some documents that do this, that compare electricity
4 cost at Puyallup relative to others, then it seems
5 relevant to me, and I would take the objection to be one
6 of irrelevance, although it doesn't say so. I don't
7 have a general objection G, by the way, but --

8 MS. DAVISON: It's in the very beginning of
9 our responses.

10 JUDGE MOSS: Right, but I don't think I have
11 it. I only seem to have A and B. I don't know why.

12 MS. DAVISON: Just for the record, objection
13 G said Air Products is objecting to the request to the
14 extent it's seeking information regarding facilities not
15 served by PSE on the grounds that such requests are
16 unduly burdensome and irrelevant since Air Products
17 operates more than 200 facilities in the United States
18 alone, only one of which is served by PSE. Collecting
19 documents and information concerning all of those
20 facilities that might be literally responsive, PSE time
21 constraints, requests would be unduly time consuming.

22 JUDGE MOSS: Ms. Davison, I would think that
23 to the extent there are any documents that compare the
24 electricity costs at the Puyallup plant with other
25 facilities that those would be available from the

00260

1 Puyallup plant folks.

2 MS. DAVISON: I don't believe so. It would
3 be corporate documents that would --

4 JUDGE MOSS: Well, somebody at corporate
5 probably knows if those kinds of studies are done, and
6 you need to inquire. And if those kinds of studies are
7 not at corporate level, then again, they can easily be
8 provided. It doesn't require that there be a search of
9 the documents in 200 facilities throughout the United
10 States.

11 And, you know, this may or may not be done,
12 but I suspect that somebody who is responsible for
13 energy management for the company at the corporate level
14 would be able to give you that answer pretty quick. So
15 I'm going to ask you to inquire, and if there are such
16 documents at corporate or in the Puyallup facility, then
17 they should be produced. I am not asking you to inquire
18 of each of the 200 plants managers throughout the United
19 States.

20 All right, which one is next, what's next?

21 MR. BERMAN: 48, Your Honor.

22 MS. DAVISON: I'm sorry, what number are we
23 on?

24 JUDGE MOSS: 48.

25 MR. BERMAN: For Air Products.

00261

1 MR. TROTTER: 48?
2 JUDGE MOSS: Yeah, 48.
3 MR. TROTTER: That's not on your motion.
4 MS. DAVISON: We provided the documents,
5 Stan.
6 JUDGE MOSS: No, that was, I think, to 49.
7 MR. BERMAN: Your Honor --
8 MS. DAVISON: We provided documents to 49. I
9 have them right in front of me.
10 MR. BERMAN: Your Honor, I think that there
11 was probably a typo within the body of our motion. It
12 says 49 within the body of our motion, but 48 is what we
13 had appended to the motion itself, and 48 is the one
14 that we're concerned with.
15 And you will note if you look at 48 that it
16 says a bunch of stuff, and then it says, notwithstanding
17 all of the above objections, we are serving some
18 responsive documents. The suggestion there is that
19 though they are serving some responsive documents that
20 there would be some responsive documents that are not
21 being served.
22 To the extent they are governed by -- to the
23 extent they wish to designate them as highly
24 confidential and produce them pursuant to the procedures
25 we have discussed, that's acceptable to us, Your Honor,

00262

1 but certainly they should not be withholding any
2 responsive documents.

3 MS. DAVISON: Well, Your Honor, we provided
4 documents that we thought would be a reasonable sampling
5 to allow PSE, which I don't believe I have even looked
6 at these documents, to conclude the basis upon which we
7 made that statement. If there are additional documents
8 that we can produce subject to a highly protective
9 designation, we will do so. But our intent here is to
10 be responsive within reason.

11 MR. BERMAN: Your Honor, they made specific
12 allegations in their affidavit, and all we ask is for
13 the documents that support the specific allegations in
14 their affidavit.

15 MS. DAVISON: Mr. Berman, have you looked at
16 the documents we produced?

17 MR. BERMAN: Your Honor, to the extent that
18 they have made specific allegations in their affidavit
19 and they have produced some documents and not the rest,
20 that makes it very difficult to assess whether or not --
21 whether or not, in fact, there's adequate support for
22 the information. As you may recall, one of the
23 commissioners, Commissioner Hemstead I believe, at the
24 hearing even raised the issue of whether the supply of
25 gases was being disrupted and impacting health and

00263

1 safety. And we think we're entitled to any documents
2 they have that might be relevant to that question.

3 MS. DAVISON: Mr. Berman, have you looked at
4 the documents we have produced in response to this?

5 JUDGE MOSS: Ms. Davison, I'm going to ask
6 you to direct your comments to me.

7 MS. DAVISON: Your Honor, I don't believe
8 that Mr. Berman has looked at the documents that we have
9 produced, because if he had, he would see that there are
10 a great number of documents that we have produced that
11 go to this issue. And we believe we have been
12 responsive. To the extent that, as I said earlier, that
13 there are documents that are highly confidential, we are
14 reserving production of those until we receive the
15 affidavit.

16 JUDGE MOSS: All right, what I'm hearing is
17 that there's not really an objection here, that you're
18 going to provide or that you have provided or will
19 provide the documents. To the extent highly
20 confidential, they will be so designated, so let's move
21 along.

22 All right, and let's do try to move along.
23 If we go until, oh, 6:30 or 6:40, I'm going to have to
24 interrupt, because I have a vehicle that I've got to
25 recover from a local car facility by 7:00. That's how I

00264

1 get to and from work. So let's try to move this along.
2 I know that's my problem and not your problem, but I
3 have to deal with it. So it's 6:00 now, so perhaps
4 we'll be finished, and I think I -- well, let's just
5 move on.

