

01748

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BEFORE THE WASHINGTON UTILITIES AND

2

TRANSPORTATION COMMISSION

3

AIR LIQUIDE AMERICA)
CORPORATION, AIR PRODUCTS AND)

4

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

5

EQUILON ENTERPRISES, LLC,) Pages 1748 to 1855
GEORGIA-PACIFIC WEST, INC.,)

6

AND TESORO NORTHWEST CO.,)
)

7

Complainants,)

8

vs.)

9

PUGET SOUND ENERGY,)
)

10

Respondent.)

-----)

11

In the Matter of)

12

Petition of Puget Sound) Docket No. UE-001959
Energy, Inc., for an Order) VOLUME VIII

13

Reallocating Lost Revenues) Pages 1748 to 1855
Related to any Reduction in)

14

the Schedule 48 or G-P)

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Special Contract Rates,)
_____)

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17

A Hearing in the above matter was held on

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January 16, 2001, at 10:20 a.m., at 1300 South Evergreen

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Park Drive Southwest, Olympia, Washington, before

20

Administrative Law Judge DENNIS MOSS and Chairwoman

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MARILYN SHOWALTER and Commissioner RICHARD HEMSTAD.

22

23

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Joan E. Kinn, CCR, RPR

25

Court Reporter

1 The parties were present as follows:

2

3 THE COMMISSION, by DONALD T. TROTTER and
4 ROBERT D. CEDARBAUM, Assistant Attorneys General, 1400
5 South Evergreen Park Drive Southwest, Olympia,
6 Washington 98504-0128.

7 PUGET SOUND ENERGY, INC., by STAN BERMAN and
8 TODD GLASS, Attorneys at Law, Heller Ehrman White &
9 McAuliffe, LLP, 701 Fifth Avenue, Suite 6100, Seattle,
10 Washington 98104.

11 AIR LIQUIDE AMERICA CORPORATION, AIR PRODUCTS
12 AND CHEMICALS, INC., THE BOEING COMPANY, CNC CONTAINERS,
13 EQUILON ENTERPRISES, LLC, GEORGIA-PACIFIC WEST, INC.,
14 and TESORO NORTHWEST COMPANY, by MELINDA DAVISON AND
15 BRADLEY VAN CLEVE, Attorneys at Law, Davison Van Cleve,
16 P.C., 1300 Southwest Fifth Avenue, Suite 2915, Portland,
17 Oregon 97201, and by MICHAEL EARLY, Attorney at Law,
18 1300 S.W. 5th Ave., #1750, Portland, OR 97201.

19 THE PUBLIC, by SIMON J. FFITCH, Assistant
20 Attorney General, 900 Fourth Avenue, Suite 2000,
21 Seattle, Washington 98164-1012.

22 PUBLIC UTILITY DISTRICT NUMBER 1 OF WHATCOM
23 COUNTY, by BRIAN WALTERS, 817 Rucker Avenue, Everett,
24 Washington 98201.

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P R O C E E D I N G S

JUDGE MOSS: Good morning, everyone. We are convened once again in the matter styled Air Liquide et al. against Puget Sound Energy, Docket Number UE-001952. Last night, but for a few housekeeping matters, we concluded the evidentiary presentations by the parties, their various direct and cross cases. Today we are convened for the purposes of oral argument.

We established a procedure last night in consultation with the parties that provides the Complainants will have an opening argument of 20 minutes duration. I will be timing that with my watch. I have prepared a one minute warning for counsel and a time up warning. I will ask you when you see this one to begin to bring that last pressing comment to a conclusion within the 60 seconds, please.

Following the argument by Complainants, the Staff and Public Counsel have been allotted 20 minutes to divide as they see fit among the three counsel participating for those parties. And then PSE will have 20 minutes to present its argument.

We then have scheduled one hour for questions from the Bench, and that will complete this particular phase. And then, as I mentioned, I will ask the parties to stay around, and we will do some housekeeping.

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1 I should mention one more thing. I afforded
2 parties who did not participate actively in the
3 evidentiary phase but who nevertheless remained parties
4 in the proceeding to submit this morning by 9:00 a.m. a
5 written statement of ten pages or less that they wished
6 to make in lieu of oral argument. We did receive a
7 statement from Western Pulp and Paperworkers which we
8 have distributed, and I have additional copies for
9 anybody who needs one.

10 So with all that said, I believe we are ready
11 if counsel are ready. All right, Ms. Davison.

12 MS. DAVISON: I fell like I should be getting
13 up.

14 JUDGE MOSS: The podium has been removed, so
15 I guess we will argue from our seats.

16 CHAIRWOMAN SHOWALTER: If you feel better
17 standing up, that's okay.

18 MS. DAVISON: Actually I have --

19 CHAIRWOMAN SHOWALTER: Actually, the
20 microphone won't be available to you if you stand up.

21 MS. DAVISON: Right. This is just a quick
22 handout.

23 JUDGE MOSS: This is a summary of the issues
24 that has been distributed by Ms. Davison.

25 MS. DAVISON: Good morning. As a preliminary

01754

1 matter, I think it's appropriate that we express our
2 appreciation to the Commission for their expedited
3 consideration of these very difficult issues. We also
4 appreciate the hard work and the long hours of Judge
5 Moss, the Commission Staff, and Public Counsel. We
6 appreciate the diligent efforts of Judge Wallis to find
7 a mediated solution to the problem. But most of all, we
8 appreciate your thoughtful consideration of all the
9 issues that are being presented to you for your decision
10 in this case.

11 Puget Sound Energy is a monopoly utility and
12 is subject to the regulation of this Commission. It's
13 the responsibility of the Commission to ensure that
14 rates charged by PSE are at all times just and
15 reasonable. This is the basic tenet of utility
16 regulation, which applies just as equally to Schedule 48
17 as it does to any other PSE tariff. It does not matter
18 that the 48 customers signed a service agreement.
19 Again, it is a tariff of general applicability.

20 Just as any rate commitment by any utility
21 always contains a reopener if the utility qualifies for
22 interim rate relief, any customer commitment is subject
23 to review if the rate is no longer just and reasonable.
24 If you conclude that the 48 and GP Special Contract
25 rates are no longer just and reasonable, you have a

01755

1 legal obligation to set a just and reasonable rate now.
2 The terms just and reasonable have a well
3 defined meaning under state and federal case law. The
4 Farmers Union case cited in our prehearing brief holds
5 that just and reasonable means a rate that provides the
6 utility an opportunity to earn a reasonable rate of
7 return based on its cost. A market based rate can be
8 used as a substitute for cost based rates of the
9 utility, but only when the market will charge rates
10 within a reasonable range.

11 The Mid-C Index is unquestionably broken,
12 giving PSE revenue well above its costs. The evidence
13 of Mr. Schoenbeck and Mr. Lazar on this point remains
14 unrefuted by PSE. The market has failed. FERC reached
15 this conclusion in its December 15th order. Remarkably,
16 DOE secretary Richardson issued an emergency order
17 requiring Northwest generators to sell power to
18 California. There is little doubt that over the last
19 eight months, the wholesale power market has
20 fundamentally ceased to function as a market. FERC has
21 dismissed PSE's complaint. FERC is even less likely now
22 to impose a rate cap for Northwest transactions. Since
23 the market has failed, the result is that the Mid-C 48
24 tariff rates should no longer apply. And under the
25 holding of Farmers Union, the Commission must set rates

01756

1 based on PSE's cost of serving these customers.

2 These conclusions are separate and apart from
3 whether an emergency exists. The emergency adjudicative
4 statute is merely a tool available to this Commission to
5 act in an expedited manner, as the Commission did when
6 U.S. West was implementing new area codes. Is there an
7 emergency within the definition of the statute here?
8 Absolutely. Mr. Berman asked many witnesses about
9 whether they should go out and buy fire insurance when
10 their houses are on fire. Well, we disagree with the
11 point that Mr. Berman was trying to illustrate. We do
12 agree with the analogy. Our houses are burning. And
13 when your house is burning, you don't go out and buy
14 insurance. That's silly. Instead, you call the fire
15 department, and you try with the help of the fire
16 department to save your house, and that's what we're
17 doing here.

18 The emergency statute does not require that
19 the house burn to the ground before you have an
20 emergency. That would be poor public policy. It
21 requires that there be a threat of immediate danger of
22 harm to the public health, safety, or welfare. Hundreds
23 of people are out of work. Certain products are either
24 not being produced, or they're being produced in smaller
25 quantities.

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1 Perhaps most compelling is that virtually all
2 Complainants have either brought it temporary emergency
3 backup generators or they are considering taking such
4 action to provide power for their industrial operations.
5 This is in and of itself sufficient to demonstrate that
6 we are in an emergency. These generators are not
7 designed to operate as a full-time source of power to
8 industrial operations. Industry has never before been
9 forced to take such extreme actions. Mr. Crawford
10 stated that the actions his company has taken are not
11 efficient. They are terribly inefficient, but they are
12 necessary to keep these companies in business. There
13 was not one shred of evidence to suggest that these
14 diesel generators are being brought in for any reason
15 other than because these companies can not operate with
16 even a modest profit at the rates that they are being
17 charged for electricity under the Mid-C Index. Reliance
18 on diesel generators is no way to solve our energy
19 crisis. Instead, this will cause its own energy crisis.
20 The public welfare has already been harmed. Without
21 immediate additional action, additional harm will
22 happen.

23 Much of the evidence in this case is
24 unrefuted. PSE was on notice from the beginning that
25 this case would address issues beyond simply whether an

01758

1 emergency exists. PSE seemed to believe that if it
2 didn't put evidence on other issues in this case, a
3 record would not exist upon which the Commission could
4 decide the case. We have heard repeatedly from Mr.
5 Berman about how his client has been prejudiced by this
6 proceeding. It's amazing given the dollars at stake
7 here that PSE would be so cavalier.

8 We have tried repeatedly to resolve this
9 issue with PSE. We utilized the services of the
10 Commission to mediate this dispute. PSE refused to put
11 any offer on the table. It was apparent based on
12 Mr. Gaines's testimony why that's the case. Mr. Gaines
13 confirmed that no matter how high the rate gets or how
14 broken the market becomes, these Schedule 48 and Special
15 Contract customers must pay the rate.

16 This leaves only one alternative. The
17 Commission must decide the case based on the record that
18 the Complainants for the most part have created. What
19 does that record in this case show?

20 The Mid-C Index is highly correlated to the
21 California market, which is in a complete state of
22 disarray. The Mid-C Index is based on a dysfunctional
23 wholesale market. PSE is the most significant
24 participant for the Mid-C Non-Firm Index trades. The
25 Mid-C Non-Firm Index is even more thinly traded than two

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1 years ago when PSE itself argued that the index should
2 not be used.

3 Based on PSE's own forward price curves,
4 according to Mr. Lazar, PSE will collect over \$400
5 Million more from these customers than it would have
6 collected from these customers under Schedule 49 in 2001
7 alone. PSE has sufficient power to serve Schedule 48
8 customers while resorting to little or no market
9 purchases. PSE is overearning. Their record strongly
10 suggests that it is overearning based on the earnings
11 from the Schedule 48 and Special Contract customers
12 alone.

13 The temporary diesel generators are a poor
14 temporary stopgap to address the obscene Mid-C prices.
15 Few, if any, will be allowed to run longer than 90 days.
16 Without relief, additional jobs will be lost, certain
17 products will be in short demand, other products will be
18 needlessly expensive, all at the cost of the public
19 welfare.

20 Why would all of this be allowed to occur?
21 The answer I have heard is because these customers
22 signed up for this. They got what they wanted, market
23 based pricing. That is wrong. PSE proposed Schedule 48
24 and the index mechanism to the customers as an interim
25 step to full open access. These customers did not

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1 bargain for a thinly traded dysfunctional market. They
2 bargained for market access, which has been denied to
3 them.

4 The merger settlement agreement which sets
5 forth the commitment to market access was not filed with
6 the Commission. However, the Commission is well aware
7 of that commitment and makes reference to the intent of
8 the parties that Schedule 48 was a transition to
9 complete market access in the order approving 48. Make
10 no mistake, the customers never bargained for a buy-sell
11 arrangement. That is not market access.

12 What are the remedies the Commission should
13 impose to correct an unjust and unreasonable rate? The
14 Complainants have suggested several. Returning to
15 Schedule 49 with a proceeding to determine if a
16 surcharge is necessary to keep all other customers
17 whole, that is the result required by the Farmers Union
18 case. Another is imposing a cap on the Mid-C Index
19 rate. Mr. Schoenbeck suggests the use of a natural gas
20 index with a generous margin to PSE. Staff and Public
21 Counsel suggest a soft cap at \$125 for 90 days. Staff's
22 proposal also has a generous margin built in to PSE and
23 the ability to go above the cap if PSE can prove that it
24 is in the market to serve these customers. It's
25 virtually a no-lose situation for PSE.

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1 The Staff/Public Counsel proposal is
2 acceptable to Complainants provided that if no solution
3 is in place at the end of the 90 day period, the cap be
4 extended for another 90 days.

5 As we pointed out in our brief, we believe
6 that you may act on this complaint either under the
7 basic complaint statute or under the emergency
8 adjudicative statute. We are seeking a finding in phase
9 one of this proceeding that the Schedule 48 rate is
10 unjust and unreasonable. If you do not believe that the
11 Complainants have met their burden of proof, then you
12 must dismiss this case at this point.

13 Under the path we proposed in our complaint,
14 phase two of this case is a remedy phase. The complaint
15 is seeking relief during the relatively short period
16 between now and the end of the Special Contracts and
17 Schedule 48. If we don't receive relief now, then as a
18 practical matter, we will not receive any relief in any
19 time frame that will provide relief to these
20 Complainants before the expiration of their Special
21 Contracts and the Schedule 48 service agreements.

22 Other proceedings are already underway to
23 address the long-term rate for these customers. We do
24 not believe that this proceeding should be used for that
25 purpose. That's not the intent of the complaint. We

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1 believe that we have presented ample evidence that the
2 rate is unjust and unreasonable based on the Mid-C
3 Indexes. There is little more we could provide to you
4 to demonstrate the Schedule 48 rate is unjust and
5 unreasonable in a more drawn out proceeding.

6 If you agree, then we are asking for
7 immediate relief subject to refund or surcharge based on
8 the results of a remedy phase or what we have termed as
9 phase two of this proceeding. Mr. Berman raised
10 repeatedly whether the analysis in this case is of "rate
11 case quality", whatever that standard might be. There's
12 no basis for any distinction that the Commission might
13 draw between the analysis presented here in this
14 proceeding and that what might be presented at a full
15 blown rate case. You do not need a rate case to
16 conclude that the Mid-C rate is unjust and unreasonable.
17 Such a conclusion would undermine the intent of the
18 complaint statute.

