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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)

4)
Complainant,)

5)

6 vs.) DOCKET NO. UW-000405

7) Volume IV

8 AMERICAN WATER RESOURCES, INC.,) Pages 49 - 76

9)

10 Respondent.)

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13 A prehearing conference in the above matter

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15 was held on December 28, 2000, at 10:12 a.m., at 1300

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17 South Evergreen Park Drive Southwest, Olympia,

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19 Washington, before Administrative Law Judge LAWRENCE

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21 BERG.

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23 The parties were present as follows:

24 AMERICAN WATER RESOURCES, INC., by VIRGIL

25 FOX, President and CEO, 921-B Middle Fork Road,

Onalaska, Washington 98570.

THE WASHINGTON UTILITIES AND TRANSPORTATION

COMMISSION, by MARY M. TENNYSON, Senior Assistant

Attorney General, 1400 South Evergreen Park Drive

Southwest, Post Office Box 40128, Olympia, Washington

98504.

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30 Kathryn T. Wilson, CCR

Court Reporter

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P R O C E E D I N G S

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JUDGE BERG: Let's be on the record. This is a prehearing conference before the Washington Utilities and Transportation Commission in Docket Number UW-000405. This matter is captioned, The Washington Utilities and Transportation Commission, Complainant, versus American Water Resources, Inc., Respondent. American Water Resources, Inc. may also be referred to as AWR.

This prehearing conference is taking place pursuant to notice served on parties and interested persons on December 21, 2000. My name is Larry Berg. I'm the presiding officer in this proceeding. Today's date is Thursday, December 28, 2000, and the prehearing conference is being conducted in the Commission's hearing room at its offices in Olympia, Washington.

At this time, we will take appearances of the parties beginning with Ms. Tennyson and then Mr. Fox.

MS. TENNYSON: Thank you. My name is Mary M. Tennyson. I'm a senior assistant attorney general. I believe you have my contact information on record already. I'm representing Commission staff. With me in the hearing room today are Gene Eckhardt and Jim Ward of the Commission staff.

MR. FOX: My name is Virg Fox. My address is

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1 921 Middle Fork Road, Onalaska, Washington, 98570, and
2 I'm the president of American Water Resources, Inc.

3 JUDGE BERG: Mr. Fox, will you also provide
4 your business telephone number, fax number, and e-mail
5 address, if you have it, and you might have just some
6 mercy on our court reporter and speak more slowly than
7 usual.

8 MR. FOX: My phone is (360) 978-6178. My fax
9 is 978-5225, and I don't have an e-mail address.

10 JUDGE BERG: Thank you, sir. I'll take note
11 that on December 20, 2000, the Commission received a
12 notice of withdrawal from Mr. Richard Finnigan, who had
13 previously had entered an appearance upon behalf of AWR
14 in this proceeding. In that notice of withdrawal, he
15 did indicate that American Water Resources, Inc. would
16 proceed in this matter on a pro se basis.

17 Mr. Fox, although it's not common, it's not
18 unusual that attorneys withdraw for one reason or
19 another from a proceeding. Whenever I'm involved in
20 that kind of a case, I also want to talk with the party
21 who may be preparing to proceed on a pro se basis and
22 make sure that that's your preference or inquire
23 whether or not your preference would be to have
24 additional time to find other counsel.

25 MR. FOX: No. The reason that Rick Finnigan

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1 is not representing me is because I told him that I
2 didn't want him to; that I don't have money to pay him,
3 and I'm not going to incur more bills that I can't pay.
4 So I just figured that basically, the Commission is
5 going to rule however they are going to rule, and I'm
6 not going to have a tremendous amount of effect on it
7 anyway, so there is no point in wasting any more of my
8 ratepayers' money. I'll do the best I can by myself.

9 JUDGE BERG: I appreciate the offer of an
10 explanation, but I want you to know that that's not
11 what I was looking for. I just want to make sure that
12 just based on where things stood today that you did not
13 feel as if you needed more help.

14 MR. FOX: No. I have no complaint with Rick,
15 and I have no suspicion of someone else would do better
16 or different, and I have no inclination towards wanting
17 someone else.

