

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3	WASHINGTON UTILITIES AND)	
	TRANSPORTATION COMMISSION,)	
4)	
	Complainant,)	
5)	
	vs.)	DOCKET NO. UE-991832
6)	VOLUME 5
	PACIFICORP, d/b/a)	Pages 448 - 473
7	PACIFIC LIGHT AND POWER,)	
)	
8	Respondent.)	

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10 A prehearing conference in the above matter
11 was held on June 1, 2000, at 1:30 p.m., at 1300 South
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge DENNIS J. MOSS.

14

15 The parties were present as follows:

16 PACIFICORP by JAMES M. VAN NOSTRAND, Attorney
17 at Law, Stoel Rives, 600 University Street, Suite 3600,
18 Seattle, Washington 98101-3197.

19 PACIFICORP, by STEPHEN C. HALL, Attorney at
20 Law, Stoel Rives, 900 Southwest Fifth Avenue, Suite
21 2300, Portland, Oregon 97204-1268

22 INDUSTRIAL CUSTOMERS OF NORTHWEST UTILITIES,
23 by MELINDA J. DAVISON, Attorney at Law, Duncan,
24 Weinberg, Genzer and Pembroke, 1300 Southwest Fifth
25 Avenue, Suite 2915, Portland, Oregon 97201.

26 NORTHWEST ENERGY COALITION, by DANIELLE
27 DIXON, Policy Associate, 219 First Avenue South, Suite
28 100, Seattle, Washington 98104.

29 PUBLIC COUNSEL, by ROBERT W. CROMWELL, JR.,
30 Assistant Attorney General, 900 Fourth Avenue, Suite
31 2000, Seattle, Washington 98164-1012.

00449

1 WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION, by ANN E. RENDAHL and ROBERT W. CEDARBAUM,
3 Assistant Attorneys General, 1400 South Evergreen Park
 Drive Southwest, Post Office Box 40128, Olympia,
 Washington 98504-0128.

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24 Kathryn T. Wilson, CCR
25 Court Reporter

00450

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

2 JUDGE MOSS: Good afternoon everyone. We are
3 convened in our prehearing conference in the matter of
4 Washington Utilities and Transportation Commission
5 against PacifiCorp doing business as Pacific Power and
6 Light, Docket No. UE-991832. This is a prehearing
7 conference that has been convened for the purpose of
8 marking our cross exhibits and otherwise taking care of
9 housekeeping matters in anticipation of our two days of
10 scheduled evidentiary proceedings on Monday and
11 Tuesday, as I recall. So we will shortly here go off
12 the record and take care of that chore, and let me ask
13 that we first take up the matter of appearances, and
14 we'll start with the Company.

15 MR. VAN NOSTRAND: On behalf of Pacificcorp,
16 James M. Van Nostrand and Stephen Hall.

17 MS. RENDAHL: On behalf of Staff, Assistant
18 Attorneys General Ann Rendahl and Bob Cedarbaum.

19 MR. CROMWELL: Robert Cromwell for Public
20 Counsel.

21 MS. DIXON: Danielle Dixon on behalf of the
22 Northwest Energy Coalition.

23 MS. DAVISON: Melinda Davison for the
24 Industrial Customers of Northwest Utilities.

25 JUDGE MOSS: Do we have anyone on the

00451

1 conference bridge line? It does not appear that we do,
2 so that will complete our appearances for today. I
3 believe, Mr. Cromwell, you indicated there is a
4 discovery dispute we need to take up today.

5 MR. CROMWELL: Would you like to do that
6 before or after?

7 JUDGE MOSS: Let's take care of that now.

8 MR. CROMWELL: For the record, Public Counsel
9 has been issuing discovery requests, specifically data
10 requests, to the Company throughout the course of this
11 litigation. The cover letter of the data requests
12 include as part of the data request the request that
13 the data request indicate, and I will quote, "Please
14 indicate the date the data response was prepared, the
15 name and phone number of the individual who prepared
16 the response, and the witness who can be cross-examined
17 on it," unquote.

