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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Petition of )  
4 PUGET SOUND ENERGY, INC. ) DOCKET NO. UE-000966  
5 for a Declaratory Order on the )  
6 Service Area Agreement between ) VOLUME I  
7 Puget Sound Energy, Inc., and ) Pages 1 - 47  
8 the City of Tacoma )  
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10 A prehearing conference in the above matter  
11 was held on August 2, 2000, at 10:36 a.m., at 1300  
12 South Evergreen Park Drive Southwest, Olympia,  
13 Washington, before Administrative Law Judge ANN  
14 RENDAHL.

15 The parties were present as follows:

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

19 WASHINGTON PUD ASSOCIATION, by JOEL C.  
20 MERKEL, Attorney at Law, 999 Third Avenue, Suite 2525,  
21 Seattle, Washington 98104.

22 CITY OF TACOMA, d/b/a TACOMA POWER, by MARK  
23 L. BUBENIK, Chief Assistant City Attorney, Post Office  
24 Box 11007, Tacoma, Washington 98411.

25 TACOMA POWER, by DONALD S. COHEN, Attorney at  
Law, Gordon, Thomas, Honeywell, Malanca, Peterson &  
Daheim, 600 University Street, Suite 2100, Seattle,  
Washington 98101.

CITY OF LAKEWOOD, by DANIEL B. HEID, City  
Attorney, 10510 Gravelly Lake Drive Southwest, Suite  
206, Lakewood, Washington 98499-5013.

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1 WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION, by JEFFREY D. GOLTZ, Senior Assistant  
3 Attorney General, 1400 South Evergreen Park Drive  
Southwest, Post Office Box 40128, Olympia, Washington  
98504-0128.

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24 Kathryn T. Wilson, CCR

25 Court Reporter

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

2 JUDGE RENDAHL: Let's be on the record. Good  
3 morning. This is a prehearing conference In the Matter  
4 of the Petition of Puget Sound Energy, Incorporated,  
5 for a Declaratory Order on the Service Area Agreement  
6 between Puget Sound Energy, Inc., and the City of  
7 Tacoma, Docket No. UE-000966.

8 This prehearing conference is being held on  
9 Wednesday, August 2nd, in the year 2000 pursuant to due  
10 and proper notice to all parties and interested  
11 Ypersons. I'm Ann Rendahl, an administrative law judge  
12 for the Washington Utilities and Transportation  
13 Commission, and I'll be presiding this morning. I'd  
14 like to take appearances, and let's start with counsel  
15 for Puget Sound Energy.

16 MR. QUEHRN: My name is Mark Quehrn, counsel  
17 for Puget Sound Energy.

18 MR. MERKEL: My name is Joel Merkel, and I'm  
19 an attorney for the Washington PUD Association.

20 JUDGE RENDAHL: Before we continue, I'd like  
21 counsel to state their name, their address, and if you  
22 could, also your telephone number and fax number.  
23 Let's go back to Mr. Quehrn.

24 MR. QUEHRN: My address is 411 108th Avenue  
25 Northeast, Bellevue, Washington, 98004; phone number,

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1 area code (425)453-7307, and my fax number is (425)  
2 453-7350.

3 MR. MERKEL: My address is 999 Third Avenue,  
4 Suite 2525, Seattle, 98104; phone number,  
5 (206)389-8222, and the fax number, (206)223-3929.

6 JUDGE RENDAHL: For City of Tacoma?

7 MR. BUBENIK: Mark Bubenik. I'm representing  
8 the City of Tacoma doing business as Tacoma Power, and  
9 my address is P.O. Box 11007, Tacoma, 98411; phone  
10 number, (253)502-8218; fax, (253)502-8672. As I  
11 indicated earlier, we are making a limited appearance  
12 in this matter for contested jurisdiction in this  
13 matter.

14 MR. COHEN: My name is Donald Cohen,  
15 C-o-h-e-n, Gordon, Thomas, Honeywell, Malanca, Peterson  
16 and Daheim, PLLC, 600 University Street, Suite 2100,  
17 Seattle, Washington, 98101; phone, (206)676-7531; fax,  
18 (206)676-7575, and I, like Mr. Bubenik, am representing  
19 the City of Tacoma doing business as Tacoma Power, and  
20 we are here in a limited appearance capacity.

21 MR. HEID: I'm Dan Heid. I'm the city  
22 attorney for Lakewood, and the address of Lakewood City  
23 Hall is 10510 Gravelly Lake Drive Southwest, Suite 206,  
24 Lakewood, Washington, 98499. The telephone number is  
25 (253)589-2489, and the fax number is (253)589-3374.

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1 City of Lakewood is a potentially interested party. I  
2 don't know that I could tell you today what that  
3 interest may be because we are pending some legal and  
4 some elective or political issues right now, and it may  
5 make a difference on that interest.

6 JUDGE RENDAHL: I think we will discuss that  
7 further as we go along. Commission staff?

8 MR. GOLTZ: I'm Jeffrey Goltz with the  
9 Attorney General's office, and I'm appearing pursuant  
10 to Paragraph 9 of the prehearing order. My address is  
11 1400 South Evergreen Park Drive Southwest, P.O. Box  
12 40128, Olympia, 98504. Phone number is area code (360)  
13 664-1186. Fax is (360)586-5522.

14 JUDGE RENDAHL: Thank you. I realize that  
15 under the statute for petition's for declaratory ruling  
16 and the notices the Commission issued in early July in  
17 the matter that the Commission has given an opportunity  
18 to cities of Tacoma and Lakewood to state whether they  
19 are interested in consenting to this declaratory ruling  
20 process or what their position is in the case, and both  
21 cities have requested a deferral at that time to  
22 determine their positions, and I also note that the PUD  
23 Association did file a statement of fact and law, and  
24 I'm wondering at this time, Mr. Merkel, whether the PUD  
25 Association wishes to intervene formally in the

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1 proceeding.

2 MR. MERKEL: Yes, Your Honor; although, I  
3 would say we are primarily in the jurisdictional  
4 question, and if this should eventually work its way  
5 into some sort of an evidentiary hearing about the  
6 contract, I would not expect the PUD Association would  
7 have any desire to put on a case about that. It would  
8 be primarily this question of Commission jurisdiction.

9 JUDGE RENDAHL: But I take it the Association  
10 is not necessarily entering a limited appearance as are  
11 the cities of Tacoma and Lakewood.

12 MR. MERKEL: The Association itself is not a  
13 utility. The Association is a separate corporation, a  
14 trade association, and I think what they are concerned  
15 about is this jurisdictional question of does the  
16 Commission regulate utilities. The Commission, I don't  
17 think, would ever claim to regulate an association, but  
18 since we have an interest only in the jurisdictional  
19 question, I would be willing to limit our appearance to  
20 that question.