19 In conclusion, our commitment to the other
20 customers remains as we stated from the beginning of
21 this case. We are not seeking any remedy that would
22 harm other customers. As Mr. ffitich calls it, the
23 Schedule 48 guarantee remains intact. We are asking
24 that a rate that is so obviously unjust and unreasonable
25 be replaced with something more rational. Certainly

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1 Staff's proposal is no windfall to Complainants. This
2 is the bare minimum relief to keep most Complainants in
3 business. Schedule 48 was an experiment that through no
4 fault of PSE or the customers has failed. The customers
5 are paying a very high price for this failed experiment.
6 We urge you to provide some immediate relief. Thank
7 you.

8 JUDGE MOSS: Thank you, Ms. Davison.
9 Mr. Cedarbaum.

10 MR. CEDARBAUM: Thank you, Your Honor. I
11 also have a handout that I would like to provide. There
12 are five copies there.

13 Thank you, Your Honor. As we indicated last
14 night, I will be addressing the emergency issue and the
15 issue as to whether or not the Commission can act, has
16 legal authority to act absent an emergency in this case.
17 Mr. Trotter will discuss remedy issues. And there are
18 four points I would like to make on the emergency issue.

19 The first one, I have provided a handout
20 which summarizes the Staff conclusion based on its
21 review of all the testimony from the Complainants,
22 customer witnesses, that staff has concluded that there
23 is no immediate danger to the public health, safety, or
24 welfare under RCW 34.05.479, and there are five general
25 reasons for that that are listed.

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1 First, we found that certain Complainants
2 have neither terminated nor interrupted operation of
3 their facilities or reduced their labor force. Second,
4 certain Complainants which have curtailed operations
5 have done so without reductions in their labor force.
6 Those Complainants that have curtailed operation,
7 reduced production, or laid off employees have done so
8 for profit reasons despite their continued ability to
9 pay increased energy costs billed by PSE. Fourth, there
10 is no shortage in the region of products produced by the
11 Complainants which are important to the public health,
12 safety, and welfare, specifically gases used by
13 hospitals, propane, jet fuels, that sort of thing. And
14 finally, certain Complainants have the ability and have
15 actually acted on that ability to pass along increased
16 energy costs to their own customers.

17 And then the handout has a catalog of
18 evidence in this case with citations both from the
19 Complainants and generally speaking of the evidence that
20 were ruled upon for those conclusions. So I didn't want
21 to belabor the record at this point with trying to argue
22 the evidence. I thought it was more helpful just to
23 hand this out and to summarize it.

24 The second point is with respect to there has
25 been reference to the U.S. West emergency adjudication

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1 in Docket UT-950446. I want to correct the record on
2 one point to begin with. In her testimony,
3 Ms. Linnenbrink indicated her understanding that that
4 case involved 911 service. It did not. That was a
5 mistake on her part for which she apologizes. However,
6 I think that case is still distinguishable for three
7 reasons.

8 One, there was no challenge to the Commission
9 having an emergency adjudication proceeding in that
10 case, so we never really addressed the issue right on
11 point. We certainly have that issue in the case before
12 you now. The case also affected the entire 360 area
13 code area, certainly a wider scope of the public than we
14 think that the case before you presents. And also in
15 that case, there was discussion in the Commission's
16 order that the Commission found that -- and that case
17 involved whether the Commission should delay mandatory
18 conversion to the 360 area code. The Commission had
19 discussion in the order that not delaying the conversion
20 would be critical and a devastating load to many
21 businesses. And we would submit that based on the
22 evidence that we have reviewed, that is not the case in
23 this situation.

24 The third point on the emergency issue is
25 there was some question during the hearing about what

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1 does it mean to be immediate under the statute. My
2 analysis of the case law is not particularly
3 enlightening on that point. I didn't find a whole lot
4 of help. So I as a last resort reverted to the
5 dictionary.

6 And the definition in Webster's for immediate
7 is, acting or being without reference to the
8 intervention of another cause, object, or agency;
9 occurring, acting, or accomplished without loss of time;
10 and made or done at once. And that is consistent with
11 the definition that or the analysis that Staff applied
12 in finding no immediate danger to the public health,
13 safety, or welfare.

14 The final point on the emergency issue, and
15 this is with respect to the 2.4 megawatt availability
16 issue in Schedule 48, I think that comes up in the
17 emergency area because of -- and it's we're talking
18 about the City of Anacortes here, because if Anacortes
19 shouldn't have been on the schedule, then perhaps
20 there's another way of dealing with their problems
21 rather than this complaint preceding.

22 However, we have had a chance to look at the
23 tariff even in light of the language that was in the
24 order, which perhaps makes the tariff language itself a
25 little bit ambiguous, but looking at the tariff, it

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1 appears fairly clear from its plain meaning that it
2 would apply to all customers at high voltage, whatever
3 their load would be. So we're in agreement with the
4 company on that. And I, again as a last resort, looked
5 at Rules of Statutory Construction, and there's a rule
6 called the last antecedent rule, which I actually never
7 heard of until this case, which says that:

8 Unless contrary intent appears,
9 qualifying words and phrases refer to
10 the last antecedent. However, presence
11 of a comma before the qualifying phrase
12 is evidence that the qualifier applies
13 to all antecedents.

14 For citations, we have 139 Wn.2d 199 and 127
15 Wn.2d 774. And basically what that means is that if you
16 apply that rule to the availability section of Schedule
17 48, the 2.4 megawatt test applies just to the primary
18 voltage portion of the tariff.

19 Moving on to the issue of whether or not even
20 if you were to -- if you would agree with Staff and in
21 this case the Company that there was not an emergency,
22 does the Commission have the legal authority to act in
23 the absence of an emergency? And we believe that the
24 answer to that question is yes, and there are really
25 three subparts to that issue.

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1 The first subpart is, has the Commission
2 utilized and completed or utilized the appropriate
3 process that would be necessary for the Commission to
4 adopt a remedy in the absence of an emergency? The
5 answer to that question is yes, the Commission has
6 invoked the complaint statute. The Complainants have
7 invoked the complaint statute, 80.04.110, and it
8 continues into 80.04.120, which all that that requires
9 is ten day notice of a hearing and a hearing for
10 evidence and testimony. You have done that. So even in
11 the absence of an emergency, we have complied with the
12 complaint statute. You can go forward.

13 The second subpart is what are the
14 substantive standards that must be met in order for you
15 to go forward in the absence of an emergency.
16 Mr. Trotter will get into this in more detail, but it's
17 our opinion that the emergency adjudication statute is
18 just a procedural remedy, allows you to act quicker, but
19 that it is not trumped by the just, fair, reasonable,
20 and sufficient statute, so that is the test that you
21 must apply in any event actually, whether or not there's
22 an emergency. It is our belief the Staff's proposal
23 meets that test and that, again, that does not require
24 rate case analysis. We believe that we have met the
25 test with the analysis that we have done.

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1 The third point on whether the Commission can
2 act or not absent an emergency is what does the notice
3 of hearing say. And that is the notice of hearing that
4 was issued December 18, 2000, in this docket. Staff
5 read the notice to be broad enough to include remedies
6 in absence of an emergency. The notice specifically
7 listed issues, but said that the issues included the
8 issues that were listed, but that they were not to be
9 limited to those issues.

10 Also, the issues that were actually listed
11 there included remedies that the Commission grants
12 without an emergency situation, and there were questions
13 that we were asked to research concerning Commission
14 authority on temporary rates and interim rates.
15 Certainly with respect to temporary rates, those are
16 done without an emergency situation. They're done with
17 a hearing, but still without an emergency. And third,
18 the Complainants, again, certainly teed up the issue in
19 their complaint as to whether or not Schedule 48 as it
20 exists is just, fair, reasonable, and sufficient.

21 So for those reasons, we interpreted the
22 notice of hearing to be broad enough to encompass
23 remedies even without a finding of an emergency. And
24 that taken together with the complaint process having
25 been undertaken, and provided that you reach the

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1 appropriate substantive conclusions of law, which we
2 think you can, we think that you can go forward with the
3 remedy absent an emergency.

4 I will turn it over to Mr. Trotter now.

5 MR. TROTTER: Thank you. For my argument, I
6 would like to touch on just a couple of points on the
7 issue of can the Commission do it in addition to what
8 Mr. Cedarbaum said. The issue is should it, and then
9 what should it do. I may reverse those last two,
10 because the Bench specifically sought comment on the
11 Staff proposal, and given the time limits, I would like
12 to get to that.

13 On the issue of can it and in addition to
14 what's already been said, and we have briefed this issue
15 as well with respect to rate plan and so on, I would
16 like to focus the Commission's intention on its own
17 order in UE-981410, which was the complaint case
18 involving these same parties. And we quoted on the
19 record from Puget's brief in that case and your order in
20 that case on page 17, where the Commission and the
21 Company were saying that if there's a problem with the
22 index, you can file a complaint.

23 Well, there appears to be a problem with the
24 index; they filed a complaint. Puget's witness said,
25 well, gee, they asked for this, and they got it. To

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1 some extent, that's true. And up until the date they
2 filed the complaint, I think they're stuck with what
3 they paid up until the date of the complaint. But going
4 forward from that date, it would appear that the process
5 that they invoked was exactly what was contemplated by
6 the Commission in its order, which postdated the rate
7 plan order and certainly is a concession by Puget,
8 expressed concession by Puget that this is the
9 appropriate procedure.

10 Moving on then to the proposal itself, it is
11 an Exhibit, 1001. It's a Staff and Public Counsel joint
12 proposal. It's been characterized as a soft cap, which
13 will place a cap on the index pricing in Schedule 48 at
14 \$125, and there are several examples shown in that
15 exhibit as to how it works. But both Mr. Lazar and
16 Mr. Buckley noted that this is still very generous
17 recovery by PSE, and it includes when the cap is above
18 \$125, if Puget's costs are, as the example is stated
19 here, \$75, they get an additional \$25 additional margin
20 recovery. And certainly if the cap is above \$125 and
21 the limit is at \$125, there is still substantial
22 recovery. That is an extremely high price to pay, and
23 Puget gets in large part the benefit of that.

24 There was some discussion about how to
25 measure it, and Mr. Lazar suggested a one month measure,

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1 and if you remember, Exhibit 605, the attempt would be
2 to measure the cost of that bar chart between the two
3 lines, the cost of serving that 300 megawatt load, we
4 think -- very strongly believe that a reasonable
5 estimate of that cost can be made. Puget historically
6 has computed that cost, and that should be the measure
7 on a one month basis. Mr. Lazar testified that
8 according to his experience, at no time has Puget's
9 costs on a total month basis exceeded \$125. So we
10 believe there's every reason to conclude that the rate
11 would be fully compensatory.

12 This is also a short-term proposal. Public
13 Counsel's recommendation was 90 days, and the Staff can
14 concur in that and perhaps subject to renewal to see if
15 it works or it does not work.

16 There had been some comments about the
17 proposal. One was that it's not -- that it is related
18 to cost, and Schedule 48 was not intended to be. Well,
19 it is related to cost, but only in a very limited way,
20 and only when the index is above \$125 is it related to
21 cost. And I think you need to look at the proposal in
22 the spirit in which it was offered. Both Mr. Lazar and
23 Mr. Buckley saw the California affect on the prices at
24 the Mid-C, the FERC conclusion that the index is broken,
25 PSE's own testimony in the last docket, UE-981410, this

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1 is an inappropriate index. There is a problem.

2 We're not intending to return these customers
3 to Schedule 49 in any way, shape, or form, and so what
4 the focus was was to look at the chart in Exhibit 1003,
5 I believe it is, and to take out the extreme and
6 unanticipated spikes in the index. Now when you do
7 that, there are certain collateral effects of doing
8 that, and that has some of the impacts that the Bench
9 and others have questioned. But it is intended to do so
10 in the most modest way we could think of to eliminate
11 the large spikes.

12 It has been suggested that this eliminates
13 the up side potential. Well, \$125 is a lot of up side
14 potential, and certainly according to Staff's exhibits
15 put in through Ms. Linnenbrink will allow Puget to earn,
16 an opportunity to earn a fair return. It is an
17 appropriate way to deal with the extreme volatility, the
18 unprecedented volatility that we have seen. It is a
19 reduction in revenue for Puget. We have documented that
20 in Exhibit 903-C. But it's not a cost shift, because
21 Puget will still be able to earn a fair return, and we
22 don't believe there's a burdon on any other class of
23 customers. The Staff's analysis done through
24 Ms. Linnenbrink does show that this rate will be fair,
25 just, reasonable, and sufficient. It will keep

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1 customers on the system and diesels off the system,
2 among other things.

3 Is this a rate case quality presentation?

4 Let me respond this way, since Mr. Cedarbaum has touched
5 on it. When companies apply for interim rate relief,
6 they don't prepare rate case quality presentations, and
7 they get substantial relief. When companies ask for
8 temporary rates subject to refund, by definition, there
9 is no rate case at all, yet substantial rate relief is
10 imposed. If this standard is imposed, it should be
11 imposed evenly across all of those forms of relief, and
12 we suggest that's probably something the utilities would
13 not appreciate.

14 We do believe this proposal is the best we
15 can propose to date. Is it perfect? Perhaps not. Is
16 it good enough? We think it is, and we think it's fully
17 defenseable based on the record in this case.

18 Should the Commission impose a remedy at all?
19 We do believe that there is substantial evidence to show
20 the market is flawed and it's affecting this rate. The
21 exhibits put in from Puget's own witnesses in the
22 UE-981410 case show that it's a thinly traded index with
23 high market share for Puget, and that gives it market
24 power in that index. And according to Mr. Gaines,
25 nothing has changed from his criticisms in that case.

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1 Exhibits 616-C and 617-C show extremely high margins
2 over incremental costs for this load. The Company
3 criticized the assumptions, but they would have to be
4 wrong by orders of magnitude to change the basic
5 presentation in those exhibits. Coupled with the large
6 volatility never before seen, the Commission is
7 justified in this docket to do a remedy.

8 And then I will turn it over to Mr. ffitch to
9 add to that.

10 MS. DAVISON: Your Honor, I just wanted to
11 quickly note that some of the material that's --
12 actually, the deposition of Randall Clancy is a
13 confidential deposition, and I'm just concerned, I don't
14 want to get past the fact that the material on page two
15 should be treated confidentially. I'm very sensitive.
16 Fortunately Air Liquide is not in the room, so they
17 don't have the data. But there are a couple of points I
18 don't want Air Liquide to know.

19 JUDGE MOSS: Anything that's reflected in the
20 notes that reflects confidential information will cause
21 those notes to be treated themselves as confidential,
22 and parties should act accordingly.