18 JUDGE BERG: This case is a little bit
19 different than most of the cases that I have presided
20 over, particularly given the somewhat technical or
21 detailed nature of a proceeding involving an audit, and
22 that is that the parties have agreed that rather than
23 prefiling direct testimony where parties would
24 essentially present their case in writing, after which
25 the hearing would be conducted for cross-examination,

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1 the parties in this case agreed that they would present
2 direct evidence live at the hearing itself. In this
3 particular case, Mr. Fox, that does mean that you will
4 have an opportunity to make statements and present
5 evidence that you believe supports the request for an
6 extension of the surcharge that has been made.

7 MR. FOX: Okay.

8 JUDGE BERG: Likewise, I understand that the
9 parties have engaged in discovery where they've
10 exchanged information back and forth, and Commission
11 staff will be making its presentation of evidence that
12 it believes supports whatever position it intends to
13 take.

14 At this point in time, I do not know the
15 position of Commission staff, nor am I looking for that
16 information here today. Primarily what I want to do
17 here today is make sure that when we all show up on
18 January 3rd that everybody knows from a procedural
19 perspective how things are going to happen so there are
20 no surprises, so you, in particular, feel as
21 comfortable as possible about participating in this
22 process and to try to work out any problems that may
23 exist in advance so that when we show up, we can listen
24 to both sides tell their stories in as smooth a manner
25 as possible.

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1 MR. FOX: I think everyone knows my position.
2 Is it fair for me to ask what the Staff's position is?

3 JUDGE BERG: I think it's fair for you to ask
4 that of Staff informally outside of my presence, but at
5 this point in time, I would prefer to not know what
6 their position is. Likewise, even though I know that
7 AWR's position is that an extension of the surcharge
8 should be granted, there are a lot of other details
9 about that that I don't know and that I would prefer to
10 wait until the hearing for that to take place. If we
11 get into that now, it actually starts to look like
12 testimony and evidence is being presented, and the real
13 purpose of my being here is to deal with the procedural
14 issues and make sure everybody knows what's going to
15 happen when we show up in another week or so.

16 MR. FOX: Okay.

17 JUDGE BERG: There are provisions in the
18 Commission's rules that address how a hearing like this
19 should be conducted, and Ms. Tennyson, I understand
20 from your comments prior to going on the record that
21 you did want to discuss some issues regarding witnesses
22 and exhibits as they may be addressed in the
23 Commission's Second Supplemental Order dated October 6,
24 2000, but before we get to that, I would like to talk
25 about the order of procedure in this hearing and what

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1 your understanding is of how the respective cases will
2 be presented. Is it your understanding in this
3 instance that Commission staff, as the Commission is
4 the Complainant, would go forward first?

5 MS. TENNYSON: No, it is not. My
6 understanding is because this is a case in which the
7 Company is asking for additional funds, the Company has
8 the burden of proof and the Company would go first.
9 Even though we are the Complainants, styled that way
10 because of the suspension of the filing, the filing is
11 one requesting, in essence, a rate increase.

12 JUDGE BERG: So your position then on that
13 procedural point is that AWR has the burden of proof in
14 this case?

15 MS. TENNYSON: Yes, that is our position.

16 JUDGE BERG: So your understanding is that
17 under the Commission rules that AWR would first put on
18 whatever witnesses and offer whatever evidence it may
19 have in its support after which Commission staff would
20 cross-examine witnesses as they appear, and then
21 Commission staff would put on its witnesses and offer
22 its evidence.

23 MS. TENNYSON: That's correct.

24 JUDGE BERG: Mr. Fox, have you been in this
25 kind of a hearing like this before where you have

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1 represented yourself?

2 MR. FOX: No.

3 JUDGE BERG: You've been in other hearings
4 where you were accompanied by counsel?

5 MR. FOX: Yes.

6 JUDGE BERG: Do you have any reason to
7 disagree with Ms. Tennyson's characterization of both
8 the burden of proof in this case and the order in which
9 witnesses will appear?

10 MR. FOX: No. Don't matter to me. I'm
11 curious to what witnesses we are talking about or why,
12 but I trust you are going to get into that.

13 JUDGE BERG: I think we could take this up
14 now. Each party is entitled to bring whatever
15 witnesses to the hearing that it believes have
16 something of relevance to the position that they wish
17 to make. In this instance, the Commission's rules are
18 fairly liberal, and certainly more liberal than you
19 would find in what's referred to as a constitutional
20 court or a court of law, in that we do allow parties to
21 present what's called hearsay evidence. If you watch
22 television at all, you've probably got a pretty good
23 education about what hearsay evidence is, but what that
24 means is it's permissible for one party to testify as
25 to what someone else said to make a point. Whereas in

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1 a court of law, that kind of testimony could be subject
2 to an objection that the person who made the statement
3 in the first place should be the person who testifies
4 about it. In proceedings before the Commission, the
5 Commission does allow hearsay evidence to be presented
6 but may not give it the same weight as if a person
7 making the statement were there testifying on their own
8 behalf.