18 You may recall, Your Honor, at the last
19 prehearing conference that I alluded to a discovery
20 issue at that time, and we never did take that up due
21 to the contraction of the hearings. I have been in
22 continuous consultation with Mr. Van Nostrand over this
23 issue up to and including just before this hearing.
24 The problem is the Company has been producing data
25 responses without identifying who is preparing them or

00452

1 who the witness is who can testify to them. I can say
2 to their credit that at the eleventh hour before the
3 last hearing and again more recently after my last
4 discussion with Mr. Van Nostrand, the Company has been
5 belatedly identifying the witness. We've never
6 received the identification of who has prepared the
7 data responses, their phone numbers or contact
8 information.

9 What has really brought this to a head, I had
10 been assuming after my last conversation with
11 Mr. Van Nostrand that our informal discussions about
12 this had resolved the issues and that the Company would
13 be complying with Public Counsel's data request. This
14 morning, I received an overnight mail package
15 containing the responses to Public Counsel Data
16 Requests No. 143 and 144, neither of which have the
17 identifying information that we've been requesting all
18 along. Since the Company appears to be unwilling to
19 voluntarily comply with our requests, they appear to be
20 unwilling to heed the advice of their counsel.

21 At this time, I would make a motion to compel
22 discovery and request from Your Honor an order
23 compelling production by the Company of the identity of
24 the person who is preparing all Public Counsel data
25 responses, their phone number, and the identity of the

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1 witness. Quite frankly, Your Honor, I've tried to
2 extend Mr. Van Nostrand every courtesy I could in
3 resolving this informally and not bringing it to your
4 attention. It appears that his client is not willing
5 to comply with our requests, and I'm about at wits end
6 in how else to deal with this matter. The reason I
7 would request an order from you in this case on this
8 issue is to reinforce to the Company the seriousness of
9 complying with this Commission's rulings, as well as
10 the discovery rules generally in Washington. They do
11 not appear to be taking them seriously so far, and I
12 would ask that you enter an order and that might get
13 their attention where nothing else seems to have.

14 JUDGE MOSS: Does our rule expressly require
15 that you be provided with the preparer and the
16 telephone number of the preparer and the witness who
17 can speak to the exhibit?

18 MR. CROMWELL: Your Honor, under Rule
19 480-09-480, the rule as more generally stated does not
20 require that specific information be included.
21 However -- I have to find the specific language in the
22 rule -- it does require reasonable production and sets
23 forth the scope of requests. I believe the identity of
24 the preparer and the identity of the witness who will
25 testify to that data is clearly within the scope of

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1 small Roman 4 under "scope of request" under WAC
2 480-09-480. I do not believe that the information
3 we've requested is in any way outside the scope of
4 proper discovery. Quite clearly, unless we know who is
5 producing this evidence, who is testifying to it, it
6 makes it awfully difficult to prepare for
7 cross-examination. I'll give the Company some credit
8 that at the last minute they have been telling us who
9 the witness would be, but they just have completely
10 failed to comply voluntarily with any of this.

11 JUDGE MOSS: I've just got a couple of
12 specific points. One thing, your request is clear to
13 me, I think. The one thing I would ask you about is
14 the telephone number of the preparer. Why would you
15 need that information, because you couldn't contact
16 that person directly?

17 MR. CROMWELL: It's my understanding, be it
18 based upon my limited exposure in this forum, that the
19 ex parte rule among contact between clients outside the
20 context of communication between counsel seems to be a
21 bit relaxed in the context of experts in this forum.
22 It's very common for experts to talk to the other
23 experts. The reason we've had that request was so that
24 if Mr. Lazar, who is one of our experts, or Mr. Hill
25 who is our other expert in this case, had a question

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1 about the data produced, rather than them calling me
2 and me calling Mr. Van Nostrand and Mr. Van Nostrand
3 calling the Company -- instead of having a six-chain
4 phone conversation, they could call whoever produced
5 it. We've not been able to do that at all in this
6 entire case.

7 JUDGE MOSS: I appreciate the convenience of
8 that, and the underlying basis for my suggestion to you
9 is that you couldn't call that person directly as
10 counsel is really grounded in the ethical rules that
11 state once counsel is identified, other counsel may not
12 directly contact the client. In this case, we're
13 talking about a corporation so that would include the
14 corporation's officers and employees and so forth, so
15 that was the basis of my comment.

