

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION

3 BELLINGHAM COLD STORAGE )  
4 COMPANY and )  
GEORGIA-PACIFIC WEST, INC., )  
5 )  
Complainants, )  
6 )  
vs. ) DOCKET NO. UE-001014  
7 )  
PUGET SOUND ENERGY, INC., ) Volume IV  
8 ) Pages 239 - 311  
Respondent. )  
9 -----

10 A prehearing conference in the above matter  
11 was held on August 11, 2000, at 1:34 p.m., at 1300  
12 South Evergreen Park Drive Southwest, Olympia,  
13 Washington, before Administrative Law Judge DENNIS  
14 MOSS.

15 The parties were present as follows:

16 PUGET SOUND ENERGY, INC., by MARKHAM A.  
17 QUEHRN and KIRSTIN S. DODGE, Attorneys at Law, Perkins  
18 Coie, 411 108th Avenue Northeast, Suite 1800, Bellevue,  
Washington 98004-5584.

19 BELLINGHAM COLD STORAGE COMPANY, by JAMES  
20 STUART SMITH and TRACI A. GRUNDON, Attorneys at Law,  
Davis, Wright, Tremaine, 1300 Southwest Fifth Avenue,  
Suite 2300, Portland, Oregon 97201.

21 GEORGIA-PACIFIC WEST, INC., by JOHN WILEY  
22 GOULD, Attorney at Law, Lane, Powell, Spears, Lubersky,  
601 Southwest Second Avenue, Suite 2100, Portland,  
23 Oregon 97204-3158.

24 WHATCOM COUNTY PUBLIC UTILITY DISTRICT NO. 1,  
25 by CAROL S. ARNOLD, Attorney at Law, Preston, Gates,  
Ellis, 701 Fifth Avenue, Suite 5000, Seattle,  
Washington 98104-7078.

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1                   SCHEDULE 4 CUSTOMERS, by MELINDA J. DAVISON  
2                   (via telephone bridge), Attorney at Law, Duncan,  
3                   Weinberg, Genzer & Pembroke, 1300 Southwest Fifth  
4                   Avenue, Suite 2915, Portland, Oregon 97201.

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6                   WASHINGTON UTILITIES AND TRANSPORTATION  
7                   COMMISSION, by ROBERT D. CEDARBAUM, Assistant Attorney  
8                   General, 1400 South Evergreen Park Drive Southwest,  
9                   Post Office Box 40128, Olympia, Washington 98504-0128.

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28 Kathryn T. Wilson, CCR

29 Court Reporter

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

2 JUDGE MOSS: We are on the record in the  
3 matter of Bellingham Cold Storage and Georgia-Pacific  
4 West, Inc., V Puget Sound Energy, Docket No. UE-001014.  
5 We are convened pursuant to a notice by the Commission  
6 that we would have a status and motions conference  
7 today that would consider certain specific pending  
8 motions and also encompassed any motions that might be  
9 received in the interim between the date of the notice  
10 and today and also any motions that might be brought  
11 forward. The contemplation is that this conference may  
12 cover matters of procedure and substance in this  
13 proceeding, and so it's a fairly broad proceeding.

14 Our basic agenda will be to take appearances.  
15 I have a brief statement to make concerning my  
16 involvement in another proceeding. We are going to  
17 take up the motions. We are going to talk about the  
18 status of the negotiations process. We are going to  
19 talk a little bit about the process and procedural  
20 schedule, and we will take up any other business that  
21 may come forward.

22 Let's begin with our appearances, and why  
23 don't we start with the Complainants.

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

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1 JUDGE MOSS: If you previously have entered  
2 an appearance, as Mr. Gould has done, you need only  
3 indicate your name and your party. If you have not  
4 previously entered an appearance, I ask that you give  
5 your address, telephone, fax, and e-mail. For  
6 Bellingham?

7 MR. SMITH: My name is Jim Smith. I'm here  
8 instead of my partner John Cameron. My address is 1300  
9 Southwest Fifth Avenue, Suite 2300, Portland, 97201.  
10 My fax number is (503) 778-5299. My telephone, (503)  
11 778-5228. My e-mail, jimsmith@dwt.com. With me is  
12 Traci Grundon, an associate in our office, who has  
13 already appeared before the Commission.

14 JUDGE MOSS: Respondent?

15 MR. QUEHRN: My name is Mark Quehrn here for  
16 Puget Sound Energy.

17 MS. DODGE: My name is Kirstin Dodge with  
18 Perkins Coie also for Puget Sound Energy. My  
19 information is the same at Mr. Quehrn's, other than  
20 e-mail, which is dodgi@perkinscoie.com.

21 JUDGE MOSS: Do we have anybody here for  
22 Public Utility District No. 1 in Whatcom County?

23 MS. ARNOLD: Yes, Your Honor. Carol Arnold  
24 for Whatcom County Public Utility District No. 1,  
25 Preston, Gates, and Ellis, 701 Fifth Avenue, Seattle,

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1 98104. My phone is (206) 623-7580. Fax is (206)  
2 623-7022, and e-mail is carnold@prestongates.com.

3 JUDGE MOSS: Thank you. Ms. Davison, are you  
4 here for the Schedule 48 Customers? Apparently not. I  
5 had left a message that we would have the  
6 teleconference bridge line available. Anyone on the  
7 line or present for Arco? I heard someone on the  
8 bridge line. Is anyone present on the line who wishes  
9 to make an appearance?

10 MS. DAVISON: Yes. Melinda Davison.

11 JUDGE MOSS: You are here for the Schedule 48  
12 Customers?

13 MS. DAVISON: Yes.

14 JUDGE MOSS: We don't have anybody here for  
15 Public Counsel as previously informed by letter that  
16 there was a conflict in the Public Counsel schedule  
17 making it impossible for a representative to attend.  
18 Mr. Cedarbaum, please?

19 MR. CEDARBAUM: Robert Cedarbaum, assistant  
20 attorney general, representing Commission staff.

21 JUDGE MOSS: We had commenced a discussion  
22 off the record that I decided should be on the record  
23 with regard to various items that are going to be  
24 brought before us today. I understand from Mr. Gould  
25 that on behalf of Georgia-Pacific, at least, there will

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1 be an oral motion to dismiss the pricing claims that we  
2 are considering in this Phase 1. Is that essentially  
3 correct?

4 MR. GOULD: That is correct. May I approach  
5 the Bench?

6 JUDGE MOSS: Yes, you may. You are handing  
7 me the original motion of voluntary dismissal and  
8 distributing that to counsel.

9 MR. GOULD: Yes, sir. The cover letter, Your  
10 Honor, recites that it's been filed with Ms. Washburn.  
11 It has not. I'm prepared to do that immediately after  
12 this hearing.

13 JUDGE MOSS: Thank you. Give me a moment.  
14 We'll take this up in just a moment. Let's finish our  
15 discussion of the agenda, if you will, and we'll take  
16 that motion up first.

17 We were having some discussion off the record  
18 also with respect to BCS's position in the case. I  
19 understand that we have before us today two motions to  
20 compel by Georgia-Pacific West concerning certain data  
21 requests, and apparently, there is some consideration  
22 being given as to whether BCS adopts those as its own.  
23 I will say that you have to this juncture been  
24 cocomplainants in the proceeding, and of course I would  
25 expect you to coordinate your discovery to promote

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1 efficiency in the process, and moreover, I will note  
2 that we have pending Bellingham Cold Storage's motion  
3 for continuance a date to submit direct evidence, which  
4 is a matter that we will take up promptly today, and  
5 that, of course, rests on the discovery that has been  
6 conducted to date in one fashion or another, so I turn  
7 to you, Mr. Smith, and ask you what your client's  
8 position is with respect to this discovery and where we  
9 stand today. I take it you are not joining in this  
10 motion for voluntary dismissal?

11 MR. SMITH: Yes, that's correct. BCS is not  
12 joining in the motion for voluntary dismissal. We need  
13 the data that is requested by Georgia-Pacific in their  
14 request for production, and I cannot recall  
15 specifically whether those requests were made on behalf  
16 of one or both complainants, so we need the data. We  
17 would seek to have those requests made our own and to  
18 deal with compelling Puget to present that material.

19 JUDGE MOSS: Have you filed a data request  
20 independent of those prepared by Georgia-Pacific?

21 MR. SMITH: No.

22 JUDGE MOSS: Does PSE have any position on  
23 that?

24 MR. QUEHRN: Your Honor, we are prepared to  
25 respond to the motion to compel today, and I don't

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1 really see any value in somehow making BCS refile the  
2 same motion. I would just as soon go forward with it.  
3 If I may ask, go forward with it, I'm still having some  
4 confusion in my own mind how going forward with this  
5 relates to the motion to continuance, so we may need to  
6 have some discussion on that, but as to this specific  
7 issue, I think we don't care.

8 JUDGE MOSS: We are going to proceed in a  
9 very orderly fashion here momentarily. I'm just  
10 getting things straight before we launch into that.

11 It's my intention to take things up in the  
12 order as follows: I'll first take up the motion for  
13 voluntary dismissal that has just been presented to the  
14 Bench. We'll next take up Complainants' motion for  
15 continuance to submit direct evidence. That will segue  
16 into Puget Sound Energy's motion to dismiss the  
17 Complaint as to the issues set for hearing in Phase 1  
18 of this proceeding, that is to say, the power pricing  
19 issues, and then we have various motions to compel, and  
20 we'll see about taking those up as well, and I  
21 understand that there are no other motions today.

22 I have three motions to compel that have been  
23 prefiled. I understand that PSE has an oral motion to  
24 compel BCS to respond to certain discovery. I did have  
25 an answer to the August 3rd motion to compel by



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1 Georgia-Pacific West, an answer by PSE, and Staff also  
2 addressed that motion in a letter to the Commission  
3 that was filed on August the 8th. I think that's all  
4 the paper I have at that point, so we'll see if anybody  
5 else has anything else to submit as we get to each one.

6 As to the motion of voluntary dismissal, I  
7 don't know that we need to have any argument on that.  
8 The Commission would treat this as a motion for leave  
9 to withdraw and would dismiss the action if it finds  
10 the motion well taken. Do we have any need for  
11 argument on this?

12 MR. GOULD: I think not, Your Honor. I do  
13 note that it's for the pricing claims only.

14 JUDGE MOSS: I understand. I assume that  
15 since you have moved to dismiss that aspect of the  
16 case, there would not be any need for argument.