6 This, I believe, brings us to the Boeing
7 Company.

8 MR. BERMAN: Yes, Your Honor.

9 JUDGE MOSS: I think 2 and 3 are probably the
10 same.

11 MR. BERMAN: Yes, Your Honor, we would accept
12 the same orders that you gave for the prior companies.

13 MS. DAVISON: Excuse me, Your Honor, can you
14 hold on one moment. I wanted to get --

15 JUDGE MOSS: We can't hear you.

16 Let's go off the record.

17 (Brief recess.)

18 JUDGE MOSS: All right, we had a brief recess
19 to permit some arrangements to be made that have nothing
20 to do with the hearing or this proceeding. Where are
21 we?

22 MR. BERMAN: Your Honor, there were just a
23 few discussions while we were off the record.

24 I agreed to withdraw my objections to Boeing
25 2 and 3.

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1 I believe that Ms. Davison agreed that with
2 respect to Boeing 11 and 13 that she would provide
3 information in the same form that you ordered with
4 respect to the other companies.

5 That with respect to Boeing 14, Ms. Davison
6 just advised me that there are no confidential materials
7 out there and that all materials that are responsive
8 will be available for inspection if we arrange an
9 appointment to come inspect them. And if that is, in
10 fact, the case, that is satisfactory to us.

11 JUDGE MOSS: All right, that takes care of
12 through 14. What is next?

13 MR. BERMAN: With respect to, I have to
14 apologize, Your Honor, I have 16 at a refers back to the
15 response to 15, and I forgot to include the response to
16 15 here. Maybe Ms. Davison has 15 with her and could
17 explain what it was.

18 MS. DAVISON: Number 15, it says to provide
19 all documents regarding payroll and other savings
20 achieved by existing and potential closures and
21 reductions in operations. Boeing objects and without
22 waiving its objection, it states, no such documents
23 responsive to this request exist.

24 I think I can tell you on the record that
25 Boeing is not planning on shutting down its facility, so

00266

1 there are no documents regarding their closure or
2 reduction in operations. So you asked for the similar
3 material in 16. We refer you back to 15 saying there
4 are no documents.

5 MR. BERMAN: Your Honor, based on counsel's
6 statements that at no power price would Boeing shut down
7 its facilities, I will withdraw my objection, and we can
8 move on.

9 MS. DAVISON: Mr. Berman, I didn't say that.
10 What I said is that Boeing has no plans to shut down its
11 facilities. I'm sure there is a price at which Boeing
12 would shut down. I didn't make that representation.

13 JUDGE MOSS: All right, I think the
14 acknowledgment made on the record is clear enough to me.
15 And, Ms. Davison, I understood your statement to be that
16 Boeing has no present intention in light of the
17 circumstances that have developed over the 2000 period
18 and into the early 2001 period to curtail or shut down
19 its operations as a result of energy prices. Is that
20 essentially correct?

21 MS. DAVISON: That is correct, Your Honor.

22 JUDGE MOSS: All right, well, that is now a
23 matter of record, your statement to that effect. And to
24 the extent it needs to be developed as a point of
25 evidence in the record, then we will probably reduce it

00267

1 to the form of a stipulation by inquiring of counsel at
2 the hearing, so that will take care of it, I think.

3 MR. BERMAN: Your Honor, with respect to
4 Number 39, that asks for how the public health, safety,
5 or welfare are impacted. To the extent that we have had
6 the agreement that Boeing will not be altering its
7 operations and has no plans to alter its operations as a
8 result of the higher energy prices, I think that that
9 clearly resolves that data request as well.

10 JUDGE MOSS: Yeah, okay, 39 then we won't
11 worry about.

12 All right, let's move on then to CNC
13 Containers.

14 MS. DAVISON: Your Honor, if you could wait
15 one minute while I grab a notebook.

16 JUDGE MOSS: Sure.

17 (Discussion off the record.)

18 JUDGE MOSS: All right, let's go back on the
19 record. Where are we, CNC Containers?

20 MR. BERMAN: Your Honor, we have moved on to
21 CNC Containers Request Number 2. CNC Containers is a
22 private company and as such does not make SEC filings
23 such as a 10-K or 10-Q, and you will note that CNC has
24 objected to providing such information to us. Certainly
25 there shouldn't be a burdon in producing earnings

00268

1 reports to us so that we can evaluate that information
2 for CNC.

3 JUDGE MOSS: Can those earnings reports be
4 provided, Ms. Davison?

5 MS. DAVISON: I have them ready to go
6 designated as highly confidential.

7 JUDGE MOSS: Okay, well, that's fine, then we
8 will take care of that in that same fashion we have
9 previously discussed.

10 All right, what's the next one, Mr. Berman?

11 MR. BERMAN: All right, the next one, Your
12 Honor, is Data Request Number 3, which asks for cash
13 flow statements. And again, they don't deny that this
14 information exists, but they simply object and say that
15 they're not going to produce it.

16 JUDGE MOSS: Okay, well, I think we
17 previously ruled on this same request for others, and
18 the ruling will remain the same. With respect to the
19 same request of each individual complainant, the same
20 ruling applies.

21 MR. BERMAN: And, Your Honor, 11 is identical
22 to one for the prior companies, and we would accept the
23 same ruling with respect to CNC.

24 12 is identical to ones from prior companies,
25 and we would accept the same ruling with respect to CNC.

00270

1 prior requests you have considered, and we would accept
2 the same ruling.