16 Having said that, I understand that there can
17 be informal processes adopted by parties that will
18 expedite the exchange of information, and I always
19 encourage that, and I think it's a good practice. I'll
20 ask to hear from Mr. Van Nostrand on this. Is there a
21 problem here or some failure to communicate?

22 MR. VAN NOSTRAND: I think there is a couple
23 of points to make, Your Honor. One, I think as you've
24 noted, there is no obligation in the rule to identify
25 the witness or the preparer or the phone number, and I

00456

1 think while it may promote informality and discussions,
2 I don't know that we want every person who possibly has
3 a hand in preparing a response having to take a phone
4 call about particular aspects of a response.

5 I guess on a case-by-case basis, if they feel
6 we've not been responsive to what the request asks for,
7 there are remedies available, but the rule itself does
8 not require this information, and I resent the
9 inference that we have not been in compliance with the
10 rule. If it's an incomplete data request response,
11 fine, resort to the remedies provided for in the rule,
12 but don't suggest that we are not complying with
13 providing the information which the rules require.

14 Second, as to the identification of the
15 witness who can stand cross, in many cases that can be
16 done. In many cases, it's based on the prefiled direct
17 testimony submitted by a witness. The two particular
18 circumstances that Mr. Cromwell refers to today, one
19 is, provide the transition plan with which the Company
20 has filed with the Commission within the last couple of
21 days; and two, have there been any offers to purchase
22 the PacifiCorp service territory in Washington.

23 Neither of those issues is part of our direct
24 case. We don't have any direct witnesses in our direct
25 case who are competent to answer questions on those

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1 matters, so I would be at a loss to identify what
2 witness would stand cross on those issues because they
3 are not within the scope of our direct case. I'm sure
4 they will be within the scope of our rebuttal case,
5 maybe not, but at this point, I can't say what rebuttal
6 witness because we don't know what the issues are going
7 to be in rebuttal testimony, and I think as
8 Mr. Cromwell notes, we have been in consultation on
9 this point, and I think the Company has tried to
10 identify witnesses where it can. I think we failed to
11 do so with respect to these two, and if required to
12 identify a witness, I don't know who we would identify
13 for these particular responses.

14 JUDGE MOSS: In terms of the good faith
15 discussions that I understand have transpired
16 consistent with the requirements of our rule as to
17 discovery disputes, has there been any explanation to
18 Mr. Cromwell that this is the problem, that there is no
19 witness to speak to these in the cases which you have
20 not abided with his request or his discovery
21 instruction that these people be identified?

22 MR. VAN NOSTRAND: I indicated that at this
23 stage of the proceeding where we don't know who our
24 rebuttal witnesses are going to be that we may
25 speculate and identify a witness who possibly could

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1 answer the questions, and then we would change that
2 once we knew who our rebuttal witnesses were going to
3 be, because we may have direct witnesses that don't
4 testify on rebuttal, and we will certainly have
5 additional witnesses that testify on rebuttal that do
6 not testify in direct.

7 JUDGE MOSS: Can Mr. Cromwell take it as a
8 given that to the extent the Company has not provided
9 the name of a witness who can testify as to the subject
10 matter of a particular data response that there is no
11 such witness currently identified in the proceeding?

12 MR. VAN NOSTRAND: I think as to these two,
13 but I believe these two are the only ones that are
14 outstanding as to this point where we haven't
15 identified a witness.

16 JUDGE MOSS: Mr. Cromwell?

17 MR. CROMWELL: In response, Your Honor, it's
18 my understanding that this has been Public Counsel's
19 standard element of its data requests per cover letter.

20 JUDGE MOSS: Let's focus on the point at
21 hand, which is what Mr. Van Nostrand is saying as to
22 these last two where he has failed to identify a
23 witness who can testify, the reason he has done that is
24 they have not presently identified any witness who will
25 appear on their behalf who is competent to testify as

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1 to these things. If that's the case, that's the case,
2 and I can't compel him to do something he can't do.

