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BEFORE THE WASHINGTON UTILITIES AND

2

TRANSPORTATION COMMISSION

3

4 AIR LIQUIDE AMERICA) Docket No. UE-001952

CORPORATION, AIR PRODUCTS AND) Volume XI

5 CHEMICALS, INC., THE BOEING) Pages 2045-2220

COMPANY, CNC CONTAINERS,)

6 EQUILON ENTERPRISES, LLC,)

GEORGIA-PACIFIC WEST, INC.,)

7 TESORO NORTHWEST COMPANY, and)

THE CITY OF ANACORTES,)

8 Complainants,)

v.)

9 PUGET SOUND ENERGY)

Respondent.)

10 _____)

In re: Petition of Puget Sound) Docket No. UE-001959

11 Energy, Inc., for an Order) (Consolidated)

Reallocating Lost Revenues)

12 Related to any Reduction in)

the Schedule 48 or G-P Special)

13 Contract Rates.)

_____)

14

15 A hearing in the above matters was

16 held on March 21, 2001, at 9:45 a.m., at 1300

17 Evergreen Park Drive Southwest, Olympia, Washington,

18 before Administrative Law Judge DENNIS MOSS,

19 Chairwoman MARILYN SHOWALTER, and Commissioner

20 Richard Hemstad.

21

The parties were present as

22 follows:

23 BELLINGHAM COLD STORAGE COMPANY,

by John A. Cameron, Attorney at Law, 1300 S.W. Fifth

24 Avenue, Suite 2300, Portland, Oregon, 97201-5682.

25 Barbara L. Nelson, CSR

Court Reporter

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1 COMPLAINANTS, by Melinda Davison,
2 Attorney at Law, Davison VanCleve, 1300 S.W. Fifth
3 Avenue, Suite 2915, Portland, Oregon 97201.

4 PUGET SOUND ENERGY, by Stan Berman
5 and Todd Glass, Attorneys at Law, Heller, Ehrman,
6 White & McAuliffe, 701 Fifth Avenue, Suite 6100,
7 Seattle, Washington 98104-7098.

8 THE COMMISSION, by Robert
9 Cedarbaum and Donald Trotter, Assistant Attorneys
10 General, 1400 Evergreen Park Drive, S.W., P.O. Box
11 40128, Olympia, Washington 98504-0128.

12 PUBLIC COUNSEL, by Simon ffitch,
13 Assistant Attorney General, 900 Fourth Avenue, Suite
14 2000, Seattle, Washington 98164.

15 KING COUNTY, by Donald C. Woodworth,
16 Senior Deputy Prosecuting Attorney, E550 King County
17 Courthouse, Seattle, Washington 98104-2312.

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INDEX OF EXHIBITS

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4	EXHIBIT	MARKED	OFFERED	ADMITTED
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5	Number 1801	2072	--	2073
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6	Number 1802	2073	--	2073
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1 JUDGE MOSS: Good morning, everyone. My
2 name is Dennis Moss. I'm an Administrative Law Judge
3 for the Washington Utilities and Transportation
4 Commission. We are convened in continuing
5 proceedings in the matter styled Air Liquide America
6 Corporation and others against Puget Sound Energy,
7 Docket Number UE-001952, and Petition of Puget Sound
8 Energy, Inc. for an order reallocating lost revenues
9 related to any reduction in the Schedule 48 or G-P
10 special contract rates, Docket Number UE-001959.
11 Those dockets are consolidated.

12 I want to note for the record that the
13 settlement agreement that's being considered in the
14 hearing today would resolve all issues pending in
15 Docket Numbers UE-001952 and UE-001959, and also in
16 Docket Numbers UE-000735, UE-001014, UE-001616,
17 UE-010038, and UE-010046.

18 The settlement agreement also requires
19 final Commission action in Docket Number UE-010010 as
20 a condition precedent. The settlement agreement also
21 would resolve PSE's complaint in Case Number
22 01-2-03801-0 SEA now pending in the Superior Court
23 for the State of Washington, King County, and would
24 effect a comprehensive release of claims against PSE
25 by Complainants and Intervenors in Docket Numbers

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1 UE-001952 and UE-001959, insofar as those claims
2 relate to the business relationship between PSE and
3 its customers under Schedule 48 and certain special
4 contracts.

5 Our notice of hearing included reference to
6 all of these matters, except perhaps the King County
7 matter, which is not within our jurisdiction, but as
8 to all matters within the Commission's jurisdiction,
9 proper notice has been issued by the Commission that
10 we would be convened today.

11 Our basic hearing agenda will be to take
12 appearances by counsel or other party
13 representatives. We'll take up preliminary matters,
14 exhibits, additional responses to bench requests. I
15 want to mention briefly that we have pending King
16 County's petition for late intervention in Docket
17 UE-010038.

18 I will pause here and ask -- okay. The
19 Commissioners will have an opportunity to make some
20 brief opening remarks. It came to me by one means or
21 another this morning off the record that counsel did
22 not wish to make opening statements; is that correct?
23 I'm seeing nods of affirmants.

24 MR. WOODWORTH: Yes, Your Honor. I'm Don
25 Woodworth, appearing for King County. We do wish to

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1 make an opening statement. However, in discussions
2 previous to this hearing, we've been asked to defer
3 that statement in order for some of the parties to
4 discuss a possible procedural treatment of our
5 intervention.

6 JUDGE MOSS: Okay, fine. Thank you very
7 much. So we'll move past the opening statements to
8 the presentation of the witness panel. Other
9 witnesses, I've mentioned that, as of course we
10 noticed and by order, established process that our
11 prior witnesses should be available today. It's my
12 intention to swear all of the witnesses
13 simultaneously so that we can have a more open
14 discussion and, of course, I also mentioned that
15 we'll have discussion with counsel, as indicated.
16 Yes, sir.

17 MR. CAMERON: Your Honor, John Cameron.
18 I'm here representing Bellingham Cold Storage and
19 Atlantic Richfield Company.

20 At a conference call among counsel on
21 Monday, we discussed two parties to the stipulation
22 to the settlement who were not intervenors. I was
23 tasked with the responsibility for contacting one of
24 them, Olympic Pipeline Company. I have a letter from
25 their counsel, Mr. William Beaver, authorizing me to

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1 request late intervention in this proceeding on
2 behalf of Olympic Pipeline, which is party to the
3 stipulation and settlement for the City of Anacortes
4 and Olympic Pipeline.

5 The purpose of their intervention is simply
6 to participate in the case in support of the
7 stipulation settlement that they have executed.

8 JUDGE MOSS: Okay. We'll take that up in a
9 few minutes. All right. Are there any other
10 preliminary matters I need to note? Yes, ma'am.

11 MS. DAVISON: Your Honor, we submitted late
12 yesterday afternoon a petition to intervene for
13 Intel, as well.

14 JUDGE MOSS: All right. I hadn't seen
15 that. We'll take that up, as well. Yes, sir.

16 MR. FFITCH: Your Honor, Simon ffitch for
17 Public Counsel. There had been discussion regarding
18 public comment or testimony. Your office had
19 communicated with us regarding that. At this time,
20 it's my understanding that that particular individual
21 is not requesting opportunity to comment today.
22 We've had communication with that person regarding
23 the nature of the settlement, and their concerns were
24 satisfied.

25 In the interest of completeness, I'll note

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1 that we had an exhibit prepared in the earlier phases
2 of this proceeding with some comments that were
3 received at an earlier time with regard to the
4 earlier posture of the complaint case. They don't
5 appear to relate at this time to the settlement.
6 They are, however, in this docket, and if the
7 Commission would like those made a part of the
8 record, we could file those and serve those on the
9 other parties to the case.

10 JUDGE MOSS: Well, we'll take that up when
11 we talk about exhibits. All right. Any other
12 preliminary matters I should note so that we could
13 take them up?

14 MR. WOODWORTH: Your Honor, Don Woodworth,
15 appearing for King County again. I would appreciate
16 guidance from the bench. If I could reserve my
17 opening remarks until later, I'd like to excuse
18 myself so that we may consult with my client.

19 JUDGE MOSS: Oh, all right. Fine. Yes, I
20 can go ahead and give you guidance on that. We'll
21 allow you to defer that and not foreclose you from
22 the opportunity to make a statement.

23 MR. WOODWORTH: Thank you, Your Honor.

24 JUDGE MOSS: Okay, all right. And then, of
25 course, we'll have any other business that we need to

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1 conduct today will be the final item on the agenda.

2 Oh, one more announcement. That is that we
3 do have -- we have scheduled a 10:30 recess this
4 morning. I believe that will be for approximately
5 one half hour. So we're just going to sort of get
6 started here, and then we'll have a brief recess so
7 that some other business can be taken care of that
8 has to be taken care of, and then we'll come back
9 immediately after that and proceed apace.

10 Let's do take appearances. And any counsel
11 who have previously entered an appearance, and Mr.
12 Woodworth, you need to stick around just a minute,
13 Counsel who have previously entered appearances may
14 do so in the short form, that is to say, name and
15 whom you represent. Counsel who are entering their
16 first appearance should give the address, telephone
17 number, facsimile number and e-mail for the record,
18 and I think we have just the one for that. So let's
19 just begin over here on the left with PSE.

20 MR. BERMAN: Good morning, Your Honor. My
21 name is Stan Berman, with the Law Firm of Heller,
22 Ehrman, White and McAuliffe, appearing on behalf of
23 Puget Sound Energy. Also with me today is Todd
24 Glass, of Heller, Ehrman, White and McAuliffe.
25 Sitting at the counsel table with me, as well, are

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1 the two Puget Sound Energy witnesses, William Gaines
2 and Donald Gaines.

3 JUDGE MOSS: All right. Thank you very
4 much. Mr. Cameron.

5 MR. CAMERON: Good morning. I'm John
6 Cameron, of Davis, Wright, Tremaine. I'm here for
7 Bellingham Cold Storage, an intervenor in the case;
8 also Atlantic Richfield Company, an intervenor in the
9 case; and as I just said, Olympic Pipeline, which
10 hopes to become an intervenor.

11 JUDGE MOSS: Mr. Woodworth.

12 MR. WOODWORTH: Yes, good morning, Your
13 Honor. I'm Don Woodworth, Deputy Prosecuting
14 Attorney for the County of King. Address is 900 King
15 County Administration Building, 500 Fourth Avenue,
16 Seattle, Washington, 98104. The telephone number is
17 206-296-0430. The facsimile is 206-296-0415. King
18 County is an intervenor in the action before the
19 Commission today and has also petitioned to intervene
20 in UE-010038.

21 JUDGE MOSS: Okay. Let me ask you also if
22 you have an e-mail? We have been doing some
23 communication in that fashion.

24 MR. WOODWORTH: Yes, Your Honor. That
25 would be don.woodworth@metrokc.gov.

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1 MS. DAVISON: Good morning, Your Honor. My
2 name's Melinda Davison, with the Law Firm of Davison
3 Van Cleve. I'm here this morning on behalf of the
4 Complainants, and in addition, I'm here also
5 representing Intel Corporation.