9 So you will certainly be able to essentially
10 testify yourself upon behalf of AWR, and presuming that
11 you intend to do so, you will be sworn in, and then you
12 will be allowed to essentially tell your story, the
13 story being all of the facts that you think support
14 your request. Now, when I say "your," I am referring
15 to AWR, to AWR's request for an extension of the
16 surcharge. It's a little bit different from your
17 presentation to the presentation that Staff will make
18 because when Staff does its presentation, it will call
19 witnesses, and then Ms. Tennyson will ask questions to
20 which the witness will provide answers.

21 Even though the rules of evidence are more
22 liberal, there still remain grounds upon which one
23 party might object to the question that is posed or an
24 answer that is given during the course of a proceeding.
25 What I'm going to have you do when you testify is I'm

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1 just going to ask that you be as prepared as possible
2 to tell your story, to make reference to whatever
3 supporting documents you have or whatever documents you
4 have that support your testimony. We will not number
5 documents in advance, but as documents are raised or
6 presented, we will number them and distribute them. I
7 will ask that when you come to the hearing that you
8 bring four copies of each document that you wish to
9 submit into evidence. That would be one copy for
10 Ms. Tennyson --

11 MS. TENNYSON: Your Honor, in the prehearing
12 conference order, you indicated a distribution of three
13 copies to the ALJ and one copy each to the witness and
14 parties, which would be five if you still want three
15 for your use.

16 JUDGE BERG: I do want three for my use. The
17 fourth I was thinking was for yourself. You are right,
18 Ms. Tennyson, if it's an exhibit to be used on cross,
19 there should be five. I would expect that if a witness
20 was using a document as a direct exhibit that they
21 would have a copy also.

22 JUDGE BERG: Do you follow that, Mr. Fox?
23 One copy is for you; one copy is for Ms. Tennyson. I
24 have an adviser who will be working with me on the
25 Bench, Mr. Maurice Twitchell, who is a staff employee

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1 but who has had no contact with anybody else at the
2 Commission regarding this case. He's an accountant.
3 He will be advising me. So we will have three copies
4 here, one for you and Ms. Tennyson, five total.

5 The one thing that I will ask, Mr. Fox, is in
6 addition to the preparation that you do before you come
7 in so you can tell your story is when you actually sit
8 down and start to tell your story, keep in mind that
9 everyone here will be hearing it for the first time,
10 and while in a social setting I love to both hear and
11 tell stories, in a more formal proceeding like this,
12 sometimes it's helpful if the information comes forward
13 a little bit slower than usual. So even though you
14 will be telling, essentially, your story, your side of
15 the story, I'll just ask that you pace yourself, and if
16 you are going too fast for me or for the reporter, I
17 will let you know and we will work that out.

18 MR. FOX: That's fine.

19 JUDGE BERG: Then after you are through
20 presenting your side of the story, Mr. Fox,
21 Ms. Tennyson will be allowed to ask you some questions.
22 Her questions will be limited to the testimony that
23 you've given. If, in fact, she wants to ask questions
24 that go beyond your testimony, normally that would have
25 to come when she would call you as a witness.

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1 Ms. Tennyson, in your experience in this type of a
2 proceeding, does it make sense to draw that
3 distinction?

4 MS. TENNYSON: It does or it doesn't. It
5 depends on precisely what information comes out and the
6 time we have available. I did provide Mr. Finnigan
7 before he withdrew a list of potential witnesses I
8 would call. I did list Mr. Fox as an adverse or
9 hostile witness in our case in the event there wasn't
10 sufficient information presented to draw out points
11 that I thought were necessary to bring out in the case,
12 so I am prepared to handle it in that fashion if you
13 would like to do so.

14 JUDGE BERG: Needless to say, if, in fact,
15 Staff's side of the story is different from yours, they
16 will be able to present their story in the order they
17 think its best told. So it may be that even after you
18 testify and after Ms. Tennyson asks questions and you
19 move from one chair to another chair, it's possible
20 that you may be requested to give further testimony.