17 MR. QUEHRN: That is correct.

18 JUDGE MOSS: This would give you the result  
19 that you seek, at least with respect to GP. As I'm  
20 going to relate presently in connection with some other  
21 matters, some of this paper has come in rather late,  
22 including this motion for a continuance. I have not  
23 had an opportunity, and despite diligent efforts, to  
24 discuss these matters with all of the commissioners. I  
25 have had an opportunity to discuss it with some of

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1 them.

2 I think the prudent course of action for me  
3 to take with respect to the motion for voluntary  
4 dismissal of pricing claims with respect to  
5 Georgia-Pacific, at least, will be to take that motion  
6 under advisement with the suggestion to you that I see  
7 nothing that would cause the Commission to not grant  
8 that, but I would certainly want to present this to the  
9 commissioners, who are the decision makers in this  
10 case, and get their approval before making that a  
11 formal decision.

12 Does that give what you need, Mr. Gould?

13 MR. GOULD: Yes, sir, thank you.

14 JUDGE MOSS: Before I move on, I realize I  
15 had neglected to do one of the things I said I was  
16 going to do, and I'll return to that now. I wanted to  
17 make a brief statement regarding my involvement in the  
18 Energy Facility Site Evaluation Council proceedings  
19 regarding the proposal of Sumas Energy 2 to construct a  
20 660 megawatt power plant in Whatcom County by, I guess  
21 I could call it special appointment. I'm sitting as a  
22 decision maker in this case.

23 I felt it was prudent as a result of my role  
24 as a decision maker in that case to disclose to the  
25 parties in that hearing my involvement in this

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1 proceeding, and that's because we did hear some  
2 testimony in that case concerning energy market  
3 conditions in the Pacific Northwest and the West which,  
4 of course, is part of the case here. In connection  
5 with making that disclosure in that proceeding, I  
6 committed to making the same disclosure here; although,  
7 I think it has somewhat less significance here since  
8 I'm not a decision maker in this case but am the  
9 presiding officer. The commissioners, of course, are  
10 sitting and are the decision makers in this case.

11 In any event, as I pointed out to the parties  
12 in the Sumas matter, as a judge, I'm quite accustomed  
13 to and comfortable with the necessity to decide each  
14 case on its merits based on the record in the  
15 individual case. Again, that's really beside the point  
16 here since I'm not a decision maker in this proceeding,  
17 but I wanted to make that disclosure for whatever its  
18 worth.

19 Now, let's turn to the motion to continue,  
20 which is Bellingham Cold Storage's motion. I have read  
21 the motion and the supporting materials. Given the  
22 filing time, we didn't have an opportunity to hear any  
23 answer from PSE directly to the motion. However, we  
24 have your motion to dismiss the proceeding, which  
25 certainly bears some relationship. I will ask,

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1 Mr. Smith, if you have anything to add to the papers  
2 that were filed, and you don't need to reiterate what's  
3 in them. I have read them. I have them in mind.

4 MR. SMITH: With that, no. They state our  
5 reason for what we want to do and why we want to do it.

6 JUDGE MOSS: Does PSE wish to make any  
7 response directly to this motion?

8 MR. QUEHRN: Thank you, Your Honor. As we  
9 did note in the motion to dismiss that we filed today,  
10 we have asked for an opportunity to fully answer this  
11 motion. We did receive it just before five o'clock  
12 last evening and have had a chance to essentially only  
13 give it a cursory review.

14 There are issues raised in the motion that we  
15 feel are outside of the scope of the Complaint. As you  
16 pointed out, there is an affidavit that, we feel, in  
17 order to have all issues and all facts before the  
18 Commission on this matter do need some response, so our  
19 position today is that we would like to have ample time  
20 to answer this motion, and I guess that begs the  
21 question what we view to be ample time. It would  
22 appear to me that if we were to be able to answer this  
23 motion, say, by next Friday, that should be sufficient  
24 time to respond to the factual allegations and address  
25 the legal arguments.

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1                   JUDGE MOSS: I don't think we are going to  
2 need to wait for that. I'm prepared to rule on this  
3 motion now, and I have had an opportunity, as I said,  
4 to discuss this with the commissioners.

5                   As to the motion to continue, the motion is  
6 deficient in form. It does not include the elements  
7 required for such a motion under WAC 480-09-440(4).  
8 The motion is untimely; moreover, its timing appears to  
9 have been calculated specifically to undermine the  
10 Commission's ability to provide orderly process for all  
11 parties. It is particularly offensive to our processes  
12 and to the common courtesies expected from members of  
13 the bar who are privileged to appear and practice  
14 before us that movements had this motion in their plans  
15 at least by Wednesday afternoon after our order denying  
16 their earlier motion to suspend the procedural  
17 schedule; yet, they failed to explain to Judge Wallis  
18 when Ms. Grundon called Judge Wallis to seek leave to  
19 file this motion via facsimile that they intended to  
20 file this motion in lieu of meeting our previously  
21 established deadline for filing of their direct case.  
22 Movements then waited until 4:56 p.m., four minutes  
23 before the Commission's close of business, to file this  
24 motion. It is obvious to anyone that this would be too  
25 late in the day for the Commission to act.

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1           Finally, the motion fails to establish good  
2 cause for a continuance. The assertion that PSE has  
3 not complied satisfactorily with its responsibility to  
4 respond to a data request is a matter that was noticed  
5 for hearing this afternoon, the day after your case in  
6 chief was due. At the very latest then, you should  
7 have immediately brought to our attention your  
8 assertion that you felt yourselves incapable of filing  
9 a direct case without the information you think you  
10 were entitled to receive.

11           The proper course of action for you in light  
12 of the circumstances was to file your case when  
13 required, and if your motion to compel was granted and  
14 if PSE's supplemental response included or lead to the  
15 discovery of evidence important to your case, then you  
16 could have sought leave to file supplemental testimony.  
17 Instead, you elected to not file any case at all  
18 without informing anyone of your intentions until 4:56  
19 p.m. on the day your case was due.

20           Moreover, despite whatever ruling might be  
21 made on your motion to compel under the standards for  
22 discovery, your motion for continuance does not  
23 establish to our satisfaction that the information  
24 sought through discovery is essential to your case,  
25 which is the only basis upon which you assert good

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1 cause to grant the relief your motion to continue  
2 requests. That is, even if we find that all or some  
3 part of the information you seek through your four data  
4 requests is within the general standard that a party  
5 may obtain discovery regarding any matter not  
6 privileged that is relevant to the subject matter  
7 involved in the pending action, that is not tantamount  
8 to determination that the data sought is essential to  
9 your case.

10 We'll get to the motions to compel and  
11 consider them under the proper standard momentarily.  
12 For now, it's sufficient to reiterate that whether or  
13 not we determine that some or all of the data you seek  
14 arguably may be relevant or may lead to the discovery  
15 of admissible evidence, we do determine that it is not  
16 essential that you have this data in advance of meeting  
17 our requirement that you file your case in chief by the  
18 date established under the procedural schedule that you  
19 helped shape and consented to at the outset of these  
20 proceedings. We note in this regard that the schedule  
21 is aggressive but far less so than what you originally  
22 proposed at our first prehearing conference.

23 You are all experienced counsel. You know or  
24 should know that filing a motion for continuance does  
25 not automatically stay the procedural schedule and the

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1 filing requirements under that schedule. You have  
2 tried to leave us with nothing but unpalatable choices.  
3 We can accede to your unacceptable arrogation of our  
4 process, or we can dismiss your complaint as to the  
5 Phase 1 issues for failure of proof as requested by  
6 PSE's motion to dismiss, which we received this  
7 morning.

8           Unfortunately, as I have mentioned previously  
9 today, the Commissioners were not all available to  
10 discuss these matters last night or today; though I  
11 have spoken with some of them individually during those  
12 time frames. It is my intention to have that  
13 discussion with them as soon as possible, probably on  
14 Monday. Until then, PSE's motion to dismiss will be  
15 taken under advisement. For present purposes,  
16 Complainants' motion to continue is denied. I will  
17 suggest to you that as you think about this after we  
18 leave here this afternoon, you may wish to consider  
19 making an effort to broaden the choices available to  
20 the Commission. You may, for example, decide that it  
21 would be extremely prudent to file such case as you  
22 have prepared by Monday at 9:00 a.m. That may or may  
23 not influence the Commission's decision on PSE's motion  
24 to dismiss, but it would at least demonstrate that you  
25 have a serious interest in pursuing this aspect of your



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1 complaint, something that frankly appears to be lacking  
2 at this juncture. You may also, for example, decide to  
3 file on Monday, as Mr. Gould has done for  
4 Georgia-Pacific today, or request for leave to withdraw  
5 your complaint without prejudice to refile when you  
6 are ready to prosecute the case diligently and in  
7 accordance with whatever procedural schedule is  
8 established, assuming the Commission finds such a  
9 renewed complaint to be well plead.

10 I believe that's all I need to say about the  
11 motion to continue that is denied, and the motion to  
12 dismiss is taken under advisement. Let's turn to the  
13 motions to compel. I want to take up PSE's motion  
14 first. And again, we have papers from both sides on  
15 this, and unless somebody has something that is not in  
16 those papers, I don't really need to hear any argument  
17 on this, but PSE, it's your motion. Do you have  
18 anything to add?

19 MS. DODGE: As to Georgia-Pacific, if their  
20 complaint is withdrawn and dismissed, then this will  
21 obviously become moot, but as that's at the moment  
22 taken under advisement, would you like to hear more?

23 JUDGE MOSS: Have you submitted the same data  
24 requests to Bellingham Cold Storage?

25 MS. DODGE: The motion to compel that is

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1 written and was filed earlier is simply as to  
2 Georgia-Pacific.

3 JUDGE MOSS: I'm getting ahead as to your  
4 motion to Bellingham Cold Storage. Is it essentially  
5 the same?

6 MS. DODGE: It is different.

7 JUDGE MOSS: Let's hear that.

8 MS. DODGE: The reason it's different is that  
9 we have responses from Bellingham Cold Storage. We've  
10 had a chance to look through those and raise certain  
11 concerns with counsel for Bellingham Cold Storage  
12 yesterday. Resolution was not reached, and I simply  
13 was hoping to walk through the various data requests  
14 that are at issue and see if we can sort them out right  
15 now. I have extra copies of those if you need one or  
16 anyone else needs one and wants to follow along.