21 JUDGE RENDAHL: I think it's a matter of your  
22 client's preference. I'm just curious as to whether  
23 you wish to remain an interested party in this  
24 proceeding or become an intervenor, and if you do wish  
25 to become an intervenor, now is the time to make that

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1 request. And I noted in your petition, in your  
2 statement of fact and law, you stated that if it did  
3 become an adjudicated proceeding, your client would be  
4 interested in becoming an intervenor, so I'm merely  
5 trying to establish at this time whether your client  
6 wishes to become an intervenor in this matter.

7 MR. MERKEL: As to the factual hearing that  
8 you might end up having to have about the contract, no.

9 JUDGE RENDAHL: Thank you. I understand,  
10 Mr. Bubenik, that at this time, Tacoma is not  
11 consenting to the Commission's jurisdiction but just  
12 appearing for this prehearing conference; is that  
13 correct?

14 MR. BUBENIK: That's correct.

15 JUDGE RENDAHL: Mr. Heid, would that be the  
16 same for the City of Lakewood at this time?

17 MR. HEID: There are positions that may  
18 change with respect to the City, but I don't have  
19 authority to say that at this point.

20 JUDGE RENDAHL: Let's proceed to discussion  
21 on the issue of the status of the case and the  
22 interested persons and the parties' positions on  
23 whether the Commission should convert this matter from  
24 declaratory ruling proceeding to an adjudication. I'll  
25 start with Mr. Quehrn.

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1                   MR. QUEHRN: Thank you. I think with respect  
2 to the issue of converting this from a declaratory  
3 ruling to an adjudication, we almost necessarily have  
4 to talk first about the jurisdictional question. I  
5 think there is a relationship between the two, and it  
6 certainly seems to be the primary focus of the other  
7 parties that are here, so I guess respecting the desire  
8 to hearing the order that you have suggested, I think I  
9 would like to talk a little about the Tanner case and  
10 the statute, because ultimately on the conversion  
11 question, our motion will be is that if the matter that  
12 has been raised in the petition does lie within the  
13 primary jurisdiction of the Commission, then whether  
14 it's in one proceeding or another proceeding doesn't  
15 render the Commission's jurisdiction. It's just  
16 whether or not it's appropriate to hear it as a  
17 declaratory ruling distinct from an adjudication, so  
18 what I'd like to do is talk about the jurisdictional  
19 question first, if I may.

20                   JUDGE RENDAHL: Go ahead.

21                   MR. QUEHRN: One thing I prepared and I think  
22 I have enough copies, is I made copies of the statute  
23 that we will be talking about this morning, Chapter  
24 54.48 RCW, and also a copy of the Tanner decision, and  
25 for just ease of reference, I would like to distribute



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1 these, one to the Bench, one to the parties, because I  
2 would like to focus in on some statutory language as  
3 well as some language of the case.

4 JUDGE RENDAHL: Please go ahead.

5 MR. QUEHRN: If you refer to the packet that  
6 I distributed, the first attachment is a copy of the  
7 statute that pertains to agreements between --  
8 basically for service area agreements, and what I would  
9 like to focus on for a moment is the language of  
10 RCW 54.48.030, which states, and as I've paraphrased it  
11 in this little cover sheet here, that any public  
12 utility is hereby authorized to enter into agreements  
13 with any one or more other public utility for the  
14 designation of the boundaries of adjoining service  
15 areas with each such utility, and it goes on to say in  
16 the statute that those designated boundaries shall be  
17 observed, so there isn't an affirmative obligation in  
18 the statute that indicates that once these boundaries  
19 have been established, boundary area agreements, that  
20 the statute requires the parties to those agreements  
21 observe those boundaries. I would also just note, and  
22 I don't believe this is contested by Tacoma, that as  
23 "public utility" is defined for purposes of the  
24 statute, that it would include both PSE, my client, and  
25 Tacoma.

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1 I'd then like to turn briefly to the language  
2 of the Tanner decision, which the case in its entirety  
3 is the second attachment, and specifically what the  
4 case holds, and this is at Page 6, it says, "The UTC  
5 has jurisdiction not only to approve or disapprove  
6 service area agreements but also to apply and interpret  
7 relevant statutes where a dispute arises pursuant to  
8 such an agreement and to issue appropriate orders."  
9 And similar language appears on the next page of the  
10 case, which I've sort of excerpted in this handout, but  
11 what I really want to focus on here is the Commission's  
12 jurisdiction not only to approve or disapprove service  
13 area agreements but to, quote, "apply and interpret  
14 relevant statutes when a dispute arises and to issue  
15 appropriate orders."

16 Just to be very straightforward here, our  
17 pleadings raise facts that we believe are in dispute  
18 arising under the service area agreement. The statute  
19 in this instance, 54.48.030, says that the parties to  
20 these agreements shall observe these agreements and  
21 specifically shall observe the designated boundaries.  
22 This is, if you will, the relevant statute that is to  
23 be interpreted in this proceeding and pursuant to the  
24 express language of the Tanner case that that  
25 interpretation, at least as an initial matter, is to be

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1 heard by this body.

2 I'm not sure that from a jurisdictional  
3 standpoint there is a lot more to add at this point.  
4 That is essentially where we are approaching this in  
5 terms of seeking our relief with the Commission. Let  
6 me just skip then to the first you ask is about the  
7 conversion. It is our understanding that under the  
8 declaratory judgment procedure that we filed as the  
9 petition for declaratory judgment that we filed that  
10 if, in fact, the parties to this proceeding do not  
11 consent that the Commission cannot proceed to hear this  
12 as declaratory judgement matter. That's why when the  
13 issue of consent seemed to become an issue, we  
14 subsequently filed or requested it be converted to some  
15 other type of proceeding. And again, if you start with  
16 the fundamental assumption that the supreme court has  
17 vested a jurisdictional question or addressed a  
18 jurisdictional question in this dispute lies with the  
19 Commission, the question then becomes, where do we go?

20 I think in this instance if you look at the  
21 Commission's general authority under RCW 80.01.040(1),  
22 this is clearly a duty that has been prescribed by law  
23 for the Commission to discharge, and the duty, again,  
24 being as defined by the Tanner court to interpret these  
25 agreements and relevant statutes. If you then go on to

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1 RCW 80.01.050, there is authority to hold a hearing to  
2 discharge this duty, and then if you go to the  
3 Commission's own rules, I think we have three choices.

4 We thought when we filed this petition -- and  
5 I guess we still feel that a declaratory order most  
6 closely fits what we are asking for. If, however,  
7 consent is not provided, we suggested two other  
8 options. We suggested the adjudicatory proceedings  
9 provisions set forth in 480.09.400. I think the other  
10 thing we suggested was it could be viewed as a  
11 complaint proceeding; although, I will concede that I  
12 think the language for adjudicatory proceedings is  
13 broader and probably a more favorable alternative for  
14 conversion.

15 So that's a very quick summary of how we view  
16 the jurisdictional question and then how we view it  
17 procedurally as being heard by the Commission. Thank  
18 you.

19 JUDGE RENDAHL: Thank you. Mr. Merkel?  
20 Actually, I'd like to hear from the City of Tacoma  
21 first on this and then Mr. Merkel.