3 Data Request 14 is likewise identical to data
4 requests you have considered for other companies, and we
5 would accept the same ruling.

6 Data Request 16 I believe has only been
7 considered for other companies when we considered
8 Boeing, which had a -- where we reached that stipulation
9 or that statement that was an assertion that was made by
10 counsel, so we have not considered 16 more generally.

11 Certainly the information in 16 is relevant
12 to this case, because it -- they argue in the amended
13 complaint that they will have to close or curtail
14 operations given certain circumstances, and we ask to
15 describe in detail what power prices and durations of
16 such prices cause closures or curtailments, and that's
17 certainly information that's relevant to the claims that
18 have been asserted.

19 JUDGE MOSS: Well --

20 MS. DAVISON: Your Honor, I have pressed
21 Equilon about this, and they can't answer. They don't
22 know.

23 JUDGE MOSS: Well, if we don't know is the
24 answer, then we don't know is the answer, and that's the
25 answer that needs to be provided, and PSE can make out

00271

1 of that whatever it will.

2 MS. DAVISON: I'm sorry, Your Honor, I didn't
3 mean to interrupt. That is what we responded to number
4 15 is we can't answer it, we don't know.

5 JUDGE MOSS: Okay, well, again, all I have
6 before me is a statement of objection.

7 MS. DAVISON: What's the last phrase,
8 plaintiff can not answer this data request at this time.

9 JUDGE MOSS: That's different from saying we
10 don't know. That's saying we can't answer, and there is
11 a material difference between those two things. So if
12 the answer is we don't know at what power price and what
13 duration of such price cumulative hours would have to --
14 would be sustained before we would close or curtail
15 operations, then that's the answer.

16 MS. DAVISON: Okay.

17 JUDGE MOSS: I don't know is a perfectly
18 acceptable answer, as I have told many a witness.

19 All right, let's move on.

20 MR. BERMAN: Your Honor, that moves us to
21 Georgia-Pacific Number 3. This is the cash flow request
22 that we considered previously, and we would --

23 MS. DAVISON: I have the documents ready to
24 go, Mr. Berman.

25 JUDGE MOSS: Okay, good.

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1 MR. BERMAN: All right. If, in fact, all
2 responsive documents will be produced, we certainly
3 would accept that. That's not what the response said.

4 Data Request Number 6, this is identical to
5 requests that were considered, that you considered with
6 respect to other companies, and we would accept the
7 response that Your Honor gave or the order that Your
8 Honor made with respect to the other companies.

9 Number 8, same story.

10 Number 10 is again the same as Air Liquide
11 requests that you considered in depth.

12 That's true for Number 11.

13 That's true for Number 14.

14 And then that brings us to Number 15.

15 MS. DAVISON: I don't have that before me,
16 just one moment. Well, Number 15, Mr. Berman, we say
17 we're going to produce it.

18 MR. BERMAN: Your Honor, if they're going to
19 produce all responsive data, then that's satisfactory.

20 JUDGE MOSS: Great.

21 MS. DAVISON: We didn't even give you any of
22 those detailed objections. We said we were going to
23 produce it.

24 JUDGE MOSS: All right, let's move on.

25 MR. BERMAN: Number 16, if they're going to

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1 produce all responsive data, that's satisfactory.

2 And the same is true for 36.

3 That brings us to 38.

4 MS. DAVISON: No, Stan.

5 MR. BERMAN: This looks similar to ones we
6 have considered for other companies, but I believe that
7 this specific one was not addressed for other companies,
8 either that or the numbering was somehow different for
9 this company.

10 JUDGE MOSS: I think we did address this one
11 previously.

12 MR. BERMAN: Yes, Your Honor, and we would
13 accept the same response that I believe Your Honor with
14 respect to these hedges required a narrative response
15 detailing this information, as you discussed earlier,
16 and that would be acceptable in the first instance to
17 us, Your Honor.

18 JUDGE MOSS: Yeah, that's my recollection of
19 the prior ruling on this one as well, so I think we can
20 go with that reliably.

21 MR. BERMAN: Your Honor, Number 40, if
22 they're producing all responsive data pursuant to the
23 highly confidential order, that would be acceptable to
24 us.

25 JUDGE MOSS: All right.

00274

1 MS. DAVISON: That's what we indicate we will
2 do, Mr. Berman.

3 JUDGE MOSS: Okay, that's fine, let's move
4 on.

5 MR. BERMAN: That brings us to Tesoro and
6 Request Number 3.

7 MS. DAVISON: Hold on, let me grab my
8 notebook. What you can't see, Your Honor, is that I
9 have about 15 notebooks in front of me of the documents
10 that we have produced. Okay, I have Tesoro.

11 MR. BERMAN: If I recall correctly, Your
12 Honor, you had limited the cash flow information to the
13 facility specific basis. And if that recollection is
14 correct, then based on the statement that they don't
15 have cash flow reports on a site specific basis, I think
16 that addresses Number 3.

17 On Number 10, this is identical to requests
18 that were made for other companies, and I think the same
19 ruling that you made should apply here.

20 JUDGE MOSS: Yes, it will.

21 MR. BERMAN: With respect to 13, this is
22 identical to --

23 MS. DAVISON: Hold on, hold on.

24 JUDGE MOSS: 13, yeah.

25 MS. DAVISON: Okay.

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1 MR. BERMAN: With respect to 13, this is
2 identical to a request that was made of other companies,
3 and we think that the same ruling Your Honor made would
4 be appropriate here.