17 JUDGE MOSS: I'll need that, and while you  
18 are getting up to pass those around, I'll say that it  
19 appears to me that PSE's motion as to Georgia-Pacific  
20 is moot under the circumstances, so there is no need  
21 for a ruling on that. So what you've handed up here is  
22 captioned, Bellingham Cold Storage's Response to Puget  
23 Sound Energy's First Data Request.

24 MS. DODGE: That's correct. It contains the  
25 requests and responses. With respect to Requests No.

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1 1.3, 1.4 and 1.5, the objection has been made that the  
2 documents involved will reveal a trade secret of BCS.  
3 The current protective order is insufficient, so they  
4 are not producing until an appropriate protective order  
5 is in place.

6           With respect to generally the question of  
7 trade secret protection under the protective order,  
8 it's not clear to us how the current protective order  
9 is insufficient. If there is some insufficiency  
10 determined, perhaps that's a matter that be addressed  
11 immediately and any additional protective order entered  
12 that might be needed so that production can move  
13 forward.

14           Looking individually at the requests, we  
15 think Request 1.3, it may well be that those documents  
16 do have some special sensitivity that requires  
17 protection, but again, we would be interested to hear  
18 what additional protections are needed. 1.4 and 1.5  
19 are a little different because we don't see how those  
20 implicate trade secret issues. 1.4 talks about  
21 documents referring and relating to hedges, price  
22 hedges or financial protection. This doesn't strike us  
23 as trade secret type information; in fact, GP did  
24 provide certain documents to us, and one of them  
25 included its July hedge. It wasn't even marked

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1 protective under the protective order. These are basic  
2 commercial documents, and it's unclear to us why it  
3 would implicate trade secret concerns.

4 1.5 similarly asks for documents relating to  
5 potential provision of electric power by Whatcom County  
6 PUD to BCS. We have the contract or a contract between  
7 GP and Whatcom PUD that GP produced, again, not even  
8 under protective order, so it's unclear to us why there  
9 is some special trade secret concern with respect to  
10 this information that BCS is concerned about. Would  
11 you like to hear the whole thing, or should we take  
12 each set?

13 JUDGE MOSS: Let's stop right there. Let's  
14 hear from BCS with respect to 1.3.

15 MR. SMITH: With regard to all, 1.3, 1.4,  
16 1.5, the Commission has ordered here that the parties  
17 negotiate, and Bellingham is concerned that if we are  
18 going to negotiate, if we are forced to reveal all pull  
19 cards that the negotiations will not result in  
20 something that would be acceptable. For that purpose,  
21 we probably view the need to keep confidentiality a  
22 little bit different than Georgia-Pacific did in  
23 responding to its request. For that reason, I would  
24 request the opportunity to take a more close look at  
25 the protective order that's currently in place and

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1 propose language concerning the dissemination of the  
2 information that would be a little bit more in keeping  
3 with how we want to proceed in this matter and to do  
4 that by Monday afternoon.

5 JUDGE MOSS: What sort of dissemination are  
6 you concerned about?

7 MR. SMITH: We want to keep it strictly among  
8 hearing counsel, trial counsel, and experts.

9 JUDGE MOSS: That's what the protective order  
10 provides right now. It provides that anybody who is  
11 going to receive access to the confidential information  
12 has to submit a certificate stating that they've read  
13 and understood the protective order, and you get a  
14 chance to look at that and can object to any individual  
15 that you identify but to whom you're concerned  
16 dissemination would be a problem. Why doesn't that  
17 provide you adequate protection?

18 MR. SMITH: The language in the protective  
19 order concerning dissemination is -- it's important,  
20 obviously, because we don't want the information to get  
21 too far wide. I will go back and take another look at  
22 the protective order that remains in place. It's  
23 possible that I did not read it carefully enough to  
24 determine that which you said.

25 JUDGE MOSS: Do you have it with you?

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1 MR. SMITH: No.

2 JUDGE MOSS: Well, I do. It says in Part B,  
3 "Persons permitted access: No confidential information  
4 will be made available to anyone other than  
5 commissioners, Commission staff, the presiding  
6 officers, and counsel for the parties for this  
7 proceeding, including counsel for Commission staff and  
8 attorneys' administrative staff, such as paralegals.  
9 However, access to any confidential information may be  
10 authorized by counsel solely for the purposes of this  
11 proceeding to those persons designated by the parties  
12 as their experts in this matter. Except for the  
13 Washington Utilities and Transportation Commission  
14 staff, no such expert may be an officer, director,  
15 direct employee, major shareholder, or principal of any  
16 party or any competitor of any party unless this  
17 restriction is waived by the party asserting  
18 confidentiality. Any dispute concerning persons  
19 entitled to access to confidential information must be  
20 brought before the presiding officer for resolution."

21 It goes on to provide for a nondisclosure  
22 agreement that must be executed by anyone who would  
23 have access to this material, and that has to be  
24 furnished to the party responding to discovery and so  
25 forth, provides for the filing of documents under seal

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1 and one thing and another. Why doesn't that satisfy  
2 your concern?

3 MR. SMITH: That does satisfy our concerns.  
4 We will withdraw the objections to 1.3, 1.4, and 1.5.

5 JUDGE MOSS: Ms. Dodge?

6 MS. DODGE: Data Request 1.8, this requests  
7 copies of documents that support or relate to  
8 assertions made by BCS that the language of the special  
9 contracts and the parties' course of dealing under  
10 those agreements reflect an imperfect attempt over time  
11 to price electric energy as it would be priced in a  
12 competitive market. BCS has objected in that it  
13 requests work product opinion of counsel as to which  
14 documents support or relate to a particular assertion.

15 To the degree there is attorney work product  
16 that, for example, may talk about what BCS believes the  
17 language of the special contracts means is a legal  
18 matter. We are not seeking that kind of information.  
19 What we are concerned about is they seem to be stating  
20 an objection that even determining which documents  
21 support or relate to their assertion is a legal  
22 opinion. We disagree. That's a factual question.  
23 It's a standard way of phrasing requests for  
24 information. I frankly am not aware of very many  
25 alternate ways of asking for this kind of information.

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1 I'm concerned that there may be documents withheld  
2 under work product opinion that are not being fairly  
3 withheld.

4 To go on, they also assert that creation of  
5 such documents is BCS's work product. This may simply  
6 have dropped out BCS's counsel work product, but we are  
7 concerned they are asserting some kind of corporate  
8 work product privilege which doesn't exist, and  
9 finally, they say to the extent that nonprivileged  
10 documents are uncovered during the course of  
11 investigation, they will be produced. That would be  
12 expected under their duty to supplement. The question  
13 is under documents that now exist that are not being  
14 produced.

15 JUDGE MOSS: It does appear, Mr. Smith, that  
16 you've got a fairly expansive view of what the work  
17 product privilege encompasses here. Is the suggestion  
18 that I'm getting from this response, as Ms. Dodge has  
19 just argued, that you are asserting that a  
20 determination by counsel that some document not  
21 prepared by counsel but in possession of the Company  
22 that is responsive becomes work product because the  
23 attorney advises it relates to the claim or assertion  
24 in the Complaint?

25 MR. SMITH: No, not at all.



00263

1 JUDGE MOSS: What are you asserting?

2 MR. SMITH: What I'm asserting is that a  
3 request for which documents support or prove a certain  
4 fact is necessarily counsel's opinion as to whether or  
5 not a document supports or proves a certain fact. That  
6 is why that statement is there. With regard to these  
7 two requests, there are no responsive documents, other  
8 than those that have counsel's notes and things like  
9 that. These requests relate to two conclusory  
10 allegations in the original Complaint and asks what  
11 documents support these. There are no documents that  
12 support these, other than notes of counsel and things  
13 of that nature that were created by counsel in the  
14 furtherance of the case.

15 JUDGE MOSS: You don't have any documents  
16 that relate to the parties' course of dealing under  
17 these agreements?

18 MR. SMITH: That reflects an imperfect  
19 attempt over time and on, I'm unaware of any documents  
20 that would meet that. Of course, there are documents  
21 that reflect the parties' transactions with each other  
22 in performance of their agreements, but this request  
23 relates to those that reflect an imperfect attempt over  
24 time to price energy.

25 JUDGE MOSS: No internal Company memoranda

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1 discussing the latest bill from PSE?

2 MR. SMITH: Well, there may well be something  
3 like that if you read the request expansively enough to  
4 include that. What it says is, it pulls out a  
5 conclusory statement from the Complaint and says, send  
6 us documents that support this or that support this  
7 contention. When you ask a party to determine what  
8 supports or relates to a contention, necessarily it's a  
9 subjective enterprise to determine what supports it or  
10 what relates to it.

11 MS. DODGE: May I maybe move to another  
12 interrogatory which might help to sharpen this inquiry?  
13 I will first say it doesn't just say "support." It  
14 says "relate to," and that's purposeful to address  
15 exactly this concern. If we move to Data Request No.  
16 1.17 at the very end of the packet, part of our  
17 colloquy yesterday in discussing this issue -- of  
18 course, this asks for documents that support or relate  
19 to the assertion in the Complaint that BCS is in the  
20 process of shutting down plant operations in  
21 Bellingham, Washington. The answer is, "Aside from  
22 information in newspapers and other public media, BCS  
23 is in possession of no responsive documents," and the  
24 question was, isn't there a pink slip, some kind of  
25 internal management memo that we are going to have to

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1 shut the plant down, any plans for the shutdown,  
2 information that's gone to employees or customers about  
3 a shutdown? It's just strange credibility to think  
4 there are no responsive documents, and in trying to  
5 work through those questions, it became apparent that  
6 BCS may have a far narrower opinion of what's being  
7 asked than what we believe is clearly stated in the  
8 request.

9 JUDGE MOSS: And you have explained this  
10 informally to BCS's counsel?

11 MS. DODGE: Correct.

12 JUDGE MOSS: What about those types of  
13 documents that Ms. Dodge just described? Are there no  
14 subject documents in existence?

15 MR. SMITH: I can't say there are no such  
16 documents in existence. I can say that in my view,  
17 Data Request 1.17 does not get to those. It's asking  
18 for documents that support or related to the assertion  
19 in the Complaint that BCS is in the process of shutting  
20 down plant operation.