6 JUDGE MOSS: Thank you. Mr. Ffitch.

7 MR. FFITCH: Simon Ffitch, Assistant
8 Attorney General, on behalf of Public Counsel.

9 JUDGE MOSS: All right. Staff.

10 MR. CEDARBAUM: For the Commission Staff,
11 Robert Cedarbaum and Donald Trotter.

12 JUDGE MOSS: Okay. Thank you very much.
13 And I believe that completes our appearances. And
14 yes, sir. I'm sorry.

15 MR. WALTERS: Brian Walters, appearing here
16 today on behalf of Public Utility District Number One
17 in Whatcom County. And for the record, I would like
18 to clarify that although the Public Utility District
19 is an intervenor in the case, we are not a named
20 party to the stipulation nor do we desire to be at
21 this time. Thank you.

22 JUDGE MOSS: Okay. Thank you very much.
23 Are there other appearances that I have overlooked?
24 Okay, fine.

25 Now, in terms of petitions to intervene,

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1 the King County petition to intervene in the Schedule
2 48 docket is -- I think it's UE-010038, that's not a
3 matter we need to take up this morning. If the
4 settlement is ultimately approved and that docket is
5 dismissed, then it would be more or less a moot act
6 in any event.

7 On the other hand, if the settlement is not
8 approved or for some reason does not go forward and
9 that proceeding is not dismissed, then we can take up
10 the question of King County's intervention at the
11 appropriate time, if there's further process in that
12 docket. So what I'm saying is certainly without
13 prejudice to King County's right to intervene and
14 participate in this docket. This just isn't the
15 appropriate moment to take that up.

16 We do have the petition to intervene by
17 Olympic Pipeline as a late intervenor and by Intel.
18 Let me just determine first whether there's any
19 objection by any party to the late intervention
20 proposed by those two entities? Apparently, there is
21 no objection. We'll take a moment to confer at the
22 bench.

23 JUDGE MOSS: All right. The late petitions
24 to intervene by Olympic Pipeline Company and Intel
25 Corporation are granted.

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1 MR. CAMERON: Thank you.

2 JUDGE MOSS: You're welcome. All right.

3 This brings us, then, to the -- I believe we should
4 first -- let's first take up the -- let's take up the
5 opening remarks by the bench, and then we'll consider
6 exhibits and so on, so forth. We may be able to do
7 some of that during the time when the Commissioners
8 are unavailable, so there will be some mechanics
9 associated with exhibits that I can handle without
10 having the Commissioners have to be on the bench.

11 MR. BERMAN: Your Honor, if I could just
12 hop in for a comment. When we had advised you that
13 none of us had opening remarks, that was with the
14 understanding that there would not be anyone amongst
15 the parties or anyone else who would be taking any
16 position adverse to the settlement.

17 I understand that the issue of King County
18 and where they stand is something that we're
19 deferring for right now. We would like to be clear,
20 before we go on with witnesses, if there's anyone
21 else who intends to be taking a position adverse to
22 the settlement so that we can hear from them. And if
23 there is someone in that situation, we would want to
24 address in our opening discussion, before we have our
25 witnesses go up, any issues that relate to that. If

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1 there is no such party, then I think that you can
2 ignore what I just said.

3 JUDGE MOSS: All right. Well, let's ask
4 the question, then, whether there's anyone who
5 intends to oppose the settlement? Apparently we are
6 in the position of ignoring what you just said. All
7 right.

8 MS. DAVISON: He's gone.

9 JUDGE MOSS: Well, the King County matter
10 is deferred to another time, so we'll not foreclose
11 the opportunity if it needs to be -- as I understand
12 -- well, I don't even want to comment on it with Mr.
13 Woodworth out of the room.

14 So let's turn to the bench for any opening
15 remarks by Chairwoman Showalter or Commissioner
16 Hemstad, and then we'll continue with the other
17 matters.

18 CHAIRWOMAN SHOWALTER: Well, before we
19 begin our probing questions, I want to acknowledge
20 and praise all of the effort that went into this
21 settlement. It's very clear from the documents
22 themselves and also from our observations of the
23 meetings that took place here that the parties have
24 worked extraordinarily hard to reach this agreement,
25 and I'm sure there were many hours in other buildings

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1 that we didn't see, and I really do appreciate it.

2 Also, I want to express appreciation for
3 the clarity of the writing. I think in general the
4 documents are very clear and it is clear what the
5 parties want to do, by and large. I want to single
6 out one document that I found exceptionally clear,
7 and that was the Staff memorandum in support of the
8 settlement. I just appreciate good, clear writing,
9 because I think that it then enables us to focus on
10 the issues we want to raise.

11 All of that said, this settlement is very
12 broad in scope and has perhaps major and perhaps
13 profound implications, and I intend to ask questions
14 about those implications, but I want you to know that
15 my questions should not detract from the appreciation
16 I feel for the effort that has gone into the
17 proposal.

18 COMMISSIONER HEMSTAD: I have nothing the
19 further to add.

20 JUDGE MOSS: Okay, thank you. All right.
21 Well, let's first just sort of take a roll call here
22 and let me ask who are to be the witnesses who will
23 participate as our witness panel in connection with
24 the settlement itself?

25 MR. BERMAN: Your Honor, as I noted

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1 earlier, the company, Puget Sound Energy, has two
2 witnesses. First we have William Gaines, who's the
3 Vice President for Energy Supply of Puget Sound
4 Energy, and we also have Donald Gaines, who is the
5 Treasurer of Puget Sound Energy.

6 And just for clarity in the record, I think
7 we're going to have to refer to their first names, as
8 well, given that they're both Mr. Gaines.

9 JUDGE MOSS: Or we could embarrass them and
10 ask for the older and the younger. No, we'll go -- I
11 think your suggestion for the use of first names is
12 well taken and we'll follow that procedure. How
13 about for the complainants in the proceeding?

14 MS. DAVISON: Thank you, Your Honor. We
15 have Mr. Donald Schoenbeck as the witness for the
16 panel, and then I don't know if you would like for me
17 to list who is here for each of the complainants now
18 or if you want to reserve that to a later time.

19 JUDGE MOSS: Let's get the panel identified
20 first, and then I do want to return to that, however.

21 MS. DAVISON: Okay, thank you.

22 MR. FFITCH: For Public Counsel, Mr.
23 Matthew Steuerwalt.

24 JUDGE MOSS: All right. And for Staff.

25 MR. TROTTER: For Commission Staff, Mr.

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1 Alan Buckley.

2 JUDGE MOSS: Okay. And that completes our
3 panel. All right. And I'd just note for the record
4 that these witnesses are arrayed around our tables up
5 front here. I think, given the accommodations that
6 we have, physical accommodations, we'll just leave
7 everybody where they are, and that will work just
8 fine.

9 Let's do, as I mentioned earlier, I'm going
10 to want to swear all the witnesses at once, and I
11 also want to have all of the witnesses, both the
12 panel witnesses and the others, available for
13 questions from the bench, as appropriate. And so
14 let's identify the other witnesses present in the
15 hearing room. And do you have other witnesses
16 present, Mr. Berman?

17 MR. BERMAN: Your Honor, no. You had asked
18 in the order that witnesses who had appeared
19 previously be available for recall. The only witness
20 who's actually appeared previously for the company is
21 Mr. William Gaines. You will recall that testimony
22 was submitted, though not admitted, on behalf of
23 Donald Gaines and Rick Hawley for Puget Sound Energy.
24 If you have questions concerning those submitted, but
25 not admitted testimonies, Donald Gaines is prepared

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1 to answer any questions that relate to that.

2 JUDGE MOSS: Thank you. Okay. Ms.

3 Davison.

4 MS. DAVISON: I have a list of individuals
5 that I'll read through, and one individual who has
6 probably got delayed on an airplane, that I don't see
7 in the room, but who'll be -- should be here any
8 time.

9 JUDGE MOSS: All right.

10 MS. DAVISON: In no particular order,
11 Suzanne Hahn.

12 JUDGE MOSS: Could you spell that last
13 name?

14 MS. DAVISON: H-a-h-n. Ms. Hahn is here on
15 behalf of Equilon. Mr. James Cunningham, who did
16 previously submit testimony on behalf of Georgia
17 Pacific. Mr. Charles Magee, on behalf of Tesoro. He
18 is here instead of Mr. Russ Crawford, who is out of
19 state today.

20 JUDGE MOSS: Better spell Magee for us.

21 MS. DAVISON: M-a-g-e-e. Mr. Randall
22 Clancy, on behalf of Air Products. Mr. Matthew
23 Franz, on behalf of CNC Containers. Mr. Ian Munce,
24 M-o-u-n-c-e (sic), on behalf of the City of
25 Anacortes. He's here in replacement of Mayor

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1 Maxwell. Mr. Dan Summers, for the Boeing Company.
2 And finally, Mr. Ed Marlovits, which is
3 M-a-r-l-o-v-i-t-s, on behalf of Air Liquide.

4 And I apologize that we were not able to
5 have someone present on behalf of Intel Corporation,
6 but Intel has authorized me to speak on their behalf
7 today.

8 JUDGE MOSS: All right. And Intel had not
9 previously put a witness on anyways, so --

10 MS. DAVISON: No, they had not.

11 JUDGE MOSS: -- it's outside the scope. We
12 won't put you in jail, I guess. All right. Mr.
13 ffitch, did you have Mr. Steuerwalt substituting for
14 your prior witness?

15 MR. FFITCH: Yes, Your Honor. Mr. Lazar is
16 out of the country at the present time and unable to
17 be here. Mr. Steuerwalt will be able to respond to
18 those issues.

19 JUDGE MOSS: Thank you very much. For
20 Staff, we have Mr. Buckley, of course, on the panel.
21 I believe Ms. Linnenbrink is probably unavailable,
22 isn't she?

23 MR. TROTTER: Yeah, she is out of the state
24 at this time. We also have Mr. Schooley, who can
25 testify on those areas, if necessary.

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1 MR. CAMERON: Your Honor, John Cameron.

2 JUDGE MOSS: Mr. Cameron, I'm sorry.

3 MR. CAMERON: Neither ARCO nor BCS
4 sponsored witnesses previously. I do have Mr. Doug
5 Thomas, President of BCS, on the bridge link, as well
6 as Mr. Mark Woodward from ARCO. I've been authorized
7 to answer any questions anyone may have from either
8 of those companies.

9 JUDGE MOSS: Thank you. Does that mean we
10 get to swear you in? Just joking, Mr. Cameron. You
11 don't need to respond.

12 MR. CAMERON: It won't matter. I'll tell
13 the truth.

14 JUDGE MOSS: All right. Well, let me ask,
15 then, that all the witnesses rise at this time and
16 I'll swear you in collectively.
17 Whereupon,

18 ALL IDENTIFIED WITNESSES,
19 having been first duly sworn by Judge Moss, were
20 called as potential witnesses and testified as
21 follows:

22 JUDGE MOSS: Thank you. Be seated. It
23 will be necessary, to the extent a witness from the
24 gallery, I'll say, is called, that that witness
25 advance to the area of the microphones. The

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1 microphone over here by the witness chair is open, so
2 that probably will be the most convenient locale if
3 that should occur. There's no chair over there, but
4 we'll pretend we're in London and put you in the dock
5 and you can stand for your testimony. All right.
6 Thank you very much.