5 MS. DAVISON: Your Honor, we indicate that we
6 will provide it subject to a highly confidential.

7 JUDGE MOSS: Okay, good, then the provision
8 of the affidavit will resolve this one.

9 What's the next one, 14?

10 MR. BERMAN: With respect to 13, as I
11 understood their offer, it was that they would produce
12 the information for just the Anacortes facility. If we
13 could be clear, when we had ruled on this, when Your
14 Honor had ruled on this previously, we had expanded this
15 one to include information relating to sites throughout
16 the Northwest Power Pool and California, and we would
17 expect the same ruling would apply here.

18 JUDGE MOSS: Yeah, let's have consistency
19 here. And I'm sure you have those careful notes,
20 Ms. Davison.

21 MS. DAVISON: I do.

22 JUDGE MOSS: Good.

23 MR. BERMAN: Your Honor, 14 is identical to
24 prior requests, and again, we would expect the same
25 ruling to apply here. Ms. Davison might point out that

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1 she has offered to produce the information, but her
2 response suggests that she was not going to produce
3 information that mentioned other facilities. And as
4 Your Honor ruled previously, if there is -- this asks
5 for analyses comparing the site served by Puget Sound
6 Energy to other facilities, and Your Honor found that it
7 would be appropriate to go to corporate headquarters and
8 seek such comparisons to the extent that those
9 comparisons exist.

10 JUDGE MOSS: Yes, that was the prior
11 determination, and the determination here is consistent
12 with that.

13 MR. BERMAN: Your Honor, I think that brings
14 us to City of Anacortes, Request Number 9. This is one
15 of the hedge requests identical to ones that were
16 previously addressed for Air Liquide and which Your
17 Honor issued a ruling, and we would ask for the same
18 ruling here.

19 JUDGE MOSS: And that ruling is consistent.

20 MS. DAVISON: Your Honor, I can tell you with
21 the City of Anacortes, they have provided every scrap of
22 paper they have in all of their files regarding Schedule
23 48 in any way, shape, or form. You have that,
24 Mr. Berman.

25 JUDGE MOSS: Okay, well, that's fine, if the

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1 response is complete, then it is.

2 You know, again, if there's no such
3 documents, you know, whenever -- my recollection of this
4 discovery practice is when there's no responsive
5 documents, you need to say so, and that way the party
6 who has interposed the data request knows that, you
7 know, they're not just being stonewalled.

8 So that's a good thing to do and say, you
9 know, rather than saying the City of Anacortes objects
10 to its over breadth and so on and so forth, just say
11 there are no such documents or any responsive documents
12 have been provided or whatever, so that's just more
13 helpful there.

14 MR. BERMAN: Your Honor, I would note that
15 this didn't request documents but asked for a list of
16 the various hedges, and you had ordered a narrative
17 response.

18 JUDGE MOSS: Yeah.

19 MR. BERMAN: But if there were no hedges,
20 then as Your Honor says, if they say they employed no
21 hedges, that seems like it would be an appropriate
22 response.

23 MS. DAVISON: Can I tell you on the record,
24 Mr. Berman, there were no hedges.

25 JUDGE MOSS: Well, Ms. Davison, you

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1 appreciate the fact that Mr. Berman is going to want to
2 put this stuff into evidence, and your statements on the
3 record are helpful in that they help everybody
4 understand what's going on, but you know the Commission
5 practice is to allow data request responses into the
6 record even when they're not necessarily sponsored by
7 the witness who prepared the response or the individual
8 who prepared the response.

9 So I think he, you know, he's entitled to
10 have a written response to an interrogatory of this
11 nature so that it can be produced as evidence for the
12 Commission's record. So I think it is necessary that
13 you take the step of responding in that fashion. And
14 that's just part of our practice here. That's the way
15 it works.

16 So, all right, does that complete it?

17 MR. BERMAN: Your Honor, Number 10 for
18 Anacortes is again one we have addressed previously, and
19 again if the answer is that they have engaged in no
20 hedges and used no techniques to manage their prices,
21 their energy prices, well, then that's the answer. But
22 Your Honor has ordered a narrative response attempt for
23 the other companies, and we would ask for the same here.

24 JUDGE MOSS: Okay, fair enough.

25 MR. BERMAN: And that, Your Honor, brings us

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1 to the end of the data requests.

2 JUDGE MOSS: All right, then we're not going
3 to take up the other aspect today, that is the subpoena
4 part. We will take that up in the future if necessary.

5 And I believe, you know, this was the only
6 written motion I have at this time. Ms. Davison, I
7 believe you had said you had a few matters you wanted to
8 bring up that we could perhaps conclude in a reasonable
9 amount of time this evening.

10 MS. DAVISON: Yes, Your Honor, thank you. We
11 have received from PSE in response to one of your orders
12 compelling production notes data related to their daily
13 sales and purchases of power. We have 1100 pages of raw
14 data. We have repeatedly asked for this data in
15 electronic format. Mr. Schoenbeck tells me that to
16 input this data to try to use it in any kind of
17 reasonable fashion, it takes three hours per two pages
18 of data. This data is obviously a computer printout.
19 We have asked for the electronic version of this. It's
20 not useful to us as 1100 pages of raw data. We would
21 like PSE to produce this in electronic form.

22 JUDGE MOSS: Have you inquired into this,
23 Mr. Berman?

24 MR. BERMAN: Yes, Your Honor, and, in fact, I
25 believe they have essentially asked for this information

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1 in the data request for which responses are due I
2 believe tomorrow. And it's my understanding that we
3 have been able to obtain a CD that has this information
4 on it. And as far as I know, it is something that we
5 will be able to make available in response to that data
6 request.