21 JUDGE MOSS: What do you do when somebody  
22 objects to one of your data requests on these kinds of  
23 grounds? Do you call them up and explain to them what  
24 you really want?

25 MR. SMITH: Yes.

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1                   JUDGE MOSS: Do you expect to them say, "Well  
2 that's not what it says here so I'm not going to  
3 cooperate with you and provide you the documents you  
4 were trying to ask for"? Is that what you expect to  
5 hear in return?

6                   MR. SMITH: No.

7                   JUDGE MOSS: I wouldn't find that to be very  
8 cooperative, would you?

9                   MR. SMITH: Not at all.

10                  JUDGE MOSS: You are expected to cooperate in  
11 the conduct of discovery, particularly in the process  
12 of --

13                  MR. SMITH: Excuse me --

14                  JUDGE MOSS: Don't interrupt me, sir. You  
15 are expected to be cooperative in the process of  
16 discovery, and particularly in the circumstances of a  
17 case such as this where, at your behest, we have  
18 proceeded in a very expedited way. Clearly, it's  
19 difficult to proceed on this kind of schedule with  
20 discovery at all. It is particularly difficult if  
21 parties are going to take a very narrow view of  
22 requests, and even in the face of explanations as to  
23 what is being sought, continue to decline to produce  
24 any responsive documents. How are we going to get  
25 through this case if the parties behave in that

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1 fashion?

2 MR. SMITH: I agree with everything you have  
3 said, Judge, except for the end part. At no point did  
4 I say I wouldn't produce it. If counsel wishes to give  
5 me a more definitive list of those things which they  
6 believe support the assertion that we are in the  
7 process of shutting down, for example, and not an  
8 exhaustive list, but give me an example of what they  
9 are seeking, we will produce it.

10 JUDGE MOSS: Did you give the examples you  
11 just related to me to Mr. Smith?

12 MS. DODGE: I did provide some examples.

13 MR. SMITH: In the course of the telephone  
14 conversation yesterday about 4:30 when I didn't have  
15 anything in front of me, and they very politely were  
16 explaining what they have in mind.

17 MS. DODGE: In fairness to Mr. Smith, he  
18 stated he did not have it in front of him and that he  
19 would have to look again, so it's not that there has  
20 been a subsequent refusal to provide the information.  
21 Our concern is that we don't think that the objection  
22 and this desire for a subsequent list is appropriate;  
23 that the question itself is very straightforward and  
24 clear. It relates to their own assertion in the  
25 Complaint, and we are simply asking for the

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1 documentation that they have that relates to that  
2 assertion. Otherwise, every single set of  
3 interrogatories and discovery requests will land in a  
4 compliance hearing. It's sounds to me that were we to  
5 provide a list, it would be an opportunity to exclude  
6 documents that didn't appear in the list as examples.

7 We don't know what kind of documents they  
8 have internally, what kind of memos they do, whether  
9 they do things by e-mail or otherwise. It's very  
10 difficult to draw a list when you don't know. That's  
11 why this request is relatively broad. It's quite  
12 specific to their allegation.

13 JUDGE MOSS: Do I understand, Mr. Smith, it  
14 is your intention to strike a more cooperative posture  
15 going forward with respect to these types of requests  
16 and try to provide and work with counsel for your  
17 adversary in getting the information required for the  
18 prosecution of this case?

19 MR. SMITH: To the extent that that statement  
20 implies I've been uncooperative, I disagree, but yes,  
21 of course, we will cooperate.

22 JUDGE MOSS: That's what's expected, and I  
23 find the data request to be straight forward enough.  
24 It says, Documents that support or relate to an  
25 assertion in your complaint. "Relate to" is a pretty

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1 broad term. One might say it's all encompassing, so to  
2 the extent you have such documents that relate to the  
3 assertion in the Complaint that BCS is in the process  
4 of shutting down operations in Bellingham, Washington,  
5 then you need to provide those documents.

6 MR. SMITH: Very well.

7 MS. DODGE: Your Honor --

8 JUDGE MOSS: We haven't ruled on this one.

9 MS. DODGE: 1.8?

10 JUDGE MOSS: Again, I find nothing unusual  
11 about the way this data request is framed. It asks for  
12 documents that support or relate to the assertion  
13 having to do with parties' course of dealing -- and the  
14 language of the special contracts is the language of  
15 the special contracts. To the extent there is some  
16 opinion of counsel, that might very well fall into the  
17 work product privilege, or actually, I guess, in unity,  
18 but aside from that sort of thing, I would expect you  
19 to provide those documents.

20 This is an allegation in your complaint. If  
21 you have documents in your possession that relate to  
22 the assertion in your complaint that the parties'  
23 course of dealing reflects an imperfect attempt to  
24 price electric energy, such as an internal memorandum  
25 between operations people in the Company or billing

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1 office or what have you, then that sort of thing ought  
2 to be provided, and it can relate to without  
3 necessarily being something you want to put into  
4 evidence in support of your claim. Nevertheless, if it  
5 relates to it, they are entitled to take a look at it.  
6 It specifically goes to an allegation in your  
7 complaint.

8 MS. DODGE: Your Honor, we were not going to  
9 go through every single request in which they've said  
10 there is public press and nothing more, essentially,  
11 but that is an answer that's repeated throughout, and  
12 we would just ask that all of those be revisited under  
13 the comments that you've just made to be sure that we  
14 are getting responsive documents if they exist and not  
15 just being asked to look at public press. For example,  
16 1.9 refers to 1.8; 1.8 refers to public press.

17 JUDGE MOSS: Have documents been provided in  
18 response to, for example, 1.9 and 1.11?

19 MS. DODGE: No.

20 JUDGE MOSS: It seems reasonable to me,  
21 Mr. Smith, to expect that the expert whose affidavits  
22 we have seen in several things that have been filed  
23 here has been busy gathering data and information and  
24 perhaps has files full of it upon which he is drawing  
25 in drafting these various affidavits and declarations.



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1 Have those files been examined to see if they include  
2 perhaps information upon which the expert relies in  
3 making the assertions that are made in those various  
4 papers?

5 MR. SMITH: Have I examined those files, no.

6 JUDGE MOSS: No. Have they been examined. I  
7 don't necessarily expect you to have done it  
8 personally.

9 MR. SMITH: I can't speak to whether they  
10 have or have not. Again, to me, the breadth of this  
11 request is for documents that exist that Bellingham  
12 Cold Storage has that relate to the request. Whether  
13 the expert has assembled information working under the  
14 direction of counsel is something that I have not  
15 investigated.

16 JUDGE MOSS: Are you telling me that you  
17 don't think it's appropriate that you should  
18 investigate the documents upon which your experts are  
19 relying and preparing for this case and their  
20 testimony? You don't consider those to be within the  
21 universe of potentially responsive documents to these  
22 sorts of data requests --

23 MR. SMITH: No, I'm not suggesting that.  
24 What I'm suggesting is that there may be privilege  
25 issues that may attach to that effort.

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1 JUDGE MOSS: But you wouldn't know if you  
2 didn't look.

3 MR. SMITH: Again, there would be privilege  
4 issues that would attach to that information that I  
5 would have to analyze, not to look at the material, but  
6 to determine whether or not it was producible.

7 JUDGE MOSS: My point is you cannot make this  
8 privilege determination in the abstract. You have to  
9 look at the documents first, don't you?

10 MR. SMITH: Yes.

11 JUDGE MOSS: And you haven't done that is  
12 what I understand you to say.

13 MR. SMITH: No. I haven't looked through his  
14 file in the entirety to determine what is and is not  
15 there.

16 JUDGE MOSS: What other files have you looked  
17 at?

18 MR. SMITH: I have discussed with my client  
19 what my client has available. Have I personally gone  
20 to Bellingham Cold Storage and reviewed the documents,  
21 no.

22 JUDGE MOSS: Has anyone from your firm  
23 personally gone to Bellingham Cold Storage and reviewed  
24 the documents?

25 MR. SMITH: I cannot answer. I assume that

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1 that has happened, but I can't tell you who did it and  
2 when they did it. Ms. Dodge earlier suggested that it  
3 would be appropriate for BCS to review the responses in  
4 light of the statement you made earlier, and I'm very  
5 willing to do that.

6 JUDGE MOSS: I think, Mr. Smith, that you do  
7 need to take a hard look at this. It does not seem to  
8 me that the effort is being undertaken that needs to be  
9 undertaken to ascertain whether there are documents in  
10 response to these requests, but instead, various  
11 objections are being interposed without even having  
12 examined the universe of documents that may be  
13 responsive to ascertain whether any of these claims of  
14 privilege or what have you apply, and that is not  
15 something that can be done in the abstract.

16 The expectation is that parties will devote  
17 such resources as are necessary to search the files of  
18 their clients or to insure that the clients have  
19 devoted sufficient manpower of their own with some  
20 guidance from counsel to respond fully and fairly to  
21 the data requests that have been put, and based on what  
22 I hear you saying, it does not seem that that's been  
23 done, and again, I think that more effort has to be  
24 made, particularly in a case that requires expedition.

25 This case calls for data responses in what,

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1 three days after the data requests are propounded?  
2 That does require an extraordinary effort. I know  
3 that. I've been there; I've done that, and I'm sure  
4 all of you have earlier in your careers been there and  
5 done that, and it takes hours and it takes a lot of  
6 work and it takes a lot of manpower, and clients  
7 experience extraordinary legal bills as a result, but  
8 that is the price we pay for entering into this sort of  
9 thing, and it's just got to be done, or this case is  
10 going to have a very difficult time moving forward.

11 The sort of problem you run into down the  
12 line when that effort is not made is you are going to  
13 seek to bring documents in here to prove your case and  
14 PSE is going to object, and they are going to say,  
15 "Your Honor, these things were not offered up during  
16 discovery and they clearly were responsive to our data  
17 requests and should have been offered up, and we want  
18 you to impose a sanction of refusing to receive those  
19 documents into evidence," and as the judge, with the  
20 guidance of the commissioners in their decision making  
21 power, those documents may very well not find their way  
22 into the case as a result of that. So you take a  
23 considerable risk on your side by not making the effort  
24 to search all those files or see to it that they are  
25 searched, whether it be by Company personnel or your

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1 own paralegal staff or poor young associates, such as  
2 Ms. Grundon there, who are asked to do these kinds of  
3 things.