22 MR. BUBENIK: Your Honor, the City will ask  
23 Mr. Cohen to make the argument. However, with respect  
24 to the emphasis of the argument, I believe it will  
25 probably focus on the statute exempting municipalities,

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1 RCW 80.04.500, which will be handed to Your Honor and  
2 counsel assuming we can approach the Bench.

3 JUDGE RENDAHL: Why don't we go off the  
4 record while you do that.

5 (Pause in the proceedings.)

6 JUDGE RENDAHL: Mr. Cohen?

7 MR. COHEN: Thank you, Your Honor. The one  
8 statute that was not mentioned in the previous  
9 discussion is this 80.04.500, which goes directly to  
10 the jurisdictional question of the Commission with  
11 respect to municipal utilities, and I've presented a  
12 highlighted version. I don't mind if anybody reads the  
13 rest of it, but it seemed the relevant part, and  
14 counsel has copies now.

15 Basically, the title of it is, Application to  
16 Municipal Utilities, and it states: Nothing in this  
17 title shall authorize the Commission to make or enforce  
18 any order affecting contracts, affecting any electrical  
19 plant owned and operated by any city or town.

20 Tacoma Power believes this is basically the  
21 end of the story. The issue of how Tanner relates to  
22 that, I think Mr. Merkel is more conversant with that  
23 than I, but Tanner is distinguishable, as he points  
24 out, in his submission. Tanner Electric, in fact,  
25 sought intervention by the Commission. It's not a

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1 utility owned by a city or town, and the Tanner  
2 situation involved an attempt to enforce a service area  
3 agreement against Puget, which nobody would doubt was  
4 regulated by the UTC, but Mr. Merkel can go into this  
5 in more detail, so it's Tacoma's position that there is  
6 no jurisdiction by the Commission to whether you call  
7 it a declaratory order or whether you call it an  
8 adjudicative order. There is no jurisdiction on the  
9 Commission to enforce whatever order might be entered  
10 against Tacoma Power on this matter.

11 If Your Honor would wind up ruling to the  
12 contrary and this proceeded in some way to an  
13 evidentiary hearing, and I think counsel admitted there  
14 are going to be factual issues in dispute regarding  
15 that, that if that were to occur and the jurisdictional  
16 issue were not first resolved on appeal, if it went  
17 contrary to Tacoma Power's position, then I think we  
18 agree with counsel that an adjudicative proceeding is  
19 probably the appropriate one, but we differ at the  
20 first step.

21 JUDGE RENDAHL: Mr. Cohen, let me ask you,  
22 you state there would be no jurisdiction for the  
23 Commission to enforce an order against Tacoma, but do  
24 you believe that there is no jurisdiction for the  
25 Commission to issue an order in this matter, leaving

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1 out the issue of enforcement?

2 MR. COHEN: Mr. Bubenik points out the  
3 language of the statute says, to make or enforce an  
4 order affecting, so I use the word "against" because  
5 that's the nature of what the Puget Sound Energy  
6 petition really at its essence is trying to do, but  
7 this says, make or enforce affecting any electrical  
8 plant owned by a city or town.

9 JUDGE RENDAHL: Would this statute,  
10 RCW 80.04.500, apply to Chapter 54.48 as well?

11 MR. COHEN: There is no indication that it  
12 doesn't. Your Honor knows that the Commission's  
13 authority on service area agreements themselves is to  
14 approve Puget Sound Energy's participation in the  
15 service area agreement. There is no indication that  
16 anything beyond that has ever been within the  
17 Commission's jurisdiction with respect to the service  
18 area agreement. At least that's what 54.48 says.

19 JUDGE RENDAHL: Thank you. Do you have any  
20 additional comments at this time?

21 MR. COHEN: No, I don't. Thank you.

22 JUDGE RENDAHL: I'll take comments from  
23 Mr. Heid and then Mr. Merkel and then Commission staff.

24 MR. HEID: I'd like to back up a little bit  
25 in terms of some of the history that prompts the City

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1 of Lakewood to appear as a potentially interested  
2 party. City counsel passed an ordinance placing on the  
3 ballot a measure which would seek approval and  
4 ratification of a decision to condemn and acquire --  
5 well, to acquire and potentially condemn the electric  
6 distribution system of Puget Sound Energy within the  
7 City of Lakewood. City of Lakewood is served by three  
8 electric utility service providers at this time and has  
9 contacted and been in communication with each of the  
10 three, Lakeview Power and Light, the City of Tacoma,  
11 and Puget Sound Energy.

12 The ordinance seeks only to condemn and  
13 acquire, seeks ratification of the condemnation of the  
14 Puget Sound Energy portion. The City has been in  
15 communication with representatives of the three  
16 utilities in terms of the operation and the management  
17 of the electric utilities should its acquisition  
18 proceed. If that is pursued and this body rules that  
19 the service area agreement has effects on the City of  
20 Lakewood's new acquisition, which would be prospective,  
21 that's a concern that would limit how the City could do  
22 what it may need to do or may intend to do through  
23 contract. Again, those are options that no decisions  
24 have been made at this point nor has the vote been  
25 rendered. It's currently on the ballot for September



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1 19th. There are ongoing discussions with the City and  
2 various individuals that may change that, but that is  
3 the current status, and I have to express the City's  
4 concern if this Court were to rule something that would  
5 impact that. I don't know if there are any questions  
6 on that. I'm trying not to talk too much.

7 JUDGE RENDAHL: Thank you for giving us the  
8 history on the record. I appreciate that. Mr. Cohen?

9 MR. COHEN: May I mention one thing that  
10 Mr. Heid's comments reminded me of that relate to  
11 jurisdiction but also relate to his comments?

12 JUDGE RENDAHL: Please do.

13 MR. COHEN: There is another related  
14 jurisdictional issue and that is whether this matter is  
15 ripe enough a dispute so that it would not be purely  
16 asking the Commission to issue an advisory opinion.  
17 Again, this is a secondary jurisdictional argument.  
18 Just historically, in federal court litigation, Puget  
19 Sound energy took the position that the Lakewood  
20 situation -- this was earlier this year -- that the  
21 Lakewood situation was not ripe and would be purely an  
22 advisory ruling, and they were successful and there was  
23 a judgment entered to that effect.

24 It would probably be Tacoma Power's position  
25 here that Puget Sound Energy either is collaterally

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1 estopped on the ripeness issue or judicially estopped.  
2 They would probably argue that circumstances have  
3 changed, but they really haven't. As Mr. Heid pointed  
4 out, everything is sort of if, if, if. If the election  
5 goes one way, if the Lakewood City Counsel decides to  
6 proceed in a certain way, if they decide to proceed in  
7 a certain way, if the Tacoma Utility Board and city  
8 counsel decide to proceed in a certain way, and if the  
9 numbers penciled out make sense and so forth.