7 JUDGE MOSS: All right, that sounds
8 promising, Ms. Davison.

9 MS. DAVISON: I will be anxiously awaiting
10 the CD tomorrow.

11 My second issue is I have asked repeatedly
12 for documents that were stated to be attached to our
13 responses 1.14 and 1.18. No documents were attached to
14 those responses. This is my third request for such
15 documents.

16 JUDGE MOSS: I'm sorry, you lost me there for
17 half a second. Could you restate the problem?

18 MS. DAVISON: Yes, I'm sorry, Your Honor.
19 PSE responded to our document requests 1.14 and 1.18
20 stating that there are documents attached, when, in
21 fact, there were no documents attached. I have brought
22 this to the attention of counsel for PSE. This is now
23 my third request. Please provide the documents that
24 should be attached as it indicates to 1.14 and 1.18.

25 JUDGE MOSS: Okay, well, Mr. Berman will

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1 follow up on that in the morning I'm sure. So he's
2 nodding acknowledgement that he will do that.

3 So what's next?

4 MS. DAVISON: The same problem, PSE provided
5 us with a written response to their responses to WUTC
6 Data Requests 1 through 5. We received documents
7 responsive to WUTC Data Request Number 1. We did not
8 receive any documents responsive to WUTC Data Request
9 Numbers 2 through 5. We only have the narrative
10 response. We would like to receive those documents,
11 please.

12 JUDGE MOSS: Mr. Trotter, are you familiar
13 with those responses off the top of your head? I
14 realize we didn't prepare you to speak to it.

15 MR. TROTTER: No, I am aware -- I don't have
16 those requests in front of me, but I am aware that we
17 did issue requests to ask for documents that had been
18 provided informally in another docket to formalize that
19 production, and it's my understanding we did get a
20 stack, two or three inches of documents.

21 MR. BERMAN: Your Honor, my recollection, and
22 I will have to check on this, is that in response to the
23 summation of 1 through 5, which had been submitted
24 informally to us by Staff prior to the commencement of
25 this proceeding, we produced a letter that has been

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1 called the Pohndorf letter that has a number of
2 attachments. And I believe that in response to the
3 formal 1 through 5, we produced the letter again.

4 And I think that perhaps there was nothing
5 more than the letter, and perhaps the confusion is
6 arising from the fact that Ms. Davison is expecting five
7 different responses, when, in fact, all of the issues
8 were raised -- were addressed in that one letter that we
9 resubmitted to Staff. I believe that's the answer.

10 MS. DAVISON: Thank you for that
11 clarification.

12 JUDGE MOSS: That's fine. I think Mr. Berman
13 will follow up on that and make sure his recollection is
14 correct. And if it proves not to be, then he will
15 furnish you the documents. Or it occurs to me that
16 another possibility if it's not too great of a volume,
17 if Staff has the documents that are responsive and
18 they're, you know, not under such a protective status as
19 would limit Staff's ability to do so, then the copies
20 could possibly be provided through that medium if
21 necessary to save time.

22 But let's just take it one step at a time and
23 let Mr. Berman check on that in the morning along with
24 the other, and then you will get it one way or the other
25 if there is anything to get.

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1 MS. DAVISON: My next issue is with regard to
2 Complainants' Data Request 2.05 and 2.07. You ordered
3 production of those documents at the deposition today,
4 and it is my understanding from Mr. Van Cleve that there
5 were very few documents produced, and we do not believe
6 that PSE has responded to those data requests.

7 JUDGE MOSS: My recollection is that I
8 suggested that a sample of those documents be brought.
9 And, Mr. Berman, was that done?

10 MR. BERMAN: Your Honor, I think I have to
11 answer each separately. With respect to 2.07, what you
12 had addressed was the work papers behind the I believe
13 it was the rate of return graph. That was the name more
14 or less given to it. And we produced the work papers
15 behind that graph.

16 With respect to number 2.05 --

17 MS. DAVISON: Excuse me, Mr. Berman, there's
18 another part of 2.07, and that was -- there are actually
19 two more parts of 2.07. The first part is that we asked
20 for the chart to be updated. The chart ends for June
21 30th. And the third part is that we asked for forecasts
22 for your earnings.

23 JUDGE MOSS: What were my rulings on the
24 forecast? I thought I remembered that I ruled that to
25 the extent that the data was available for updating that

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1 it should be done, but didn't I rule that the forecast
2 need not be done?

3 MR. BERMAN: Your Honor, what you ruled was
4 that to the extent there were forecasts going to the end
5 of the year that we should produce them. What
6 Mr. Gaines informed Mr. Van Cleve on the record, and I
7 know Ms. Davison wasn't there so that makes it somewhat
8 difficult for her to address this, but what Mr. Gaines
9 informed Mr. Van Cleve on the record during the
10 deposition is that the graphs are produced from a six
11 month compilation of data that's prepared for the
12 Commission, and it takes some time to close out those
13 books and get that six month compilation together.

14 So the latest data we had went through the
15 first six month period of 2000, that the data was not
16 yet available to close out the remaining period, and
17 that to his knowledge, he was not aware of any earnings
18 estimates otherwise going to the end of the year 2000.
19 I also inquired into the existence of such information
20 and was told that there were no such earnings estimates.
21 I asked other officers of the company. So with respect
22 to that, there is nothing more, and we gave the work
23 papers that supported what there was.

24 With respect to 2.05, that was related to
25 information about the resource costs for various

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1 resources, and what Your Honor said is -- what I had
2 said was that that was a very dynamic thing and it
3 varies from time to time and depends on many, many
4 factors, and I didn't think there was any such data.
5 And Your Honor said, well, if there is any such data,
6 get a sampling of it and bring it in.