4           So it does seem to me that particularly --  
5 and I previously had seen -- I realize Georgia-Pacific  
6 is not involved in this directly anymore, but having  
7 reviewed the motion to compel by PSE, I have to say it  
8 looks to me like when they tie their question  
9 specifically to allegations in the Complaint that there  
10 is not much question but if there are any responsive  
11 documents, they need to be produced, and they need to  
12 be produced within the schedule provided, and if they  
13 can't be, our rules provide you are to contact counsel  
14 for the other side and explain why they can't be  
15 produced in a timely fashion and try to work something  
16 out, and if you can't work something out, then it has  
17 to come to me, and I have the singularly unpleasant  
18 task of sitting here and parsing through all of this  
19 stuff.

20           So that's where it stands, I think, with  
21 respect to these data requests, and they all appear to  
22 me to be tied to specific allegations in the Complaint.

23           MS. DODGE: 1.7 through 1.17. Actually,  
24 nearly all of them, that's true.

25           JUDGE MOSS: Are these essentially the same

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1 as the ones that were propounded to --

2 MS. DODGE: They are identical other than the  
3 party to whom they are propounded.

4 JUDGE MOSS: I did read them carefully, and I  
5 did find them all to be tied to specific allegations in  
6 the Complaint, and you are expected to prove those  
7 allegations if you are going to win the case. There is  
8 almost bound to be some kind of documents that related  
9 to them. I think we all understand the sort of narrow  
10 compass of work product and what it means, and there is  
11 a lot of case authority out there on that.

12 So to the extent that you don't have a  
13 serious work product objection as a result of it being  
14 something that is truly of that nature prepared by  
15 counsel in anticipation of litigation or to support  
16 counsel directly in anticipation of the litigation, you  
17 need to produce it.

18 MR. SMITH: As I indicated, we will redouble  
19 the effort to go back and proceed as you described.

20 MS. DODGE: There is just one other data  
21 request that brings up a separate issue, which is Data  
22 Request No. 1.11. This asks PSE to refer to the chart  
23 BCS offered during the hearing on the emergency motion.  
24 We do not have a copy of that chart. The evidence  
25 never came in. I believe that Mr. Smith may be

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1 planning to get it to us, but the answer also states  
2 that the chart was based upon information from public  
3 sources, such as the Wall Street Journal, and whether  
4 the sources are public or not, we would expect that the  
5 sources for the chart also be produced. Just because  
6 something is public, it doesn't mean we know which ones  
7 they relied on.

8 MR. SMITH: The chart will be produced, in  
9 reference to the public sources that serve as the basis  
10 for the chart will be produced.

11 JUDGE MOSS: That would seem to satisfy your  
12 need.

13 MS. DODGE: That's fine.

14 JUDGE MOSS: Thank you, Mr. Smith. We  
15 appreciate that. Anything else? Everybody clear on  
16 this one? All right. Now, Bellingham Cold Storage is  
17 adopting Georgia-Pacific West, Inc.'s motions to compel  
18 filed August 7th, 2000 and August 9th, 2000, as I  
19 understand it; is that right, Mr. Smith?

20 MR. SMITH: Correct.

21 JUDGE MOSS: So we are going to take those up  
22 now.

23 MS. DODGE: Your Honor, may I say just on  
24 follow-up -- I apologize for not thinking more quickly,  
25 but it occurred to me that we don't have a specific

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1 date for follow-up by which we will get those  
2 documents, and that may avoid some future disagreement.

3 JUDGE MOSS: Well, we don't know where we are  
4 going to be on Monday. I hope that we do know exactly  
5 where we are going to be with respect to the pending  
6 motion to dismiss, so it would seem to me that it would  
7 be appropriate to set a date that would fall sometime  
8 after that to allow the Commission adequate opportunity  
9 to deliberate on that motion and make its decision and  
10 either announce it or have me announce it. The  
11 response time required under the schedule is three  
12 days. That would put us into close of business on  
13 Wednesday. Is that workable, Mr. Smith?

14 MR. SMITH: That's fine.

15 JUDGE MOSS: That will probably allow  
16 sufficient time to pass to get this other matter  
17 resolved, and, of course, if the motion to dismiss is  
18 granted, then that will moot that aspect of the  
19 discovery just as it has with respect to  
20 Georgia-Pacific, who has filed its motion to withdraw  
21 that part of the case. Everybody understands that.  
22 There will be no need to respond if the Commission acts  
23 on that and grants it.

24 MR. SMITH: As a matter of procedural  
25 clarity, you indicated earlier in the discussion you



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1 made concerning the motion for a continuance that the  
2 Commission would make that determination on Monday.  
3 Are you seeking from us or are we permitted to make a  
4 response to the motion to dismiss that was made this  
5 morning? The reason I ask is I would like the  
6 opportunity to so do.

7 JUDGE MOSS: Maybe we should just take  
8 argument on that today and we will have that record.

9 MR. SMITH: It was handed to me as I walked  
10 out of the office to drive here. I've not read it in  
11 its entirety.

12 JUDGE MOSS: When could you have a responsive  
13 pleading in hand here at the Commission?

14 MR. SMITH: End of the day on Monday.

15 JUDGE MOSS: How about midday on Monday?

16 MR. SMITH: Midday being two o'clock?

17 JUDGE MOSS: Noon is what I meant.

18 MR. SMITH: If you wish it noon.

19 JUDGE MOSS: You get it in by noon on Monday,  
20 and I'll put it before the commissioners along with  
21 everything else.

22 MR. SMITH: Thank you.

23 JUDGE MOSS: I do want to clarify that I  
24 don't issue guarantees, so it is my fervent hope that  
25 we have this resolved by Monday close of business, but

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1 I can't be assured of that.

2 MR. SMITH: I understand.

3 JUDGE MOSS: Are we ready to move on to the  
4 motions to compel, and I'll just refer to them as the  
5 Bellingham Cold Storage motions at this juncture. As I  
6 understand it from the papers, these motions to compel  
7 concern four data requests to which there has been  
8 responsive material furnished on two occasions, and I  
9 guess in PSE's answer to the first motion to compel,  
10 they do attach to that the responses to first discovery  
11 request, which was Request No. 1 and 2, and the samples  
12 of the documents that were furnished. Now, all the  
13 data on mine are blacked out, and I assume that was  
14 provided in this answer in that fashion simply because  
15 of the confidential nature but that the actual data was  
16 provided to Bellingham Cold Storage.

17 MR. QUEHRN: Yes.

18 JUDGE MOSS: So I'm fairly mindful then of  
19 what exchange there has been, unless there is something  
20 that has been exchanged in addition to what was  
21 included, so PSE further supplemented these responses,  
22 or is this it?

23 MR. QUEHRN: No, Your Honor, we have not  
24 further supplemented the responses.

25 JUDGE MOSS: Let's focus on these first two

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1 and then we'll deal with the other two. Bellingham  
2 Cold Storage remains dissatisfied, as I understand it,  
3 in connection with those first two. Well, one reason  
4 is that the counterparties to the various transactions  
5 are not identified. Does that go to both 1 and 2 or  
6 just to the second one?

7 MS. GRUNDON: It goes directly to the second  
8 one. For the first one, the issue is that we would ask  
9 for all electric purchase and sales transactions and  
10 did not get all electric purchase and sales  
11 transactions; rather, we got a selected portion, and I  
12 do note that we specifically said all.

13 JUDGE MOSS: According to my notes, PSE  
14 provided the requested information for transactions at  
15 mid Columbia?

16 MR. QUEHRN: Correct, and, Your Honor, the  
17 reports that are provided to Dow Jones.

18 JUDGE MOSS: That's the second data request,  
19 isn't it?

20 MR. QUEHRN: No. 2 of the first set.

21 JUDGE MOSS: For ease of reference, we are  
22 going to call them 1, 2, 3 and 4. 1 and 2 being the  
23 two that were in the first set of discovery requests  
24 and three and four being the second one. So as to  
25 No. 1, the complaint by Bellingham Cold Storage is that

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1 they asked for all the electric purchase and sale  
2 transactions, not just those at mid-Columbia, and tell  
3 me -- I'm sorry, Ms. Grundon, tell me why you need that  
4 information.

5 MS. GRUNDON: We detailed in the motion we  
6 made yesterday, affidavit and motion to continue, the  
7 reasons why we need that information. Our case is  
8 based on theories which we made, based on the  
9 information we had at hand and based on public  
10 information. In order to actually prove those  
11 theories, the information that is necessary to do so is  
12 in absolute control of PSE's hands, and without having  
13 that information, we can not conduct a full analysis or  
14 comparison of the data that we do have.

15 JUDGE MOSS: What theory does it go to?

16 MS. GRUNDON: It goes to the theory that  
17 pricing under the index is unjust and unreasonable at  
18 this time.

19 JUDGE MOSS: How is this going to help you  
20 show that?

21 MS. GRUNDON: The information concerns prices  
22 that PSE -- sales and transactions, we have several  
23 theories concerning pricing that's going on that's  
24 affecting that index.

25 JUDGE MOSS: Those theories are? I'm trying

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1 to understand to what element of proof you intend to  
2 make this data would relate. That's what I'm trying to  
3 understand. In other words, I'm trying to understand  
4 why is it that you need to know about all of Puget  
5 Sound Energy's electric purchase and sales  
6 transactions. What is that going to tell you? What  
7 are you going to use that information for? What  
8 element of proof will that go to? What will it help  
9 you show?

10 MS. GRUNDON: The issue is whether or not PSE  
11 is somehow improperly influencing the market because of  
12 its market power.

13 JUDGE MOSS: Where is that allegation raised  
14 in your complaint?

15 MS. GRUNDON: It's raised in the initial  
16 complaint, which generally says that we have -- that  
17 there are concerns about market manipulation and  
18 corruption on the western market. It's a very general  
19 statement that encompasses the entire West Coast.

20 JUDGE MOSS: Are you looking at the purchase  
21 and sales transactions of every player in the electric  
22 energy market in the West Coast of the United States?

23 MS. GRUNDON: We are specifically looking at  
24 PSE.

25 JUDGE MOSS: That doesn't really answer my

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1 question. My question was, are you examining, do you  
2 have experts out there examining all the sales and  
3 purchase transactions in the electric energy market  
4 that are taking place in the western United States?