21 MR. FOX: That's fine. I hope that not
22 knowing the legal procedures, you will give me some
23 tolerance or latitude in that regard, and I'm not
24 expecting them to be so formal that I'm going to
25 criticize them on the formal way they are doing

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1 something. That's not by any means my objective.

2 JUDGE BERG: My role in this proceeding is to
3 try and conduct a truth-finding mission. That's my
4 objective, Mr. Fox. I'm looking to do whatever I can
5 to help both parties present all relevant information
6 that might possibly help me make a good decision in
7 this case. Sometimes there is strategy that gets
8 played out between the various parties in the way that
9 information is presented, and when that happens, my job
10 is just to make sure that the hearing is conducted as
11 fairly as possible, and that's my commitment to you and
12 to Commission staff in this case.

13 MR. FOX: Fine, thank you.

14 JUDGE BERG: At this time, Mr. Fox, do you
15 intend to have anyone else appear to testify upon
16 behalf of AWR?

17 MR. FOX: No.

18 JUDGE BERG: Ms. Tennyson, who might
19 Commission staff call as witnesses?

20 MS. TENNYSON: As I indicated, I did provide
21 Mr. Finnigan with a list, and part of this, if it would
22 be an appropriate time to raise it, the issue of the
23 second prehearing conference order on the fourth page
24 in your Paragraph 20 of that October 6th, 2000, order
25 indicated that the parties were to exchange witness

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1 lists on or before December 6th. Neither of us did
2 that. I did provide Mr. Finnigan a list of potential
3 witnesses on December 19th, and this paragraph also
4 requires the parties to exchange exhibit lists on or
5 before December 22nd of 2000, and that also has not
6 been done at this time.

7 Potential witnesses that I did list were the
8 two engineers from Howard Godat and Company -- I don't
9 remember the full name of the company -- that were
10 project engineers for the various projects that are
11 involved in this surcharge matter; also Mr. Ward of
12 Commission staff and Mr. Eckhardt of Commission staff;
13 two representatives from the VR Fox Company, Inc., the
14 affiliated interest company, the construction company
15 that did the work on the projects, Craig Steepy and
16 Katherine Woods.

17 At this point, I do not know -- basically,
18 the topic that I listed was the process of bidding the
19 projects for this work, performing the work, and
20 invoicing. Mr. Steepy was the one who signed the bids
21 submitted to AWRI for the construction work, and
22 Ms. Woods is the signatory on the contracts on behalf
23 of VR Fox Company. I did issue subpoena duces tecum to
24 each of those individuals to require them to appear and
25 to bring documents with them because we have not

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1 received -- there is a lot of documents that have been
2 requested in the course of the Staff's investigation
3 that we just don't have.

4 In addition, I indicated one or more
5 representatives from the Department of Health, and
6 given the timing of the hearing, if we do go to hearing
7 next week, Bill Liechty will be the Department of
8 Health representative that will be attending. As I
9 indicated earlier, I did list Mr. Fox as an adverse
10 witness.

11 MR. FOX: Your Honor, may I comment? Craig
12 Steepy no longer works for us so I brought this back.
13 (Indicating.) Can I ask a couple of other questions
14 about those witnesses or why, or is that appropriate?

15 JUDGE BERG: That's something I would prefer
16 you handle off the record. Commission staff is under
17 no obligation to disclose why it's requested certain
18 witnesses to be present, but I have no reason to
19 believe that they wouldn't discuss that with you. So
20 when we are through here, why don't you and
21 Ms. Tennyson talk about some of those issues together.
22 I'll say that the Commission always encourages and
23 favors situations where parties work out settlements or
24 agreements resolving disputes, and if you have not had
25 an opportunity to explore that possibility, you might

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1 just try and get enough of a feeling for where
2 Commission staff is at to see whether there is a
3 possibility of a mutual agreement, and if there is,
4 then we will want to figure out a way to give the
5 parties some more time to talk about these things with
6 each other. The old adage is, it's better to make your
7 own bed than be told where to lie, and there is a lot
8 of wisdom in that.

9 MR. FOX: I guess my biggest concern there is
10 the question of asking my employees to bring records.
11 Is that something I can discuss here or something, like
12 you said, I discuss with them?