7 I asked Mr. Gaines if he could do that, and
8 he said, well, there really is no such data. What they
9 do is they know the heat rates for the various units and
10 on a daily basis understanding the gas prices, they just
11 use that information. And he explained that on the
12 record during the deposition today.

13 In fact, he was shown an exhibit that listed
14 all the various resources, longer term resources, that
15 were used by the company and in several months at the
16 end of the year 2000 and was asked information about
17 each of those different resources, how they worked and
18 what they related to. And Mr. Gaines gave information
19 about all of that. So, in fact, we have an ample record
20 that addresses that issue, and we produced what we were
21 able to produce.

22 MS. DAVISON: Your Honor, may I make a follow
23 up inquiry? What we were looking for, Your Honor, was
24 information regarding their dispatch decisions.

25 Mr. Berman, are you concluding that PSE does

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1 not have documents relating to dispatch?

2 MR. BERMAN: Your Honor, I can say what I
3 have learned from the company. We have the vice
4 president for energy supply here, and he testified today
5 about how that dispatch works, and he described it all
6 on the record in the deposition, that there are skilled
7 people in the room who knew the heat rates and knew
8 information about the various resources and used that
9 information based on their knowledge and experience.

10 JUDGE MOSS: And one thing I want to say here
11 too is it's my contemplation that the deposition today
12 would be an opportunity to pursue these issues with the
13 person who was being put forth by the company as
14 knowledgeable and what have you. And, of course, I know
15 Mr. Van Cleve was here to conduct the deposition,
16 Ms. Davison, and I also know that he is now in transit,
17 and so you haven't had an opportunity to coordinate and
18 interact with him and understand you may have everything
19 you need on this.

20 MS. DAVISON: Well, I did actually
21 communicate during the break, and he didn't find the
22 responses to be satisfactory. That's why I'm raising
23 it.

24 JUDGE MOSS: Well, if you study the
25 deposition transcript and feel like you have a need to

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1 follow up on some of these points, then, you know, it
2 may be necessary to have some more discovery before
3 we're done. Or it may be that this can simply be done
4 through cross-examination on the stand since Mr. Gaines
5 will be here as the witness and you will have the
6 benefit of the deposition as background.

7 So, you know, it doesn't sound to me like the
8 company is objecting or trying to withhold anything
9 here, but simply is not finding the sort of
10 documentation that you would hope exists, because they
11 conduct this particular aspect of their decision making
12 process sort of on the ground, you might say, on a day
13 to day, perhaps even hour to hour basis. And, you know,
14 again, you may need to follow up on that with some
15 additional questions on cross or what have you to get a
16 full explanation of it, but I think that's the best we
17 can do under the circumstances.

18 Again, there's not been an objection
19 interposed here. It's just that the documents are what
20 they are. The heat rate, I guess if you want to have
21 information about the heat rates of the various gas or
22 perhaps other fuel facilities, then those could be
23 provided to you, and you can do with them what you will.
24 I don't know what else to suggest in this connection.

25 MR. BERMAN: Your Honor, I would note that

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1 Mr. Cedarbaum for Staff looked during a break at the
2 form one, I believe it was Mr. Cedarbaum, but he
3 determined that the heat rates were spelled out in the
4 FERC filed form one and described the results of his
5 looking at the form one to counsel during the
6 deposition.

7 JUDGE MOSS: Anything else, Ms. Davison?

8 MS. DAVISON: Yes, I have one last matter. I
9 filed a motion today seeking to remove the highly
10 confidential designation from the November financial
11 report.

12 JUDGE MOSS: You did file such a motion
13 today.

14 MS. DAVISON: Yes, I did.

15 JUDGE MOSS: Yes, I have seen it.

16 MS. DAVISON: Yes, and I'm wondering if, Your
17 Honor, you are prepared to rule on this.

18 JUDGE MOSS: I don't think I'm going to be
19 prepared to take that up before Monday morning.

20 MS. DAVISON: Oh, Your Honor, we are
21 extremely prejudiced by not having that information
22 available to us. That is a very, very critical piece of
23 our case, and I feel extremely prejudiced by not having
24 that document available to Mr. Schoenbeck to evaluate.

25 JUDGE MOSS: Well, Ms. Davison, I granted

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1 your motion for an amendment to the protective order
2 consistent with the terms of such prior orders, and it
3 does seem to me that to the extent the parties are
4 asserting highly confidential status that we have to
5 proceed in an orderly fashion. And I don't know that
6 it's going to particularly advance the game for me to
7 rule on that before Monday morning.

8 MS. DAVISON: But, Your Honor, we need that
9 document to prepare our case for Monday. Your Honor --

10 JUDGE MOSS: Well, I will speak to the -- if
11 the Commissioners are available, I will speak to them
12 before the end of the week and see if we can do
13 something about that. I will be quite blunt with you,
14 Ms. Davison, I am not prepared to rule on that document
15 without myself and the Commissioners having an
16 opportunity to review and consider the matter in camera.
17 Because when I do make a ruling on something like that,
18 it can thrust the Commission into court proceedings, as
19 it has done on several occasions in the past.

20 And so while I am prepared to rule on most
21 motions that are presented in a case of this nature
22 without consulting the commissioners, there are certain
23 types of matters that have an elevated sensitivity, and
24 I feel it's an obligation that I have when the
25 commissioners are sitting on the Bench to consult with

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1 them as the ultimate decision makers in the case.