5 MS. GRUNDON: I actually have our expert here  
6 if you would like to hear --

7 JUDGE MOSS: I would not.

8 MS. GRUNDON: I cannot speak to exactly the  
9 full range of what our expert witness is looking at,  
10 but I do believe it does encompass most of the western  
11 market. It does indeed.

12 JUDGE MOSS: Let's hear from PSE about this.  
13 What's your objection to providing this information?

14 MR. QUEHRN: Thank you, Your Honor. Our  
15 objection frankly starts with a line which is in the  
16 prehearing order in the scope of discovery in this  
17 proceeding, and I would just refer to Paragraph 7 in  
18 the prehearing order that says, Parties are required to  
19 limit discovery to that necessary to their  
20 representative case.

21 In my reference to the Complaint, the  
22 allegations as to corruption are influenced on market  
23 were allegations that were made with respect to  
24 California utilities, and we frankly view this request  
25 outside of the scope of the Complaint, and therefore,

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1 outside of the scope of discovery as it was presented  
2 in the prehearing order.

3 We did, of course, provide all of the  
4 transactional information relative to the mid Columbia  
5 index because clearly, that issue was raised in the  
6 Complaint, but beyond that, transactions beyond the  
7 scope of the mid Columbia index, particularly as they  
8 relate or specifically as they relate to allegations of  
9 market corruption or collusion are not raised in the  
10 Complaint with respect to PSE.

11 We also supplemented our response to this by  
12 a determination by the FERC indicating that we  
13 essentially do not have market power, and our argument  
14 is essentially it goes without saying if you don't have  
15 market power, you are not in a position where you can  
16 exercise that power in some way to exclude or corrupt  
17 or otherwise influence the market, so the bottom line  
18 is to our reading of the discovery rule or the scope of  
19 discovery as stated in the prehearing order, this fell  
20 outside of the scope of the Complaint, was not alleged  
21 in the Complaint, and moreover, it's something we have  
22 established in our response is essentially we do not  
23 have market power to exercise in this regard.

24 JUDGE MOSS: That does raise a point that I  
25 want to ask you about, Ms. Grundon. I did consider

00286

1 PSE's argument that the Complaint does not allege that  
2 it is, in fact, a player in this asserted corrupt  
3 market. Is it your position that that has been alleged  
4 in the Complaint?

5 MS. GRUNDON: What we allege in the Complaint  
6 was that there were indications that there was  
7 manipulations in the market. The only reference to  
8 California entities was the fact that they had raised  
9 that issue as well. We did not specify that it was  
10 only California that was experiencing the problem.  
11 Rather, we said the market itself is experiencing  
12 allegations that it has become corrupted. I think it's  
13 a misstatement to say that we said that was only  
14 directed at California utilities.

15 JUDGE MOSS: As I read your complaint, and  
16 maybe I'm looking in the wrong place, but I'm looking  
17 at Page 3, and I'm looking at the first full paragraph  
18 there which starts out with the phrase, "The shoe is  
19 now on the other foot," and using the passive voice,  
20 the sentence beginning, "Allegations that the markets  
21 have become corrupted by energy underscheduling and  
22 other manipulation have also been made by major players  
23 in West Coast markets," and I note that that's in the  
24 passive voice because it does not appear in the form  
25 stated to be an assertion or allegation of the



00287

1 Complaint that such corruption has occurred. Is it  
2 your intention that it is an allegation in the  
3 Complaint that you were going to prove in this case  
4 that markets have become corrupted by energy  
5 underscheduling and other manipulations?

6 MS. GRUNDON: That was the intention.

7 JUDGE MOSS: That is your intention to prove  
8 that. I'm having a hard time making this out. Is  
9 there anyplace else in here that you believe would  
10 support a reading of this complaint that you were  
11 alleging that the Respondent here has been a player in  
12 or somehow participated in corrupting energy markets  
13 through underscheduling and other manipulation? Is  
14 there anything else in the Complaint other than this  
15 one sentence?

16 MS. GRUNDON: The underlying context of our  
17 complaint was that the index was no longer a reasonable  
18 pricing mechanism for this contract. That was what we  
19 intended to show. Part of that was the fact that there  
20 are problems with manipulation in the market being  
21 alleged.

22 JUDGE MOSS: By others.

23 MS. GRUNDON: They had already been alleged  
24 by others by the time of our complaint.

25 JUDGE MOSS: Right. But I think you just

00288

1 told me that you are now alleging that or believe you  
2 allege that through this complaint and that you intend  
3 to prove that to the Commission. Did I understand that  
4 correctly? I may have gotten it wrong.

5 MS. GRUNDON: I believe that was an implicit  
6 assumption by the statements we made in the Complaint,  
7 that if there was corruption in the market that we  
8 would seek to show that and seek to show why that  
9 affected the index and what made it an unreasonable  
10 pricing index for this contract.

11 JUDGE MOSS: How would corruption in the  
12 market that's not traded at mid Columbia demonstrate  
13 that the mid Columbia index is not a reflection of the  
14 market at that particular point?

15 MS. GRUNDON: The reason we sought the  
16 information about markets at other places than mid  
17 Columbia is because we need data in order to compare.  
18 Other markets also would affect how PSE could act; in  
19 other words -- our expert could speak to this exactly  
20 all of how the markets actually work, but there is  
21 actually ways that transactions can be shifted from one  
22 transaction point to another, and without any  
23 information on those other points, we have absolutely  
24 no data for comparison.

25 JUDGE MOSS: If you are intending to prove

00289

1 that the energy markets or power markets, as it says  
2 here, in the western United States are corrupted by  
3 energy underscheduling and other manipulation, then I  
4 assume you would have to develop a fairly broad and  
5 comprehensive set of information about all of the  
6 players in that market; do I have that right? I see  
7 your expert nodding his head in the affirmative back  
8 there. Maybe you would like to consult with him for a  
9 minute.

10 (Discussion off the record.)

11 JUDGE MOSS: Go ahead.

12 MS. GRUNDON: The answer is that we are  
13 indeed looking at all players in the marketplace, and  
14 that due to the way the Dow Jones is reported, it's  
15 extremely important that we have all information from  
16 PSE because it's possible that if a transaction occurs  
17 at another point, it can actually be dropped off -- we  
18 would never see it if it had initially happened on the  
19 mid-C. The other issue is that preliminary data shows  
20 that at times, PSE is the only person making trades in  
21 the market at a particular time.

22 JUDGE MOSS: At mid Columbia.

23 MS. GRUNDON: At mid Columbia.

24 JUDGE MOSS: I understand that occurred  
25 during one hour on one day; is that right?

00290

1 MS. GRUNDON: I would have to confer with the  
2 expert witness.

3 JUDGE MOSS: So this would be one small piece  
4 of data if PSE were to furnish this information to you  
5 that would contribute to this overall analysis of West  
6 Coast energy markets and what's going on in those  
7 markets. Is that why you seek this data?

8 MS. GRUNDON: I don't understand your  
9 question.

10 JUDGE MOSS: You've just confirmed to me what  
11 I was suspecting and asking you about, and that is that  
12 it is your intention to provide this commission with  
13 some sort of a comprehensive review of the West Coast  
14 energy market and thereby demonstrate that there has  
15 been underscheduling and other manipulation taking  
16 place in that market. Didn't I just understand you to  
17 tell me that?

18 MS. GRUNDON: Yes.

19 JUDGE MOSS: So my question to you now is  
20 that this data you seek through this first data  
21 request, is it the case that that would be one small  
22 piece of the data, one element of that data, that would  
23 constitute the body of information that would help you  
24 prove that point?

25 MS. GRUNDON: I don't know what its relative

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1 size would be, but nevertheless, it's a very important  
2 piece.

3 JUDGE MOSS: Well, I'll give PSE another  
4 opportunity to speak to this before I rule on it.

5 MR. QUEHRN: I think effectively what we are  
6 seeing here is an attempt to amend the Complaint. The  
7 Complaint on its face does not contain an allegation  
8 that PSE is alleged to be in act of corrupting the  
9 market. I find with interest, and I guess I just note  
10 this is my parting observation, in reading Mr. Gould's  
11 motion to withdraw, he makes the following statement.  
12 He says, "It may well be that proof of manipulation of  
13 the spot market will have to await governmental  
14 inquiry. We are aware that FERC has launched such an  
15 investigation and has called for an initial staff  
16 report by November 1 of this area. We shall at least  
17 await that report before proceeding further on this  
18 course."

19 I would suggest this is probably a more fair  
20 context of what was being discussed here rather than an  
21 allegation that PSE was directly acting to corrupt the  
22 market.

23 JUDGE MOSS: Based on my understanding of the  
24 matter as we've discussed it at some length here this  
25 afternoon, I'm inclined to agree with what Mr. Quehrn

00292

1 just said; that it does appear that you are sort of  
2 trying to make an ad hoc amendment to your complaint  
3 here. I certainly have not understood your complaint  
4 to allege that PSE has itself manipulated or been a key  
5 player in manipulating the market.

6 Of course, parties are free to file motions  
7 to amend their pleadings. You haven't done that. You  
8 might do that yet, and at that time, this data may  
9 become at least marginally relevant or calculated or be  
10 determined to be calculated to have the potential to  
11 lead to the discovery of admissible evidence, but until  
12 that time, I think PSE has provided you the information  
13 at mid-C, which is the market index allegedly broken  
14 under the terms of your complaint, and I think that's  
15 adequate for the present, and, of course, if you do  
16 amend your complaint and these allegations are more  
17 pointedly made so that PSE may gird its loins  
18 appropriately, then we can take this up again in a  
19 renewed discovery request at that time.

20 I need a break. Let's take 10 minutes, and  
21 we'll be back on the record at five after the hour by  
22 the wall clock.

23 (Recess.)

24 JUDGE MOSS: We still have several data  
25 requests to take up. Looking again at the August 3rd

00293

1 motion to compel, it strikes me that the only other  
2 question with respect to that is the question of  
3 counterparties on all transactions. It seems to me as  
4 I read your motion to compel, it says that, The  
5 identification of the counterparties will permit us to  
6 analyze the transactions for collusion or suspicious  
7 patterns of trading inimical to fair dealing.