10 I'm making the argument that Puget made in  
11 the federal court that was, at least Judge Burgess at  
12 that time found persuasive, and Puget Sound Energy has  
13 embarked on an effort to express its view to the public  
14 and the City of Lakewood on this matter prior to the  
15 election. I'm not begrudging them that, but their  
16 position is that this is not something that they would  
17 want to see occur, the municipalization, the  
18 condemnation of their facilities by Lakewood, so it  
19 further throws things into greater disarray. So there  
20 is this sort of second level jurisdictional question  
21 that relates to ripeness, advisory opinion, if that's  
22 something we need to get to, and I wanted to make sure  
23 that we didn't sandbag Your Honor on that one.

24 JUDGE RENDAHL: Is there a written opinion by  
25 Judge Burgess on that matter?

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1 MR. COHEN: Yes.

2 JUDGE RENDAHL: Is that something the City of  
3 Tacoma can provide to the Commission and all the other  
4 parties?

5 MR. COHEN: Sure.

6 JUDGE RENDAHL: Mr. Merkel?

7 MR. MERKEL: Thank you, Your Honor. I think  
8 that we need to find a procedure or some sort of  
9 process that will allow us to resolve the  
10 jurisdictional question first. That's the primary  
11 issue, and if we can do that, then I think the other  
12 issues in the case kind of will logically sort  
13 themselves into some sort of, if it had to go to that  
14 point, into an adjudicative process, at which point the  
15 PUD Association would probably not be involved, so I  
16 think we need to focus first on this jurisdictional  
17 question. Whether we do that as a declaratory ruling,  
18 and it seems to me that's the logical thing to do,  
19 leave it as a declaratory ruling for purposes of  
20 resolving the jurisdictional question first.

21 As to the Tanner case, first of all, let me  
22 say that the Court's ruling, if you carefully read it,  
23 there is quite a bit of language about Commission  
24 jurisdiction, most of which is dicta, because that was  
25 not necessary for the Court's decision. What

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1 ultimately happened in the Tanner case is that it was  
2 sent back for retrial based on an improperly granted  
3 summary judgment. Actually, at the trial court, Tanner  
4 argued that the Commission, when we went back for  
5 retrial, and I represented Tanner at that time, still  
6 do, actually, we argued that the trial court should  
7 send it back to the Commission because the Commission  
8 had primary jurisdiction, and the trial court declined  
9 to do that, but all the language in the case about  
10 Commission jurisdiction is largely dicta.

11 Specifically, I think it's important to  
12 recognize that Tanner did go to the Commission in the  
13 first instance to ask that the service area agreement,  
14 that Puget be compelled to comply with the service area  
15 agreement. It was a case of a utility coming in,  
16 seeking to get the Commission to act to enforce an  
17 agreement against a regulated utility.

18 We have exactly the reverse case here in  
19 which the regulated utility is seeking to come into the  
20 Commission and asking the Commission to exercise  
21 extraordinary jurisdiction which it has not, to my  
22 knowledge, exercised in the 80 or so years that public  
23 power agencies have been around in Washington state. I  
24 can't think of another case in which the Commission has  
25 entered an order binding on a municipal cooperative or

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1 publicly owned utility, so this is really, I think, an  
2 extraordinary remedy that Puget is seeking here and  
3 really strikes me more as legislation than as a  
4 judicial remedy.

5 I agree with Don completely that 80.04.500  
6 and for the PUD Association, 54.16.040, and for  
7 cooperatives, 54.48.040, specifically exempt those  
8 utilities from Commission jurisdiction. 54.48 was  
9 really intended to deal with the question of immunizing  
10 utilities from the antitrust laws by allowing these  
11 service area agreements to have some sort of premature,  
12 and to qualify under the state action, exemption of the  
13 federal antitrust lawsuit. It had nothing to do with  
14 broadening the Commission's jurisdiction over publicly  
15 or cooperatively owned utilities and should not be so  
16 interpreted. I don't think it was interpreted by the  
17 supreme court that way and should not be interpreted by  
18 the Commission.

19 I made reference in my statement of law and  
20 fact to the Commission's legislative electricity study  
21 in December of 1988, some two years after the Tanner  
22 decision, in which the Commission made exactly that  
23 statement that the Commission does not obtain  
24 jurisdiction by overunregulated utilities or  
25 self-regulated utilities merely by reason of these

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1 service area agreements.

2 That's all I had to say, but just to go back  
3 to the primary thing, I think we need to find a way to  
4 resolve the jurisdictional question first, and then I  
5 think things will sort themselves out from there.

6 JUDGE RENDAHL: I have a few questions. You  
7 stated that you believe we should leave this as a  
8 declaratory ruling proceeding to resolve the  
9 jurisdictional issues. However, the statute as I read  
10 it states that an agency may not enter a declaratory  
11 ruling that would substantially prejudice the rights of  
12 a person who would be a necessary party and who does  
13 not consent in writing the determination of the matter  
14 by a declaratory ruling proceeding.

15 If Tacoma and Lakewood do not consent, my  
16 question is, how do we proceed in a declaratory ruling  
17 matter on their jurisdiction in the matter?

18 MR. MERKEL: That's definitely a problem,  
19 unless some way can be worked out that there is, in  
20 effect, a limited appearance that they are consenting  
21 to a declaratory ruling for the limited purpose of  
22 deciding whether the Commission has jurisdiction, and I  
23 don't know that Tacoma or others would find that  
24 acceptable, but I think it would have to be -- to the  
25 extent they are going to give consent, it has to be

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1 limited to just determining this issue, I would think.  
2 Otherwise, you would have to convert it, and if that's  
3 the way you have to go, then so be it.

4 JUDGE RENDAHL: Does Tacoma have any position  
5 on that question?

6 MR. COHEN: Your Honor, I may be less  
7 conversant with procedures than either of these two  
8 gentlemen, but I guess all three of us agree that we  
9 ought to address this jurisdictional issue up front in  
10 someway. I frankly was thinking of the adjudicative if  
11 we get into an evidentiary side of this thing. On the  
12 other hand, I don't quite understand in the context of  
13 the jurisdictional issue what the difference really  
14 might be in terms of it being a declaratory or an  
15 adjudicative proceeding.

16 JUDGE RENDAHL: As I understand it, and I  
17 guess I would like any thoughts -- maybe I'll turn to  
18 Mr. Goltz and then I'll ask a few more questions, but  
19 as I understand it, a declaratory ruling proceeding is  
20 an adjudicative proceeding, but the statute under the  
21 Administrative Procedure Act does require consent for  
22 interested parties, for potentially necessary parties  
23 for an agency to issue an order, and that is not  
24 necessarily the same in adjudicative proceedings, but  
25 Mr. Goltz, if you have any thoughts on the

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1 jurisdictional issue, I would appreciate them at this  
2 time.

3 MR. GOLTZ: I have some, and I will have to  
4 say, however, as will probably become apparent, that it  
5 is not clear, but a couple of general principles first.  
6 First, I agree with Mr. Merkel that if the Commission  
7 were to assert jurisdiction and issue an order directed  
8 without the consent of the cities here, that would be  
9 somewhat of a dramatic departure from past  
10 understandings. That is not to say, and that may not  
11 be the result here, but the point is that there is that  
12 history of sort of hands off the public utility  
13 district, the municipal utilities.