3 MR. CROMWELL: Respectfully, Your Honor, I
4 think that's not entirely relevant. In essence, I
5 think it's our position the content of the data
6 response is not the issue here, because they've been
7 doing the same thing all along. If this were an issue
8 about these two data response requests, the responses
9 to these two data requests, I think his point would be
10 well taken, but it's not. It's been a pattern of
11 conduct throughout this litigation. We've discussed it
12 over and over. Mr. Van Nostrand has agreed, yeah, they
13 need to do that. Over and over it's been the same
14 thing. The only time I find out who the witness is
15 that will testify to these data responses is at the
16 last minute when I really press him on it, and he
17 apparently motivates someone in the Company to identify
18 them.

19 The purpose of our meeting here today is to
20 identify exhibits, mark them for witnesses. Pretty
21 hard to do that if you don't know which exhibit is
22 going to be testified to by which witness. How can any
23 of us engage in this process if we don't know who is
24 responsive to a data request, what witness can identify
25 this thing, whatever the thing is, and I say "thing",

00460

1 because again, the content of any particular data
2 request response is irrelevant to the issue I'm
3 bringing to the Court, which is the Company's
4 consistent failure to abide by a reasonable request in
5 the context of discovery, and I would emphasize that
6 Mr. Van Nostrand's point that, Well, the rules don't
7 make it so, and we are in compliance with the rules, if
8 it's the Company's position that they really want an
9 additional data response from Public Counsel asking for
10 that specific information in a data response rather
11 than in the cover letter to the data response, it seems
12 to be the practice in our office for however long folks
13 have been doing this. I can certainly issue him
14 another 200 data requests asking for that specific
15 information in each and every data request response and
16 each and every data request response issued in the
17 future. I think that's taking it a bit over the hill.

18 JUDGE MOSS: I don't think we need to go
19 there. It does strike me that it's not an unreasonable
20 instruction to ask the identity of the preparer of the
21 response to a data request. The telephone number gets
22 us into a territory that we may need to explore in a
23 bit more detail.

24 As far as identifying a witness, it seems
25 conceivable to me that you might ask for some data that

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1 maybe your witness is going to rely on in some fashion
2 or another, and that's how you are going to get that
3 data into the record is by having your witness sponsor
4 this data response as part of the material on which he
5 or she as an expert has relied. It's equally
6 conceivable in that context that as far as the Company
7 is concerned, that has zip to do this with case, and
8 therefore, they do not have a witness who is competent
9 to testify as to the particular things you have asked
10 for, so their response would be, "No such person," and
11 you just have to live with that.

12 So that's part of the problem, and yes, it's
13 a question of sincere good faith, and I feel confident
14 that the group assembled in this room exhibits that on
15 a continuing basis in this litigation as in others, so
16 you have to sort of work with each other on a point
17 like that. I do think it's appropriate,
18 Mr. Van Nostrand, that the preparer of a response be
19 identified.

20 MR. VAN NOSTRAND: Okay.

21 JUDGE MOSS: As far as the phone number thing
22 is concerned, at this juncture, I would say I certainly
23 encourage what has been described as a long-standing
24 practice to be continued for the reason it occurs to me
25 is not that Mr. Cromwell might have to file 200

00462

1 follow-up data requests saying, "Who prepared this,"
2 but he might have to file 500 asking the questions
3 Mr. Lazar might ask of this individual informally to
4 understand something, and surely the Company doesn't
5 want to deal with that kind of thing.

6 Moreover, I might say, this informal exchange
7 is just that. If Mr. Lazar picks up the phone and
8 calls Ms. Smith at PacifiCorp and said, "I don't
9 understand this and that. What about it," that's all
10 it is, and it's not formal discovery. It's not
11 something that's going to come into the record in any
12 direct way. It seems to me that would be to everyone's
13 benefit to allow that sort of process to go forward.
14 So that's where I am so far. Is there anything else we
15 need to take up?