23 Since we're taking a little bit of a hiatus
24 here, Mr. ffitch, you understood that our procedures
25 contemplated that Staff and Public Counsel would share

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1 the 20 minutes allocated?

2 MR. FFITCH: That's correct, Your Honor.

3 JUDGE MOSS: Because Mr. Cedarbaum and

4 Mr. Trotter used 19 of the 20 minutes.

5 MR. FFITCH: Mr. Trotter has just so advised

6 me.

7 JUDGE MOSS: But I think it would be

8 reasonable, and we are a little ahead of schedule, for

9 you to have a couple of minutes to say your piece.

10 MR. FFITCH: I will try to abbreviate my

11 comments.

12 JUDGE MOSS: We will be flexible, and I don't

13 think anyone will claim that they are being prejudiced

14 by that. So go ahead, please.

15 MR. FFITCH: Thank you, Your Honor. Simon

16 ffitch, Assistant Attorney General for the Office of

17 Public Counsel.

18 As a first principle in this case, the

19 Commission must protect Puget Sound Energy's core

20 customers according to the terms of the Schedule 48

21 guarantee. Stripped down to its essence, that guarantee

22 told residential and other core customers of Puget Sound

23 Energy that they would not pay more as a result of the

24 rate concession allowed to industrial customers in

25 Schedule 48, which was adopted with the full concurrence

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1 of Puget Sound Energy.

2 In fact, when Schedule 48 was adopted
3 originally, it was fully expected to result in lost
4 revenue to Puget Sound Energy. And, in fact, it did so.
5 It resulted in lost revenues to the Company below the
6 existing revenue levels of Schedule 49 and other
7 tariffed rates. And even with that dire scenario in
8 view, Puget Sound Energy customers were given a
9 guarantee that their rates would not be affected, and
10 it's critical that this promise continue to be honored.

11 However, Public Counsel understands that
12 there are urgent circumstances, unanticipated
13 circumstances in today's Western energy market and that
14 those circumstances affect all of Puget Sound Energy
15 customers and for industrial customers and their
16 employees. And so for that reason, we have jointly
17 proposed and supported a rate cap in this case, because
18 we believe that it can be implemented without disturbing
19 either the Schedule 48 guarantee or the rate plan.

20 In the pleadings, the briefs, and the
21 statements in this record, the Complainants themselves
22 have made clear they do not challenge either the
23 guarantee or the rate plan, and Ms. Davison has just
24 reiterated that again this morning. If the Commission
25 concludes differently and decides that the adoption of a

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1 cap or any other remedy proposed in this case would
2 require abrogation of the Schedule 48 guarantee or the
3 rate plan, Public Counsel would strongly oppose the
4 adoption of any such remedy.

5 However, and this is where I will abbreviate
6 my remarks and simply agree with those of my colleagues
7 who are representing Staff, we believe that this cap can
8 be adopted without any change or shift of costs to other
9 customer classes. It simply adjusts revenue levels, but
10 we believe that as supported by the testimony of
11 Mr. Lazar, Mr. Schoenbeck, and Ms. Linnenbrink, it can
12 do so without affecting the Company's ability to earn a
13 reasonable rate of return.

14 Given the time limits that have been imposed
15 on us by the Bench, I will simply conclude my remarks by
16 asking the Commission to remember the Schedule 48
17 guarantee in this case as it conducts its deliberations.

18 JUDGE MOSS: Thank you, Mr. ffitich.

19 Mr. Berman.

20 MR. BERMAN: Thank you. First, I will
21 address the issue of emergency, which is the subject of
22 this hearing. I would note that at page 185 of the
23 transcript in the prehearing discussions, Judge Moss
24 advised us that the issues in the case were, one, is
25 there an emergency, and two, if so, what do we do about

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1 it. And that was the same conference in which we
2 established that witnesses would have to be named by
3 December 26. If any relief is to be offered that
4 relates to issues that are not based on an emergency,
5 that would be in violation of the procedures that were
6 established and implied to Puget Sound Energy and would
7 indeed be a deprivation of our procedural rights.

8 Addressing the emergency, it's hard to deny
9 that there is an emergency of sorts in that the
10 Secretary of Energy has declared an emergency in power
11 markets in the West. The Secretary of Energy has
12 required utilities throughout the West to sell power to
13 California in certain circumstances. I have to say
14 that's an emergency.

15 It's hard to say that there isn't a
16 significant issue in wholesale power markets throughout
17 the entire region. We see governors of all of the
18 western states including our own state traveling to
19 Denver, to Washington D.C., to Sacramento, meeting with
20 each other, taking action, issuing press releases,
21 trying to deal with a West wide regional issue.

22 But that's a wholesale power market issue,
23 and it's an issue that can be addressed only by the
24 people who have authority with respect to wholesale
25 power issues, that is FERC, the Secretary of Energy, and

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1 other federal bodies that have jurisdiction over
2 wholesale power issues.

3 When the State gets involved in trying to
4 address wholesale power issues, then we get the problem
5 that arises in California where the wholesale power
6 markets yield one set of prices, but the utilities are
7 limited to another set of prices, and we get a squeeze
8 that hurts and punishes the utility.

9 The Federal District Court in Los Angeles
10 held in the past week that that squeeze is impermissible
11 if it precludes the utility from obtaining its prudently
12 incurred wholesale procurement costs. Yet the relief
13 that's been proposed in this case would impose upon
14 Puget Sound Energy exactly the same sort of squeeze that
15 has been rejected by the federal courts in California.
16 That is something that would be inappropriate and
17 illegal.

18 Looking to the claims that there is some sort
19 of retail emergency, there is nothing in the record to
20 suggest that there is. Boeing has no witness in the
21 case. All we know is that they're a gigantic company
22 with a record year. Air Liquide has no witness in the
23 case. Another gigantic company with a great year. The
24 limited evidence in the record about Air Liquide
25 suggests that they have engaged in a form of illegal

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1 self help shifting load from one rate schedule to
2 another in order to benefit themselves, but they have
3 shown no emergency. Equilon, another giant company,
4 another multi-billion dollar company. They have no
5 witness in the case. There's nothing to suggest that
6 they face an emergency.

7 Georgia-Pacific makes a claim that there's an
8 emergency. They claim that they laid off folks as a
9 result of the electric power issues. But the evidence
10 in the case shows that Georgia-Pacific has experienced
11 market related down time and has had layoffs at plants
12 throughout the country as a result of that market
13 related down time. There's nothing to suggest that an
14 electric power problem in this region is causing their
15 problems. Instead, it's problems in the pulp markets.
16 Also Georgia-Pacific recently merged with Fort James
17 Paper and has thus acquired facilities in this region.
18 Georgia-Pacific has made choices about what their high
19 margin and low margin facilities in the region are and
20 is acting in accordance with those choices, but there is
21 nothing to show that they acted based on the electric
22 power rates that they're exposed to, or certainly not
23 exclusively as a result of the electric power rates that
24 they're exposed to.

25 Tesoro, a large refinery, is enjoying a

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1 record year. In fact, they have just put in place a \$90
2 Million capital improvement program, or at least they
3 have started on it. That's not a business that's about
4 to go under. That's a business that is making record
5 money because it sells its product into the markets and
6 charges whatever the market will bear.

7 The only customer who really should get any
8 sympathy is the City of Anacortes. They're small,
9 they're unsophisticated, they're not a huge company, and
10 it's easy to feel sympathetic for them. But the
11 evidence in the case shows that you shouldn't even feel
12 sympathetic for them. They have had, as the evidence
13 shows, a total of \$1 Million in excess electric costs in
14 the year 2000. \$700,000 of that \$1 Million are picked
15 up by their two oil refinery customers, and so the
16 remaining \$300,000 for the year is split over 30,000
17 customers. That's \$10 per customer per year. Again,
18 \$10 per customers per year. That's no emergency.

19 Let me switch from the issue of emergency to
20 the issue of public policy and what type of relief this
21 Commission is authorized to issue. Our position is that
22 a deal is a deal, and we had a deal with these
23 customers, a five year deal that provided that they
24 would buy power at a market rate, a market rate tied to
25 certain indexes that are specified in the contract.

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1 When you enter into a deal like that, sometimes you win,
2 sometimes you lose. And when they won, they were happy.
3 When they lost, they were not happy. But when you enter
4 into a deal, you live by your deals. And these
5 customers when they have a deal with their customers,
6 they expect their customers to live by those deals as
7 well. We expect the same.

8 We think it's important to be aware of the
9 history of the prior proceedings that have come forward
10 in the hearing in this case, and in particular the
11 981410 complaint case. You heard a lot about that case
12 in this proceeding, and I think it's interesting to
13 think about what happened in that case. The basics of
14 that case are that Dow Jones, which operates the
15 Mid-Columbia Indexes, reformulated the indexes. They
16 reformulated the indexes, and because they reformulated
17 the indexes, it was the view of Puget Sound Energy that
18 the new index didn't do a good job of tracking what it
19 was that Puget Sound Energy sold to these customers. So
20 Puget Sound Energy said, okay, we're going to blend the
21 indexes to match up with what we were originally talking
22 about and to match up with what we really sell these
23 customers.

24 And the customers came back, and they sued,
25 and they said, we don't care what you sell us, we don't

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1 care about its quality, we don't care about its cost, we
2 don't care about how the indexes are calculated, we
3 don't care about anything at all about the indexes. All
4 we care about is that your deal with us said that you
5 were going to sell power to us at the non-firm index,
6 and therefore that is what you must do. And you know
7 what, they won.

8 This Commission said, Puget Sound Energy, we
9 don't care what your costs are. Puget Sound Energy, we
10 don't care what type of product you sell to these guys.
11 You made a deal with these customers, and you've got to
12 live by your deal. You may lose money, you may make
13 money, it doesn't matter. You've got to live by your
14 deal and sell according to those indexes.

15 Here we are a year and a half later, and the
16 same witnesses who testified in that case are now
17 saying, well, let's look at those indexes, do those
18 indexes really cover the type of products that are sold,
19 do those indexes really do a good job of measuring what
20 we want to sell. And they start quoting back what the
21 Company said to them in that case about how it doesn't
22 really match up with the product that was being sold.
23 And they say, aha, the Company was right, we don't want
24 that deal. Well, the fact is that a deal is a deal, and
25 they have to live by the deal.

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1 It's not just the customers who are raising
2 that issue. Public Counsel and Staff, for instance,
3 point to the so-called guarantee in the Schedule 48 rate
4 case, and that guarantee said that there would be no
5 cost shifting that resulted from the deal, and they say
6 we're held to that. So again, the issue seems to be if
7 a part of the deal goes against Puget Sound Energy, then
8 Puget Sound Energy is stuck with the deal, and we're
9 stuck with the deal forever. But if a part of the deal
10 favors Puget Sound Energy and goes against the
11 customers, then the Commission is free to change the
12 deal. Well, that's not the way it is. A deal is a
13 deal, and the Commission approved the deal, Puget Sound
14 Energy is willing to live by the deal, and we think that
15 the Commission is bound to honor the deal as well.

16 I would note that when you look at the sorts
17 of relief that have been proposed, we made a big deal of
18 the fact that the data was not rate case quality data.
19 And that's not my words, those are words -- well, that
20 is my words, but it's word that were adopted by the
21 various witnesses who I questioned. They admitted it
22 wasn't rate case quality data. They also admitted that
23 they were working a fundamental change to the deal. Why
24 is that important? Well, because when we entered into a
25 deal, we could agree to a rate structure that was kind

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1 of odd, that was based on a market index, that was based
2 on something that wasn't tied to costs. But if you're
3 going to fundamentally change the deal, if you're going
4 to say, oh, no, we can do whatever we please, we can do
5 what the statute says, well, then you got to live by the
6 statutory standards. And the statutory standards say,
7 if you impose a new rate on us, you have to do a rate
8 case quality analysis, and that's not something that has
9 been done. That's not something that anyone has done.
10 There has been no rate case quality analysis, and thus
11 you can not impose a new rate on Puget Sound Energy.

12 I think I'm going to close out by mentioning
13 the self generation that's been referred to during the
14 course of the hearing. There's been kind of the most
15 intense factual debate, because there isn't much of a
16 factual debate here, but the most intense factual debate
17 has been whether or not you can obtain catalytic
18 converters to attach to temporary diesel generators.
19 Puget Sound Energy says you can. A witness from Tesoro
20 who has not shown himself to be particularly
21 sophisticated about playing in energy markets or
22 electricity markets at least says that he searched
23 around, called three suppliers, and found that you
24 couldn't get it.

25 Well, we stand by our suggestion that you can

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1 get catalytic converters to apply to your temporary
2 diesel generators, but I note that the evidence shows
3 that whether you can or can't, you can operate those
4 diesel generators for about 90 days without getting any
5 sort of new permits. We strongly suggest that this
6 Commission work to approve Schedule 448 within those 90
7 days so if any customer has a problem operating those
8 generators past the 90 days, they can take advantage of
9 the solution that's provided by Schedule 448. That's a
10 solution here, and that would be a solution that makes
11 sense and that would be consistent with the deal. But
12 otherwise, a deal's a deal, and you can't break the
13 deal.

14 JUDGE MOSS: Thank you, Mr. Berman.

15 We will take a ten minute recess, and then we
16 will resume with questions from the Bench at 11:20.

17 (Brief recess.)

18 JUDGE MOSS: All right, we will be back on
19 the record, and during this section of our proceeding
20 this morning, we will have questions for counsel from
21 the Bench.

22 CHAIRWOMAN SHOWALTER: I will start off. I
23 think most of my questions are going to be legal ones
24 about process and what the Commission can or can't do,
25 but I want to start off with something a little

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1 different, which is a scenario under the Staff's
2 proposal, and really I would like to hear from all of
3 you on the question.

4 As I recollect the evidence, if the Staff
5 proposal were implemented based -- if we assume the
6 forecast of December 20th, it showed that Puget would
7 still be able to meet its authorized rate of return, but
8 just so. And my question is, if a contingency arises
9 such as Colstrip going out, if Puget had a large deficit
10 and as a result, a deficit in power that is, and as a
11 result had to go out onto the wholesale market and buy
12 at a very high price, let's for just for example say at
13 \$300 a megawatt hour for four months, if they had to do
14 that and that caused first a likelihood that they would
15 not meet their authorized rate of return, but in
16 addition caused them to come in to this Commission for
17 relief, what is your view as to where the burdon of that
18 relief would fall, among the Company's shareholders, the
19 core customers, and the Schedule 48 customers? In other
20 words, I want you to assume that there's some kind of
21 contingency that justifiably causes Puget to have to go
22 buy on the market at a high price. And assume further
23 that had we not altered Schedule 48, they may well not
24 have had to come in for that relief because of the extra
25 revenue they were getting. So my question is to each of

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1 you, where would we spread that relief?