14 Going sort of to the framework for how we are  
15 to determine whether or not the Commission really has  
16 jurisdiction, you asked in the notice to address the  
17 issue of whether this should be converted. The term  
18 "conversion of proceeding" is kind of a term of art and  
19 statutorily authorized in the Administrative Procedure  
20 Act in 34.05.070 entitled, "Conversion of Proceedings,"  
21 but I don't think that relates here. That provision  
22 relates to if an agency commences an adjudication and  
23 then switches to a rule making or vice versa, it allows  
24 the movement between one or the other.

25 One could say, and in many cases, declaratory



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1 rulings have many of the elements of an adjudicatory  
2 proceeding, but if you look at the declaratory order  
3 statute in the APA, it says in 34.05.240(4), it  
4 references that RCW 34.05.410 through .494 -- only to  
5 the extent an agency so provides by rule of order, and  
6 I guess those references to statutes in the APA are  
7 adjudicative provisions, and I don't see that in the  
8 Commission's declaratory order Rule 480.09.230, but  
9 that doesn't necessarily mean that we end there. I  
10 think it would be possible to issue a declaratory order  
11 if there is consent. There really has to be consent, I  
12 believe, even under the Tanner decision. I think the  
13 Tanner decision is somewhat confusing on the point, but  
14 what the Court was telling the Commission was if there  
15 is, in effect, an opportunity or necessity to declare  
16 the rights and obligations of a regulated company like  
17 Puget, and it's possible to do that in a declaratory  
18 order proceeding, that's not what Puget is asking here.  
19 They aren't asking for necessarily what their rights  
20 are. They are saying what are the limitations, what  
21 are the restrictions on the City of Tacoma, and so they  
22 are asking for an order to be issued directed to the  
23 City of Tacoma, and I think it's problematic whether  
24 that can be done without their consent under the  
25 declaratory order statute or under the Commission rule

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1 implementing that statute.

2 I'm not sure that's the end of it, and let me  
3 tell you why I think that's true. Here is the argument  
4 that I think would have to be adopted in order for the  
5 Commission to assume jurisdiction. It wouldn't  
6 technically be a conversion of the proceeding to an  
7 adjudication. It would be, in effect, treating the  
8 petition as a complaint under 80.04.110, and whether  
9 that requires a withdrawal and refiling or whether it's  
10 just between the Commission and Puget -- they say,  
11 "Well let's treat our petition as a complaint" -- I'm  
12 not sure, but basically, that allows a complaint by  
13 anybody against a public service corporation -- those  
14 are the words -- where they allege that that  
15 corporation has done any act or claim to be in  
16 violation of any provision of law, any provision of law  
17 or any order or rule of the Commission.

18 Now, if you go back to the definition section  
19 on 80.04, we don't find "public service corporation"  
20 defined. We find "public service company" defined, and  
21 if one is to assume that is a drafting oversight in  
22 1911, and those happen from time to time, and I know  
23 it's happened in the 1990's. I don't see why it  
24 couldn't have happened in 1911, but the definition  
25 there includes city or town, public service counsel.

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1 City or town providing electrical service is a public  
2 service company, and we may assume, perhaps, that that  
3 also means they are a public service corporation under  
4 110.

5           Now, the cities put forth 80.04.500 as  
6 saying, But no, what 80.04.110 in the definition  
7 section, what jurisdiction that gives to the Commission  
8 over cities and town, 80.04.500 takes away. I don't  
9 think that's true, and the language here states that,  
10 Nothing in this title should authorize the Commission  
11 to make or enforce any order affecting rates, tolls,  
12 rentals, contracts, and they focus on the term  
13 "contract," and a service area agreement is a type of  
14 contract, and therefore, we can't do anything about it.

15           I think that probably the proper analysis of  
16 that is a contract in the context of the other terms in  
17 that sentence, rates, tolls, rentals, charges, or  
18 service, and those are really principles of a just and  
19 generous -- one would have to read contracts the way  
20 the Commission frequently deals with contracts, which  
21 is a special rate type of contract, the contract for  
22 utility -- for provision of a service at a given rate  
23 as opposed to generally applicable tariffs, for  
24 example.

25           So with 80.04.500 not applicable, arguably

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1 80.04.110 is applicable, but one has to determine that  
2 the term "any provision of law" described in 80.04.110  
3 includes the provision of law cited by Puget, which is  
4 54.48.030, stating that any public utility, which in  
5 this case includes city or town, after they make one of  
6 these agreements, shall observe them. I think that's a  
7 fairly close question, and I think before Tanner, I  
8 would have said that's probably not true, because  
9 obviously, the term "any provision of law" as used in  
10 80.04.110, it can't mean literally any provision of  
11 law. The Commission doesn't have jurisdiction over  
12 Puget Sound Energy regarding employment laws they may  
13 have. This isn't the forum for those. It has to be a  
14 provision of law within the context of the Commission,  
15 but after Tanner, I think that's a much closer issue  
16 only because despite the distinctions in Tanner, that  
17 is to say, it was the Court's order asked for by Tanner  
18 regarding the obligations of Puget, not the reverse  
19 cases we would have here.

20         There seems to be some strong indication that  
21 these sorts of matters can be adjudicated before the  
22 Commission, so I think it's a very close question, and  
23 anyway, that's the nub of the analysis, I think, is the  
24 meaning of the term "any provision of law" in  
25 80.04.110, and I apologize for that being somewhat

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1 elaborate or convoluted, but I would be happy to put  
2 that in writing if you wish us to do that. Other than  
3 that, I have no other comments.

4 MR. QUEHRN: Your Honor, I suspect you don't  
5 really want to turn this into oral argument this  
6 morning. I would request, however, since the  
7 statements of law and fact that were asked to be  
8 provided were never provided and we are hearing some of  
9 these issues for the first time, with the exception of  
10 Mr. Merkel's brief, just a brief opportunity to respond  
11 to some of the points that have been made by the City  
12 of Lakewood in particular and also to Mr. Goltz.

13 JUDGE RENDAHL: I was going to ask you to do  
14 that, and if you could make them brief, I would  
15 appreciate it.

16 MR. QUEHRN: The first thing I would like to  
17 point to, and I think this was also sort of implicit in  
18 a question that you asked, I had considered Mr. Cohen's  
19 argument based upon 80.04.500 even before we filed this  
20 petition, and I would like to refer you just back to  
21 his handout and emphasize the first four words of the  
22 statute: "Nothing in this title," and that, I think,  
23 qualifies all that follows.

24 We are not asserting jurisdiction based upon  
25 anything in this title. We are asserting jurisdiction

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1 based upon the other statute that I cited this referred  
2 to as interpreted by the Washington State Supreme  
3 Court, so I do not believe that 80.04.500 divests the  
4 Commission jurisdiction in this instance, and I would  
5 rely on the supreme court case, Tanner, to that point.