2 And so that's why my thought was to take this
3 up Monday morning, because I know that the
4 commissioners' schedules are somewhat limited over the
5 next couple of days. But I will do my best to get an
6 early determination on this.

7 In the meantime, however, you do have an
8 opportunity under the terms of the protective order to
9 review these documents. And certainly I can't make an
10 exception for you to the standard that has been put in
11 place, you know, literally at your own request. And so,
12 again, I have to do things in a balanced fashion, and,
13 you know, that's the protective order we have.

14 And I realize it imposes difficulties. PSE
15 has obviously experienced some difficulty in identifying
16 someone that they want to subject to the terms of that
17 highly confidential amendment and Section 6 of the
18 protective order, if memory serves me. I understand the
19 problem, but, you know, we do this in order to
20 facilitate discovery and do it on the terms that parties
21 find acceptable, and this is the way parties of prior
22 proceedings have found acceptable and the way it was
23 suggested that we do it in this proceeding.

24 So it just -- my hands are a little bit tied
25 on this, and I will do the best I can. But, you know, I

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1 don't remember the precise procedures in there, but my
2 recollection is that were the Commission to make a
3 determination that the document is not entitled to the
4 highly confidential status, the person asserting that
5 would have an opportunity to dispute that.

6 MR. BERMAN: Your Honor, I believe it does
7 give that opportunity, and I would ask that you give us
8 an opportunity, give Puget Sound Energy an opportunity
9 to respond to the motion, which I have not seen yet, so
10 that before you consider the motion.

11 It's my understanding that the SEC selective
12 disclosure regulations have been significantly tightened
13 in recent periods, and though I'm not an SEC lawyer
14 myself, that's my understanding, and that that creates a
15 level of regulatory and statutory scrutiny that would
16 put Puget Sound Energy in jeopardy if it were to not
17 comply with those new selective disclosure requirements
18 of the SEC.

19 Q. And I think, Ms. Davison, your clients are
20 sensitive to the same things based on some of the
21 responses we have talked about this evening where the
22 parties, the clients are concerned about the
23 implications of disclosing certain type of data without
24 adequate protection and that sort of thing. So, you
25 know, it's an important issue, as I'm sure you

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1 appreciate. It is one where even under the terms of the
2 protective order itself, I certainly would give PSE an
3 opportunity to respond in writing to your motion.

4 We will take it up and rule on it as quickly
5 as we can and try to facilitate it. But in the
6 meantime, probably the best course of action is for you
7 to redouble your efforts. Maybe you have to hire an
8 additional expert for this one matter or something. I
9 don't know, but.

10 MS. DAVISON: But, Your Honor, I just want to
11 make sure that the record is perfectly clear that prior
12 to November, PSE for a long period of time pursuant to
13 its statutory requirements publicly filed these
14 documents. It wasn't until this litigation was filed
15 that it all of a sudden took on the highly confidential
16 nature.

17 JUDGE MOSS: I'm familiar with your
18 arguments, Ms. Davison. You make that argument in your
19 motion, and again, that doesn't -- the fact that that
20 argument can be made out does not change the rules of
21 the game under the protective order, and I have to
22 follow the rules of the game.

23 MS. DAVISON: I understand, Your Honor. We
24 would just appreciate a ruling as soon as possible.

25 JUDGE MOSS: Well, we have, as you are well

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1 familiar, done everything we can to expedite this
2 proceeding and give rulings as quickly as possible. And
3 I have certainly made myself available on a continuous
4 basis to try to do that, and I don't have any intention
5 of departing from that as we go forward.

6 And again, Mr. Berman, I would ask you, can
7 PSE provide its response by say noon on Friday?

8 MR. BERMAN: Yes, Your Honor.

9 JUDGE MOSS: All right, then that will give
10 us an opportunity to see if we can get it handled before
11 the weekend. And I can't promise that, Ms. Davison, I
12 will just have to do my best.

13 MR. TROTTER: Your Honor, can I -- this is
14 Donald Trotter, can I make a very brief comment in this
15 regard.

16 JUDGE MOSS: You may.

17 MR. TROTTER: Because I have heard the
18 statements made about SEC regulations, and they are what
19 they are. Perhaps a middle ground, I'm not advocating
20 it but just offering it to the parties, is that the
21 language of the protective -- the high confidential
22 protective order that appears to be bothersome here is
23 the restriction on a consultant using this information
24 for competitive decisions of other parties over five
25 years, or words to that effect. So perhaps that

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1 consideration is not as much a problem in the context of
2 this SEC problem as other trade secret type information
3 might be. So perhaps a middle ground would be to relax
4 that requirement or create a separate category so that
5 people normally consulting in this area can have access
6 to this class of information. I just offer that. It's
7 late, I'm done. Thank you.

8 JUDGE MOSS: All right, well, you know, if
9 you all can work out some accommodation on this, I would
10 encourage both sides to do so. And, of course, the
11 parties are free to deviate to the extent they feel they
12 can under the law. But I, you know, I can't without
13 following the processes called for under the protective
14 order, or in the alternative if someone wanted to
15 propose amending the protective order further, then I
16 would have to take that up on the basis of motion and
17 response. You know, other than that, again, I'm bound
18 by the rules just like everybody else. I can't just
19 rule arbitrarily that in this instance the rules are
20 suspended, so that's what we're stuck with, so.