8 We have already discussed that that does not  
9 appear to be part of your complaint as plead, that PSE  
10 has engaged in collusion or suspicious patterns of  
11 trading inimical to fair dealing, so I'm going to deny  
12 the motion to compel to that extent. Is there anything  
13 else with respect to the first two?

14 MS. GRUNDON: No.

15 JUDGE MOSS: Let's go to the motion of August  
16 9th. This concerns what I have denominated for  
17 purposes of today as the third and fourth data request.  
18 The third says, Provide hourly loads since May 22nd in  
19 the same format as provided in FERC Form 714, and the  
20 second, which appears to be closely related to the  
21 first is, Provide hourly generation for each of Puget's  
22 resources, an hourly supply from all long-term supply  
23 contracts, each since May 22nd, and then there is a  
24 parenthetical explanation that the term "long-term  
25 supply contracts" means duration longer than one day.

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1 The idea being, as I gather, to get a comprehensive  
2 picture of Puget's load and resource management from  
3 May 22nd to the present; is that what you are seeking  
4 here?

5 MS. GRUNDON: Generally, correct.

6 JUDGE MOSS: To what extent is it not  
7 specifically correct?

8 MS. GRUNDON: It's correct.

9 JUDGE MOSS: If that is what you are seeking,  
10 then I want to put to you the question again as I did  
11 before. To what element of your complaint does this  
12 information relate?

13 MS. GRUNDON: It again would relate to the  
14 general allegation the index no longer properly  
15 reflects the market, a competitive market, and is  
16 therefore no longer a proper pricing mechanism.

17 JUDGE MOSS: Ms. Grundon, I don't mean to  
18 seem difficult to you, but I'm trying to understand how  
19 it is that if you present to this Commission a profile  
20 of Puget Sound Energy's load and resource management  
21 for this period of two or three months, whatever it is,  
22 how that is going to help us understand whether or not  
23 the mid-C index is a reflection of the market, some  
24 market, a subset of the market, whatever it is that you  
25 are going to show us? I'm having a hard time



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1 understanding how knowing that information will help  
2 you or help the Commission, and that's what my concern  
3 is, because as I understand it, the objection is that  
4 this material is not relevant nor is it calculated to  
5 lead to the discovery of admissible evidence. Isn't  
6 that the objection?

7 MR. QUEHRN: Yes, Your Honor.

8 MS. GRUNDON: The issue is we are trying to  
9 analyze the market. PSE is a primary if not at times  
10 the only entity performing trades at the mid-C Columbia  
11 index. It's necessary to look at other delivery points  
12 in order to have some basis for comparison.

13 JUDGE MOSS: But how does their activity at  
14 other delivery points help you to understand what's  
15 going on at the mid-C?

16 MS. GRUNDON: I can hear my expert sighing in  
17 the background.

18 JUDGE MOSS: He's chomping at the bit, but we  
19 are not going to have testimony today. The proceeding  
20 wasn't noticed for that.

21 MS. GRUNDON: May I confer with him?

22 JUDGE MOSS: Absolutely.

23 (Discussion off the record.)

24 JUDGE MOSS: Go ahead.

25 MS. GRUNDON: The issue that we are trying to

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1 pursue is whether or not transactions that Puget Sound  
2 Energy is carrying out correspond to their own resource  
3 needs or whether or not it's possible that those  
4 transactions are actually designed to affect the market  
5 in general.

6 JUDGE MOSS: By definition, their  
7 transactions affect the market. They are part of the  
8 market; right?

9 MS. GRUNDON: Of course, but what I just said  
10 was if their own resource needs, which we had asked to  
11 understand the second data request, correspond to the  
12 transactions that are actually taking place in that  
13 market, then there would be no cause for concern.  
14 However, if there is a deviation between resources  
15 being pursued and actual transactions on a market,  
16 whether at mid-C or other locations, then that's data  
17 that we need to look carefully at.

18 JUDGE MOSS: Let me hear from PSE on this.

19 MR. QUEHRN: Thank you, Your Honor. Again, I  
20 guess I would just start with the scope of discovery  
21 that's articulated in the prehearing order, because it  
22 really is at the core of how we've responded to this  
23 motion, and that is, are we looking at a request for  
24 discovery that is necessary to the respective case.

25 We do not see at all how our loads and our

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1 generation to meet our loads bears any relationship to  
2 the index, to the pricing under the special contracts.  
3 We, in fact, separately briefed this issue in our  
4 motion for summary determination frankly anticipating  
5 that maybe we were going to get into this, and again,  
6 we, both with supporting affidavits and somewhat  
7 extensively in our briefing, laid out why we do not  
8 think this is an issue that has been fairly raised in  
9 the Complaint, and it is an issue that's germane to  
10 either is the index broken or is the market broken.

11 I also am puzzled in listening to argument  
12 because the motion to compel does state a different  
13 reason than what we've heard here, and it talks about  
14 the need to see if PSE is using the index to unjustly  
15 enrich its shareholders, and that's yet another, I  
16 think, theory that I didn't find raised in the  
17 Complaint. Having listened to counsel's argument here,  
18 I still am not seeing any relevancy of our loads and  
19 how we meet those loads and how that relates to the  
20 allegations raised in the Complaint.

21 Indeed, if one wanted to sort of walk through  
22 the analysis and the motion for summary determination,  
23 we identify that in this instance, Complainants are not  
24 core customers. Our loads and our resources to meet  
25 loads for our core customers are extraneous to how we

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1 are providing service to them under the special  
2 contracts, and indeed, the order the Commission entered  
3 approving the special contracts or allowing the special  
4 contracts to go into effect specifically states, as I  
5 recall, that at the end of the contract, they can't  
6 look to our generation resources as with any  
7 expectation of service.

8 JUDGE MOSS: This is the basis of some of  
9 your argument for motion for summary determination with  
10 respect to narrowing the issues.

11 MR. QUEHRN: Correct.

12 JUDGE MOSS: Mr. Quehrn does make a good  
13 point that the argument presented in the motion to  
14 compel does not really go to the points we've just  
15 heard but rather to the suggestion that whether it was  
16 necessary for PSE to purchase spot power at mid-C index  
17 prices, how does that matter under the special  
18 contract?

19 MS. GRUNDON: We do have the issue that --  
20 myself or Mr. Smith or Mr. Cameron did not actually  
21 write this motion to compel. This was actually written  
22 by Mr. Gould.

23 JUDGE MOSS: But you adopted it as your own.  
24 We went through that exercise earlier today. You don't  
25 have your separate motion to compel. Maybe I should

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1 just overrule this for now and let you file your own  
2 motion, and maybe you can state your own reasons and  
3 make your own arguments. Would that be your  
4 preference?

5 MS. GRUNDON: That would be acceptable.

6 JUDGE MOSS: That's the ruling. Do we have  
7 any other discovery disputes we need to take up today?

8 MR. QUEHRN: I do not believe so.

9 JUDGE MOSS: It was my intention to sort of  
10 put all of this on a track that would not require  
11 parties to -- well, Mr. Smith, your party is going to  
12 have to make an effort to get that data together that  
13 we talked about earlier, but I think we've set next  
14 Wednesday for the response date?

15 MR. SMITH: Correct.

16 JUDGE MOSS: So Wednesday, and that will be  
17 close of business.

18 MR. SMITH: The only other date I have, Your  
19 Honor, if we wish to respond to the motion to dismiss  
20 we need to respond to that my noontime on Monday.

21 JUDGE MOSS: Yes, Monday noon, and that will  
22 help us in terms of the Commission's administrative  
23 needs and problems of scheduling and so forth. I had  
24 mentioned, and I don't mean to suggest that you should  
25 do this or must do this or anything along those lines,

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1 but I did suggest one alternative you may wish to  
2 consider is to the extent you have prepared your case,  
3 which I would expect would have been fully prepared by  
4 the 10th with the exception perhaps of a piece or two,  
5 to the extent you wish to submit that, and again, the  
6 Commission may or may not give any weight to that  
7 determination by you, but if you did wish to do that, I  
8 had said something about nine o'clock, and certainly if  
9 you are going to be filing something by the noon hour  
10 in the way of an argument and you decided to take some  
11 other action, submit something else and do all that at  
12 the same time, there is no point in making you do two  
13 deliveries and so on and so forth.

14 MR. SMITH: Very well. Do I have your  
15 permission to file that by fax?

16 JUDGE MOSS: The case?

17 MR. SMITH: The response to the motion to  
18 dismiss should we choose to do one.

19 JUDGE MOSS: I suppose so. This is on an  
20 accelerated schedule. That does create some  
21 difficulties for our records center, but they have been  
22 very good so far about handling all this, and I may  
23 hear differently later on, but I'll go down and  
24 apologize to them after this and say yes, once again we  
25 are going to allow that to occur. It does create a

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1 problem, for those that don't know, so we try to avoid  
2 it, but they are an excellent staff.

3 MR. SMITH: Thank you, and please express our  
4 thanks for the reference.

5 JUDGE MOSS: I will do that. I believe the  
6 next item on the agenda for today is I wanted to have  
7 some brief discussion concerning the status of the  
8 negotiations.

9 MR. CEDARBAUM: Your Honor, I didn't realize  
10 we are going to a new subject. I have two housekeeping  
11 questions about the last discussion. One is, did the  
12 Commission want any other -- if other parties wished to  
13 respond to the motion to dismiss by Puget Sound Energy,  
14 I assume those would also need to be filed by noon on  
15 Monday as well?

16 JUDGE MOSS: Yes. It's my intention to take  
17 this up with the commissioners at the earliest  
18 opportunity, and that might have been Monday morning,  
19 but I've foreclosed that, so if you wish to file  
20 something, if you could get it in by then, it would be  
21 very helpful.

22 MR. CEDARBAUM: The second question was you  
23 indicated, and we might see on Monday the Bellingham  
24 Cold Storage direct case or the case they have prepared  
25 so far.

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1 JUDGE MOSS: Just a thought I threw out.

2 MR. CEDARBAUM: To the extent that comes in  
3 and the case is not dismissed, Staff and other parties  
4 are prejudiced by not having seen it yesterday when it  
5 was supposed to have been filed, so my question is,  
6 what sort of process will we use to accommodate that or  
7 deal with it?

8 JUDGE MOSS: I'm sure you will be thrilled to  
9 know that momentarily we are going to talk about  
10 process and the procedural schedule, and we will  
11 clearly have to make some adjustments.