6         It was also referenced, I think, a couple  
7 times both by Mr. Merkel and I believe also by  
8 Mr. Cohen that somehow this is different because the  
9 party involved here is not a party that the Commission  
10 otherwise has general jurisdiction over, nor did they  
11 over Tanner. Yeah, there are some factual differences  
12 between the two cases. I would agree to that, but the  
13 fact that the parties were, if you will, had different  
14 status under the laws of the Commission was true in  
15 Tanner just as it's true here.

16         I think a very important point that  
17 ultimately runs to all that we are talking about, it  
18 was suggested that somehow the unambiguous statement of  
19 jurisdiction in Tanner that runs to both approval and  
20 disapproval of these agreements and then essentially  
21 interpreting them and enforcing relevant statutes, when  
22 we read the quote -- I would like to go back to Page 6  
23 and read the preceding sentence into the record. What  
24 the Court says, quote, "This case highlights the  
25 reasons for and the importance of the review process

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1 for administrative decisions. At issue here is not the  
2 alleged breach of simple contract between two parties  
3 but the alleged breach of service area agreement  
4 entered into by public utility and a rural electrical  
5 cooperative." My point is simply that the Court, in  
6 introducing this jurisdictional statement, highlighted  
7 this as perhaps one of the most important issues it was  
8 deciding, and I don't think you can then turn around  
9 and fairly characterize that as dicta.

10 We want to make it real clear that we are not  
11 seeking any sort of order or remedy or relief,  
12 vis-a-vis the City of Lakewood in this instance. I  
13 understand somewhat Lakewood's concerns, but what we  
14 are looking at is an interpretation of a service area  
15 agreement between Tacoma and Puget Sound Energy. Very  
16 quickly, a couple other issues, the judge requested --  
17 I think you received a copy from a federal district  
18 court order issued in an antitrust case. I think  
19 Mr. Cohen pointed out two things. One, circumstances  
20 have changed factually, and also, I think it was a  
21 different set of legal issues that we were addressing  
22 in that instance.

23 Finally, I want to make sure, I guess, that I  
24 understood something correctly from Mr. Goltz. We do  
25 not dispute that consent is required to proceed under

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1 the declaratory judgment statute. We do not believe,  
2 however, that consent is required to the subject matter  
3 jurisdiction of this Commission over service area  
4 agreements in interpreting disputes arising under  
5 service area agreements. There is absolutely nothing  
6 in the Tanner case that would suggest that any such  
7 consent is required, and, in fact, to infer that I  
8 think just guts the holding, and that leads me to my  
9 last point, I think.

10 I think I followed Mr. Goltz's tour through  
11 the procedural niceties of some of the rules he looked  
12 at, and I appreciate that analysis. Again, I think  
13 it's not all that sophisticated at one level.  
14 80.01.040 specifically states that the Commission shall  
15 exercise all powers and perform all duties prescribed  
16 by law, and we have a very clear prescription of  
17 authority by the supreme court. As to the procedure, I  
18 would again just point to the first sentence of  
19 48.09.400, quoting again, "Persons involved in an  
20 actual case or controversy --" I think counsel back and  
21 forth have acknowledged that there will, in fact, be  
22 facts and controversy here. Reading on, "-- within the  
23 jurisdiction of the Commission," reading on, "can avail  
24 of themselves of an adjudicatory proceeding pursuant to  
25 this rule." There are some exceptions. I don't think



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1 any of the exceptions apply in this instance, and I  
2 didn't hear the exceptions argued.

3 JUDGE RENDAHL: Thank you. I'd like to take  
4 a break, but I'd first like to have the parties briefly  
5 address the issue that was raised in the notice of the  
6 prehearing conference, given that the cities of Tacoma  
7 and Lakewood did not provide any statement of fact or  
8 law. I guess the question is, essentially, is there a  
9 dispute of fact or is it a dispute of law in this  
10 matter? Do you dispute the facts that were presented  
11 by Puget Sound Energy?

12 MR. COHEN: Your Honor, I think there will be  
13 if we get pass the jurisdictional issue, yes.

14 JUDGE RENDAHL: There will be a dispute of  
15 fact.

16 MR. COHEN: Yes. It will relate to issues of  
17 intent concerning the service area agreement. They  
18 will relate to whether -- this is probably a mixed sort  
19 of legal and factual question about whether the service  
20 area agreement in this instance actually fits within  
21 the statutory framework of 54.48, which is linked to  
22 avoiding duplication of facilities, which, I think, we  
23 will have some differences of opinion on, and it's sort  
24 of mixed question of law and fact, so yes, there will  
25 be, perhaps not on the jurisdictional question though.

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1 I wouldn't think so offhand.

2 JUDGE RENDAHL: I'd like to take a 10-minute  
3 break and then back on the record.

4 (Recess.)

5 JUDGE RENDAHL: We are back after a brief  
6 break. I guess I have one question to all the  
7 participants: Does anybody wish to provide a written  
8 statement about their jurisdictional argument at this  
9 point, or are you satisfied with the discussion on the  
10 record this morning?

11 MR. COHEN: Your Honor, I think we probably  
12 would like the opportunity, and it would take guidance  
13 from you of whether you wanted it on both facets, at  
14 least as I mentioned about the jurisdictional issue,  
15 the ripeness as well as sort of the statutory  
16 jurisdiction side of it, or purely the one we focus  
17 more of our time on.

18 JUDGE RENDAHL: I think that's your decision  
19 as to which facets you wish to address, but if the  
20 participants wish to provide written statements, would  
21 a week from today be too much burden, or would 10 days  
22 be better for the parties? I'm anticipating, given  
23 that you've all heard each other's arguments this  
24 morning, I'm anticipating just one round of briefing on  
25 the jurisdictional issue.

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1                   MR. QUEHRN: Your Honor, I have a question.  
2 When you say the "jurisdictional question," I view that  
3 purely as a subject matter jurisdictional question, not  
4 necessarily addressing -- assuming we decide that, say,  
5 in the affirmative that the Commission does have some  
6 jurisdiction, I think there is a procedural question  
7 that remains, and that is, how does the Commission go  
8 about to discharge that? Is it in the context of a  
9 declaratory judgment proceeding? Is it in the context  
10 of a adjudicatory process under the rule? Where they  
11 seem to get kind of bound up is with this notion of  
12 consent. Before I answer your question, maybe you  
13 could clarify a little bit, are we talking about the  
14 pure jurisdictional question as, again, we portrayed it  
15 as what the Tanner decision means?

16                   JUDGE RENDAHL: I would like to hear all  
17 facets of this matter, the, as you call it, the subject  
18 matter jurisdiction question as well as the issue of  
19 consent and in what form of proceeding this should be  
20 held. I think, as you state, they are all somewhat  
21 intertwined, and I think it's appropriate to include  
22 all of those issues, and again, the question of whether  
23 seven or ten days, given that it's the summer, and we  
24 do have a statutory time line that we are working  
25 under, so I would like to have things filed within a

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1 10-day period, but again, my question to you all is  
2 schedule wise, how does that work?