2 MR. TROTTER: I will respond first, and
3 there's lots of assumptions, and I will assume they're
4 all correct, and then I might be a little critical of a
5 couple of them, if I might.

6 CHAIRWOMAN SHOWALTER: All right, that's
7 fine.

8 MR. TROTTER: I'm assuming all your
9 assumptions are correct. If Puget came in for rate
10 relief, they would have to meet the standards set forth
11 on the rate spread of any rate increase as stated in the
12 rate plan, which was I think on an equal margin basis
13 for gas and equal percentage basis for electric, and we
14 have those split, reversed, but it's in the rate plan.

15 In terms of Schedule 48, because Staff and
16 Public Counsel have proposed this only being for a
17 temporary basis, you could add a condition that if
18 interim rates are proposed that the remedy is
19 eliminated. But it is in for such a short period of
20 time that that would probably be the result anyway; you
21 simply would not continue it. But certainly under the
22 plan itself, in our view, Schedule 48 would be included
23 in any interim rate relief that would be required.

24 Now as to the question if you had done
25 nothing to Schedule 48 there might not be an emergency,

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1 that's where I guess I will criticize the assumption, in
2 that at \$300 rates, would these customers be paying
3 Puget anything. Would they simply be off line, shut
4 down. So on whether would Puget actually be able to
5 receive those revenues, and if it is in a deficit
6 situation, there's a very good chance it would. That's
7 why the proposal is to keep the revenue coming in.

8 If a contingency arises about Colstrip going
9 out, we think there's an equal chance that the plant
10 might operate more efficiently than historically, and
11 the risk will go the other way. So it's hard to predict
12 the future. There are some predictions about critical
13 water versus average water and so on. That's why a
14 shorter term solution, I think, makes sense in that
15 context, that you're not putting this into effect on a
16 long-term basis that might cause you problems down the
17 line.

18 And as far as Staff is concerned, if you want
19 to put in a condition, if you would go for the remedy
20 that we have proposed and say if the company files for
21 interim relief and it's granted, that this temporary
22 solution is at that point no longer in effect.

23 CHAIRWOMAN SHOWALTER: So what you're saying,
24 you don't really see a scenario whereby there could be
25 such a contingency that would press the Commission to

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1 spread the relief on the core customers? That's really
2 my question.

3 MR. TROTTER: If there is a contingency that
4 occurs that justifies interim rate relief, there will be
5 spread according to the rate plan of whatever
6 incremental revenue is required to the rate payers of
7 Puget Sound Energy, and that would include the Schedule
8 48 customers, in our view.

9 CHAIRWOMAN SHOWALTER: The core customers, I
10 said.

11 MR. TROTTER: As well as core customers,
12 both. I hope I didn't suggest otherwise. We think
13 that's highly unlikely and is not a reason not to adopt
14 the proposal. But I think the real assumption here is
15 if prices do go to that level and these customers are
16 still on the system, the revenue won't be coming in at
17 that level, because they won't be buying. I mean that's
18 an equally likely assumption under that 300 average
19 megawatt assumption.

20 CHAIRWOMAN SHOWALTER: Mr. Ffitch, do you
21 think that scenario that I described could arise, and if
22 it does, how would the burden of the relief be spread?

23 MR. FFITCH: Well, first of all, I just want
24 to say that Public Counsel would agree with everything
25 that Staff counsel, Mr. Trotter, just said. Secondly, I

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1 do think that from the very beginning, even before this
2 case, back in the original Schedule 48 proceeding, it
3 was always contemplated that in the event that Puget
4 Sound Energy was facing very significant revenue
5 problems that they could seek interim rate relief and
6 that core customers might well have to bear some of that
7 burden as laid out in the rate plan.

8 Moving ahead to the scenario that you have
9 described, I think it's the same answer. If the company
10 is entitled to interim rate relief, core customers would
11 have to bear their fair share of that interim rate
12 relief. I do want to underline something I believe I
13 heard Mr. Trotter say, which is that a first step in
14 that direction, however, if there is a request for
15 interim rate relief is that the temporary remedy of the
16 cap would be terminated so that you would revert back to
17 the Schedule 48 remedy, or excuse me, revenue levels so
18 that those would kick in first, and then you would
19 determine whether you needed interim rate relief beyond
20 that. And we have actually stated that through the
21 testimony of Mr. Lazar and also in our memorandum, we
22 have laid that out.

23 The second thing I wanted to perhaps add to
24 Staff's comment is that if you do go back to the
25 scenario, if you will, the future that was contemplated

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1 when Schedule 48 was adopted, we actually had a future
2 there where what was expected to happen was that the
3 Schedule 48 customers would actually generate a real
4 revenue loss. They would actually pay less than
5 Schedule 49 customers. And that even under that
6 scenario in that situation, which I think would, you
7 know, at least hypothetically put Puget in a comparably
8 difficult revenue situation to your scenario, customers
9 were given a guarantee, and a rate plan was put in place
10 that there would be no shifting even under that very
11 sort of dire revenue prediction.

12 We are very, very far from that right now.
13 What we're talking about is kind of adjusting the level
14 of positive revenues that the Company will get, and I
15 think the evidence has shown that. For example, in
16 Mr. Lazar's Exhibit 1302, under the cap, even under
17 critical water, the company will be earning over \$91
18 Million over its cost of service.

19 CHAIRWOMAN SHOWALTER: That's assuming the
20 December 20 forecast?

21 MR. FFITCH: Assuming the December 20
22 forecast, correct.

23 CHAIRWOMAN SHOWALTER: You do agree that's
24 kind of the peak; the forecast has been going down since
25 that time?

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1 MR. FFITCH: Well, I don't know about the
2 forecast going down. I think certainly that there have
3 been some changes, and it is just a forecast. The
4 January numbers so far look lower than the January
5 numbers in that forecast. But assuming the December 20
6 forecast, they're certainly covering their costs and
7 then some.

8 CHAIRWOMAN SHOWALTER: Ms. Davison, do you
9 agree with those points? You don't need to reiterate
10 them if you do.

11 MS. DAVISON: Generally I do. I guess the
12 only thing I would offer is that given the very, very
13 short time frame that we're operating under here, I
14 think that as a practical matter, the likelihood of
15 interim rate relief won't happen, because we're just
16 dealing with a matter of, you know, nine months or
17 something like that here.

18 The other thing, very quickly, in my list of
19 thank you's, I forgot an obvious one, and I would like
20 to thank Ms. Kinn for her extraordinary court reporting
21 services during this hearing.

22 CHAIRWOMAN SHOWALTER: We all appreciate
23 that.

24 COMMISSIONER HEMSTAD: Any comment?
25 Mr. Berman.

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1 MR. BERMAN: Yes, first I would note that one
2 concern about the scenario you have described and
3 sometimes we have missed this in the examination of
4 various witnesses, because most of the witnesses have
5 come at it from a different direction, but as we have
6 discussed in our petition, it's our view that it's
7 legally necessary and appropriate that to the extent any
8 revenues are taken away from Puget Sound Energy's
9 recovery from Schedule 48 and Special Contract customers
10 that they would be put into a deferred account or some
11 sort of account so that they could be allocated to other
12 customer classes. So it --

13 COMMISSIONER HEMSTAD: Why is that? I mean
14 so if the company were to suffer a revenue loss but
15 still be earning above its authorized rate of return,
16 why would that have to be put into a deferred account to
17 be recovered later?

18 MR. BERMAN: There's no such thing as an
19 authorized rate of return for the Company. To the
20 contrary, in the deal that was cut in 1996, it was
21 agreed that a fixed set of rates would be in place and
22 that the company could earn more, or the company could
23 earn less, and it was up to the company to do as much as
24 it could given the deal that was in place. And that
25 deal that was entered into was entered into with

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1 Schedule 48 and the Special Contracts in place so that
2 Puget Sound Energy knew that those revenue streams were
3 fixed in their own way in relation to the Company's
4 overall portfolio. If you alter the revenue streams
5 from that one large class of customers, well, then to
6 make the deal even, you have to alter the revenue
7 streams from the other classes of customers as well.

8 COMMISSIONER HEMSTAD: Can I jump to --

9 CHAIRWOMAN SHOWALTER: Well, I was hoping is
10 to get just an answer to that scenario and then go to
11 the other ideas just so we don't lose track of it.

12 MR. BERMAN: I will stick to that scenario,
13 which I guess contemplates that somehow we lose on the
14 petition so that we simply lose revenues from the
15 Schedule 48 customers without making them up from
16 anywhere else. If that happens, it is indeed more
17 likely that we would find ourselves having to seek
18 interim rate relief. As the evidence in the case shows,
19 we are in, if not a critical water year in terms of the
20 definitions related to 1937, we are in something
21 incredibly darn close to a critical water year. The
22 predictions are for very low water, and with the current
23 market environment, the company is exposed to having to
24 purchase a huge amount of power on the market.
25 Mr. Gaines testified that he predicted approximately 1.2

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1 million megawatt hours of extra market purchases as a
2 result of the reduced water.

3 If you take 1.2 million megawatt hours and
4 multiply it by a market price, you will get a sense of
5 the impact on the company. If the market price is \$200,
6 then we're talking about \$240 Million that goes out down
7 the drain for the Company. That's just the water
8 situation. If we then throw into that a Colstrip outage
9 or some other sort of serious outage, we make it quite
10 likely that we would have to come in and seek interim
11 relief. And if that were the case, then the core
12 customers would see a significant hit.

13 CHAIRWOMAN SHOWALTER: And that's your answer
14 to my question. Let me just on the deferred account,
15 you're suggestion was that if we grant any kind of
16 relief, that there be a deferred account where what the
17 customers would otherwise be billed falls into a
18 deferred account? Is that correct, kind of a reversed
19 deferred account?

20 MR. BERMAN: What we would contemplate is
21 that we have to establish accounting so that the
22 revenues that are not paid by the Schedule 48 and
23 Special Contract customers will instead be accounted for
24 by other customer classes.

25 CHAIRWOMAN SHOWALTER: Okay.

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1 COMMISSIONER HEMSTAD: The premise behind
2 that is the point that you were making earlier and
3 through the case, a deal is a deal, and it can't be
4 altered. Do you want to translate that into the legal
5 question. Is it your position that this Commission does
6 not have the legal authority when evidence is presented,
7 I'm turning this into a hypothetical, that even if at
8 the time a tariff is adopted, that the conclusion is
9 that the tariff is fair, just, reasonable, and
10 sufficient, but there are subsequent intervening events
11 that provide a different circumstance leading to a
12 conclusion that in that new environment, the tariff is
13 not fair, just, reasonable, and sufficient, is it your
14 position that this Commission does not have the
15 authority to modify the tariff?

16 MR. BERMAN: Looking at Washington state law,
17 it was difficult to find any cases really on point, so I
18 looked to federal law. And in federal law, it's very
19 clear that in the federal regulation, typically parties
20 enter into rate schedules with FERC approving or
21 disapproving those rate schedules, and FERC has the
22 authority in general at any time to modify a rate
23 schedule that's filed at FERC if that rate schedule is
24 determined to no longer be just and reasonable under the
25 Federal Power Act.

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1 But under the Sierra Mobile line of cases,
2 the U.S. Supreme Court has held that when parties enter
3 into a so-called fixed rate contract, that is a contract
4 in which the parties establish that the rates will be in
5 a certain way for a certain duration of time and that
6 neither party has the right to unilaterally obtain
7 relief from that contract except under certain very
8 specified terms, that the regulator does not have the
9 right to just come back in applying the old just and
10 reasonable standard, but that there is a heightened
11 burdon that the regulator must meet.

12 The Papago Tribal Authority Case, which I'm
13 afraid was not cited in our brief, is probably the
14 leading case on what that heightened burdon is. It's
15 Papago Tribal Authority versus FERC, and that's a 1984
16 D.C. Circuit case. I will get you the cite afterwards.
17 I don't have it with me right now. But in the Papago
18 Tribal Authority case, the D.C. Circuit explained that
19 only in extraordinary circumstances where there would be
20 dramatic harm to the public would there be a situation
21 where the regulator could step in and undo a contract
22 once the parties had entered into that contract.

23 Of course, you get to look at it, the
24 regulator gets to look at the contract at its inception,
25 and that's what this Commission did. This Commission

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1 looked at these deals and said, these are goods deals,
2 these are fair, just, and reasonable deals that make
3 sense. But once they approve fair, just, and reasonable
4 deals, we don't think it's appropriate for this
5 Commission to come back and say now a few years down the
6 line after people have altered their position
7 significantly, after we have sold power plants, after we
8 have done power deals, after we have incurred huge
9 costs, it's not fair right now to undo and alter the
10 deal.

11 COMMISSIONER HEMSTAD: I would like to hear
12 the response of the other parties.

13 MR. TROTTER: Just briefly. Number one,
14 that's not what Puget said in UE-981410 when it clearly
15 said the Complainants in that case could file a
16 complaint against the tariff.

17 Number two, the Mobile Sierra doctrine we
18 addressed in footnote 11 of our opening brief and said
19 it didn't apply, because it's based on an interpretation
20 of the Natural Gas Act, not the Constitution or Title 80
21 obviously.

22 Third, on the point of a deal is a deal, the
23 Commission may want to look at the Raymond Lumber case
24 cited on page 18 of our brief. In that case, two
25 private parties contracted to make a deal for the

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1 supply, I believe, of water at a fixed price. Sometime
2 later, the State decided to regulate water rates, and
3 the regulatory agency sought to change that deal, and
4 the court said it could, and there was no legal
5 impediment under the contract laws or anything else,
6 because all contracts are entered into with a view of
7 possible subsequent public interest regulation, and we
8 think that principle applies with even more force here.
9 So there is state law authority in this jurisdiction
10 that the Commission could come in. So that's our
11 response to the Mobile Sierra point and the specific
12 case law in this jurisdiction.

13 CHAIRWOMAN SHOWALTER: Does it make a
14 difference either as a legal matter or as a policy maker
15 that this Commission did approve the tariff itself, and
16 also did we approve the contract under those tariffs
17 that the agreements were --

18 MS. DAVISON: (Shaking head.)

19 CHAIRWOMAN SHOWALTER: No, we didn't. But
20 the Schedule 48 did have a template agreement, and the
21 template which was then used doesn't have what you might
22 call a savings clause, that this agreement is always
23 subject to change if the Commission modifies Schedule
24 48. There may have been something in there if Schedule
25 48 was changed significantly.

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1 MR. TROTTER: I don't believe so.