12 MR. CEDARBAUM: Thank you.

13 JUDGE MOSS: That's the point after the  
14 status point, so if you be patient with us here for a  
15 moment, we'll get through the status.

16 Now, clearly, I don't want to know anything  
17 about the substance of what's going on in your  
18 settlement negotiations. What I am interested in  
19 learning and I think can fairly ask is whether you all  
20 are indeed diligently pursuing negotiations and whether  
21 you are, for example, using the services of a  
22 professional mediator and that sort of thing, so I'll  
23 hear from all parties or a select spokesperson or  
24 whatever. I don't want to hear anything about the  
25 substance of your negotiations, but I would like to



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1 have an update on progress in terms of the process.

2 Mr. Gould, did you want to speak to that?

3 MR. GOULD: I guess I need to confer with my  
4 client for just a moment.

5 JUDGE MOSS: Let's allow a moment for that to  
6 take place, but we'll stay on the record.

7 (Discussion off the record.)

8 MR. GOULD: The status is that the parties  
9 have made contact with one another, high parties for  
10 both sides. A date has been set for a meeting. It's  
11 not yet occurred, but there is a time certain. We are  
12 aware that mediation is available; although, neither  
13 party has sought it as yet.

14 JUDGE MOSS: Anything to add, Mr. Smith?

15 MR. SMITH: The most recent meeting took  
16 place last Friday. From time to time, the governor's  
17 staff has participated as facilitators, I guess, to try  
18 to assist the parties to reach an agreement, and from  
19 BCS's perspective, that has been helpful. To try to  
20 reach agreement, we, at this point, are open for  
21 further discussions, but no agreement has been reached.

22 JUDGE MOSS: Does PSE wish to add its  
23 perspective on how things are going?

24 MR. QUEHRN: I can say a few words, Your  
25 Honor. Frankly, my personal knowledge of the status of

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1 the negotiations is somewhat limited. I do understand  
2 that after the order was entered, PSE directed a letter  
3 to both parties inviting negotiations to resume, and  
4 that that invitation was favorably received, and there  
5 are meetings scheduled, and it sounds like there have  
6 been some meetings that have taken place that I'm not  
7 aware of, and I do understand that there is efforts  
8 through the governor's office to essentially facilitate  
9 in some fashion.

10 JUDGE MOSS: Has Staff been involved in that  
11 aspect at all, Mr. Cedarbaum?

12 MR. CEDARBAUM: No, we haven't.

13 JUDGE MOSS: Again, it's not up to me to tell  
14 you all how to conduct yourselves. Well, sometimes it  
15 is, but perhaps not specifically in this regard. I do  
16 think it is an excellent idea to use the services of a  
17 professional mediator, particularly when the parties  
18 have been having a difficult time negotiating without  
19 that kind of assistance. I have myself been a mediator  
20 and participated in many of these types of  
21 negotiations, principally before coming here; although,  
22 I've had one occasion to be a mediator on behalf of the  
23 Commission to mediate a private dispute between parties  
24 who were jurisdictional to us, and they settled, by the  
25 way. I'm not available to you in that capacity, and it

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1 might not help after my -- after you've all observed my  
2 rather stern demeanor today, but you might find someone  
3 out there who can help you, and I think you might  
4 really seriously consider that.

5 I do want to say a word or two about the  
6 parties' conduct in the proceeding and how that might  
7 bear on this. I appreciate that you all are zealous  
8 advocates, and there is nothing wrong with that. I  
9 think that's what you are paid to do and by and large  
10 doing a good job, but please don't forget that there is  
11 a line between zealous advocacy and plain old  
12 instability, and I have observed on several occasions  
13 what I consider to be some unnecessary and unacceptable  
14 practices, including some gratuitous remarks in the  
15 pleadings and some statements that frankly border on  
16 being attacks, and I'd really like to see that stopped.  
17 It does not advance your cause before the Commission to  
18 do that. It's unimpressive. It doesn't impress  
19 anybody when you say something ugly or snipe at the  
20 other side. It certainly doesn't promote cooperation  
21 in the adjudicatory process, and my concern too is that  
22 it will spill over into the settlement process. It  
23 does not promote the sort of good will that is  
24 necessary for parties to achieve agreement through  
25 settlement, so I would encourage you to tone it down a

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1 little bit, and I realize we are on an expedited  
2 schedule, but if you can at least put your paper to  
3 sleep for a few hours and go back to it cold and reread  
4 it, I think you will find as I did when I stood in your  
5 shoes that you strike a lot of that stuff out, and it  
6 serves your best interest in the long run to do so, so  
7 please take that into account on a going-forward basis.

8 I do think your best opportunity for a  
9 mutually agreeable solution in this case is a  
10 settlement. You do all have a serious problem here.  
11 This isn't just Bellingham Cold Storage's problem or  
12 Georgia-Pacific's or PSE's, but you all have a problem  
13 here, and I think -- mediators talk about batnose and  
14 whatnose (phonetic), the best alternative to a  
15 negotiated agreement and the worst alternative to a  
16 negotiated agreement and try to focus the parties whom  
17 they are trying to assist on those alternatives, and I  
18 would encourage you all to do that, and this is the  
19 sort of thing that a mediator can bring to your process  
20 and your thinking is to focus you on, Yeah, that's hard  
21 to give up, but what might happen to me if this thing  
22 goes to a fully litigated result.

23 So I think there are some possible outcomes  
24 to the conundrum that faces everyone that will serve  
25 all of your best interests, and the best chance to see

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1 that it comes to fruition is through the negotiation  
2 and settlement process. I want to try to leave that  
3 word of encouragement with you and pursue that as  
4 vigorously as you have the adjudication, and you might  
5 get there in a hurry.

6           Process and procedural schedule. If this  
7 proceeding goes forward as to Phase 1, then we will  
8 need to have another prehearing conference, and we may  
9 be able to accomplish that by telephone conference  
10 instead of live conference; although, that can be a  
11 little awkward, but we can probably do that, and we can  
12 particularly do that if you all will discuss among  
13 yourselves what adjustments, if any, need to be made to  
14 the procedural schedule to accommodate slippage that  
15 has occurred, so I would encourage you all to see what  
16 happens early next week. We'll all know then what the  
17 posture of the case is going forward, and if we need to  
18 have a prehearing conference on a fairly quick basis,  
19 then we will get that noticed and get everybody  
20 participating by telephone or otherwise and get that  
21 issue resolved.

22           Assuming we do go forward with Phase 1 and  
23 that we do so on a fairly expedited schedule still  
24 trying to capture those hearing dates, October 5th and  
25 6th, and being mindful of the fact that the next

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1 available hearing dates for the commissioners will  
2 probably not be until November sometime, we will need  
3 to have a little more active management from the Bench,  
4 and so what I'm going to do if we go forward with  
5 Phase 1 is we are going to have a regular scheduled  
6 status conference every week, and we are going to try  
7 to conduct that by telephone conference so everybody  
8 doesn't have to drive up here or down here, and we will  
9 get that set up as need dictates.

10 I will also in the future, and indeed, I have  
11 been all along, but I haven't had an opportunity to  
12 tell you, I will always be glad to make myself  
13 available on a short turnaround basis to resolve  
14 discovery disputes. I don't like having to resolve  
15 discovery disputes, but I am prepared to do it, so if  
16 you all find yourselves at loggerheads over some  
17 discovery issue, and one side is telling the other,  
18 "That's not what I meant," and the other side says,  
19 "That's what you said, and I'm not going to answer,"  
20 well, that just prolongs things and is agony for  
21 everybody, so just call me on the phone and we will get  
22 it resolved. By the way, in terms of the record when  
23 we do that, we do just tape record those sessions, and  
24 then if anybody wants a transcript, we can request it  
25 from the Commission, and I don't how we do that

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1 exactly, but we do.

2 I don't think it's been mentioned in this  
3 record, but there is a practice at the Commission of  
4 holding a prehearing conference shortly before the  
5 hearing date, and that is varied anywhere from the day  
6 before to five days before, and we usually try to hit  
7 around three days before if that's possible in terms of  
8 facilities and so forth, and what we do at that  
9 prehearing conference is establish our order of  
10 witnesses. We exchange cross-examination exhibits. We  
11 get estimates of cross-examination time, basically all  
12 the little housekeeping things that help a hearing  
13 itself go forward most smoothly, so we will establish  
14 that as we get a little closer down the line, and  
15 assuming we stay on the current schedule for hearing, I  
16 think that will probably be on the 29th, which is a  
17 little sooner than I would like relative to the hearing  
18 date, but there are some other things going on at the  
19 Commission that week in October that are going to make  
20 it very difficult to arrange facilities, so we will  
21 probably have to push that up to the 29th.

22 The same sort of processes or similar  
23 processes are going to be followed in Phase 2 of the  
24 proceeding. Although, it doesn't appear from our  
25 earlier prehearing that there is the same sense of

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1 urgency and need for expedition that has governed this  
2 phase so far, but we do need to establish a schedule  
3 for that phase, and I don't want to try to do that this  
4 afternoon, so we will need to work on that. Again,  
5 I'd ask that the parties try to work among themselves  
6 to develop a workable schedule and present that. To  
7 the extent there is some disputed date or whatnot, then  
8 we will have to take that up and resolve it, but it's  
9 best for all of you if you can come up with a schedule.

10 In the meantime, I will continue to make  
11 myself available to work with you on that and get you  
12 information regarding commissioners' available dates  
13 and that kind of thing, and Mr. Cedarbaum may end up  
14 coordinating that for the Commission staff, and of  
15 course, he's convenient to me being located here in  
16 Olympia just a building away, so we will work with you  
17 on that, and when I say that, I mean we will work with  
18 you informally. You can call me and we will work it  
19 out.

20 I believe that's all I have for you today.  
21 Let me ask if the parties have anything else they would  
22 like to bring up at this time.

23 MR. SMITH: Nothing further.

24 MR. QUEHRN: Nothing from us, Your Honor.

25 MR. GOULD: Nothing further.



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1 JUDGE MOSS: Mr. Cedarbaum, did we get to all  
2 your points?

3 MR. CEDARBAUM: Yes.

4 JUDGE MOSS: Thank you for appearing on  
5 relatively short notice, and I appreciate your  
6 cooperation in helping us move this case along.

7 (Prehearing conference adjourned at 3:40 p.m.)

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