16 MR. CROMWELL: Respectfully, Your Honor, I
17 disagree with the first part of your analysis while
18 agreeing partially with the second. I think the first
19 part of your analysis or rationale would be correct if
20 the Company had been responding at all in any fashion.
21 They haven't. This has been a blank slate. It's not
22 that they are saying, "We don't know whether this is a
23 witness or not." It's complete silence. This is the
24 only company I've got in any of my cases where they are
25 failing to comply with this very reasonable, minimal

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1 request.

2 JUDGE MOSS: Maybe I'm misunderstanding. I
3 thought Mr. Van Nostrand says except for these last
4 two, you had been given that information.

5 MR. CROMWELL: We have up through Public
6 Counsel Data Request No. 142. There are more coming.
7 Again, as to the points you've recently made, I have no
8 doubt about the good faith of the people in the room,
9 never have. My problem is with PacifiCorp's folks who
10 aren't getting the message. I've conveyed the message
11 in my cover letter to my data responses. I'm assuming
12 from the occurrences after my conversations with
13 Mr. Van Nostrand that he has had communications with
14 his client on this issue. They don't appear to be
15 getting the message on a pro active going-forward
16 basis.

17 Again, what I would ask from you is an order
18 compelling the production of -- if you are
19 uncomfortable with the phone number, we can set that
20 aside -- who prepared the data response, and if you
21 have a witness for it, let me know. If you don't have
22 a witness, say so. Name of the preparer or name of the
23 witness who will testify to it. If not known, say
24 "unknown."

25 JUDGE MOSS: That seems reasonable enough.

00464

1 If you've got a witness you can identify, maybe say so.
2 That doesn't seem unreasonable, does it
3 Mr. Van Nostrand?

4 MR. VAN NOSTRAND: No.

5 JUDGE MOSS: Then you will do that. Do you
6 require a written order? Is there some kind of client
7 relation problem here as Mr. Cromwell speculates that I
8 need to bring the hammer down, so to speak?

9 MR. VAN NOSTRAND: Without an either or,
10 either of the identity of the preparer or the
11 witness --

12 JUDGE MOSS: Do both. If somebody prepares a
13 response and you've got a witness who is competent to
14 testify on it and it's somebody different from the
15 preparer, then identify both. And again, I can
16 encourage cooperation. I can't really order it in any
17 meaningful way. People want to dig their heels in and
18 make life difficult, then they do. If you can't agree
19 to have some sort of an informal exchange on these
20 points where there are questions, then to that extent,
21 Mr. Van Nostrand is right. There are available to you
22 avenues to pursue. This is one, what we are doing
23 right now. Another is to file follow-up data requests
24 to get the information you need. Another is to notice
25 the deposition if a witness has been identified and

00465

1 spend days with them.

2 MR. VAN NOSTRAND: This is the first I've
3 heard on the identity of the preparer issue, that
4 that's the problem. Maybe we can go back and do that
5 for 144 data requests to Public Counsel, I guess, if
6 that's wanted. We've had discussions on who is the
7 witness, but the identity of the preparer, that's a new
8 one.

9 JUDGE MOSS: That's all water under the
10 bridge, and sitting here butting heads over who did
11 what, who cares. I don't. My job here is let's
12 resolve this. I get there is a sense of cooperation
13 here that Mr. Cromwell says he needs the stuff. It is
14 part of discovery instructions. The Company has to
15 this point, at least, somebody somewhere has said,
16 "We'll be a little less than fully cooperative her and
17 not do everything he has asked us to do." Let's go
18 ahead and be a little more fully cooperative, because I
19 do think it's appropriate that the preparer and a
20 witness, where one exists who is competent, I think
21 that's certainly within the realm of reasonable
22 discovery, and thinking back to my years as an
23 advocate, we used to come up with these long lists of
24 instructions about how you are to respond to my data
25 requests. As long as they were reasonable, the judges

00466

1 would enforce those, and that's part of it.

2 Are we set? I don't really know that we need
3 a written order on this.

4 MR. CROMWELL: My only reason for a request
5 for a written order is to make the message clear that
6 this is necessary, and it's more the fact that it just
7 keeps happening. Yeah, Mr. Van Nostrand and I can cure
8 this every time it happens, but my hope would be that
9 on a going-forward basis, we don't have to do that.