3 MR. COHEN: At the risk, I hope, of not  
4 offending Your Honor, Tacoma Power isn't used to be  
5 down in front of a Commission. We heard everybody say  
6 80 years of this and that, and when we start talking  
7 about issues that are of this magnitude, and I mean  
8 substantive magnitude, including form of proceeding,  
9 basic jurisdiction, some of these other things -- the  
10 City has also retained another lawyer, whose name I'll  
11 give to the court reporter, who is involved in this  
12 also, and I do not believe, with all due respect, that  
13 seven to ten days is adequate to address these things.  
14 These things are of critical importance to cities, and  
15 I'm sure Mr. Merkel will agree from his point of view.  
16 Am I mistaken that time periods can be extended for  
17 good cause?

18 JUDGE RENDAHL: Yes. The statute does  
19 provide that time periods may be extended for good  
20 cause, and the Commission does understand the  
21 importance to all the parties and the importance in  
22 resolving the matter, and I believe that under the  
23 declaratory ruling proceedings, there is an interest in  
24 resolving things as quickly as possible so there is  
25 that competing issue, so not to dismiss the importance

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1 of the issue to your client, it is important to the  
2 Commission as well. It's a very important matter.  
3 What time frame would be workable for the City of  
4 Tacoma?

5 MR. COHEN: I think three weeks. We are  
6 talking, and you will see this in the papers when we  
7 talk about the ripeness issue, what is the pressing  
8 need here? As Mr. Heid pointed out, there may be an  
9 election on the 19th. There may not be. It may go one  
10 way or the other way. This petition may go away, as it  
11 relates to the City of Lakewood.

12 JUDGE RENDAHL: Let's be off the record for a  
13 moment.

14 (Discussion off the record.)

15 JUDGE RENDAHL: While we are off the record,  
16 we discussed events and the City of Tacoma and if, in  
17 fact, anything occurs that would make this matter moot  
18 that the parties will immediately advise the Commission  
19 of that.

20 On the issue of briefing in this matter on  
21 the jurisdictional issue, understanding the importance  
22 to all the parties and understanding the summertime and  
23 parties' schedules, I believe three weeks is a bit long  
24 given that the parties gave a fairly eloquent  
25 explanation this morning on the record of their

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1 positions on jurisdiction. I do believe that two weeks  
2 would be appropriate, and the Commission, I think, has  
3 an interest in resolving this jurisdictional issue  
4 fully and fairly and also quickly so that we can  
5 proceed, if, in fact, the Commission does make a  
6 decision that requires this matter to go on in an  
7 adjudicative or declaratory proceeding that we can do  
8 so quickly and fairly. Mr. Bubenik?

9 MR. BUBENIK: Excuse me, Your Honor.  
10 Mr. Cohen will be away the second week and unable to  
11 work on the brief, so we would request your  
12 reconsideration of three weeks to allow for a briefing.

13 MR. QUEHRN: Your Honor, I'm sorry. At this  
14 point, we've had weeks already transpire wherein  
15 statements of law and fact were due and not provided.  
16 We've heard some discussion today, and again, I would  
17 go back to my other statement.

18 As I started thinking through my  
19 understanding of what we were briefing, the ripeness  
20 question came back in. I think we need to move this  
21 matter along, and I think if we are going to have a  
22 briefing schedule here, we also have to have a real  
23 clear statement of what it is we are briefing, or we  
24 need to treat this as a dispositive motion and have a  
25 moving parties brief and reply brief. Otherwise, I'm

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1 just afraid ships are going to pass in the night, and  
2 then we are going to come back here in two weeks and  
3 say, "Wait a minute. I didn't think that was in the  
4 realm of things that we were supposed to address  
5 affirmatively."

6 I'm getting very concerned about affording  
7 more time and also running off and writing briefs  
8 unless there is a very clear and definitive statement  
9 of what we are briefing.

10 JUDGE RENDAHL: First, as to what I would  
11 like to see the parties brief, I would like to have the  
12 parties' interpretation of RCW 54.48.030 or the Chapter  
13 54.48, and the interpretation of Tanner and whether the  
14 Commission has jurisdiction to decide a dispute between  
15 a regulated public utility and a municipal public  
16 utility over the service agreement, regardless of who  
17 brings that matter to the Commission.

18 Secondly, I would like the parties' positions  
19 on the question of if under the declaratory ruling  
20 statute, 34.05.240(7), if the City of Tacoma as a  
21 necessary party chooses not to provide consent to a  
22 declaratory ruling proceeding, how should the  
23 Commission proceed in this matter to resolve the issues  
24 of jurisdiction and the other issues in this case.

25 Third, if there are any issues, such as

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1 ripeness, that the parties wish to raise, they are free  
2 to raise those issues. Mr. Quehrn, is that concise  
3 enough?

4 MR. QUEHRN: Until we got to the last  
5 question, and I guess I would only say if issues are  
6 raised -- you said any issues any party wants to raise.  
7 If I don't anticipate all of those issues, I would  
8 certainly be in a position where I would want to go  
9 back and ask for an opportunity to respond. Ripeness  
10 has been raised, and we will address that. Maybe we  
11 could just see if there are any other issues, could we  
12 just get them on the table now?

13 JUDGE RENDAHL: Yes. Why don't we go back to  
14 see if any other parties have any other issues. I  
15 believe, as in other proceedings, if there is an issue  
16 of surprise that would come up in briefings, then  
17 parties are always offered an opportunity to respond to  
18 issues of surprise, so I will give another opportunity  
19 very briefly for participants here to state any other  
20 issues they might address in this jurisdictional  
21 briefing, but again, if there is an issue of surprise,  
22 anyone will be offered an opportunity to -- and then  
23 again, within a very short turnaround time. I would  
24 say within a week in response -- to address those  
25 issues.



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1           MR. QUEHRN: I would raise one other that we  
2 would be prepared to address affirmatively and that is  
3 the -- and Mr. Merkel and I were talking about this  
4 during the break. I understood the PUD Association's  
5 interest in this to run primarily to the jurisdictional  
6 question, and I also understood Mr. Merkel to say that  
7 if we get past the jurisdictional question, there is  
8 not an interest in PUD to get into interpretation of  
9 the contract. If that's the PUD's Association that  
10 their interest is limited to jurisdiction only, then I  
11 think that is an issue that we don't need to deal with  
12 in terms of briefing at this standpoint.

13           If the PUD Association, however, has interest  
14 beyond purely and simply the jurisdictional question, I  
15 think there is then their sufficient interest in this  
16 proceeding question comes before us, and I would like  
17 to have that on the list subject to Mr. Merkel's  
18 clarification that it is jurisdiction only, in which  
19 instance I don't think we have anything to brief.

20           JUDGE RENDAHL: I'm not sure I followed you  
21 on the last point, but I'll let Mr. Merkel respond and  
22 then maybe hear more.