2 CHAIRWOMAN SHOWALTER: Okay.

3 MR. TROTTER: I don't believe so. I think
4 the underlying clause is in 80.28.010 and .020, all
5 rates must be fair, just, and reasonable. And the
6 Commission made a finding in its order that the
7 contracts would generate such rates, but it's in the
8 context -- it's in a totally different context. And as
9 Commissioner Hemstad has noted, the context changes over
10 time, and you have the right to reexamine that.

11 I had one other thought, oh, your point about
12 can you or should you. And we're saying that you can.
13 And should you, I think you can take a look at on that
14 issue the risks that were in the contracts. So I want
15 to take those things into account, and you should do
16 that. But can you reevaluate the situation, we don't
17 think the Mobile Sierra doctrine applies as a matter of
18 law.

19 CHAIRWOMAN SHOWALTER: So shifting to the
20 should you side, if we decide in effect to modify the
21 agreements that have been entered into that have
22 specific terms, what does it mean about the future
23 tariffs or agreements that we approve special contracts
24 if all of them are always subject at any time to
25 modification, should they become fair, just, and

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1 reasonable, how do parties rely on the terms of them.
2 And by that I mean, the actual terms but also the length
3 of the term, the two year, five year. Would it be wise
4 to have an extraordinarily high burdon such as was
5 mentioned, that only in the most extreme circumstances
6 would we upset these contracts or agreements?

7 MR. TROTTER: As a matter of policy, I think
8 the Staff has attempted to balance, and I think both
9 witnesses for Staff and Public Counsel acknowledged the
10 risks that were allocated and that to the extent they
11 were allocated. But in the context of the conditions
12 they were allocated, I think the principle here is that
13 the fair, just, and reasonable standard is a consistent
14 standard that applies throughout and that you can as a
15 matter of law alter those publications on an ongoing
16 basis. And I think and I would hope that everyone
17 understands that.

18 And certainly based on the Raymond case,
19 every private contract, completely private contact, in
20 the state of Washington is to some degree at risk of
21 being altered should the state decide to regulate a
22 particular area. So those risks are out there. And
23 Puget undertook the risk that there could be some
24 modification of these contracts based on the case law of
25 this state. Now they did not assign a sizable risk to

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1 that either, and they went ahead and made some decisions
2 based on these contracts, but there was that risk, that
3 this matter could come before the Commission under the
4 statutes of the State of Washington.

5 COMMISSIONER HEMSTAD: Mr. Trotter, maybe you
6 might pull your microphone a bit closer.

7 JUDGE MOSS: I had a question for you,
8 Mr. Berman. You noted that there was no authorized rate
9 of return, and I believe you said specifically under the
10 merger rate plan. And indeed, as I recall our evidence,
11 it related back to Puget's last approved rate of return
12 of about 10.5%, and that was back in 1992, as I recall
13 the testimony. Do you contend that accepting for the
14 moment that there was no authorized rate of return set
15 at the time of the merger rate plan, do you contend that
16 that relieves the Commission of its obligation to
17 continually monitor and examine the Company's earnings,
18 and if it finds they fall outside some zone of
19 reasonableness, to then take steps to bring them back
20 within that zone of reasonableness?

21 MR. BERMAN: Yes, Your Honor, I think that
22 there's no such thing as overearning under the rate plan
23 and the set of agreements that were reached in 1996. To
24 the contrary, it was made explicitly clear that Puget
25 was free to either make money or lose money on the set

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1 of deals that it was entering into. And the Commission
2 was quite explicit, it was more concerned about the
3 losing money part than about the winning part, because
4 they didn't want Puget to come back in. And so the
5 Commission was quite explicit that except in certain
6 very narrowly constrained and explicitly stated
7 circumstances, Puget would not be allowed to come. They
8 gave up their right to come in and say we're not earning
9 as much return as we would like.

10 JUDGE MOSS: But isn't that exactly the
11 point, that at the lower end of the zone of
12 reasonableness, Puget does have the right to come in and
13 seek interim rate relief. Are you contending that there
14 is no up side, that if the company was earning the
15 equivalent of a 25% or 35% or 50% rate of return on
16 equity that this Commission would not have the statutory
17 responsibility to take a look at that and make some
18 adjustments to bring that back down within what would
19 ordinarily be considered a zone of reasonableness for
20 regulated utility earning?

21 MR. BERMAN: Yes, we very explicitly stated
22 those conditions when Puget Sound Energy could come in
23 and seek rate relief. If there had been a desire to
24 state conditions under which Puget's rates could be
25 reduced, then those conditions could and should have

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1 been stated. It becomes particularly clear when we look
2 at Puget's negotiations with the Schedule 48 or Special
3 Contract customers. These are huge companies for the
4 most part, companies that are bigger and more
5 sophisticated than Puget Sound Energy. They can afford
6 numerous consultants, numerous lawyers. They can afford
7 every resource available in order to assist them in
8 their negotiations with Puget Sound Energy. If they
9 wanted a deal that said that there was a cap on rates,
10 they could have put in that deal, but they didn't. If
11 they wanted a deal that said that there was some sort of
12 outlet in case the market rates went out of control,
13 they could have put that in, but they didn't.

14 And, in fact, when you look at during again
15 the 981410 complaint case, when Puget was trying to
16 focus on whether the reformulated Mid-Columbia Non-firm
17 Index was, in fact, an appropriate index to use and was
18 saying, well, let's look at the product we're providing
19 and whether the index matches it well, we asked
20 Mr. Canon about the set of risks and products that were
21 involved, and Ken Canon said in his deposition, we had
22 no idea what the risks were, no idea whatsoever, but
23 they decided to absorb them and bear them and live with
24 them anyway, because that was the deal that they
25 accepted and wanted to live with. And again, these

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1 companies when they're dealing with their customers
2 expect their customers to live by their contracts. We
3 expect the same.

4 JUDGE MOSS: Somewhat related question, and
5 again to you, Mr. Berman. You have mentioned to us
6 several times through the course of these proceedings
7 and again today the decision denying a motion for
8 summary judgment in the Central District of California
9 case, and as we discussed previously, that relates back
10 to a longstanding principle under the U.S. Supreme Court
11 case involving Natahala Power. I would ask you at this
12 point though, what evidence would you cite us to that
13 shows that Staff's proposal would deprive Puget Sound
14 Energy of the opportunity to recover its prudently
15 incurred wholesale costs?

16 MR. BERMAN: Your Honor, it's simple enough
17 to work through examples that show that their proposal
18 can deny us of prudently incurred wholesale costs.

19 JUDGE MOSS: Theoretically. I'm asking you
20 what specific evidence in our record that you can point
21 us to that shows that Staff's soft cap proposal would,
22 given PSE's resource acquisition strategies and plans
23 and things it has in place, what evidence is there in
24 our record that would show that imposing that soft cap
25 proposal would deprive PSE of the opportunity to earn or

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1 recover its prudently incurred wholesale power cost?

2 MR. BERMAN: Well, the proposal is a forward
3 looking proposal, and I worked through it with, when
4 Mr. Buckley and Mr. Lazar were on the stand, I worked
5 through some examples. And I think that it was clear
6 that if Puget Sound Energy were to engage in a longer
7 term transaction, let's say they engaged in a four month
8 transaction that at the time was very prudent, let's say
9 that transaction was a transaction that would have
10 provided for \$200 power, and the forward price
11 projection for that four months is at \$250. Well, if
12 Puget can get that deal, that's a good thing for Puget
13 to do, if Puget can lock in power at below market prices
14 for the coming four months.

15 But as we learned throughout the testimony,
16 we know that forward price projections can turn out to
17 be wrong. And so what can happen is that the spot
18 market prices in the Mid-Columbia Index might turn out
19 to be significantly lower than the \$200 that Puget Sound
20 Energy locks in. If that happens, under the proposals
21 that have been spelled out by Staff and Public Counsel,
22 Puget Sound Energy would not recover their prudent
23 purchase costs of the \$200.

24 COMMISSIONER HEMSTAD: Well, wouldn't the
25 company then be entitled to come back before the

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1 Commission and ask for, call it, what is the term in the
2 rate plan, under economic distress and ask for relief?

3 MR. BERMAN: Well, the term in the rate plan
4 that allows one to seek relief applies in certain pretty
5 limited circumstances that are spelled out in the case
6 that's cited in the rate plan. I think that if we
7 incurred a purchase cost to serve a group of customers,
8 it might not live up -- it might not live up to the
9 standard that comes in for interim relief, but it might
10 nonetheless be a case where we prudently incurred
11 wholesale power procurement costs and would be unable to
12 recover those costs.

13 And an important part of this is that we
14 weren't necessarily guaranteed that recovery in the deal
15 we entered into in 1996, but we agreed to that. We
16 agreed to the terms of the deal in 1996, so even though
17 there was a chance that we wouldn't necessarily recover
18 our costs, that's okay if we agreed to it. But going
19 forward, if you impose a new deal on us and if that new
20 deal doesn't allow us to recover our prudent wholesale
21 power costs, then you're violating the Mantahilla,
22 Mississippi Power and Light, and other line of Supreme
23 Court cases that were relied on in the Central District
24 of California federal case.

25 CHAIRWOMAN SHOWALTER: I'm following your

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1 line of thinking in terms of your having purchased at an
2 earlier date a good deal, but then lo and behold, the
3 index drops below that, but I'm struggling over the word
4 recover. If you are still operating either above an
5 authorized rate of return or let's just call it a
6 healthy profit, if you're still at healthy profit
7 levels, does it matter that you didn't directly recover
8 that prudent purchase, or are you talking about a
9 situation in which your profits become unhealthy and you
10 are unable to recover that prudent purchase?

11 MR. BERMAN: It's a little bit hard to answer
12 that, because the way the current structure is, we have
13 agreed to and frozen our rate structures for all of our
14 classes of customers. It gets confusing if we envision
15 a world where you now alter our rate structure for one
16 class of customers, but if you don't grant our petition,
17 then you're leaving in place the frozen rate structure
18 for the other class of customers.

19 And it does create some confusion about what
20 happens if we lose money or don't fully recover our
21 costs with respect to that one class of customers, is
22 that something that kicks in the Mississippi Power and
23 Light, Mantahilla Power line of cases. I would argue
24 that it does, but there would be complex issues that
25 would have to be explained and sorted through.

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1 CHAIRWOMAN SHOWALTER: Can I turn the same
2 example to Staff. Supposing there is a prudent purchase
3 in November that turns out to be below the index, what's
4 the answer under the Staff's proposal?

5 MR. TROTTER: Well, under the Staff's
6 proposal, the Company can recover up to the Mid-C Index
7 for that particular month, which is exactly how Schedule
8 48 operates today, although it's on a day-to-day basis.
9 Under the hypothetical that was mentioned, Puget would
10 not recover that cost currently. Mr. Berman's answer
11 is, well, we agreed to that. Well, if you look to
12 981410, they absolutely did not agree with what the
13 Commission did in that case. So I think we are at --
14 there is a reason -- perhaps that's another reason why
15 Schedule 48 may not be valid. And it does beg the
16 question whether the Company would be prudent to make
17 that deal if it's buying long term for a customer class
18 that they say they don't plan long term for.

19 CHAIRWOMAN SHOWALTER: No, I --

20 MR. TROTTER: So we would have to look at the
21 prudence of that cost.

22 CHAIRWOMAN SHOWALTER: No --

23 MR. TROTTER: But to get to the specific
24 answer to your question, which is arguably based on the
25 testimony of Mr. Lazar and Mr. Buckley, that if you take

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1 a look at the Staff proposal on a monthly basis, that
2 the Company will recover its prudently incurred
3 wholesale costs coupled with the short-term duration of
4 the proposal, we think that's a reasonable approach.

5 Now if you say long term that the Mid-C goes
6 way up and Puget's costs go way up, what about that.
7 Well, we would have to take a look at that situation.
8 But historically and even in this period, they are not
9 incurring on a consistent basis costs anywhere near that
10 level to serve 300 megawatts of load.

11 CHAIRWOMAN SHOWALTER: So just in the very
12 specific example, if Puget had made a purchase last
13 November at let's say \$250 for the first four months of
14 2001, and now let's assume that in a given month the Dow
15 Jones turns out to be at, I don't know whether to go
16 above or below your cap, let's say it's below, let's say
17 it's at \$124, I'm not sure which example would give the
18 best result. But my first question is under your
19 proposal, does that purchase that was made in November,
20 is that a cost that is applied to January, February,
21 March, and April?

22 MR. TROTTER: If you assume that that
23 purchase was made to serve this load and if that could
24 be demonstrated, the Company would recover the index, up
25 to the index, \$124. That purchase would be challenged

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1 on prudence grounds. But if you want me to make the
2 assumption that it was prudent, and that they actually
3 did it, and they did it to serve this class, then they
4 would recover \$124, which is what the index would say,
5 which would be no different than under the current
6 Schedule 48.

7 CHAIRWOMAN SHOWALTER: And you're saying it
8 would be challenged on prudence just because of the high
9 number?

10 MR. TROTTER: No, because the Company would
11 not buy forward to serve this load. They would serve,
12 as you remember 605, the resource stack, they would
13 serve the load at the least cost, which would be the
14 other customers before the schedule on the bus, and then
15 would serve this customer with its resource. And then
16 if it can demonstrate what its costs were to serve this
17 class, then that would be the measure.

18 Mr. Lazar testified that historically even in
19 this period, Puget's net cost to serve this load is
20 nowhere near \$125 or \$200. If the company went out
21 today and bought power, 300 megawatts to serve this load
22 at \$200, I think hopefully everyone would agree that
23 that would not be a prudent purchase. But if they did,
24 and if this Commission determined that it would be
25 prudent, then they would recover the index price.

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1 CHAIRWOMAN SHOWALTER: Even though it was
2 purchased in November?

3 MR. TROTTER: Yes.

4 CHAIRWOMAN SHOWALTER: I want to give
5 Mr. Berman a chance to respond to that.

6 MR. BERMAN: I think that it's interesting to
7 note this notion that there would be a challenge on
8 prudence grounds, because that brings us back to what
9 the deals in 1996 were all about, which were to allow
10 Puget Sound Energy to manage its own resources in the
11 way it saw fit. By doing so, it didn't have to worry
12 about prudence challenges, but was able to exercise what
13 it deemed to be its sound business judgment about how to
14 best serve its various portfolio of loads in order to do
15 the job right.

16 If we're now entering a world where we have
17 to do -- I guess I have heard that there could be
18 prudence challenges to our expenses. I have heard that
19 it may be that we lose some money, but then we can come
20 in and seek rate relief if we didn't get quite enough on
21 some months. We're moving to a terribly different world
22 than the world that we agreed to in the deals in 1996.