7 Now, we have deferred any openings by
8 counsel unless and until necessary, and so with that,
9 I believe we are ready to begin our process. And
10 primarily we'll be having questions from the bench.
11 To the extent those questions are directed to
12 counsel, that, of course, will be the opportunity for
13 legal argument. To the extent the questions are
14 directed to the witness, of course, then that will
15 constitute testimony in the proceeding. So with
16 that, I'll the turn to the Chairwoman and kick our
17 process off with questions.

18 CHAIRWOMAN SHOWALTER: Well, my thought was
19 that we might try to group our questions into the
20 major subjects that have occurred to us followed by
21 maybe miscellaneous, maybe followed by just a
22 run-through of all the documents to catch anything
23 that we didn't catch.

24 The top, the major grouping of issues that
25 I see, and I think I will defer to Judge Moss to

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1 categorize them --

2 JUDGE MOSS: Yeah, let me just establish
3 some categories. And some of these are related to
4 one another to a greater or lesser degree. One
5 subject area that we wish to have discussion on is
6 that the parties request that the Commission enter
7 what is characterized in the papers as a finding,
8 which I would consider or call a conclusion of law,
9 disavowing jurisdiction over the range of potential
10 power supply or sales to Schedule 449 customers. So
11 I think of that as the jurisdiction issue, and there
12 will be some questions and discussion in that area.

13 Somewhat related is the question of
14 obligation to serve. And perhaps to a lesser degree,
15 but also related is what I think of or call the
16 enforceability issue. There is a -- there are issues
17 raised with respect to -- or questions in the bench's
18 mind with respect to the provisions of the settlement
19 that concern what happens in the event there is a
20 transfer of property down the line, and in terms of
21 the binding nature of the arrangements on successors
22 in interest or even, it appears, those who might
23 acquire assets of an existing company to conduct some
24 wholly different business. And we need to ask some
25 questions in that area.

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1 As signaled somewhat by the bench request,
2 the bench has concerns with respect to tax
3 implications of the settlement agreement, and so that
4 is another subject area. And I think that really
5 does outline the principal subject areas.

6 And then, as Chairwoman Showalter
7 mentioned, we of course will complete those
8 discussions and then we'll want to go through the
9 settlement and pick up other isolated points and
10 issues that -- where there may be questions.

11 I'm thinking about the exhibits matter. I
12 had thought to defer that until the 10:30 hour, when
13 we could handle some of the mechanics of that sort of
14 thing, but it does occur to me that we do have
15 perhaps some issues concerning exhibits that do need
16 to be taken up with the full bench present, and that
17 would concern the confidential settlement agreement
18 that was submitted for an in camera review.

19 And the question was left open as to
20 whether the Commission would determine that that
21 should be made a matter of record in the proceeding,
22 and if so, whether we would need to amend the
23 protective order so that the parties could assert the
24 appropriate confidentiality and arrangements for
25 handling and so on and so forth, and that's something

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1 we should take up now. And I'm going to just go off
2 the record very briefly for a bench conference here.

3 (Discussion off the record.)

4 JUDGE MOSS: All right. We're back on the
5 record. We've had an opportunity to confer on the
6 matter, and it is the preference of the bench to
7 defer consideration of whether that document will
8 need to be made an exhibit, and if so, under what
9 guidelines that will occur. And so that does leave
10 us in a position, then, of deferring other exhibits
11 for a few more moments until the 10:30 hour. We're
12 going to stay on the record. The Commissioners will
13 leave the bench to conduct some other pressing
14 business, so that's how we'll proceed this morning.

15 So with that, I think I've outlined the
16 principal subject areas, and if --

17 CHAIRWOMAN SHOWALTER: Well, I'm wondering
18 whether we should just start our break now. We have
19 a meeting that's starting at 10:30. It's very
20 possible the participants are there. Otherwise, I
21 think we're starting in and we're going to just get
22 going with the first one or two questions.

23 JUDGE MOSS: All right. That's fine.

24 CHAIRWOMAN SHOWALTER: Why don't we do
25 that, and maybe we'll be back before 11:00, if we can

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1 finish up our business.

2 JUDGE MOSS: Okay. Sounds good. And we
3 will continue, then, and let me just ask if the
4 parties have any -- if there are any loose ends with
5 respect to exhibits that we need to have. Now, of
6 course, we need to make the stipulation itself an
7 exhibit, as we typically do, and I'll mark that here
8 momentarily. But are there other exhibits that
9 parties wish to introduce during this phase of the
10 proceeding?

11 MR. BERMAN: Your Honor, our intention is
12 to not offer any additional exhibits beyond the
13 filing consisting of the stipulation and the various
14 documents that accompanied the stipulation.

15 Also, to the extent there are any
16 unresolved issues relating to exhibits from the
17 litigation phase of the proceeding, we're
18 uninterested in pursuing those issues in light of the
19 settlement of the litigation phase of the proceeding.

20 JUDGE MOSS: Thank you. Anybody else have
21 exhibits? Mr. ffitch, I had, of course, reserved
22 your opportunity with respect to the comments you may
23 have received from members of the public, so I didn't
24 want to foreclose you from that opportunity. I will
25 say that, independently, the bench doesn't have any

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1 requirement for those, except perhaps to the extent
2 they might bear on the settlement, since that's where
3 we are at this stage of the game.

4 MR. FFITCH: My understanding is they do
5 not, Your Honor. We had inquired of the Commission's
6 public affairs office whether they had any more
7 recent comments. My understanding is they do not
8 have. The comments that were received and which we
9 had been ready to offer at an earlier stage of the
10 case related to the need for relief, the emergency
11 situation, the need for rate relief for customers and
12 that kind of thing. If the bench would like to have
13 those in the case record as an exhibit, we could
14 offer those. They're actually in the possession of
15 the Commission's public affairs office, as well.
16 They are all e-mail comments, if memory serves me.

17 JUDGE MOSS: Okay. Unless you
18 affirmatively wish to offer them, the bench has no
19 independent need for them, I think, in order to
20 determine the case and have a full record to do so,
21 or determine the settlement question, anyway.

22 MR. FFITCH: I don't -- I don't -- I am
23 almost a hundred percent confident they don't relate
24 to the case as it's currently postured before the
25 Commission and would not be relevant. I will double

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1 check that.

2 JUDGE MOSS: Okay.

3 MR. FFITCH: And make a subsequent request
4 if need be.

5 JUDGE MOSS: All right, okay, fine. Does
6 any other party have anything they wish to be made of
7 record in connection with this phase of the
8 proceeding in the way of a document exhibit? All
9 right. And no lingering matters concerning the prior
10 record in line with Mr. Berman's suggestion, and we
11 don't need to go there. Let's don't. All right.

12 Well, I really don't have any other
13 business that we can usefully conduct during the
14 interim here. So unless somebody else has something
15 they'd like to bring up on the record at this time
16 that we can handle with the Commissioners off the
17 bench, I think we can all go have a donut. We'll be
18 in recess until approximately 11:00. I'll ask you to
19 stay in the vicinity, so if we can get started a few
20 minutes early, we'll send somebody out into the halls
21 and round you up. Thanks. Off the record.

22 (Recess taken.)

23 JUDGE MOSS: All right. We're ready to go
24 back on the record, and let's do so.

25 CHAIRWOMAN SHOWALTER: I just -- I want to

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1 put one small thing on the record, in case anyone had
2 a question. Given that Olympic Pipeline -- which is
3 British Petroleum, am I right?

4 MR. CAMERON: No, ma'am, separate
5 corporation.

6 CHAIRWOMAN SHOWALTER: Separate
7 corporation. Okay. I'll say it anyway. Just -- we
8 just had a meeting with British Petroleum, Bob Batch
9 and Dan Cummings, and it was on the subject of our
10 pipeline safety legislation and nothing to do with
11 this case. We didn't bring up this case. But I was
12 under the impression that we perhaps had just granted
13 their intervention in this case. And if I'm wrong,
14 then I need not have even reported it, but it's a
15 separate meeting.

16 MR. CAMERON: Well, for the record, Olympic
17 Pipeline is a corporation owned in part by ARCO, now
18 BP, Equilon, and at one point GATX, the tank car
19 company. So each has an interest, but it is a
20 distinct corporation from any of them.

21 CHAIRWOMAN SHOWALTER: All right.

22 JUDGE MOSS: Okay. During the period after
23 the Commissioners stepped off, we did mark for
24 identification Exhibit Number 1801, which is the
25 settlement package consisting of a number of

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1 documents. We're going to mark it as a single
2 exhibit, and as we refer to it, of course parties
3 will need to identify what specific portions we're
4 talking about by appropriate means, so we can
5 recognize it later when we read the transcript.

6 Let me ask if there's any objection to the
7 admission of 1801? Hearing no objection, it will be
8 admitted as marked.

9 I'm also going to mark for identification
10 the Staff response to the Bench Request 3.1 and 3.2
11 as 1802. And in the absence of objection, and
12 hearing none, it will be admitted as marked.

13 I understand there are no other documents
14 or other materials that would constitute exhibits
15 that we need to take up at this time. So with that,
16 I think we are ready to begin our questions of the
17 witnesses and counsel.

18 CHAIRWOMAN SHOWALTER: All right. Well,
19 let's begin with the jurisdictional issues. That's
20 probably going to take me awhile to get warmed up to
21 this subject, because it is complicated, but let me
22 observe first, we either do or don't have
23 jurisdiction as a matter of law, so as a matter of
24 fact, whether we say we have jurisdiction or not is
25 not going to change the fact of whether, under the

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1 law, decided at some point by some court, that we do
2 or don't.

3 But I gather what the parties are asking us
4 is for us to draw our conclusion at this time as to
5 whether we do or don't have jurisdiction over certain
6 situations. Let me ask -- I'm not sure whom to ask
7 this of, but the question is why is it important to
8 have this declaration at this time, and how important
9 is it to have it at this time. I'm casting about
10 looking for someone to answer this question. Maybe
11 we could just get a volunteer.

12 MS. DAVISON: I'll start off the
13 discussion, because I think it's an issue that is
14 critically important to my clients. And I'm assuming
15 that the jurisdictional issue that you're speaking of
16 is the request regarding the sales by marketers to --

17 CHAIRWOMAN SHOWALTER: Right.

18 MS. DAVISON: -- under 449. And the issue
19 is important to us because it is related to the
20 number of potential sellers that we see that would be
21 interested in selling under 449.

22 We recognize that we are entering this
23 arena at a time in which prices remain high and
24 supply remains tight, and we are extremely concerned
25 that if there is the potential that a marketer who

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1 would be selling to a 449 customer might step into
2 being regulated by this Commission, that those
3 entities would be disinclined to sell under 449.

4 So we're very concerned that we have as
5 broad of a pool of potential sellers as possible. We
6 believe that if there is any type of likelihood that
7 the Commission would assert jurisdiction in terms of
8 declaring those companies to be electric companies or
9 public service companies subject to the Commission's
10 jurisdiction, that they would simply decline to enter
11 into those transactions. And that would then leave
12 the pool of sellers to entities that are already
13 subject to the Commission's jurisdiction, which would
14 be primarily PacifiCorp and Avista.