13 JUDGE BERG: That's something you would
14 discuss with them, and if you had objections based upon
15 the subpoenas that were issued, you can present them,
16 but there are Commission rules and statutes that do
17 give parties power to subpoena witnesses and records.
18 It may be that Ms. Tennyson can point you to those
19 rules and statutes upon which she relied when issuing
20 those requests.

21 Again, I'll tell you, Mr. Fox, the Commission
22 did issue a protective order in this case, and if there
23 are certain records that deserve to be kept
24 confidential because they might otherwise place AWR at
25 a competitive disadvantage, then we are sensitive to

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1 that, and we can mark documents as confidential when
2 appropriate, but the fact that documents might
3 otherwise contain sensitive or proprietary information
4 in and of itself is usually not a reason for not
5 producing documents.

6 MR. FOX: I'm not particularly worried about
7 that. I don't think we've got any big secrets to hide
8 there. I'm just concerned that if any documents are to
9 be presented, I'm more than willing to present any
10 documents that we have, and I don't think an
11 unauthorized employee should be asked to. So that's my
12 only concern.

13 JUDGE BERG: I know you may relate to it as
14 your personal business, but it is a corporation, and
15 because of that, there are certain formalities that
16 apply. In the same way that your relationship as a
17 corporation entitles you to certain protection, it also
18 means that employees of the corporation may be the
19 appropriate parties to give testimony or to produce
20 documents. This is something that I'm not deciding one
21 way or the other whether these subpoenas are or not
22 properly issued, but I think at this point in time, we
23 are getting awful close to the hearing, and I wouldn't
24 want you to wait any longer before talking to
25 Ms. Tennyson, and if there is a better way to deal with

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1 it, then discuss it with her, and I'm sure she will be
2 reasonable.

3 MR. FOX: I'm happy to do that.

4 JUDGE BERG: Let me also say, Mr. Fox, the
5 schedule we are on is partly dictated by the legal
6 requirements that AWR's request be resolved within a
7 certain amount of time, and as of this point, the
8 Commission must enter a final order on or before, I
9 believe, it's April the 3rd in this case. So in order
10 to do that, it means that we have to have the hearing
11 in early January. I'll issue an initial order. Then
12 there is the opportunity for review of my decision by
13 the commissioners at which point in time there is a
14 final order, but to the extent that AWR is already
15 receiving a surcharge, and what we are dealing with
16 here is an extension of the surcharge that won't begin
17 for another three-plus years.

18 MR. FOX: If there is an extension to be
19 tacked on the end.

20 JUDGE BERG: What I'm saying is certainly if
21 you are feeling a little unprepared after you talk with
22 Ms. Tennyson, parties always have the opportunity to
23 request a continuation of the presently scheduled
24 hearing, but if we were to do that, it would also
25 require that AWR agree that the Commission could have

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1 more time to make a final decision.

2 MR. FOX: I'm not interested in asking for
3 more time.

4 JUDGE BERG: I just wanted to be sure that
5 was on the table and you knew what your options were.

6 MS. TENNYSON: Your Honor, on that point,
7 because at this point, I have not received any listings
8 of potential exhibits or information that AWR might
9 offer in support of its filing, I am somewhat concerned
10 about the hearing dates that we have. Essentially, I
11 feel that because I don't have a list of exhibits, and
12 apparently, Mr. Fox intends to be the only witness,
13 that I need to prepare my case as if I'm trying to
14 prove his, and that's not our job. Our position at
15 this point is we don't have the information. He has
16 not provided the information to the Commission
17 necessary to prove the request that he's made to the
18 Commission.

19 So we've asked for lots of documents and
20 received some of them. Some of them, like this pile
21 and these, I got yesterday. (Indicating.) So I haven't
22 had a lot of time to prepare any exhibits that we might
23 propose because I haven't sorted through what we
24 received back in April or May when some of these
25 requests I made because we had not gotten full

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1 information when earlier requests were made and formal
2 requests were made by Staff.

3 So it's a question of how do we proceed to
4 prepare our case not knowing what information the
5 Company may be presenting and how much duplication
6 there might be if we prepare all these documents, and,
7 as Mr. Fox has indicated, I have subpoenaed information
8 from primarily the engineers and from the VR Fox
9 Company, his construction company. I don't have those
10 documents because I've asked the witnesses to bring
11 them with them. Again, they are things that we think
12 we've asked for in the past and have not received in
13 response to discovery requests. So while I would like
14 to expedite the hearing and get everything completed in
15 the two days that we have scheduled, I think it may be
16 difficult to do so not knowing whether those witnesses
17 are going to show up with documents or what documents
18 they are going to bring.