23 Also it's a world where we're allocating
24 again to various customer classes the benefits that
25 Puget was promised in the merger rate plan. Because in

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1 the merger rate plan, we were promised the right to
2 manage our own resources and to obtain the benefit of
3 those resources. Mr. Canon in his transcripts
4 particularly from the 981410 case was very explicit in
5 saying that they had given up their rights to the
6 embedded cost generation of Puget Sound Energy. Yet all
7 of the proposals that we're hearing rely on giving to
8 these classes of customers the benefits of the power
9 that can be produced with Puget Sound Energy's embedded
10 cost resources. It's entirely, totally, and completely
11 inconsistent with the deal that was reached. It's a
12 completely new contract.

13 COMMISSIONER HEMSTAD: Well, I would like to
14 pursue that. Your point is that it would then be a
15 terribly different world from 1996. I want to focus on
16 what was foreseen or foreseeable in 1996. I cite to the
17 record that shows on January 1 of the year 2000, the
18 price at the Mid-C for a megawatt was \$15. And then on
19 January 3, the price was \$150. Now that's a 1000%
20 change in a year, and during the year, the price was
21 substantially higher than \$150.

22 I really have two parts to this question. Is
23 it the Company's position that the parties to the deal
24 in 1996, which I suppose ultimately also includes the
25 Commission in its approval of the rate plan,

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1 contemplated that there could be volatility of 1000% in
2 a relatively short period of time on the price of power?

3 MR. BERMAN: Nobody specifically expected
4 that sort of volatility, but what we do know is that
5 Mr. Canon put forward testimony that the risks were
6 totally unknown, totally unknown, but that the customers
7 accepted them anyway. We also note that Mr. Schoenbeck
8 testified even back in 1999 that he would advise any of
9 his clients to enter into a longer term deal, not based
10 on the index. If his clients had done what he had
11 suggested, listening to Mr. Schoenbeck, and as much as I
12 have criticized him in cross-examination, he's a very
13 bright guy, if they had listened to Mr. Schoenbeck and
14 entered into longer term deals, which they could have
15 through the optional price stability provision or
16 through their own hedging arrangements, they could have
17 locked in in 1999 multi year deals at \$28 a megawatt
18 hour. If Georgia-Pacific had done that, it's quite
19 possible that all of those people who are out of work
20 right now would still be working, if we assume for the
21 moment that Georgia-Pacific's problems really are
22 related to electricity.

23 COMMISSIONER HEMSTAD: Okay. I would like
24 the other counsel to comment on that question of what
25 was foreseen or foreseeable. The second question along

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1 the same lines, you say at the time the Company was
2 given the opportunity to manage its resources, and it's
3 I suppose we can call it the resource stack, and it
4 seems like the Seattle Centralia and its at least
5 proposed sale of Colstrip, but the fact that the price
6 is \$150 or \$400 or \$1,000 is not something that falls
7 within the skittle bank of the Company in managing its
8 resources, is it?

9 MR. BERMAN: I think it is, because the deal
10 as we understood it was that we had a set of customers
11 who were I will call them entitled to the resources we
12 owned, and so we through -- so we slowly reduced down
13 the amount of resources we owned. Then we had a set of
14 customers who had no entitlement to the resources we
15 owned, and they were served at market rates.

16 Now if we were smart, if we were good
17 businessmen, we might be able to serve them, figure out
18 a way to get the power to sell to them at below market
19 rates and sell to them at market rates. But we knew
20 that whatever we did that our risks were limited in the
21 sense that we were supposed to sell to them at market
22 rates, and worse came to worse, we could buy for them at
23 market rates, because we no longer maintained longer
24 term leases for them.

25 So it was a deal that all hung together and

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1 made sense, made sense at the time. And it makes sense
2 and made sense no matter what the market rate level is.
3 That is we serve the fixed price customers with our
4 fixed resources, and we let the fixed resources match
5 the amount of fixed customers we had. And then we have
6 another set of customers that we serve at market rates,
7 and we can serve them through the market. And I don't
8 think that it matters what level the market is for that
9 set of deals to be one that's consistent with what we
10 agreed to in 1996.

11 MR. FFITCH: Maybe I can jump in here. As a
12 lawyer, I nervous when I haven't talked for a while. In
13 response to Commissioner Hemstad, your question about
14 expectations, and I think responding to this, I also
15 want to respond to a number of statements that
16 Mr. Berman has made about the Company's sense that the
17 up side revenue levels that they're currently
18 experiencing with Schedule 48 customers are somehow part
19 of the deal, part of the almost guarantee under Schedule
20 48.

21 I want to go back to what I think perhaps is
22 the only thing that we can say was anticipated at the
23 time of Schedule 48, and that is actual bona fide
24 revenue losses by the Company. That's what was expected
25 by Puget Sound Energy, by this Commission, by Public

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1 Counsel, and by the Complainants. That was the
2 expectation of what would occur under Schedule 48 is
3 that there would be revenue losses. In other words,
4 that these Complainant customers would be able to get
5 deals out in the market that put them ahead of Schedule
6 49 rates, below Schedule 49 rates. There was simply --
7 and that was the premise upon which the guarantee as
8 adopted and upon which the rate plan was adopted.

9 There was no premise built into the approval
10 of Schedule 48 that there would be any positive level of
11 earnings by Puget Sound Energy. But what we're hearing
12 today from Puget Sound Energy is that there's somehow a
13 guarantee that the maximum possible windfall type of
14 earnings levels that result from these really
15 unprecedented market developments were somehow a
16 fundamental premise of the adoption of Schedule 48, the
17 rate plan, and the guarantee. I just think that's not
18 the case.

19 CHAIRWOMAN SHOWALTER: Wasn't there at least
20 a quid pro quo that because of the expectation of
21 revenue loss, which of course would be to Puget's
22 detriment, they were at least going to get the
23 flexibility to manage their resources as they saw fit,
24 and if they did better, to keep the difference? I mean
25 isn't that just as much a premise or at least as much a

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1 part and parcel of the original deal as the expectation
2 of loss?

3 MR. FFITCH: I would say up to the point of
4 fair, just, and reasonable rates.

5 CHAIRWOMAN SHOWALTER: I want to shift gears,
6 so if you want to answer, if counsel wants to comment on
7 this topic, go ahead.

8 MR. TROTTER: I just have one brief one then.

9 CHAIRWOMAN SHOWALTER: Go ahead.

10 MR. TROTTER: With respect to managing its
11 resources, as the Commission was aware, it did not apply
12 that to the Centralia and Colstrip context. In at least
13 one of those dockets, I think it was the first one,
14 Puget objected, this is part of our management. So I
15 think this is in that category of things that weren't
16 anticipated under the merger plan, and the record is
17 very consistent. No one expected the volatility, and
18 the issue is how do you deal with that.

19 Mr. Berman is correct, in the worst case
20 scenario, if there are no resources left on Puget's own
21 system, it will go out and purchase in the market for
22 these customers, and it may do that on an occasional
23 basis in the meantime. But we are firmly committed to
24 the principle they have the obligation to serve at least
25 cost, and that includes the resources in the last on the

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1 bus analogy.

2 MS. DAVISON: Could I just briefly comment on
3 several things that have been discussed. First, I want
4 to clear up this notion that Mr. Canon stated that the
5 risks were totally unknown. If you look at his
6 affidavit that's attached to the complaint, it's
7 indicated in there what the expectations were at the
8 time 48 was developed in terms of the risks. Also, I
9 would point you to the evidence that has been included
10 in this record of the preparation of the account, the
11 execs' summary for each customer that went onto Schedule
12 48, which was an individual here for the Boeing Company
13 or for CNC, these are the expectations of the range of
14 what you will pay. So I would point you to that in
15 terms of the expectations.

16 Now in terms of the issue that I think you're
17 getting at with your questions, which is quite
18 appropriate, is to test kind of the if you implement
19 Staff's proposal, all the various what ifs. And what I
20 would say is that at this moment in time more so
21 probably than at any other time in our industry, the
22 future is so unclear. I can't predict what's going to
23 happen next week with prices or this industry, much less
24 next month. If you are inclined to go that way, and if
25 you are concerned about the issues that Mr. Berman has

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1 raised with regard to these federal cases, I think that
2 you have the ability to address that through a reopener
3 provision.

4 CHAIRWOMAN SHOWALTER: Mr. Berman.

5 MR. BERMAN: If I could just give you a cite
6 to exhibit, I'm afraid I don't know what exhibit it is,
7 it was the rebuttal testimony of Ken Canon from the
8 981410 case. And in that exhibit at page eight, line
9 one, he starts out:

10 The risk of where the index price would
11 be in relation to PSE's energy related
12 costs was and is completely unknown.
13 Therefore, both parties assumed equal
14 price risk.

15 And again, I think it's important that at
16 that point, the Complainants were taking the position
17 that a deal is a deal and that we have to enforce the
18 terms of the index price provisions in the deal no
19 matter what. And they won, and Puget lost. And we
20 think it's appropriate to stick with what the Commission
21 found in that case.

22 CHAIRWOMAN SHOWALTER: It strikes me that we
23 have maybe six different options that have been
24 discussed, the first being the status quo, the second
25 being going back to 49 with a surcharge, which was the

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1 original request of the Complainants, the third being
2 the soft cap proposed by Staff and Public Counsel, the
3 fourth being a firm cap based on gas prices proposed by
4 Mr. Schoenbeck and Complainants. The fifth and sixth I
5 think are in the air, and so I would like to discuss
6 them as well. One is the new filing of Schedule 48 and
7 what it may or may not afford procedurally, and then
8 finally schedule 448. All of these things are in play,
9 though perhaps not all are directly before us in this
10 proceeding.

11 My question is, wouldn't the remedy of
12 speedily getting back either to Schedule 49 under the
13 terms of 48 that anticipates payment of long run
14 resource costs and incremental capacity, or 448, which
15 is the buy-sell, aren't those two options much closer to
16 the intent of 48 itself? That is it seems to me that 48
17 did not or does not contemplate cost based solutions,
18 but it does contemplate return to 49 with a charge at
19 least at the end of 48, and it does contemplate going to
20 open access, which maybe buy-sell isn't, but it's closer
21 to it than I think the soft cap proposal. So I would
22 just like to hear from the parties whether they think
23 that's conceptually right. And then is it practical to
24 try to get to either of those two places quickly, should
25 we want to grant relief?

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1 MS. DAVISON: Let me say with regard to 448
2 first, because I think that's an easier answer for me to
3 provide you, we took 448, and admittedly this was a
4 draft about a month ago, but it was essentially the
5 same. It's essentially the same now. Things have
6 changed a little bit in the course of a month. And we
7 had a couple of our ICNU members shop that to power
8 marketers, and we had two of them say, no, thank you,
9 we're not interested in serving under this tariff. We
10 had a couple of other ones say to us, well, yes, if we
11 provide you with a bid under this tariff, it will be the
12 Mid-C Firm Index price. And that took us back pretty
13 substantially in terms of thinking, oh, my goodness,
14 this is definitely heading in the wrong direction, so --

15 CHAIRWOMAN SHOWALTER: That tells you
16 something about the market out there, doesn't it though?

17 MS. DAVISON: It tells us that the market is
18 in a complete state of disarray, and people are not
19 willing to take on any risks at this moment in time,
20 because no one can predict the future at the moment.
21 Where the in game will be with the West Coast markets is
22 anyone's guess. I think that's right.

23 So I think with regard to 448, we would love
24 for it to be a solution. We would love to be able to
25 say, yes, we want this tariff, we want to buy-sell, and

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1 we want to go out and buy our own power, but we are
2 extremely fearful that 448 is actually going to be a
3 worse solution for us.

4 With regard to the refiled --

5 CHAIRWOMAN SHOWALTER: Actually, before you
6 go to the refiled, just staying on 448, I'm just having
7 trouble reconciling I guess your answers, because it
8 seems to me, yes, you have stated anyway, you would, or
9 let me ask the question. If you could actually have
10 true and genuine open access today, would you want it?

11 MS. DAVISON: I think that you would get
12 different answers from different Complainants. I think
13 what you would hear from Mayor Maxwell from the City of
14 Anacortes is no, he had no idea that that was what he
15 was signing up for with Schedule 48. He's got about a 1
16 megawatt load, and he doesn't have anybody that's going
17 to serve him under 448, very unlikely, and particularly
18 given the type of load he has. So I think he would say,
19 no, thank you. I think you would hear from
20 Mr. Cunningham, sure, if it's true open access without
21 this kind of middle arrangement, and we just simply pay
22 cost based access to PSE, and we're able to go out and
23 do our own deal, I think Mr. Cunningham would tell you
24 that he's very interested in that. And then the rest of
25 the Complainants are somewhere in between.

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1 CHAIRWOMAN SHOWALTER: And what if both
2 options were available, route A, 49 with a surcharge,
3 and route B, we'll call it 448 as proposed, as heard, as
4 modified by this Commission, in other words after
5 consideration of some of the issues that you're raising?

6 MS. DAVISON: I think that there would have
7 to be a pretty substantial change. There would have to
8 be a substantial number of changes to 448 from what we
9 have heard from individuals in the market in order to
10 make that work.

11 Again, as I indicated during the open
12 meeting, we are going to work very hard to present to
13 the Commission what we think should be changed, and
14 we're hopeful that perhaps there will be at least some
15 of these Complainants that might be able to take
16 advantage of that. But I don't want to suggest that
17 that is the solution here, because we don't believe,
18 particularly as proposed, that it is the solution. In
19 fact, as I just mentioned, the testing of the market
20 indicated that it's a worse alternative from 48,
21 particularly since 448 even has some higher charges in
22 it than 48 has. So I don't want to belabor 448 too
23 long, but I also want you to know that there's some
24 very, very serious concerns there with that.

25 CHAIRWOMAN SHOWALTER: Now you were going to

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1 go to refiled 48.

2 MS. DAVISON: With regard to the refiled 48,
3 I guess -- I have heard throughout this proceeding that
4 all we had to do was just simply ask for a cap and we
5 would have gotten it, we could have asked for a reopener
6 if the market went haywire and we would have gotten it,
7 so I guess I would like to officially ask PSE for a cap
8 on the refiled 48, and I would like to officially ask
9 for a reopener if the market goes haywire on 48.

10 And, you know, I say that somewhat tongue in
11 cheek. I say that to illustrate a point, that there are
12 lots of things that we asked for back in 1996 that we
13 didn't get, and I'm not going to sit here today and say
14 that we're going to be able to restructure 48 in a way
15 that is acceptable to all parties that takes away what
16 we think were risks that we did not assume in this
17 market that we think is, as FERC described it,
18 fundamentally dysfunctional.