15 CHAIRWOMAN SHOWALTER: So you're not
16 comfortable with your own conclusion that you are
17 asserting we don't have jurisdiction, so presumably
18 you could advise your clients of that and rest on
19 your legal advice that we have no jurisdiction. So
20 the question is, why isn't that good enough for you?
21 Is it could it be you doubt whether -- or you lack
22 some confidence that you're correct?

23 MS. DAVISON: Well, I think that we're
24 correct, and our opinion is shared by the other
25 counsel around these tables, but the consequences of

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1 us perhaps misinterpreting or the Commission deciding
2 affirmatively that they do want -- that you do want
3 to assert jurisdiction, the consequences of that are
4 very severe, given the underlying arrangement and
5 what my clients are entering into with regard to 449.

6 There is -- the only safety net that exists
7 is Schedule 448, and if it is a situation in which,
8 because of this jurisdictional issue, as I said, we
9 have such few sellers under 449, the alternative is
10 pretty limited. And so we need to understand up
11 front, at least as well as we possibly can -- I agree
12 with you that, you know, there may not be an ability
13 to nail it down with a hundred percent certainty, but
14 we believe that the courts would give great deference
15 to your opinion on this issue and --

16 COMMISSIONER HEMSTAD: Why would they?
17 Matters of law, particularly matters of jurisdiction,
18 it's my understanding that our appellate courts don't
19 give deference to the state agency as to its
20 jurisdictional authority.

21 CHAIRWOMAN SHOWALTER: Tanner case.

22 MS. DAVISON: I'm very familiar with the
23 Tanner case. I would like to say that that is an
24 unusual case, but I believe that it has been
25 certainly my experience over the years that, in

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1 matters that deal with the complexity of utility
2 regulation, that the courts generally do.

3 COMMISSIONER HEMSTAD: Dealing with our
4 expertise on the industry end, it's -- call it the
5 fact-based aspects of it, but I didn't think that was
6 the case with regard to our jurisdictional authority.
7 I don't know if Staff has any comment or not.

8 MR. CEDARBAUM: Commissioners, I think I
9 would agree with the comments from the bench, that
10 that type of analysis from the court would be de
11 novo. It may be that a court might give some sort of
12 intangible credit, credence, or -- I don't want to
13 use the word deference to the Commission, but
14 certainly listen to what the Commission had to say
15 about it, but it is a de novo question.

16 CHAIRWOMAN SHOWALTER: Mr. Cedarbaum or Mr.
17 Trotter, I'm not sure which of you wrote the
18 comments, but you seem to acknowledge that only a
19 bona fide marketer that's not unduly close to its
20 affiliate, the regulated company, should be
21 categorized as a power marketer. Am I right on that?

22 MR. CEDARBAUM: Just for the record, both
23 Mr. Trotter and I wrote the comments.

24 CHAIRWOMAN SHOWALTER: Okay.

25 MR. CEDARBAUM: I won't tell you which

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1 part. I think our point on that was that we did
2 reach the conclusion that a power marketer is not an
3 electrical company under the state law, nor, even if
4 it was an electrical company, would be a public
5 service company under these circumstances under state
6 law.

7 We -- and we also felt that as long as that
8 power marketer was truly separate, in fact and in
9 law, from an affiliate that might be a Schedule 449
10 customer or some other power supplier that was an
11 electrical company, that that seemed to us to be
12 something the Commission would not have jurisdiction
13 over.

14 I think we kind of -- I don't know if hedge
15 is the right word, but we wanted to make sure it was
16 clear that we were talking about a bona fide power
17 marketer, and not a situation which we didn't --
18 we're not saying is present here today or we didn't
19 really define it, because there are just many -- a
20 wide range of hypotheticals I think you could come up
21 with, but we wanted to make it clear that we were
22 talking about the true power marketer, even if it was
23 an affiliate of the power supplier, that bona fide
24 affiliate, that that was something we thought the
25 Commission did not have authority to regulate.

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1 what that distinction then means. If we state as a
2 matter of law this abstract proposition, how does it
3 actually apply to any fact situation, since you seem
4 to acknowledge that there might be some facts in
5 which there wasn't a bona fide power marketer. That
6 is, whether a power marketer is or isn't subject to
7 our jurisdiction could be dependent on how closely
8 allied that power marketer was to a regulated
9 utility. So we can't get at facts that aren't before
10 us.

11 MR. CEDARBAUM: Well, I think that's right.
12 I think we would -- like all conclusions of law or
13 legal analysis, it is fact-specific. And I think
14 we're saying here that, for purposes of this
15 settlement, if a company is not owning, operating or
16 managing electric plant, it is therefore not an
17 electrical company, and whether it's a power marketer
18 or something else, it wouldn't be subject to
19 Commission jurisdiction, although the finding we're
20 asking for is just limited to the marketer or other
21 entity. But if a situation came along in the future
22 where that condition wasn't fulfilled, then I think
23 the Commission and other parties would have the right
24 to examine that.

25 COMMISSIONER HEMSTAD: When you say that

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1 condition --

2 MR. CEDARBAUM: If, for example, the
3 condition that the marketer or other entity selling
4 to a Schedule 449 customer through either itself or
5 not being what you'd call the bona fide affiliate,
6 does own, operate or manage electric plant, in other
7 words, if it crosses that line. Again, it's a gray
8 area. There are facts that we can probably all think
9 of that are on one side or the other of that fence.

10 I think if the facts were presented where
11 the marketer or other entity was owning, operating or
12 managing electric plant, then that conclusion of law
13 would not have any weight in that situation.

14 CHAIRWOMAN SHOWALTER: I guess, I mean, one
15 way to look at this is that you're asking us to do no
16 more than repeat a statute. If you don't meet the
17 statutory test, then you're not under our
18 jurisdiction, in essence, in which case we haven't
19 really said very much, and then I wonder whether we
20 need to say it.

21 The other way to look at it is we're
22 somehow seeming to scoop up quite a bit that will
23 happen in the future and to bless it when actually we
24 don't have those fact patterns in front of us.

25 MR. CEDARBAUM: I think that it does more

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1 than -- I think there is usefulness to this and I
2 think this gets to the point that Ms. Davison made,
3 that during the negotiations we heard her comments in
4 similar words, or maybe the same words, and we
5 understood that to be important to her clients, and
6 so we felt that since we could agree with this
7 conclusion of law, there was no reason why not to
8 also agree to have a finding to that effect.

9 But I would agree with you that the finding
10 that we're asking for does use statutory terms.

11 CHAIRWOMAN SHOWALTER: Mr. Cameron.

12 MR. CAMERON: I would take your point, but
13 to the extent we're simply asking for a declaration
14 of law, the courts will ultimately decide what they
15 want to decide. But I believe in this context we are
16 presenting facts to you, as well, and facts of an
17 expert nature to which the courts usually defer. The
18 vacant legal phrase is for hire or holding out to the
19 public. Obviously, there are questions that arise.
20 Does that mean holding out to one, two, three
21 customers? What about just industrials? Must it be
22 residential, as well?

23 I think the proposition here is that, given
24 the statute, we are talking about a regime in which
25 suppliers will be selling through Schedule 449 to no

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1 more than the group comprising the companies before
2 you.

3 If you're looking for a factual context, it
4 is that sellers participating under 449 and no other
5 retail sales in the state, or at least within Puget's
6 service territory, are not holding themselves out to
7 the public and don't satisfy that criteria of being
8 declared a public utility.

9 CHAIRWOMAN SHOWALTER: But now, it seems
10 like what you're getting at starts to -- is not
11 actually what we've been asked to do. We've been
12 asked to just state that if you don't have a power
13 plant for hire in the state, then you're not subject.
14 But now we're getting to, well, what does it mean,
15 what does for hire mean and who is the public. Do
16 you see this as -- are we being asked to find not
17 just this abstract statement under the law, but that
18 power marketers delivering or selling power under 449
19 are not selling to the public? Are we asked to take
20 that step?

21 MR. CAMERON: I think you're being asked --
22 well, you're being shown Schedule 449, which consists
23 of a class, closed set class of customers before you.
24 And in terms of for hire or holding out to the
25 public, the proposition before you is, given that

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1 limited schedule and no other, given these customers
2 and no other, the participating sellers are not
3 public utilities.

4 CHAIRWOMAN SHOWALTER: But if you look at
5 page -- line 22, page three, what I see we're being
6 asked -- it seems like what we're being asked to
7 pronounce is that a power marketer who sells under
8 449, who does not own, operate or manage electric
9 plant for hire within the state of Washington is not
10 subject.

11 That begs the question of who is not -- who
12 doesn't own, operate or manage electric plant for
13 hire within the state of Washington. Who is or isn't
14 is a factual issue that I take it we don't have in
15 front of us. Am I right on that?

16 MR. CEDARBAUM: But you don't have specific
17 factual circumstances before you. You only have the
18 request for this conclusion of law to be made.

19 JUDGE MOSS: Let me ask a clarifying
20 question, if I may, picking up on what Mr. Cameron
21 was saying. Is the suggestion, then, that this
22 should read, Find that marketers or other entities
23 who sell power only to Schedule 449 customers? I
24 mean, let's take a situation. Let's say Enron comes
25 into the state and puts up a billboard, Power for

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1 sale, all comers welcome.

2 MR. CAMERON: Not this case.

3 JUDGE MOSS: Not this case. So this is a
4 narrower set of sellers.

5 MR. CAMERON: Narrowest we can make it.
6 Not narrow in terms of sellers, but narrow in terms
7 of program and customer group.

8 JUDGE MOSS: Yeah, I guess a concern that
9 sort of came to mind there was Ms. Davison's comment
10 that the idea here is to broaden the potential
11 universe of sellers, and so if we're talking about
12 only sellers who don't sell to the public, doesn't
13 that narrow the set of potential sellers?

14 I mean, let's say that PGE wants to make
15 such a sale in Washington to a Schedule 449 customer,
16 but PGE also sells to other members of the public, if
17 you will, and might want to offer to sell to other
18 industrial customers who aren't 449 customers. Would
19 they be outside of what's being requested here or
20 inside? That's what I'm trying -- I'm trying to get
21 some clarification here.

22 MR. BERMAN: Your Honor, the intention of
23 the stipulation is that we're seeking a limited
24 finding and we're not seeking anything further than
25 what's spelled out in Section 2.17. To me, the

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1 answer is that for every hypothetical that you can
2 come up with of some situation with someone selling
3 to others or something like that, you're going beyond
4 what we're asking.

5 Because if you look at, in Section 2.17,
6 among other things, it says that you make this
7 finding that people who fit within this category are
8 not subject to regulation as electric utilities under
9 the laws that exist today, and then solely because of
10 sales to Schedule 449 customers.

11 If you want to -- if they're doing
12 something else and you conclude that because of that
13 something else, that they're subject to regulation,
14 that's not what this finding is about.

15 Also, it was not the company's intention to
16 have you sort through -- to have you reach
17 determinations about all the types of factual
18 situations or to render a set of analyses about
19 different factual situations. It was to acknowledge
20 the conclusion that's spelled out here in 2.17.