23           MR. MERKEL: I think what he's talking about  
24 is that he and I during the break had a discussion  
25 about what the Association was interested in, and I

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1 said it was primarily the jurisdictional question, but  
2 that if we somehow got beyond that that the Association  
3 might have an interest in submitting a brief on  
4 interpretations of municipal law or the contract. In  
5 particular in my statement, I said that law and fact,  
6 that I was concerned about contracting away police  
7 powers or contracting away municipal authorities to go  
8 into the utility business might be a void agreement,  
9 and if we got beyond the jurisdictional issue, I might  
10 want to submit a brief on that question, but I don't  
11 think that would be covered in what you've asked for.  
12 I think that is way beyond the jurisdictional question,  
13 and that does not arise until the Commission is  
14 actually looking at the contract and deciding what the  
15 parties intended and whether that kind of agreement is  
16 lawful, so I would not intend to brief that on this  
17 brief due in either 14 or 21 days.

18 JUDGE RENDAHL: My understanding at this  
19 point is we are just discussing, Mr. Quehrn, the  
20 jurisdictional issue and that any further briefing or  
21 statements of law and fact that any parties may wish to  
22 provide, if we do get beyond this issue of  
23 jurisdiction, I think we will address that down the  
24 line.

25 I do want to get your ideas on scheduling

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1 should we need to go further. I realize that may seem  
2 somewhat tentative; however, I need to work with the  
3 commissioners in the event we need to go on and at  
4 least try to schedule potential hearing times with  
5 them, so once we resolve this issue of the  
6 jurisdictional brief, I would like to talk about  
7 scheduling.

8 Mr. Cohen, what date are you considering is  
9 best for you for filing this jurisdictional brief? You  
10 had said three weeks, and I'm looking at my August  
11 calendar, and I'm wondering if we could be discussing  
12 dates.

13 MR. COHEN: I apologize for asking for  
14 consideration. Three weeks from today would take it to  
15 the 23rd.

16 JUDGE RENDAHL: Yes. I'm wondering if that's  
17 the date you are requesting or some other date?

18 MR. COHEN: We'll live with that. Certainly,  
19 we'll live with anything Your Honor does, but I'm going  
20 to be away that whole previous week, and it's not  
21 something that I can change around. I guess, Your  
22 Honor, if I may make a comment that doesn't go  
23 specifically to the schedule, but it does relate to it.  
24 I guess I still am struggling with the sort of -- I  
25 understand the Commission has an interest in resolving

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1 issues as expeditiously as possible, but I don't see  
2 the emergency nature, because whether or not --

3 JUDGE RENDAHL: This has been pending since  
4 the 22nd of June when Puget Sound Energy filed this,  
5 and I believe the City of Tacoma has requested at least  
6 a three-week delay to file a response to the consent  
7 issue, and we are well beyond that time period.  
8 Understanding it is summer and people have schedules  
9 that they need to meet, the declaratory ruling statute,  
10 RCW 34.05.240, specifies that within 30 days after  
11 receiving the petition the Commission has to take some  
12 action, which the Commission did by setting this  
13 prehearing conference, and after doing that, it says no  
14 more than 90 days after receipt of the petition it has  
15 to enter an order or decline to enter an order or take  
16 some action, and the time limits may be extended for  
17 good cause. That 90-day period ends on September 20th,  
18 and I think the Commission would like to stay within as  
19 close as possible to that 90-day period, so that is, in  
20 a sense, the issue of urgency, and good cause is, in  
21 this case, the importance of the matter to all the  
22 parties and to the jurisdictional issue, but I think we  
23 do want to resolve this as quickly as possible.

24 I think if we can, in fact, have the parties  
25 file their jurisdictional statements by the 23rd, no

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1 later than the 23rd, certainly, and if there is any  
2 issue of surprise in any briefings that any parties  
3 provide, then certainly within a week after that by the  
4 30th, I would expect any responses, but I would like to  
5 talk about scheduling this matter further, and assuming  
6 we do get beyond the jurisdictional question and, in  
7 fact, the Commission chooses to proceed, I would like  
8 to know what your schedules look like for September  
9 for an adjudicative proceeding or declaratory  
10 proceeding, however we proceed in this proceeding.  
11 Let's be off the record for a scheduling discussion.

12 (Discussion off the record.)

13 JUDGE RENDAHL: While we were off the record,  
14 we had a discussion about briefing deadlines as well as  
15 further scheduling, and the issues of the  
16 jurisdictional briefing as we discussed earlier in  
17 terms of the contents of those briefings will be due on  
18 Wednesday, August 23rd, by the end of the day here at  
19 the Commission, and if there are any matters of  
20 surprise that are raised in that single round of  
21 briefing, then parties will have an opportunity to  
22 address those issues a week later on the 30th.  
23 However, I'm not giving that opportunity as a standard  
24 response time. I believe we've had sufficient  
25 discussion this morning on what jurisdictional issues

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1 are, and I don't expect to have any issues of surprise,  
2 but if there are any, there is that opportunity.

3           Then we will schedule a prehearing conference  
4 either on Wednesday, September the 13th, or Thursday,  
5 September the 14th, and Mr. Goltz and Mr. Merkel will  
6 advise me of their schedule and we will plan  
7 accordingly, and I will send out a prehearing  
8 conference order that will set forth that schedule for  
9 the next prehearing conference in the event we need  
10 one. The Commission will take under advisement the  
11 arguments on jurisdiction and render a decision  
12 following briefing. Are there any other matters that  
13 we need to discuss here this morning?

14           MR. COHEN: I think we forgot to thank Your  
15 Honor for rescheduling this conference, so I wanted to  
16 express our appreciation on that one.

17           JUDGE RENDAHL: That's no problem.

18           MR. COHEN: The other thing I think we wanted  
19 to do for the record is Tacoma Power had retained  
20 another attorney, and is it appropriate to give the  
21 court reporter his information as well?

22           JUDGE RENDAHL: Why don't you read that  
23 information into the record now.

24           MR. COHEN: His name is John A. Cameron,  
25 Davis, Wright, Tremaine, LLP, 1300 Southwest Fifth

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1 Avenue, Suite 2300, Portland, Oregon, 97201; telephone,  
2 (503)778-5206; fax, (503)778-5299.

3 JUDGE RENDAHL: Thank you. Given that there  
4 are three counsel representing the City of Tacoma,  
5 please designate one of you to be the person that the  
6 Commission will serve matters on to and that other  
7 parties will serve, and then you can distribute amongst  
8 yourselves just for ease of paper distribution. Who  
9 should be the primary contact to the Commission?

10 MR. BUBENIK: I will do that, Mark Bubenik.

11 MR. GOLTZ: I just wanted to confirm that the  
12 issue of ripeness is a legitimate issue for this  
13 jurisdictional briefing?

14 JUDGE RENDAHL: Yes. Having looked at the  
15 declaratory ruling statute, I think there is also an  
16 issue of -- in sub 1, 34.05.240 sub 1(b) that there is  
17 an actual controversy arising from the uncertainty such  
18 that a declaratory order will not be merely an advisory  
19 opinion. I think that issue is appropriate under the  
20 statute and so please address your comments on that  
21 issue. Are there any other matters to come before us  
22 this morning? Hearing none, we will be in recess until  
23 the next prehearing conference, if we shall need one.  
24 Thank you very much.

25 (Prehearing conference adjourned at 12:30 p.m.)