19 I think that we do need to move forward with
20 a proceeding that determines exactly what the 49 rate
21 plus long run incremental costs are, and I'm sure that
22 will be quite an intense debate. We have had
23 conversations with PSE about that over the last several
24 months, six months or so, and we do not agree on what
25 that language intended, and I'm sure you will be hearing

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1 more about that.

2 JUDGE MOSS: What would it take to work that
3 out? I mean you have suggested it's one of the possible
4 remedies here, Schedule 49 with a proceeding to
5 determine the appropriate surcharge that would be based
6 on that language that you say is in dispute. So with
7 what are we all faced in that regard to determine what
8 that surcharge would be?

9 MS. DAVISON: I think there are two items
10 that I can think of that would be essential for the
11 Commission's consideration and resolution in that issue.
12 The first is that there needs to be evidence about what
13 was intended, what did that language -- what was the
14 intent of the parties and the Commission in adopting
15 that language with Schedule 48. The second is, I think
16 that we need to bring in expert testimony about what the
17 long run incremental costs actually are, and we need to
18 determine what time period that applies to.

19 CHAIRWOMAN SHOWALTER: Is it possible to have
20 an expedited proceeding on those questions that may
21 result in a, well, say temporary short-term interim.
22 I'm never sure what the right term is depending upon the
23 proceeding, but an interim rate while the ultimate
24 questions are litigated?

25 MS. DAVISON: I think that's right. I think

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1 that, and that's part of what we're asking for you to
2 impose, a temporary rate. Let's go forward, and let's
3 litigate that. We can litigate it on an expedited basis
4 and deal with that issue, and we certainly would be
5 prepared to present evidence on that.

6 CHAIRWOMAN SHOWALTER: I would like to hear
7 from the other parties on the attractiveness of 49 with
8 a surcharge and 448 and new filed 48, both procedurally
9 and substantively as possible solutions.

10 MR. TROTTER: Let me start with 49 with the
11 surcharge. That's certainly called for under the
12 tariff. Our concern is there's not a vehicle for moving
13 that, at least it doesn't for moving that today. The
14 Commission might have to ask for the Company's
15 assistance in getting such a vehicle, but that is one
16 long-term solution, that that could be expedited. And
17 the company may have more observations regarding the
18 feasibility of that.

19 With respect to 448, in concept, Mr. Buckley
20 testified for Staff that that is in concept an
21 attractive solution for the Staff, from the Staff
22 perspective. But the devil is in the details, and
23 there's problems that would have to be addressed.
24 Whether that can be done in a real expedited manner also
25 is -- I can't -- I just don't have a good feel for that.

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1 But certainly if it can be shown that a schedule, a form
2 of Schedule 448 is out there that is available to all
3 the customers, that would be an acceptable solution.

4 With respect to refiled 48, under the
5 Schedule 48 order, the Commission can revise or
6 terminate that schedule, and the Company has the burden
7 of proving that the schedule ought to be continued. And
8 so that also, I think, is an attractive vehicle for a
9 number of reasons.

10 And I think the Staff remedy in this case is
11 a bridge to any of those elements, but I think they all
12 have something going for them except for the Schedule 49
13 with surcharge option. We don't have a vehicle for
14 that. The other two --

15 CHAIRWOMAN SHOWALTER: May I just stop you
16 there since we do have a vehicle if 48 -- and we could
17 after hearing terminate it, and at termination it, by
18 its terms, allows customers to go back on 49 subject to
19 surcharge, why isn't new filing of 48 a vehicle to get
20 to 49?

21 MR. TROTTER: It may be. I thought of it in
22 terms of a termination charge at the end of the contract
23 period, but it would be subject to the review. So I
24 think you're probably right. If a notice of hearing
25 goes out in which that issue is teed up, I presume the

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1 Company would pursue that, so I think you're probably
2 right on that one.

3 CHAIRWOMAN SHOWALTER: Mr. Berman.

4 MR. BERMAN: I have a number of different
5 notes. One, I would note that just something to keep in
6 mind and an issue that we have dodged around throughout
7 the case was whether the exact same relief is necessary
8 or appropriate for all parties. I think there are
9 obviously some who have assumed that everyone gets
10 relief or everyone doesn't get relief, and they all get
11 it in the same way.

12 There are some Schedule 48 customers who are
13 not here, and there are some Special Contract customers
14 who are not here, and I think we should be mindful of
15 the fact that there is the ability right now to hedge
16 against an indexed price and that the schedules serve
17 that purpose, that they create a vehicle for hedging.
18 Because all the hedges in the region are hedged against
19 the Mid-Columbia Indexes, and so you should just think
20 in terms of looking at those different sorts of avenues
21 about the fact that there may be people who want to stay
22 on 48.

23 With respect to the refiled 48, I made my
24 position clear in the open meeting, and I don't want to
25 repeat it too much, but our view of the order that

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1 established Schedule 48 was that it was crystal clear
2 that the reason for the refiling and the compliance
3 filing by the Company was to check the sufficiency, the
4 very concerns that Public Counsel was raising. There
5 was a concern that the company might be making too
6 little and that the Commission would want to look and
7 make sure that that wasn't going to create some problem
8 with respect to other customers' rates. And you will
9 remember that when Schedule 48 was entered into, that
10 was before the merger rate plan was entered into, so
11 they didn't know yet that the merger -- that the rates
12 for other customer classes would get frozen, so it
13 wasn't yet a complete deal at that time. We don't think
14 that that's really a good policy for doing a whole lot
15 of other finagling to the tariff. We think the
16 appropriate thing is to just look at whether the tariff
17 is compensatory, and there's no one who is saying it
18 isn't.

19 With respect to 448, as I have said already,
20 we think that that provides options. We think that
21 that's a solution. We would definitely like the
22 Commission to engage in whatever procedures would allow
23 us to move to a world where people who could take
24 advantage of 448 and want to take advantage of 448 can
25 do so. We think that there are people who will want to

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1 do so.

2 One thing to keep in mind is that the type of
3 rates that you can get when you enter into a deal depend
4 to some extent on how long a deal you're willing to
5 enter into. If you go to a marketer and say, I want a
6 deal for the next few months, that marketer is going to
7 say, well, you're going to pay me the market rate, the
8 index rate, because that's what everyone locks in for,
9 the next few months. But if you're willing to go say I
10 want a deal for the next few years, you may be able to
11 get a better deal, because people have a different view
12 in mind of what's in place for the next few years.
13 Maybe some sophisticated customers out there or at least
14 customers who bring in some of the sophisticated
15 analysts within their companies can go to look at the
16 array of options out there, talk to brokers, and realize
17 they can get some deals over the long term that make
18 sense, that make sense with Schedule 448.

19 With respect to the Schedule 49 plus a
20 surcharge option, I note first of all that that only
21 comes into play at the end of Schedule 48, and we're not
22 there yet. But once it does come into play, there's a
23 lot of it depends on how that works, that is the issue,
24 of how the costs work. In my mind, it depends on what
25 the customer wants and is willing to commit to. Again,

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1 if the customer is willing to commit to staying with the
2 Company for power supply for 10 years, the set of
3 options and arrangements for how you would provide power
4 to that customer seems to me at first thought that,
5 though we haven't worked it all out, seems to me it
6 would be different than a customer who is frankly not
7 willing to make any commitment at all or who is only
8 willing to make a short-term commitment.

9 If the customer wants only a short-term
10 commitment, I think Mr. Gaines said, and I would agree,
11 that 49 plus a surcharge would look basically like the
12 deal we have today. That is, someone who wants a
13 short-term commitment is going to find that our cost of
14 serving them comes out to be the same as market. For
15 any shorter term arrangement and even for a longer term
16 arrangement, you're going to probably find that there's
17 a market bridge to whenever the point that the longer
18 term arrangement can come into play.

19 MR. FFITCH: Your Honor.

20 CHAIRWOMAN SHOWALTER: Yes.

21 MR. FFITCH: Public counsel is, I think, very
22 comfortable with the Commission proceeding to look at
23 Schedule 448 or the new Schedule 48, either one of those
24 vehicles, as a way to try to resolve the industrial
25 customers' issues and all the issues that have really

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1 been raised here. You've obviously got some procedural
2 options you could adopt. You could find that there's an
3 emergency and adopt a remedy, and then probably will
4 nevertheless proceed with those dockets and to evaluate
5 those things. Or you could conclude that there's no
6 emergency at this time and no interim relief is
7 necessary, and you could then proceed, and you would
8 likely then proceed to review issues in those dockets.
9 Our position is that the Commission should only look at
10 that kind of interim relief in the cap that we're
11 proposing if it finds that there's an emergency. I just
12 wanted to reiterate that at this point.

13 CHAIRWOMAN SHOWALTER: Okay.

14 MR. FFITCH: And secondly, the other point I
15 wanted to make is that while the Commission can
16 certainly look at the return to Schedule 49 with a
17 surcharge, Public Counsel has some very serious
18 questions about that as a long-term option here. As we
19 have said in our briefs, we think that because Schedule
20 49 appears to be below cost, by bringing customers back
21 on to Schedule 49, it does create cost shifting
22 problems. We're not sure that those customers really
23 want to be on a tariffed rate long term. In any event,
24 it would put substantial resource burdens on the
25 Company.

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1 And the surcharge, I think as Mr. Berman has
2 pointed out, if they come back with a surcharge, we
3 certainly would ask the Commission to establish a
4 reasonable surcharge. That's going to be so significant
5 as a practical matter, that it may not be a real
6 attractive option to these customers in the long-term.
7 So we do continue to think that buy-sell for the large
8 customers is the best approach, so a 448 docket we think
9 would be a productive exercise.

10 Having said that, we do think for the
11 smallest customers here, in the case of Anacortes and
12 perhaps CNC, that some return to a tariffed rate with a
13 reasonable surcharge might be in those limited cases
14 perhaps a reasonable approach.

15 JUDGE MOSS: I note the hour and that we are
16 past our time a little bit, but I will leave it to the
17 discretion of the Commissioners whether we continue.

18 COMMISSIONER HEMSTAD: Well, I have a couple
19 of questions for Staff, and I don't think this should
20 take long. I take it there's a difference of view
21 between the Staff and Public Counsel with regard to if
22 the conclusion is not an emergency but this falls within
23 the normal adjudication statutes, our ability to apply a
24 temporary or interim rate going forward.

25 MR. TROTTER: I think that's a fair

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1 statement. There is a difference. Public counsel just
2 said theirs is conditioned on a finding of emergency.

3 COMMISSIONER HEMSTAD: Are you saying that as
4 a matter of law or simply as a matter of policy
5 recommendation, Mr. ffitch?

6 MR. FFITCH: As to the legal issue, Your
7 Honor, we had not specifically done a legal analysis of
8 whether at this particular point in time absent a
9 finding of an emergency the Commission could
10 nevertheless grant interim relief. We had proceeded on
11 the basis that this hearing was about, is there an
12 emergency, and if so, what's the remedy. That, I guess,
13 perhaps answers the question.

14 COMMISSIONER HEMSTAD: Back to Staff,
15 pursuing that point in a somewhat different context,
16 Mr. Berman in his opening remarks, I believe, made the
17 point that in the prehearing conference, the issues as
18 presented were, is there an emergency and what is the
19 remedy, and therefore we could not consider anything
20 more than that. And I take it you would disagree with
21 that assessment of the prehearing conference or
22 prelitigation environment.

23 MR. CEDARBAUM: Let me answer this one,
24 Commissioner. Again, I had referenced earlier to the
25 Commission's prehearing conference order, which was I

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1 guess on I think it was December 18th, and that was the
2 document which to us defined the issues to be considered
3 in this hearing. We interpreted the Commission's notice
4 of hearing to include remedies even in the absence of an
5 emergency.

6 However, I would concede though that if the
7 Commission sees that differently, again, that was our
8 interpretation of it. If we were wrong in that, then
9 there would be an issue as to whether or not the Company
10 has been put on notice that absent an emergency, a
11 remedy could be granted.

12 CHAIRWOMAN SHOWALTER: I would like to follow
13 up on that point. Let's assume we find there's no
14 emergency, and let's assume we do have another hearing.
15 In other words, skip over the issue of whether this
16 hearing is sufficient to move forward on the complaint
17 or any of these other matters. If after another hearing
18 we found that the tariff is not fair, just, and
19 reasonable, at that point, in your view, what are the
20 remedies that we can or adjustments that we can make in
21 light of these different options, all the different
22 options that we have talked about?

23 MR. CEDARBAUM: Generally speaking, at that
24 point, you're past phase one, now you're into phase two,
25 the appropriate notice of hearing has gone out, all of

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1 those procedural requirements have been met and you were
2 to find that current Schedule 48 was unjust and
3 unreasonable, you would then be setting a different
4 rate, but a just and reasonable and fair and sufficient
5 rate prospectively. And that could be done on a
6 temporary basis, I think, pending these other processes.
7 It would be the Schedule 48 rate. I suppose you could
8 characterize it as a permanent rate until changed again
9 in one of these other processes. But it would be a
10 prospective rate, at least from the Staff's -- we would
11 recommend a prospective change.

12 There is the issue in 80.04.220 that
13 discusses relief back to the date of the complaint or
14 even before that. You would have to make a judgment,
15 the Commission make a judgment itself as to whether or
16 not to provide relief backward in time, but the Staff
17 rate cap proposal at least -- and any new rate Staff is
18 proposing only prospectively.

19 CHAIRWOMAN SHOWALTER: While we're on this
20 point, do you agree that in order to do anything here,
21 we have to find the whole tariff not fair, just, and
22 reasonable as distinct from the Mid-C Index. In other
23 words, it's the tariff we have in front of us with all
24 -- with the Mid-C Index and the various options for
25 hedging, et cetera. Do we have to look at the tariff as

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1 a whole, or do you think we can just say the Mid-C Index
2 is no longer fair, just, and reasonable?

3 MR. CEDARBAUM: As I remember the complaint,
4 the complaint was directed to the energy charge index
5 mechanism. And so I think as to the -- so I think we
6 would be focusing on that, but I suppose in determining
7 whether or not that was a fair, just, and reasonable
8 rate, you could look at the entirety of the tariff.

9 CHAIRWOMAN SHOWALTER: Do you agree with
10 that, Ms. Davison?

11 MS. DAVISON: Yes, I do. I think that that's
12 absolutely correct. Our complaint addressed the issue
13 of the energy component of the rate, the Mid-C Index.
14 However, we put in the catch all provision that you may
15 impose whatever relief or remedy that you believe to be
16 fair, just, and reasonable, which could include either
17 specifically substituting something for that index or
18 terminating Schedule 48.