10 JUDGE MOSS: Mr. Van Nostrand is going to
11 tell me right now on the record that this is going to
12 be a problem that will go away after today.

13 MR. VAN NOSTRAND: That's exactly what I was
14 going to say, Your Honor.

15 JUDGE MOSS: If the problem recurs, you bring
16 it back to my attention.

17 MR. CROMWELL: We will do so.

18 JUDGE MOSS: Catch me on a day when I haven't
19 had a mouthful of novocaine, and I'll be mean and
20 nasty. Does that solve that then?

21 MR. CROMWELL: I think we will go forward
22 with the best expectation of cooperation from the
23 Company.

24 JUDGE MOSS: And I think the Company has put
25 its best foot forward and agreed to do that.

00467

1 MS. DIXON: I thought I heard
2 Mr. Van Nostrand say in responding to Public Counsel he
3 would then provide the name of the preparers. That was
4 a request also made by the Northwest Energy Coalition
5 and by the Energy Project in our data requests as well,
6 so in the spirit of cooperation, if you could provide
7 us with the names of the preparers of our data request
8 responses too, that would be great.

9 JUDGE MOSS: I think it would be useful to
10 look at the instructions that are included with the
11 various data requests and see. You do have some new
12 folks in place in the corporation, and maybe there is a
13 little bit of a learning curve about the long-standing
14 practices. That sort of think certainly happens, and
15 maybe we can take care of this sort of problem. As
16 long as the instructions that are included with the
17 data requests are reasonable, I think you should make
18 every effort to comply with them. If your client has a
19 problem with that, then you are equally free to bring
20 that to my attention, because we do have protections
21 against undue burden and those sorts of things, and if
22 you come in here and convince me that's the case, we
23 may have to devise some sort of other mechanism to take
24 care of this problem.

25 MR. CEDARBAUM: We fall into the same

00468

1 category.

2 JUDGE MOSS: My point goes to all parties.

3 Maybe have the people who are directly in charge of
4 this take care of it, take a look at the instructions
5 and those that have asked for it.

6 MR. CEDARBAUM: I had one clarification I
7 wanted to make. There was discussion about if there is
8 not a witness who is competent to testify to something
9 that we don't get a name and that's fine, but I
10 understood that to mean that there is no witness who
11 doesn't know anything about the subject matter. There
12 is not a witness who knows anything about the subject
13 matter, I think is what I meant to say, as opposed to a
14 witness who knows about the subject matter but may not
15 be testifying to it in their testimony.

16 JUDGE MOSS: No. That is competent to
17 testify is the standard. If there is a witness who is
18 competent to testify with respect to the material in
19 question, then that person should be identified so you
20 may inquire of that person in hearing, and we don't get
21 into one of these things where we are three witnesses
22 down, and the witness says, "Oh, you should've asked
23 Mr. So and So about that." I hate it when that problem
24 comes up, because then we have to recall the witness or
25 some such thing. The record suffers.

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1 MR. CEDARBAUM: I just didn't want to be in a
2 situation where I wouldn't be allowed to ask questions
3 of a witness who knows about a subject matter just
4 because they may not be testifying in their direct
5 testimony or rebuttal testimony about that specific
6 subject matter. It may still be relevant to the case,
7 and I don't think that I should be precluded from
8 asking questions or required to make it a part of my
9 own witness's testimony just because Company Witness A
10 may not talk about that subject in their testimony. I
11 guess I don't want to argue it now, unless you want to.

12 JUDGE MOSS: I'm thinking here, it is a
13 little difficult to take that problem up in the
14 abstract, but it occurs to me that one of several
15 conditions might apply. Either the data request
16 response, just to use that as an example, may bear on,
17 in some fashion or another, a witness's prefiled direct
18 or rebuttal or whatever it may be testifying to, in
19 which case your question on cross-examination then
20 would be within the scope of the direct and therefore
21 would be proper, and you could use the exhibit in that
22 circumstance or the data request response as an exhibit
23 in that circumstances.