21 And there's one central purpose, really.
22 The purpose is to provide such comfort as is possible
23 to marketers who would want to sell to these
24 customers. And given that it's a limited finding,
25 they may take limited comfort, but it's the belief of

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1 the customers that they will take comfort, that
2 marketers will take comfort if they get that finding.
3 And as part of the stipulation, since it's
4 the company's goal that this be a deal that works, it
5 was part of the arrangement. And quite frankly, it's
6 -- since it's in this Section 2 as a necessary
7 condition of the stipulation that this finding be
8 made, we need you to make this finding for the deal
9 to work.

10 But it's very limited and we worked very
11 hard to make sure that you weren't being asked to
12 deal with situations that -- relating to someone
13 selling to others. If Portland General wants to sell
14 to others, that's not an issue -- that's a separate
15 set of circumstances that you're not addressing here.

16 CHAIRWOMAN SHOWALTER: Well, that gets to a
17 related issue, and I think what it is --

18 MR. CAMERON: Can I offer --

19 CHAIRWOMAN SHOWALTER: Oh, sure, go ahead.

20 MR. CAMERON: I'd offer one more comment to
21 Judge Moss' hypothetical regarding PGE doing other
22 business in this state. The purpose of this clause
23 is to expand the market of potential suppliers,
24 ideally creating price competition, competition with
25 regard to credit terms, services, a variety of things

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1 that will make the market more robust and help the
2 customers out.

3 Now, we want more entrants in that market
4 than we might otherwise have if they are fearful of
5 price regulation by the Commission. But if, to
6 follow up on your hypothetical, if PGE is doing
7 business in the state already, then they already have
8 made the corporate decision that the possibility of
9 price regulation in this state will not forestall
10 them from participating. We don't have to worry
11 about them, because they've already decided to enter
12 into the market.

13 What we're worried about is the folks who
14 are currently doing no business in the state
15 whatsoever, certainly no retail business, and we
16 would like, to the extent they are credible
17 suppliers, for them to bid for our business. And if
18 they are -- if they're only willing to do so on
19 commercial terms which don't entail regulation by the
20 Commission, we'd like to preserve the opportunity to
21 do business with them to the extent our own due
22 diligence determines that they're a credible
23 supplier. But only under 449.

24 CHAIRWOMAN SHOWALTER: Well, let's take the
25 example of Portland General, and let's say they're

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1 not in this state and they're not selling this state
2 and the first thing they're ever going to do is try
3 to sell to some 449 customers. Now, they do own
4 plant in Oregon; right?

5 MR. CAMERON: Yes, ma'am.

6 CHAIRWOMAN SHOWALTER: So then the question
7 is is that plant for hire in this state. So then the
8 question is, does for hire means to the public. So
9 we get to this question of is this collection of 449
10 customers the public; is that correct?

11 And so wouldn't we have to say, maybe not
12 in this pronouncement, but if we were looking at that
13 fact pattern, we'd have to say either it's not for
14 hire in Washington, because the plant's not in
15 Washington, that's -- there's a little ambiguity in
16 that term, in Washington. Does it apply to the plant
17 or does it apply to the words "for hire."

18 But if it is for hire in Washington, even
19 though the plant's in Oregon, it's still not
20 jurisdictional if it's not to the public.

21 MR. CEDARBAUM: I think that's right. It's
22 not just the definition of electric plant that uses
23 that for hire type of analysis. It's the case law
24 that I think a number of us have cited in our memos,
25 but you're right. I mean, there is a question of

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1 whether or not this is for hire to the public. And
2 the conclusion that Staff reached, again, because of
3 the limited circumstances that this settlement
4 presents of only these customers under Schedule 449,
5 this limited class who have given up the protection
6 of this -- or are willing to give up the protection
7 of a certain amount of regulation and take upon
8 themselves the responsibility of finding their own
9 power suppliers, that that is not for hire to the
10 public, in Staff's opinion.

11 CHAIRWOMAN SHOWALTER: All right. Then I
12 want to pursue that just a little bit. What is it
13 that makes them not the public? Is it that they
14 happen to be on something called 48 and they paid
15 some transition charges and they're renouncing their
16 -- as I say, they're seceding from the public. Do
17 you need all those facts?

18 Or what if a newcomer comes along, a new
19 company with more than ten megawatts, hasn't paid any
20 transition charges because they haven't been there,
21 and they say we don't want to be a member of the
22 public, either. We want the benefits of 449. Now,
23 one answer might be, Well, you can't have it because,
24 by its terms, it's for old 48 customers. But that
25 begs the question of what is equal treatment.

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1 So what's your opinion if a newcomer comes
2 along and says, I'm just like those guys, except I
3 wasn't here for 48. I don't want to be a member of
4 the public, either. By approving this settlement in
5 449, in particular, will we need to let in the door
6 more members of the nonpublic?

7 MR. CEDARBAUM: I think that also raises
8 some of the discrimination issues that we tried to
9 get to in our memo. And it was a Staff position that
10 this is -- that you would not have to open the door
11 for those non-Schedule 48 customers, and that would
12 be -- that would not be unlawful.

13 COMMISSIONER HEMSTAD: Why not? Why
14 wouldn't that -- well, of course, it depends on where
15 the price goes. But if that new entrant is paying to
16 Puget a much higher price than this class of 449
17 customers, they're going to say, We want in, because
18 the arrangement is unduly discriminatory. We're
19 precisely situated like anyone else in that class.
20 Why can you exclude us.

21 MR. CEDARBAUM: And I think that the
22 argument, the opinion of Staff, and I think others
23 who obviously could speak for themselves, is that
24 those customers, potential customers are not
25 similarly situated to the customers who do have

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1 Schedule 449.

2 CHAIRWOMAN SHOWALTER: But what's the
3 difference that makes the difference?

4 MR. CEDARBAUM: One of the differences that
5 was important to us was the fact that those potential
6 customers did not make transition payments, that the
7 Schedule 48 customers did, and those transition
8 payments were made kind of as a down payment on the
9 anticipation of retail wheeling, and that that was
10 done five or six years ago with those expectations,
11 and now we're coming through on those expectations,
12 and that makes them different.

13 CHAIRWOMAN SHOWALTER: What if the newcomer
14 says, Fine, I'll pay my share, I'll pay something
15 equivalent to the transmission charge that the other
16 customers paid. I just want to get on this same
17 thing that they wanted.

18 MR. CEDARBAUM: Well, I guess I would say
19 again that that customer still is not the same or
20 similarly situated to these Schedule 48 customers,
21 because they were not in the class of customers that
22 were entered into a bargain, if you will, for
23 receiving retail wheeling. Those are the customers
24 that paid the transition payments back beginning in
25 1996, or whenever it was 48 began. These new

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1 potential customers are not in that same situation.

2 CHAIRWOMAN SHOWALTER: But wasn't the
3 reason they paid the transition charges is that the
4 company was going to be put to some risk otherwise?
5 There was a cost they were paying. What cost has the
6 newcomer imposed when they just arrived? Maybe they
7 arrived to build the plant, they want wheeled power.

8 MR. CEDARBAUM: I'm not sure I can answer
9 more beyond what I have.

10 CHAIRWOMAN SHOWALTER: Well, then, another
11 aspect of this is doesn't this create kind of a
12 closed class of customers that I guess just keep
13 going on in the future, the 449 customers?

14 Meanwhile, I hope that in this region we'll get some
15 newcomers in the door, other types of customers, who
16 will be making arguments if not I should get 449, I
17 should get something very -- almost identical to it.

18 MR. CEDARBAUM: I don't think that our
19 stipulation precludes either the Commission from the
20 discretion in the future of opening that or some
21 other potential customer asking the Commission to
22 consider that. So I don't think that door is closed,
23 but at least at this point in time, for purposes of
24 this settlement, we've placed some eligibility
25 criteria on it which we think both makes it

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1 nondiscriminatory and keeps us below the to the
2 public hurdle.

3 COMMISSIONER HEMSTAD: Interesting comment.
4 Do the other parties concur in that hypothetical of
5 future industrial entrants of sufficient size; that
6 the question would be open to the Commission, then,
7 to incorporate them into the class.

8 MS. DAVISON: I would like -- I'll get to
9 the precise answer, I think, to your question in one
10 second. I wanted to go back and agree with Mr.
11 Cedarbaum about his analysis of why this group of
12 eligible customers under 449 is not similarly
13 situated to either other industrial customers or
14 newcomer industrial customers.

15 And I think that, agreeing with everything
16 he said and going back in time to 1996, that group of
17 customers are the group of customers that entered
18 into Schedule 48 arrangement as part of their support
19 for the merger and the settlement related to the gas
20 company, electric company merger.

21 So there's a whole list of things that I
22 could lay out for you that is unique about those
23 particular customers. I think --

24 COMMISSIONER HEMSTAD: But of course the
25 Commission wasn't party to that settlement. That was

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1 a settlement amongst the parties that were in front
2 of us.

3 MS. DAVISON: That is true, although, you
4 know, certainly the Commission -- the actual document
5 that comprised the settlement agreement was not
6 officially filed with the Commission for the
7 Commission's approval, but the elements that are
8 contained in that settlement agreement are found in
9 the Schedule 48 order.

10 COMMISSIONER HEMSTAD: I understand. We
11 only became aware of that in this proceeding.

12 MS. DAVISON: Right, right. But, you know,
13 I think that there are a whole array of things that
14 make these customers unique in time, and then we get
15 into, you know, also the issue of the core versus
16 non-core status, which is a new unique concept to
17 these customers, as well.

18 COMMISSIONER HEMSTAD: We're getting -- I
19 want to pursue a different question, and you can come
20 back to the earlier one, but one of the public policy
21 questions here, it seems to me, that's of
22 significance is industrial operations compete with
23 one another. And one of the premises, I suppose, of
24 the utility regulation and the prohibitions against
25 discrimination is that, at least with respect to the

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1 infrastructure requirements, everyone will be treated
2 equivalently, and then they can compete on their own
3 efficiencies.

4 Doesn't this at least pose the opportunity
5 for this class to have special entitlements that
6 other competing new entrants won't have in the sense
7 of being competitively unfair?

8 MR. BERMAN: Your Honor, my answer to that
9 is that it's not discriminatory if others don't get
10 the deal that's in this deal, because the people who
11 are getting this deal are different than others. But
12 that's not to say that anyone who comes down the line
13 later can't make whatever arguments they please.

14 You'll recall perhaps that when Puget filed
15 Schedule 448 in January, the version that's now being
16 superseded, that we actually had a much broader
17 eligibility criteria than is specified in the
18 settlement now. As part of the deal, the stipulation
19 that we were able to work out, we narrowed the class
20 and we dealt with the set of customers who really are
21 unique because of the reasons that you've heard.

22 One set of the customers are special
23 contract customers. There's been a -- to get a
24 special contract, there has to be a statutory finding
25 that basically you're unique and that you're not like

02097

1 everyone else.