19 JUDGE BERG: If we need to extend the hearing
20 for additional days, we will look at the Commission's
21 calendar and do our very best to come up with a hearing
22 room within a contemporaneous time frame to continue
23 proceeding so that it can be completed as fully as
24 possible, and I understand the challenge that you may
25 have, Ms. Tennyson, to the extent you rely on documents

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1 from other parties who are appearing under subpoena.

2 MS. TENNYSON: My bigger concern is not with
3 knowing what documents Mr. Fox has intent to present,
4 and that is perhaps something we should discuss with
5 him, I think, even on the record. He may not know what
6 you do or do not have in your file.

7 MR. FOX: I have little expectation that I
8 would have some exhibit that you are not aware of
9 because I've tried to give what information I have.

10 MS. TENNYSON: It's not a matter of, Mr. Fox,
11 you being aware of the documents, but what you need to
12 present would be proof in this case. What the hearing
13 officer has, essentially, is the order of suspension
14 and doesn't have any other documentation in support of
15 the surcharge. So in order to prove your case, you
16 need to present that information, and I don't want to
17 be put in the position of having to present that for
18 you. You will provide it to us, but you do have an
19 obligation to enter it into the proceeding.

20 JUDGE BERG: I prefer not to deal with this
21 on the record. What I would like to happen,
22 Ms. Tennyson, is you have documents that have been
23 produced to date. Mr. Fox may have documents with him
24 that comprise what he would intend to present. I would
25 like the parties to talk about this issue of what

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1 documents will be presented outside of the hearing.

2 If, in fact, Ms. Tennyson, there were
3 requests for documents -- number one, if the requests
4 for documents were made that were not produced but
5 later offered as evidence, certainly there would be the
6 opportunity for you to request for some sanctions or
7 some other type of decision protecting your client's
8 interest. To the extent that Mr. Fox states that he's
9 attempted to provide all documents in his possession in
10 response to requests, if he can't clearly narrow that
11 field down, then likewise, I would just rely on you to
12 come back and either seek some kind of order protecting
13 your client's interest or proposing some way to resolve
14 the issue.

15 MS. TENNYSON: Okay.

16 JUDGE BERG: If, in fact, Staff were to come
17 back and ask for some kind of order or protection based
18 upon both the production and the designation of
19 documents as exhibits, it would be important for me to
20 have a more detailed chronology of when requests were
21 made and when documents were received than I think I'm
22 prepared to get into here today.

23 MS. TENNYSON: Certainly, Your Honor. I
24 spent several hours yesterday trying to detail that and
25 only got about halfway through it, so I'm not prepared

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1 to present that today.

2 JUDGE BERG: Along those same lines,
3 Ms. Tennyson, I think it's important that to the extent
4 that Commission staff received documents or exhibits on
5 or before December 22nd that to the fullest extent
6 possible, you let Mr. Fox know what documents Staff
7 intends to rely upon, and if, in fact, there was some
8 problem that came up later as to whether or not Staff
9 made timely disclosure, or if it's one of those
10 tit-for-tat type arguments, "Well, we didn't do it but
11 neither did they," I would want to look at the relative
12 equities in whatever solution parties are proposing to
13 remedy whatever disadvantage may be caused.

14 Again, my goal is to make sure that we have
15 all relevant information to make a fair, informed
16 decision within the time frames we have, but I'll also
17 be relying on the parties to help me figure out how to
18 solve some of these problems if they do exist when we
19 start the hearing or if they come up during the
20 hearing.

21 MR. FOX: Can I ask a question?

22 JUDGE BERG: Yes, sir.

23 MR. FOX: I know that assumptions aren't
24 good, but I'm assuming if someone calls a witness, then
25 they pay that person for their time. I'm not expected

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1 to pay for witnesses like my employees or the engineer
2 or something like that, am I?

3 JUDGE BERG: That's correct. I believe that
4 if a witness appears under subpoena, they may be
5 entitled to receive a witness appearance fee, but they
6 do not appear -- certainly, third-party witnesses don't
7 appear on your dime, but neither is Staff. To the
8 extent they be your employees, that may be another
9 matter to be resolved over which I have no opinion or
10 control.