21 MR. BERMAN: Your Honor, I have one very
22 quick non-controversial matter, I think. Our prehearing
23 briefs are due tomorrow, and we intend to rely on
24 various information that's in the depositions that we
25 took last week. As I understand it, essentially all of

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1 the depositions were designated as confidential because
2 of various information was disclosed. What we intended
3 to do to deal with that was to make a filing under seal
4 at the Commission of the depositions themselves and then
5 to do our level best in the brief to not address
6 confidential information so that we could have a public
7 brief that we would file.

8 And I just wanted to confirm that that was an
9 acceptable way of proceeding in light of the
10 complexities. Things are moving so quickly, it's hard
11 to even keep track of what all the procedures are and
12 sort them all through in the time that's allowed.

13 JUDGE MOSS: Ms. Davison, is that an
14 acceptable procedure to you?

15 MS. DAVISON: I don't have any problem with
16 Mr. Berman filing his deposition transcripts under seal.
17 I can't comment on his brief. To the extent that he
18 represents he will not be revealing confidential
19 information, obviously I don't object.

20 JUDGE MOSS: Well, no, Mr. Berman, as you do,
21 I'm sure understands the burdon if he wants to refer
22 specifically to information that's been designated as
23 confidential that he needs to do so by reference or file
24 pages under seal. That's a typical practice we follow.

25 Now I will just comment while we're on this

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1 subject that I want to encourage the parties to
2 accomplish briefing and other undertakings to the extent
3 possible without the necessity for redacted copies and
4 all of those things that complicate my life materially
5 as I deal with the record.

6 And, of course, if we have the need for
7 confidential testimony at the hearing, that also becomes
8 a complicated matter, and we sometimes have to close the
9 hearing room and exclude people who have not signed
10 affidavits and all that sort of thing.

11 To the extent we can avoid that, let's try to
12 do so. In prior cases, it has been my experience that
13 the parties are adept at avoiding those types of
14 problems, and I will encourage you all to do that here.
15 But again, we, the Commission takes the matter of
16 confidential business information seriously and will do
17 what we need to to afford the appropriate protections to
18 people's trade secrets or what have you.

19 MR. TROTTER: Your Honor, this is Donald
20 Trotter again. There were some commitments made on the
21 record that the parties would try -- apparently there
22 were only small sections of the depositions that were
23 really problematic and that they were committed to
24 designating those, so that we could understand before
25 the hearing what we could delve into verbatim and what

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1 we can't. And I just wanted to know if there was any
2 progress in that regard that the parties can report to
3 us.

4 MR. BERMAN: Your Honor, I have heard of no
5 progress. I think it would be quite reasonable to say
6 that -- and I should note just for the sake of
7 completeness that I followed the same practice today
8 that was followed at the prior depositions of
9 designating the deposition as confidential, because a
10 bunch of confidential documents were pulled out, and it
11 was hard to on the fly designate portions of the
12 questioning as confidential or not.

13 But I would suggest it would be appropriate
14 for all the parties to review the transcripts prior to
15 the hearing and indicate those portions of the
16 transcript that really need confidential designation.

17 JUDGE MOSS: Yeah, I think that is important
18 that we do that to the extent possible.

19 Now, of course, and this is a subject I had
20 meant to bring up before so I am glad we have reached it
21 this evening, and that is what we're going to do with
22 these depositions. You know, I have mentioned on one or
23 two occasions that it is appropriate to relax our
24 procedural rules a bit in the context of this
25 proceeding. And I have, in fact, done that on a couple

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1 of occasions, although I may have been too relaxed, and
2 I don't want to see parties go too far in taking
3 advantage of my cheerful and easy going nature.

4 So, you know, I don't think we can expect
5 that parties are going to be able to designate portions
6 of depositions five days in advance of the hearing that
7 they intend to introduce as evidence, which is basically
8 what the rule requires. And my best guess is that
9 somebody at some point in time is going to say we ought
10 to set the whole deposition in the record. And, you
11 know, that is not an unlikely outcome based on the
12 experience I have had in prior cases.

13 But having said that, it would certainly be
14 my preference then, in fact, I think I would probably
15 require that the deposition be reviewed, and only those
16 portions that truly include confidential information
17 then would be designated as such. Otherwise, frankly it
18 becomes very difficult to even write an order if so much
19 of the evidence referenced is confidential that you
20 can't meaningfully relate it to the court. And by that
21 I mean write an order that a court can comprehend is
22 truly based on the evidence of record, and then it
23 becomes difficult. Then it becomes -- borders on
24 impossible.

25 So I will have to probably be a little more

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1 strict in terms of enforcing the requirement that the
2 parties designate only that material that is truly
3 confidential in terms of the final development of the
4 record. But I will try to be relaxed in terms of making
5 allowances for the time constraints in terms of notice
6 requirements and that sort of thing. So again, try to
7 strike an appropriate balance based upon the needs of
8 the case.

9 MR. BERMAN: Your Honor, just for the record,
10 I think it quite likely that we will want to introduce
11 the entirety of some of the depositions that were taken
12 last week.

13 JUDGE MOSS: That does not come as a
14 surprise.

15 Okay, anything else we need to deal with
16 tonight? Ms. Davison?

17 MS. DAVISON: Nothing else, Your Honor, thank
18 you.

19 JUDGE MOSS: All right.

20 Mr. Berman?

21 MR. BERMAN: Nothing else, Your Honor, right

22 now.

23 JUDGE MOSS: Mr. Trotter?

24 MR. TROTTER: Nothing.

25 JUDGE MOSS: All right, well, I thank you all

00300

1 again. I appreciate particularly the efforts of our
2 court reporter and appreciate it has been a long day.
3 We'll be off the record.
4 (Motions conference adjourned at 7:00 p.m.)

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