2 Then the other set of customers are the
3 Schedule 48 customers who've paid these transition
4 payments. That's a pretty darn unique class, and
5 it's hard for anyone else to say that they're really
6 just like those people. But when it comes down the
7 line someday, whether it's today or five years from
8 now or sometime, there will be folks who want to get
9 a deal like this, I would expect, looking forward
10 into the future, and we'll have those battles then
11 with those folks. Maybe -- and I don't know that
12 they'll be battles. You know, maybe it will be
13 something that works for everyone, maybe the
14 legislature will deal with it for everyone, maybe it
15 will be dealt with in narrower circumstances that
16 relate to particular groups of customers, but those
17 are all things that can be considered and reviewed in
18 the future.

19 And it may be that there are some other
20 customers for whom this would be appropriate, but
21 that's not something that you have to decide now,
22 because I think there is a valid argument that it's
23 not discriminatory to deal with this group of
24 customers the way they're being dealt with today.

25 CHAIRWOMAN SHOWALTER: I guess one thing

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1 I'm struggling with is that I don't know if it's
2 sustainable to say a group of customers gets to be on
3 449, but others who come along who may be -- who may
4 not have the same history as these other customers
5 will be denied it. If they're not denied it, then I
6 wonder if we're not essentially creating a general --
7 well, that it's inevitable that we create a general
8 class of industrial customers who are -- who have a
9 right to wheel power in the sense that if anyone has
10 a right, then everybody would have a right. That is,
11 these distinctive factors that you're mentioning are
12 not persuasive on a going forward basis. The
13 newcomers are not going to care very much about the
14 history, and you can cite the history, but what they
15 are going to look at is what does my competitor get
16 and what am I getting.

17 And if those suppositions are true, then I
18 wonder if we aren't getting back to this problem of
19 the public and whether, in fact, we're creating a,
20 quote, publicly-available arrangement called 449.
21 That's a little different than whether the seller is
22 offering to the public, and perhaps because they're
23 all bilateral agreements, that's not a public
24 situation.

25 Fundamentally, I just wonder whether this

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1 is really a broader policy determination that you're
2 asking us to make that can't help but go beyond these
3 -- the parties in front of us.

4 MR. CAMERON: I think perhaps we're
5 starting to drift off focus by looking at customer
6 and customer eligibility questions. I hear you
7 asking the question, if we make this jurisdictional
8 finding, is it forever; what happens down the road.

9 Right now, we've told you that the class of
10 Schedule 449 customers is a closed set. And you just
11 won't give up on hypotheticals. I appreciate that.

12 CHAIRWOMAN SHOWALTER: They aren't so
13 hypothetical. They do tend to come in the door.

14 MR. CAMERON: You're asking the question,
15 well, what if someone else qualifies. What if we are
16 convinced that someone else ought to have these
17 rights as well to retail wheeling service. I would
18 suggest to you that even a jurisdictional finding, as
19 I said, which involves some elements of fact, as well
20 as law, is not forever.

21 If you find that the class is growing and
22 if you find that, as a result, that your
23 determination, your prior determination of
24 nonjurisdictional status for 449 suppliers is leaving
25 a gap in your need to regulate, then, at that time,

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1 that is, at a time when the class expands and we're
2 moving off of one, two, three, four customers into
3 some indeterminate number of customers who qualify
4 according to objective eligibility criteria, then you
5 revisit the jurisdictional issue.

6 And at that time, we, and our hopefully
7 nonjurisdictional suppliers will come to you saying
8 either continue the carve-out for us or grandfather
9 relationships we have right now and then deal
10 generically as you will with the rest.

11 But I don't think we have to face the
12 question right now so long as the set is closed. But
13 I would grant you that it would require revisitation
14 when and if you decide to expand the class.

15 CHAIRWOMAN SHOWALTER: Well, and that
16 reminds me of another point that I think PSE made
17 rather softly, and I'll paraphrase it, but I think
18 they said, Well, if you think you do have
19 jurisdiction maybe, you could still forebear or say
20 that maybe we do, maybe we don't, but we're going to
21 give a very light hand here.

22 And I wanted to raise that, because in the
23 telecommunications field, we have 600
24 telecommunications companies that are registered in
25 this state that are subject to our jurisdiction, and

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1 all but 23, or some small number, they're declared
2 competitively unregulated. We don't regulate them.
3 I mean, it's very minimal regulation. And we have a
4 statute that allows us to do that, but I'm -- I'll
5 put the question to you.

6 If we sidestep the question of whether we
7 do or don't have jurisdiction but say, in any event,
8 because this is a competitive situation, because it's
9 voluntary on the part of the customer, we're not
10 going to look much further than this agreement. Is
11 that a problem or is that not a problem?

12 MS. DAVISON: Unfortunately, I don't think
13 that goes far enough. Obviously, we've been in
14 contact with power marketers in anticipation of how
15 -- actually, we've had power marketers look at
16 Schedule 449 extensively to make sure that there are
17 no technical problems. We've talked to power
18 marketers in terms of what are the potential power
19 supply arrangements that you could put into place,
20 and this is an issue that is of concern to them,
21 because of what you just mentioned, that there is not
22 a statute or a regulation that the Commission has
23 that sets forth the light regulation, which is, in
24 effect, really very limited, if no regulation of
25 those entities.

02102

1 And so there is a fear that if they come in
2 and make this sale, that they are unknowingly
3 subjecting themselves to some type of regulation that
4 they're not even sure what it is, and that's the
5 problem, is that we think without some statement by
6 the Commission, we will have a fairly significant
7 group of potential sellers that will just simply
8 elect not to sell.

9 JUDGE MOSS: We've had a lot of focus, I
10 think, on the sort of -- what I would think was the
11 first part of what the Commission's asked to do in
12 2.17, and I'd like to turn for a moment to the second
13 part, which is the clause or phrase "whether or not
14 such marketer or entity has a corporate affiliate
15 that owns, operates or manages electric plant for
16 hire in the state of Washington."

17 I think everyone -- certainly I can say
18 Staff acknowledges in its memorandum that that
19 particularly is a fact intensive question. Staff
20 uses the phrase a bona fide affiliate, for example,
21 to qualify the notion in a fashion that's not
22 qualified in the requested conclusion of law.

23 The way it's phrased is pretty sweeping and
24 does not appear on its face to me to permit the
25 Commission to make that inquiry in specific facts, no

02103

1 matter what the nature of that affiliate relationship
2 is. If it's a total sham, the Commission still would
3 have said not jurisdictional, as I read it.

4 Now, if I'm wrong about that, then I
5 certainly want to know, or I -- really, more to the
6 point, is there some way to refine this phrase so
7 that it's clear that the Commission is saying no more
8 than that, Marketers or other entities who sell power
9 to 449 customers and do not own, operate or manage
10 electric plant for hire in the state of Washington
11 are not subject to regulation, which seems like a
12 straightforward enough proposition under the analysis
13 all of you have offered in your various comments.

14 If it's not, if there is -- if it doesn't
15 meet that first criteria, owning, operating or
16 managing, and it's not an electric company, not
17 subject to -- but if the affiliate relationship is
18 one that should be pierced, because it is essentially
19 a sham, that would be precluded under this, wouldn't
20 it? The Commission taking a look at the facts in
21 that circumstance.

22 I'm thinking of the telecom cases that we
23 had last year, for example, where the corporate
24 structure was an important element of the
25 Commission's consideration of whether or not it had

02104

1 jurisdiction in those cases, and the Commission
2 ordered, elected, found, concluded in those cases
3 that the form would not be elevated over the
4 substance, and that the fact that these layers of
5 corporation had been established in order to make
6 these transactions work, did not remove those
7 transactions from the jurisdiction of the Commission
8 and the Commission was obligated to review those.

9 CHAIRWOMAN SHOWALTER: Scottish Power might
10 be more familiar to you, since it's a power case.

11 JUDGE MOSS: A power case, same line of
12 reasoning occurred there. So -- well, I probably
13 said too much, but that's the concern I'm trying to
14 focus on here, and I would like to have one or all of
15 you address that aspect of the 2.17.

16 MR. BERMAN: Well, it certainly wasn't our
17 intention to suggest that you should bless in advance
18 sham transactions. We were imagining that this was a
19 legitimate relationship that was established and that
20 satisfied -- that was a honest-to-god, bona fide
21 corporate affiliate. I think that the customers in
22 the end have a better sense of what will give them
23 the comfort that they need, and I would defer to the
24 customers on whether there's some way to actually
25 address the wording of that that might satisfy them.

02105

1 MS. DAVISON: I think, in response to the
2 question that you raise, you should maybe step back a
3 little bit and look at the particular situation of
4 the entities that would be selling under 449. And
5 for the most part, you have entities that fall into
6 two categories.

7 The first one is these will be power
8 marketers that have received their power marketer
9 licenses at FERC. And so FERC has a, you know,
10 series of regulations and things that they look at
11 before they actually grant that license.

12 The second group of potential sellers that
13 are not utilities, are EWGs. And again, that is
14 something where FERC looks at, you know, criteria in
15 an application before they actually issue someone
16 that status.

17 I'll turn to Don Schoenbeck, who knows an
18 awful lot about this area, given some of his clients
19 that he represents, but I'm hard pressed to think of
20 other categories of potential sellers that are not
21 licensed power marketers, EWGs, or utilities. Can
22 you think?

23 MR. SCHOENBECK: No.

24 MS. DAVISON: Am I leaving something out?

25 MR. BERMAN: I would just clarify that an

02106

1 EWG itself could not sell to these customers. By
2 law, an EWG is an exempt wholesale generator and is
3 required by law to sell only at wholesale.

4 MS. DAVISON: To the marketer.

5 MR. BERMAN: I would imagine that what
6 would happen is that an EWG would sell to a marketing
7 entity, and the marketing entity, which would not be
8 subject to the EWG restrictions, would then be the
9 party that engaged in power sales to --

10 MS. DAVISON: Right.

11 MR. BERMAN: -- someone like the 449
12 customers.

13 MS. DAVISON: Right, I agree with that. In
14 terms of all the discussions that we have had with
15 regard to the potential supply of power and what
16 would be available to the customers, there's
17 certainly an element of actually a very heightened
18 interest on the part of the customers to have an EWG
19 arrangement in terms of creating new generation in
20 the state and particularly in some of the areas where
21 these customers are located.

22 JUDGE MOSS: In general, let me just put
23 the question. Is there -- and this is probably even
24 more abstract than some of the concerns we're trying
25 to address here, perhaps, but is there any reason

02107

1 that this couldn't be rephrased and still satisfy the
2 underlying need? That's really where my thought is
3 going here, is this is a -- as stated, it's very
4 broad, very sweeping. It would cover a host of
5 relationships beyond those you have described or
6 potentially could, and so I'm wondering if this
7 language could be modified without upsetting your
8 apple cart.

9 MR. CAMERON: Are you still focused on the
10 affiliate clause?

11 JUDGE MOSS: I'm focused on the whole
12 thing, but yeah, the affiliate clause is a point of
13 concern, because it just says, in a blanket way,
14 whether or not the marketer has an affiliate and
15 ignores such questions as should we look through that
16 affiliate relationship in certain circumstances.

17 MR. CAMERON: The only circumstance I can
18 think of to which the affiliate clause would apply
19 would be in the instance of a regulated utility in
20 the state. Let's take Avista. I can never keep
21 track of what part of Avista is which.