19 CHAIRWOMAN SHOWALTER: Mr. Berman.

20 MR. BERMAN: I think that it's important to
21 look at the tariff as a whole and the Special Contracts
22 as a whole. And one thing that we occasionally forget
23 in our conversations, but I try to always bring us back
24 to, is that the tariff and the Special Contracts both
25 had optional price stability provisions. And if you say

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1 that there's something that's unjust or unreasonable,
2 without me conceding that you have the right to do so,
3 but if you say there's something unjust and
4 unreasonable, you should look at whether the index
5 energy pricing in combination with optional price
6 stability is not fair, just, and reasonable.

7 I think that you made an excellent decision
8 this past summer in the Georgia-Pacific/Bellingham Cold
9 Storage case where basically the same set of claims were
10 made by a subset plus another customer of those who
11 we're facing today. And your ruling there was, well, go
12 try to work out optional price stability, since that's
13 part of the provisions that are available under your
14 tariff. The record shows that if they had done that, if
15 they had worked out optional price stability after that
16 order was entered, that they would have been protected
17 from the spikes and price shocks that they have
18 experienced recently.

19 And again, it's notable that Bellingham Cold
20 Storage is not here as a Complainant in this case, and
21 we learned in the initial prehearing conference that
22 that is because Bellingham Cold Storage listened to your
23 order this summer and went out and found price
24 stability. It didn't do it through the Company, but it
25 found a hedge, and that's why Bellingham Cold Storage is

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1 not here.

2 COMMISSIONER HEMSTAD: I have one further, I
3 hope a question with a short answer. And I guess it
4 goes to the substance of the remedy that the staff is
5 proposing and the comment from Mr. Berman. How do you
6 see your remedy applying to some Schedule 48 customers
7 who, assume they have hedged and would not want to
8 switch to the soft cap, would you see this as mandatory
9 in all 48 customers or some kind of a choice to make?

10 MR. TROTTER: I don't think it would make a
11 difference, because I think, as I understand the way
12 hedges work, the customer pays the tariff rate, and then
13 whoever is giving them the price stability pays them
14 back the difference between the hedge price and the
15 tariff price. So it would not -- there would not need
16 to be any special treatment for them.

17 And with respect to this complaint does go to
18 the remedy, does go to the tariff overall, I think the
19 damages question would be limited to the Complainants
20 here, but the remedy would be for the tariff overall,
21 not just the customers that are here.

22 CHAIRWOMAN SHOWALTER: I thought the question
23 Commissioner Hemstad was going to ask was what about the
24 customers who have hedged, are they're liable to pay
25 Puget the index rate, which if lowered, gives them, in

01843

1 essence, a windfall?

2 MR. TROTTER: It would depend on the degree
3 to which they hedged.

4 CHAIRWOMAN SHOWALTER: Right, could have been
5 \$20, \$50, \$150, we wouldn't know.

6 MR. TROTTER: I think it would give the
7 hedger the windfall. But the whole problem, in our
8 view, is one of balancing all of these competing
9 interests, and that would be another one to add to the
10 pile.

11 CHAIRWOMAN SHOWALTER: Okay.

12 MR. BERMAN: I would note in that regard that
13 again, not all customers are here, and many of the
14 customers are differently situated. Some of the -- I
15 think we found that in general, the bigger customers
16 chose not to even submit witnesses, perhaps because they
17 knew the embarrassment that could occur when we found
18 that their energy prices were a tiny fraction of a
19 percent of their revenues for the year. When you're
20 considering remedies and if you're going to consider
21 remedies, and I don't want to suggest that any remedy is
22 permissible, I think it would be wise to think about
23 whether it really makes sense to think of remedies for
24 everyone or whether you should limit your thinking to
25 just the very smallest of the small customers. The big

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1 guys can take care of themselves.

2 JUDGE MOSS: Okay, well, I believe then the
3 Bench has had its questions satisfied with answers, and
4 I think at this point in time, we will take a recess and
5 let the commissioners retire from the Bench. And then I
6 will ask for you all to come back and finish up exhibits
7 and other housekeeping matters.

8 Was there something else from the Bench?

9 CHAIRWOMAN SHOWALTER: I would like to thank
10 you, all parties. This has been an extraordinary set of
11 hearings, very long hours, very substantive issues
12 compressed into a very short time. It has been
13 intellectually taxing and physically grueling for all of
14 us. But I think the caliber of presentations and
15 arguments and briefing has really been outstanding even
16 if there weren't time constraints, which there were. So
17 thank you very much.

18 COMMISSIONER HEMSTAD: I would certainly echo
19 those comments.

20 And did you say we're taking a recess?

21 JUDGE MOSS: Okay, we will be in recess then
22 until 1:00.

23 (Brief recess.)

24 JUDGE MOSS: All right, now in terms of
25 exhibits, I think the only paper I have been handed so

01845

1 far this morning includes the response of Public Counsel
2 to Bench Request Number 15. Now that would be we called
3 some things records requisition requests. Actually, we
4 didn't get that high, so.

5 MR. FFITCH: We didn't, Your Honor. I was
6 going to address that. Mr. Lazar and I were unable to
7 communicate during the preparation of this, and I
8 believe it should be number 12.

9 JUDGE MOSS: All right.

10 MR. FFITCH: From my notes.

11 JUDGE MOSS: All right.

12 MR. FFITCH: So I guess --

13 JUDGE MOSS: And that's Exhibit 31.

14 MR. CEDARBAUM: Is that the whole packet or
15 just the non-confidential?

16 JUDGE MOSS: Oh, I don't know, is this all
17 part of one response, Mr. ffitich, or is it two?

18 MR. FFITCH: Yes, it's all part of one
19 response. The white paper is non-confidential, and then
20 the confidential calculations based on Exhibit 1304 are
21 on pink paper and marked highly confidential.

22 JUDGE MOSS: Oh, highly confidential?

23 MR. FFITCH: Yeah, so I don't know how you
24 want to deal with this.

25 JUDGE MOSS: It's going to be Exhibit 31-HC.

01846

1 I'm just going to treat the whole thing as a single
2 exhibit.

3 MR. BERMAN: Your Honor, we have a response
4 to a -- frankly, we lost track of the number, whether it
5 was a records requisition or a Bench request. This was
6 the request by Chairwoman Showalter for the number of
7 occurrences where the index price is greater than \$125
8 and where it's greater than \$150, and we will hand that
9 out now.

10 JUDGE MOSS: Was that the last one she asked
11 you about?

12 MR. BERMAN: I believe so, Your Honor.
13 That's the only homework assignment we had written down
14 for ourselves.

15 JUDGE MOSS: Okay, well, that was then
16 Records Requisition Number 13, and I'm going to mark
17 that as Exhibit 32.

18 MR. BERMAN: And for the record, on that
19 document, it shows the number of occurrences where the
20 on-peak index was greater than \$125 and where it was
21 greater than \$150, the number of occurrences in 2000
22 where the off-peak index was greater than \$125 and
23 greater than \$150. And then it shows the number of
24 occurrences where the average for an entire day was
25 greater than \$125 and where it was greater than \$150.

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1 JUDGE MOSS: Okay.

2 MS. DAVISON: Your Honor, could I just get
3 clarification about the response here. Is this the
4 number of days, is that the interpretation of
5 occurrences?

6 MR. BERMAN: Yes, these are the number of --
7 for each day, there's an on-peak and an off-peak, and
8 there's an average for the day. And so we looked at the
9 data table for the on-peak days and found 94 above \$125,
10 79 above \$150, et cetera, and that was days in the year
11 2000, January 1, 2000, through December 31, 2000.

12 JUDGE MOSS: Okay, and then the third column
13 is where the average for the entire day was above the
14 appropriate threshold?

15 MR. BERMAN: (Nodding head.)

16 JUDGE MOSS: All right. Now is there any
17 other new paper anybody wants to hand up, this being the
18 last best chance as they say.

19 MS. DAVISON: Your Honor, I just had one
20 question about I think it actually was -- well, I
21 actually have lost track of the numbers. I wanted to
22 say it was the very first request, but I want to make
23 sure that I didn't drop the ball, and that was the
24 request for the service agreements.

25 JUDGE MOSS: We have them all.

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1 MS. DAVISON: Okay, I just wanted to make
2 sure that happened.

3 JUDGE MOSS: Now there is one thing though
4 that you did drop the ball on, and that is Records
5 Requisition Number 6 asking for a statement of the days
6 and hours of operation of each Complainant. That's
7 Exhibit 23, and I don't have a response to that. I
8 should think that would be a fairly easy one to put
9 together and also fairly uncontroversial, so if you
10 could do that and submit it in the next day or so, that
11 what be helpful.

12 MS. DAVISON: We'll do that, Your Honor. Can
13 you state that again, I'm supposed to?

14 JUDGE MOSS: Yeah, we just wanted to know the
15 days and hours of operation of each Complainant.

16 MS. DAVISON: We will do that right away. I
17 apologize for not getting it to you earlier.

18 JUDGE MOSS: I have no idea how many pages of
19 paper there are in this record, but it is enormous, and
20 that would probably take one sheet, so it will be a
21 small matter in a great universe.

22 Mr. ffitch.

23 MR. FFITCH: May I please ask what the Bench
24 request or Record Requisition Number 11 is. I just did
25 not catch that one.

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1 JUDGE MOSS: And I would be able to tell you
2 if I had a note on that subject, but I don't. I have a
3 response to it apparently. It's been marked 30-C, and I
4 have it checked off on my pad, but I honestly off the
5 top of my head don't remember what it called for.

6 MR. FFITCH: I assume I have been given a
7 copy of it too.

8 JUDGE MOSS: I would think so. Exhibit 30-C,
9 who provided that? I could pull it out.

10 MR. TROTTER: We have it.

11 JUDGE MOSS: That was provided by Puget.
12 It's 11, that's right, 30-C, it's Puget Sound Energy
13 Schedule 48 summary 2000, I guess it would be the
14 summary of usage.

15 MR. BERMAN: We were asked to give a list of
16 the customers, their sites, and the average megawatt or
17 load for each customer, and that's what that exhibit
18 has.

19 MR. FFITCH: Thank you very much.

20 JUDGE MOSS: And if you don't have a copy,
21 let them know, and they will give you one.

22 MR. BERMAN: And it was confidential since it
23 has load data for specific customers.

24 JUDGE MOSS: Right, I did note it's a C,
25 30-C.

01851

1 electronic transmissions of these updated exhibit lists,
2 if you catch something, please let me know. These
3 things are prone to human error like anything else, so
4 if you catch something in the way of a failure to
5 designate something as confidential or highly
6 confidential or a numbering problem or an exhibit
7 description, anything, bring it to my attention, and
8 we'll get it corrected.

9 MR. BERMAN: Your Honor, with respect to
10 confidentiality, there were a couple of exhibits that
11 perhaps we should reference now that we back designated
12 as confidential. One of them was an exhibit that
13 related to Air Liquide. We have no objection to
14 backdating that as confidential, and that was not put
15 into the Commission's files or records until after we
16 designated it as confidential, so I think that's
17 straight. With respect to there was some information in
18 relation to a Boeing swap, and we also will not object
19 to back designating that as confidential.

20 JUDGE MOSS: Do we have numbers?

21 MR. BERMAN: I can obtain them, Your Honor, I
22 don't have them handy.

23 JUDGE MOSS: Just forward them to me by
24 E-mail.

25 MR. BERMAN: And there was also a question

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1 about a memo for which there was a claim of
2 attorney-client privilege asserted with respect to the
3 memo, and I think it's still an open question that has
4 to be ruled on at some point, whether that memo will get
5 the protections of the privilege or not. But we did
6 designate in the Commission's files pursuant to your
7 order that that document would be designated
8 confidential. We view the document as having all
9 confidentiality waived because it was freely and
10 voluntarily faxed to Puget Sound Energy, thus waiving
11 the attorney-client privilege.

12 JUDGE MOSS: Well, I don't really want to
13 hear any extended argument on that right now. If it
14 becomes important to treat it other than confidentially,
15 then I suppose we have to resolve the issue. Otherwise,
16 it's in the record as a confidential matter. As I
17 understand it, that's satisfactory to everybody. It was
18 just a question because of privilege that was asserted
19 as to it should be treated confidentially. Have I got
20 that right, or is there some contention that it
21 shouldn't be in the record at all that's important to
22 you to have sustained?

23 I mean really, come on folks, we have put a
24 lot of effort into this case. Let's don't quibble. We
25 all understand that if you are willing to allow that to

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1 occur, that that is not in itself a concession on the
2 point. And if it becomes important at some future
3 point, then you can have me subpoenaed, and I will come
4 into court and testify that I never ruled on it or
5 whatever you need. But really, I would hate to spend
6 any more of my time on this if it's not really
7 necessary.

8 MS. DAVISON: Your Honor, could I just make a
9 brief statement for the record?

10 JUDGE MOSS: You certainly may.

11 MS. DAVISON: Thank you. What I was saying
12 with regard to that document, I'm not going to object to
13 it being in the record on a confidential basis.
14 However, we do believe that it is an attorney-client
15 privileged document, we do not believe there was any
16 waiver of that privilege. Mr. Berman did not put on a
17 witness that testified as to how this document got into
18 their possession. We have no evidence on that fact. We
19 preserved the privilege at the deposition, and I do not
20 believe that Mr. Berman should have released that
21 document based on our preservation of the privilege.

22 JUDGE MOSS: Okay, well, you all can duke
23 that out in some other forum if you choose to do so, but
24 for our purposes, I will note for the record that I do
25 not regard my receiving it into the record under the

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1 circumstances of this case to be something that any
2 court or other jurisdictional body should consider as
3 constituting a waiver of any attorney-client privilege
4 that might otherwise apply to the document. And I will
5 note also that I do not feel I have adequate information
6 in the record to rule one way or the another on the
7 subject and that it would require probably some hours of
8 effort to get through that and -- well, I will stop
9 there.

10 Now anything else we need to take up?

11 I always have this lingering sense that I'm
12 forgetting something, but I suppose if I am, it is of
13 probably sufficient order of importance that we can deal
14 with it informally. At least I will be hopeful that
15 that's the case.

16 I would like to add on the record to the
17 comments that the commissioners made at the close of
18 their presence on the Bench earlier this afternoon and
19 say that for my part, I very much appreciate the highly
20 professional way in which all counsel and parties and
21 witnesses have conducted themselves throughout what is
22 in my 20 years of experience in doing this business the
23 most challenging administrative law case I have ever
24 seen in terms of the process that was undertaken and the
25 amount of high quality material that was developed by

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1 all parties for presentation to the Commission to assist
2 it in making a good decision. And I really sincerely
3 appreciate the hard effort that you all put in, so thank
4 you very much.

5 And with that, our record is closed.
6 (Hearing adjourned at 1:25 p.m.)

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