24 If, on the other hand, it was something one
25 of your witnesses was relying on in the development of

00470

1 her prefile testimony, then she could sponsor the data
2 request response as something she relied on in the
3 ordinary course of her activities as an expert witness.
4 Then there is that third category that sort of falls
5 into the cracks which is that there is a piece of
6 information in a data request response that you believe
7 would contribute to the record and the Commission's
8 deliberations in the case and that the Company is not
9 sponsoring testimony in relation to that particular
10 piece of subject matter, and your witness is not
11 sponsoring testimony upon which that data request
12 response or to which that data request response pertain
13 directly. In other words, she did not rely on it.

14 The practice that I have seen observed at
15 this commission and in other jurisdictions is that when
16 we have the discovery process going forward with
17 written questions and answers that those are pretty
18 uncontroversial in terms of being allowed into the
19 record, even without a witness, and I have done that
20 here in other cases, and to the extent you can convince
21 me of the relevance of such a thing in the face of an
22 objection -- lack of foundation, for example, might be
23 an objection that would come up in this circumstance --
24 I might be inclined to not be terribly concerned about
25 the lack of foundation if it was a written response

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1 from the company.

2 MR. CEDARBAUM: I think you are right on all
3 that, but I think there is a fourth category. This is
4 like a law school class this afternoon, but that
5 category is information that my witness might be
6 relying upon as part of their direct case, but
7 information about it comes better from a company
8 witness even though the company witness may not have
9 one word on it in their direct testimony.

10 Again, we are talking in the abstract, and I
11 am bringing it up so in the next hearing or next case,
12 I wouldn't have been found of having given in on
13 something that I might want to argue, but I think that
14 in that situation, it's still appropriate to ask for
15 that information through the company, subject to
16 relevant objections or whatever, and as an example,
17 looking at Ms. Davison's list of proposed exhibits
18 today, she has for Mr. Larsen the Company's transition
19 plan. That's not anywhere in the Company's direct
20 testimony, but it's probably important in this case,
21 and I think that it's probably best for the Company to
22 testify about it, not somebody else, so there is maybe
23 not an abstract example, anticipating what we might be
24 getting into, but I guess enough said on all that.

25 JUDGE MOSS: It can be a tricky area, and I

00472

1 don't want to slip into the role of offering advice
2 about how you conduct your case or how anybody conducts
3 their case. I would say as a general principle that to
4 the extent a witness relies on a piece of information
5 in their testimony, it's probably prudent to include
6 that as an exhibit to that witness, and I have seen it
7 happen where that occurs, and counsel for that witness
8 will nevertheless inquire of other witnesses about that
9 exhibit that is not yet part of the record, and that
10 happens all the time: "Have you read Ms. Johnson's
11 testimony that we haven't had Ms. Johnson on the stand
12 yet?" The witness says, "Yes, I have." "Are you
13 familiar that she said black and you just said blue?"
14 That happens all the time.

15 So again, it's difficult to discuss it in the
16 abstract. Maybe that's why the law schools wouldn't
17 hire me, but when it comes up we will handle it. I
18 think that's about as much useful as we can say about
19 it today. We don't have a specific dispute right now.
20 It will come up, and we'll probably see some good
21 lawyering and all have a good time.

22 Anything else we need to take up before we go
23 off the record and take care of our exhibit marking and
24 that sort of stuff? Okay. Everybody is clear. Let's
25 go off the record.

00473

1 (Discussion off the record.)

2 JUDGE MOSS: We are back on the record after
3 having an hour or so of exhibit marking, and rather
4 than recite into the record the fruits of our labor, I
5 will simply note that we have done that and that we
6 will be updating the official exhibit list in the
7 proceeding by tomorrow, and we'll make that available
8 to the parties, and we'll have it at the hearing, and
9 we will also, of course, make that available to our
10 erstwhile court reporter who will then be able to work
11 from that in marking the exhibits at hearing.

12 Do we have any other business that we need to
13 conduct this afternoon? There apparently being none, I
14 say that I appreciate you being here and look forward
15 to seeing you all Monday morning at 9:30 ready to go.
16 We are off the record.

17 (Prehearing conference concluded at 3:00 p.m.)

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