22 CHAIRWOMAN SHOWALTER: Avista Utilities is
23 the utility and Avista Energy is the power marketer.

24 MR. CAMERON: Okay, all right. Avista
25 Utilities sells at retail as a regulated entity in

02108

1 and around Spokane. Avista Energy is a power
2 marketer that right now sells in the wholesale
3 markets up and down the West Coast.

4 Let's posit a situation in which Avista
5 Energy wants to sell to a Schedule 449 customer.
6 This clause says that they would not become
7 jurisdictional merely because of their relationship
8 with Avista Utility. And again, it's not the purpose
9 to try to create sham relationships. To the extent
10 we're talking about an affiliate that's a regulated
11 utility, it seems to me you have some control from
12 the start in terms of what affiliates are set up,
13 sham or otherwise. So I don't really see that as big
14 an issue as you might.

15 Avista, PacifiCorp, pick a utility,
16 regulated utility in the state. I guess it could be
17 a gas utility, as well as an electric utility. It's
18 just that an affiliate, simply by doing business with
19 a 449 customer, ought not become jurisdictional if it
20 isn't otherwise merely because its brother or sister
21 or parent is a regulated utility.

22 JUDGE MOSS: I think if we begin to tie the
23 finding and conclusion to facts, such as you just
24 did, then yes, the comfort factor goes way up. It's
25 the abstraction that is of concern, because you've

02109

1 described a situation where the Commission might very
2 well easily find that Avista Energy has a
3 sufficiently segregated business operation from
4 Avista Utility that there is absolutely no reason to
5 be concerned.

6 On the other hand, you might have some
7 other utility company. We've been picking on poor
8 PGE. I'll pick on them again. Let's assume for half
9 a second that they create PGE Marketing-Washington
10 Company, and the fellow who's sitting there running
11 the utility side of the operation for acquisition and
12 sales of energy picks up, you know, puts down one
13 phone and picks up the other phone, and now he's PGE
14 Marketing-Washington. A moment ago he was PGE
15 Marketing Utility. This Commission might be a little
16 concerned about that.

17 MR. CAMERON: But the clause only applies
18 if we're dealing with an affiliate that owns,
19 operates or manages electric plant for hire within
20 the state of Washington, which means it's
21 jurisdictional, which means if you don't like the
22 relationship, you just nail that regulated utility.

23 MR. BERMAN: Your Honor, in the same vein,
24 I'd point back to 2.17 was very carefully drafted to
25 be limited, and one of the ways in which it was

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1 drafted to be limited is this clause, "solely because
2 of such sales to Schedule 449 customers."

3 If you had jurisdiction over Portland
4 General as an electric utility operating within the
5 state and they were engaging in -- if they had set up
6 some sort of arrangement with some other entity that
7 was a sham transaction, we're not saying here that
8 you can't go after that arrangement in whatever way
9 is appropriate, given your powers.

10 This says that the mere fact that that
11 entity sells to 449 customers in and of itself does
12 not suddenly create some new situation that's subject
13 to regulation. But you have whatever powers you have
14 separate from that, and you're not making any
15 findings relating to anything separate from their --
16 from their service to Schedule 449 customers.

17 JUDGE MOSS: Okay. And let me just say,
18 since we're using some pejorative -- arguably
19 pejorative language in these hypotheticals, that I'm
20 picking on PGE only because of their geographic
21 proximity to Washington, and for no other reason
22 whatsoever. So to the extent this should ever get
23 back to the ears of someone at PGE, it's a matter of
24 convenience only that they're the subject of the
25 exam.

02111

1 Oh, is it lunch time? I was having so much
2 fun, I -- all right. Well, I guess we should take a
3 luncheon recess. How much time does the bench
4 prefer?

5 CHAIRWOMAN SHOWALTER: Well, it's kind of
6 hard. It's hard for everybody else to get lunch
7 given that it's ten minutes after 12:00, so should we
8 say 1:30? We can start earlier, it's all right with
9 me, but I know it's kind of hard to get in and out.

10 MS. DAVISON: We've already brought
11 sandwiches in, so we're okay.

12 CHAIRWOMAN SHOWALTER: Well, you should at
13 least be thankful that I cancelled a scheduled fire
14 drill in this building. We got an e-mail that there
15 will be a fire drill from 12:00 to 1:00.

16 JUDGE MOSS: All right. Well, I suppose we
17 can be in recess, then, till 1:30, and people can
18 have an opportunity to get a sandwich.

19 (Lunch recess taken from 12:15 to 1:30
20 p.m.)

21 JUDGE MOSS: Let's go back on the record.
22 Good afternoon, everyone. I trust everyone had some
23 lunch and is ready for the afternoon session. I
24 think we've largely wrapped up the bench's questions
25 on jurisdiction.

02112

1 I thought about the matter a little bit
2 over lunch and I wanted to make sure that I'm
3 capturing things here, and so I took a stab at
4 rephrasing this, and I just want to do sort of a
5 reality check and see if this captures the intent of
6 the 2.17 finding/conclusion that the Commission is
7 being asked, so I framed it this way: The Commission
8 finds and concludes that the act of selling power to
9 a Schedule 449 customer is not by itself a sufficient
10 basis upon which to base a determination that the
11 seller is within the Commission's jurisdiction.

12 Is that essentially what the parties are
13 hoping to have the Commission find and determine?
14 Ms. Davison, do you need me to repeat that?

15 MS. DAVISON: Please.

16 JUDGE MOSS: The Commission finds and
17 concludes that the act of selling power to a Schedule
18 449 customer is not by itself a sufficient basis upon
19 which to base a determination that the seller is
20 within the Commission's jurisdiction.

21 CHAIRWOMAN SHOWALTER: In other words, you
22 might say anyone, whoever it may be, can sell to a
23 449 customer, and that doesn't confer jurisdiction.
24 You might have to know who the anyone is, and if the
25 anyone happens to be somebody that's already under

02113

1 our jurisdiction, then they're under our
2 jurisdiction.

3 But isn't what you're getting at is selling
4 to a 449 customer alone doesn't confer jurisdiction.
5 And I think we were maybe confused by the definitions
6 about someone who doesn't own a plant for hire in
7 Washington, and even if it is an affiliate of one of
8 those people, but really those aren't the critical
9 issues. The critical issue is does the sale of power
10 to someone under 449 confer jurisdiction.

11 MR. CEDARBAUM: And I think for Staff's
12 part, that's acceptable to Staff. It's actually,
13 quite frankly, I think broader than the finding in
14 the stipulation.

15 CHAIRWOMAN SHOWALTER: It is.

16 MR. CEDARBAUM: Because we were looking at
17 the finding that we asked in the stipulation, and an
18 important part of that was the operation of electric
19 plant. So under your sentence, you could have
20 somebody who operates electric plant and sells only
21 to these Schedule 449 customers and they would not be
22 jurisdictional, which was the conclusion we reached,
23 as well.

24 CHAIRWOMAN SHOWALTER: At least by that
25 reason alone.

02114

1 MR. CEDARBAUM: That's correct.

2 CHAIRWOMAN SHOWALTER: Or a different way I
3 thought of it over lunch, too, is that your analysis
4 starts with is this an owner of a plant, is it for
5 hire in Washington; that, in turn, is it the public,
6 and you kind of go down that list, but you need all
7 elements for jurisdiction, so you could equally go
8 back up the other way. You could just, say, start at
9 the bottom. If this is not to the public, it's not
10 jurisdictional, unless happens to be by somebody
11 who's already selling to the public.

12 MR. BERMAN: Your Honor, for the company, I
13 would concur with Mr. Cedarbaum, that I think your
14 formulation is in some modest respects broader than
15 what we requested from you in the stipulation, but I
16 think it perfectly and completely satisfies the --
17 what was requested in the stipulation, and I think
18 you focused on the key factor, which is that the
19 solely -- because of such sales to Schedule 449
20 customers, that that was an essential element of the
21 finding.

22 JUDGE MOSS: Ms. Davison, I'm particularly
23 interested in hearing your response, and I will say
24 that I too regard what I've drafted and read as being
25 somewhat broader than what was requested, but I was

02115

1 trying to capture the essence of it and make sure
2 that we understand the essence of it, because as all
3 of you know, when it's written in some sort of
4 legalese type form, as it is, and properly so, it was
5 drafted by lawyers, I suppose, there's potential for
6 some misunderstanding, so we want to try to avoid
7 that by putting it in a more lay form, which is what
8 I tried to do.

9 MS. DAVISON: Your Honor, I appreciate the
10 effort to redraft the provision in a way that
11 captures the essence of what the parties agree to. I
12 appreciate the fact that the phrase that you've come
13 up with is a lot simpler, and I like that.

14 What I'd like to do is maybe get a copy of
15 your language and have some folks who were part of
16 drafting this language look at it and think about it
17 just to make sure that it does do what we all think
18 it does, because the language that was drafted as
19 part of 2.17 did receive an awful lot of scrutiny --

20 JUDGE MOSS: Sure.

21 MS. DAVISON: -- and evaluation. So I
22 would be reluctant to just have, based on my opinion,
23 say it's okay.

24 JUDGE MOSS: Ms. Davison, I think your
25 suggestion is a good one and I'll follow it and I'll

02116

1 reduce it to something that's legible. But at the
2 same time, I want to say that the bench is not trying
3 to suggest on an insistence that the language be
4 redrafted.

5 The concern and the questions go to the
6 point that we understand it, understand its intent,
7 and of course we can capture in an order what our
8 understanding of it is without the necessity for it
9 to be redrafted. But consider that and you may
10 decide that you would prefer to have it drafted in
11 some slightly different way or even a materially
12 different way. Or I shouldn't say materially; I
13 should just say in a different fashion, but that
14 would capture the concept as we now understand it.

15 MS. DAVISON: Yes, thank you.

16 JUDGE MOSS: Okay, fine. Then I'll provide
17 that to you at the end of the day.

18 MR. CEDARBAUM: Your Honor, if I could
19 just, before we leave the subject, just to pick up on
20 one point I discussed with counsel toward the end of
21 the lunch break, that if that type of language is
22 what ends up in the order if the Commission accepts
23 the stipulation, then these comments are unnecessary.
24 But if whatever language is used gets into the
25 corporate affiliate notion, the parties are amenable

02117

1 to the words bona fide being inserted before
2 corporate affiliate. So we'd have no objection to
3 that.

4 JUDGE MOSS: And that sounds like, even if
5 you decided you wanted to stay with the language as
6 it is, that might be a useful edit, in any event, it
7 seems. Qualify the term in that fashion. Okay.

8 So I guess if we don't have any further
9 questions on that subject, we can move on to the
10 others. And I think the questions on some of these
11 other areas are somewhat interrelated, so we may
12 touch back and forth on this.

13 CHAIRWOMAN SHOWALTER: Shall we move on to
14 obligation to serve? All right. I want to focus on
15 two statutes, and they are RCW 80.28.110, and also
16 RCW 80.28.010(9). The first statute, I'll read. I
17 don't know that everybody has these in front of them.
18 It's not very long, so let me just read the first
19 one, which is generally what I would call the
20 obligation to serve statute.