11 MR. FOX: I'm assuming if an employee is
12 going -- we're only talking about one employee, which
13 is Katie Woods. If she's going to appear, that's going
14 to take time off work that she's expecting to be paid
15 for, and I don't have funds to pay.

16 JUDGE BERG: We will certainly schedule the
17 hearing and try to schedule her appearance in such a
18 way that she loses as little work as is necessary. If
19 you wish to speak with Ms. Tennyson on her behalf, I
20 think that's something else you should put on your
21 list, and Ms. Tennyson, I am sensitive to both
22 Ms. Woods' situation as well as Mr. Liechty's as well
23 as the engineers from the Howard Godat firm. So if you
24 will try and to the best of your ability coordinate
25 with them in advance and during the hearing so that

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1 they are present only as necessary, I'd cooperate and
2 assist you in that effort.

3 MR. FOX: I presume this is the subpoena for
4 Steepy? (Indicating.) How should I deal with that? I
5 don't want to do something wrong.

6 JUDGE BERG: You don't have to do anything
7 here on the record, Mr. Fox. Why don't you talk about
8 that with Ms. Tennyson. She may want something in
9 writing, but I'll just leave that to the two of you to
10 work out together.

11 MR. FOX: Okay.

12 JUDGE BERG: Ms. Tennyson, do you think it
13 would be helpful if the parties make an opening
14 statement at the start of the hearing?

15 MS. TENNYSON: I really don't know. I think
16 it could be. I don't have a need to, but I'd be
17 willing to if you would find it helpful.

18 JUDGE BERG: Why don't the parties think
19 about that, and we'll take that up again at the start
20 of the hearing. Sometimes, Mr. Fox, in a more
21 complicated case where you are going to have numerous
22 witnesses, parties will, again, like you see in
23 television, they will stand up and they will say, Well,
24 this is what we are going to tell you, and they will
25 lay out the theory of their case, and then they will

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1 put on their evidence, and then it's to be seen later
2 whether or not, in fact, everything matches up. The
3 other old saying is, you tell them what you are going
4 to tell them; then you tell them; then you tell them
5 what you told them, and there will certainly be some of
6 that.

7 MS. TENNYSON: As I think about it, Your
8 Honor, it may well be helpful to give you a road map,
9 because usually what happens is when you see the briefs
10 after the hearing is the only time it gets tied up for
11 you. So we could present just an outline at the
12 beginning, if you would like.

13 JUDGE BERG: Particularly in this kind of
14 case where there is no prefiled direct evidence, and
15 both myself and my adviser, Mr. Twitchell, we are going
16 to be coming into this pretty green, and while I do
17 know some of the background from your position,
18 Mr. Fox, based upon documents that previously were
19 filed with the Commission and the Complaint itself, I
20 certainly would want you to feel free to take some time
21 at the start of your testimony to give me a big picture
22 of what your position is and then to start presenting
23 me some of the details and showing me where I can look
24 to other evidence to support the position you are going
25 to make.

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1 MR. FOX: Okay.

2 JUDGE BERG: Anything else from the parties?

3 Any other questions at this point in time, Mr. Fox?

4 MR. FOX: I don't think so.

5 JUDGE BERG: We'll take some time at the
6 start of the hearing to address any other questions
7 that may come up or you may think of, Mr. Fox, about
8 how things are going to be done. Let me just say
9 again, it does appear to me that with the change of
10 counsel, Mr. Fox, that there hasn't been the type of
11 communications between the parties that I would
12 normally have expected to see at this point in time. I
13 don't think that's to either party's fault, but I think
14 it might be a good time to see if there is a
15 possibility of any middle ground, and if so, how you
16 might go about exploring that further.

17 MR. FOX: I would be more than happy to
18 participate in any discussion.

19 JUDGE BERG: Anything else, Ms. Tennyson?

20 MS. TENNYSON: I have nothing at this time.

21 JUDGE BERG: The one thing I want to check
22 off with the parties is what time we will begin on
23 January the 3rd, and I don't believe I've provided any
24 other direction on that point in any previous order, so
25 how about we get together in the hearing room around

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1 nine o'clock on January the 3rd, 2001, and we may have
2 to deal with some procedural matters before we get
3 started, but hopefully, we will start with the actual
4 testimony in this proceeding no later than 9:30, but
5 please be present at nine o'clock. With that, we will
6 be adjourned.

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8 (Prehearing conference concluded at 11:02 a.m.)

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