21 It says, Every electrical company engaged
22 in the sale and distribution of electricity shall,
23 upon reasonable notice, furnish to all persons and
24 corporations who may apply therefore and be
25 reasonably entitled thereto suitable facilities for

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1 furnishing and furnish all available electricity as
2 demanded. I left out references to gas companies and
3 water companies in that statute.

4 So it's the obligation, as I read it, of an
5 electric utility to furnish all people with
6 electricity who are reasonably entitled thereto to
7 the electricity, and it's the reasonably entitled
8 word that I think I want to focus on. Absent
9 something special about a customer, I think Puget is
10 obligated to serve that customer. But now we're
11 talking about a specific group of customers who has
12 -- each of whom has renounced their right to be
13 served.

14 And the question I have is, is that how you
15 read this statute, not to extend to the 448 and 449
16 customers because those customers have elected and
17 chosen not to be in this group. Are they therefore
18 not reasonably entitled to the power? Who wants to
19 answer this one?

20 MR. BERMAN: I'll take a first shot at
21 that, if that's okay. I have -- my notes in front of
22 me have three different answers to that, and I think
23 they're -- I think they all are answers that make
24 sense. One is that the part that you mentioned, that
25 -- what you've called renouncing their rights or that

02119

1 the voluntary election to be served in this manner is
2 I think a vital one that the customer -- I would,
3 rather than framing it in terms of saying that
4 they've renounced their right to be served, I would
5 frame it a little differently, which is to say that I
6 believe these customers have stipulated that the
7 obligation to serve is met through the set of
8 arrangements that have been established in this
9 proceeding.

10 And if these customers feel that the set of
11 arrangements that have been established meet whatever
12 the obligations are and are not going to contest that
13 in the future, I think that that's a way of looking
14 at things that is very appropriate. If you're
15 confronted with some different set of customers who
16 had not agreed that their obligations to them had
17 been met in this manner, you might have to look at it
18 in a different way or consider a different set of
19 issues. But it's very important that these customers
20 have stipulated that the obligations to them are, in
21 fact, met and that they will not be complaining about
22 that as a result of this.

23 So I don't even see it as necessarily
24 trying to renounce or give up a statutory right; it's
25 an agreement as to how that statutory right is going

02120

1 to be followed or achieved. So that's item one.

2 CHAIRWOMAN SHOWALTER: Well, let me stop
3 you on that one. All right. Supposing one of these
4 customers comes back to us later and says, I know I
5 signed all these documents, but now we're in a pickle
6 and now I want to get some other form of service, no
7 matter what I said. Is it appropriate at that point
8 for us to say, Well, it's not reasonable for you to
9 get any more than you originally asked for? That is,
10 they're not reasonably entitled to something more
11 than they're signing up for at this moment because
12 they know what they're doing and --

13 MR. BERMAN: Well, I would argue in that
14 regard that you heard me say earlier in the
15 proceeding that --

16 CHAIRWOMAN SHOWALTER: If you say a deal's
17 a deal --

18 MR. BERMAN: -- that a deal's a deal.

19 CHAIRWOMAN SHOWALTER: I thought you were
20 going to say that.

21 MR. BERMAN: I think that the fact that the
22 customers have agreed that the obligations, as they
23 exist, are being met through this set of arrangements
24 is important and it's reasonable to hold these very
25 large, very sophisticated customers who've made this

02121

1 decision that has tremendous financial consequences
2 to them and to the company and to all the other
3 customers that the company serves, it's very
4 reasonable to hold them to the set of -- to the
5 decision they've made that they're willing to have
6 their service come in the form that's provided in
7 these agreements.

8 CHAIRWOMAN SHOWALTER: So on this point,
9 you would say the statute is being met because they
10 are getting what they're reasonably entitled to
11 because they've agreed to it. And as far as you
12 know, they'd never be reasonably entitled to anything
13 more than they're agreeing to get today?

14 MR. BERMAN: That's right. And again, no
15 one forced these folks into this particular deal.
16 They -- it was a negotiated agreement and they've
17 determined that this is a reasonable way of
18 satisfying the obligations that are owed to them.
19 That was just part one of my answer.

20 Part two of my answer related to Schedule
21 448. I think 448 is easier to understand how it
22 deals with obligation to serve than 449, and that's
23 because in 448 Puget Sound Energy buys the power from
24 some third party and then resells it to the
25 customers. And that matters in that it's always been

02122

1 the case, and I'm familiar with utilities all over
2 the country, there are quite a few utilities who
3 satisfy their obligation to serve through power
4 purchase arrangements.

5 I don't think there's any -- I don't think
6 there's anything in the statute or anywhere else that
7 says that the way you satisfy an obligation to serve
8 is by owning a power plant and using your power plant
9 to serve a customer. There are different ways to
10 meet that arrangement. And Schedule 448 provides a
11 way for Puget Sound Energy to serve these customers.

12 It's a complex deal, but it's a deal that
13 has -- that involves procurement from the market and
14 obtaining the power and reselling the power to the
15 customers, but it is, in fact, Puget Sound Energy
16 serving these customers through a power purchase
17 arrangement, just as many utilities who have an
18 obligation to serve their customers through power
19 purchase arrangements, and frankly, just as -- in
20 some respects, just as Puget Sound Energy serves even
21 its core customers. When it's short, it goes out on
22 the market and buys power on the market and sells
23 that power to its core customers.

24 I don't think anyone would argue that Puget
25 Sound Energy is failing to meet any obligation to its

02123

1 customers when it meets those core customer needs
2 through power purchases on the market. So I think
3 that it's -- it would be wrong to look at this
4 arrangement and say that just because the specific
5 terms of the arrangement and the way that the power
6 supply is established and determined is a little bit
7 different than the norm that we see in other
8 arrangements, it would be wrong to say that that's
9 not an arrangement that's consistent with the
10 obligation to serve.

11 If you'll accept -- if you'll accept for
12 the moment that 448 satisfies the obligation to
13 serve, my answer on 449, I'm not going to try to
14 extend the argument as much. I think the same logic
15 would apply there, that we've established a set of
16 arrangements that get the power to the customer, but
17 even if you don't buy that that meets the obligation,
18 one of the elements of Schedule 449 is that the
19 customer can choose to switch to 448 if they want.
20 So the customer retains the right, if they are
21 unhappy with what they're getting under 449, to
22 switch over to 448, where they get the power service
23 through Puget Sound Energy.

24 CHAIRWOMAN SHOWALTER: Is there a notice
25 requirement on that?

02124

1 MR. BERMAN: I believe that there's a
2 90-day notice requirement just to make that a
3 workable arrangement, because it takes a little bit
4 of work to make those things happen.

5 That was my second reason for saying that
6 the obligation to serve is satisfied. But I think it
7 is important to remember that, in 449, if you don't
8 like it, you can switch to 448. So I'd have you
9 think about does 448 look like an arrangement where
10 Puget Sound Energy is serving the customer with power
11 that it's obtained somewhere, and the answer is yeah,
12 it is.

13 My third thing that I would point you to is
14 that you'll note in both 448 and 449 that if the --
15 if the customer has a problem, if they have trouble
16 getting their energy, if their power supplier goes
17 belly up, whatever the problem is, arrangements are
18 established for the customer to get power and for
19 Puget Sound Energy to arrange for and procure and
20 obtain power for the customer, it establishes a rate
21 methodology for that, but there are arrangements for
22 them to get the power.

23 And in fact, it explicitly provides that
24 the customer would only get curtailed if there's a
25 problem under the curtailment provisions that appear

02125

1 in Rate Schedule 80. That's the curtailment
2 provision that applies to everybody, or just about
3 everyone.

4 And so when it comes to the issue of are
5 these guys going to be left with no power, for the
6 most part, you know, and of course you'd have to
7 apply whatever it says in Rate Schedule 80, but for
8 the most part, these customers are not any different
9 than other customers on the system that they can have
10 as much assurance that they're going to continue to
11 be served as other customers on the system. The
12 pricing arrangements are different, the terms and
13 conditions of the arrangements are different, you
14 know. There are certainly considerable differences
15 between the way they're served and the other
16 customers, but when it comes down to will these folks
17 get power if and when they want it and their other
18 arrangements fail, they're treated like other
19 customers.

20 And that seems in its essence to be -- and
21 ultimately to be what -- I don't know what more the
22 obligation to serve could be asking for than that
23 particular commitment.

24 CHAIRWOMAN SHOWALTER: Well, that sounds
25 somewhat reassuring, but then how does that square

02126

1 with page 40 of the stipulation or settlement, line
2 25, Section 13.4? And I want to mention that I
3 paused over this even before King County, in its
4 brief, raised it.

5 But it says, Prices of power and
6 availability of power may reach levels that make it
7 impossible for a non-core customer to carry on its
8 business. Even if pricing or availability of power
9 make it impossible for a non-core customer to carry
10 on its business, and even if such pricing or
11 availability endangers the public health, safety and
12 welfare, that will not constitute a grounds for
13 return to core status and will not entitle a non-core
14 customer to service from PE generation resources --
15 PSE generation resources, and will not entitle the
16 non-core customer to service based on PSE's cost of
17 generation.

18 Am I right that this somewhat alarming
19 language is actually limited in scope to the kind of
20 power and the price of the power that such a customer
21 would get, not whether the customer actually gets
22 some power in a situation that endangers the public
23 health, safety and welfare?

24 MR. BERMAN: Yes. As I said, when it comes
25 to curtailment, the customers are treated like other

02127

1 customers pursuant to the provisions of Schedule 80,
2 and so when it comes to availability, you're subject
3 to what's in Schedule 80. But that's something that
4 all customers are subject to. There really is no
5 greater risk for these customers than for other
6 customers.

7 Now, with respect to price, and you
8 referred to price in your question, pricing can be
9 different. And one of the things that availability
10 relates to is that if someone was hoping for
11 plentiful cheap power, we're not guaranteeing
12 plentiful cheap power. That will depend on where the
13 market is. And so when it comes to pricing, that
14 depends on a lot of things. I don't think that the
15 pricing element is essential to the obligation to
16 serve. I think it's a distinct thing that you can
17 evaluate whether the pricing fits into a just and
18 reasonable framework independent of whether the
19 obligation to serve them has been met.

20 I would also note that many of these things
21 will be dealt with in a longer term manner. That is,
22 I believe the customers who look at the market over
23 the long-term and see that prices are higher than
24 they like are going to take advantage of
25 self-generation, and that if they take advantage of

02128

1 self-generation, they're going to ensure price
2 availability at a price that they like.

3 And this was designed to accommodate and
4 make that a really viable option. I know that lots
5 of people worry about, you know, diesel generators
6 and the like, but, frankly, we're mostly talking
7 about big guys who have options that go well beyond
8 temporary diesel generators and who in fact are
9 seriously considering other options that would be
10 more efficient, more environmentally friendly, and
11 would be good things to have added to the regional
12 power supply.

13 CHAIRWOMAN SHOWALTER: So supposing --
14 supposing most or all of the customers go on 449 and
15 they do find a source of cheap power, which turns out
16 to have been a fly-by-night operation and the power
17 doesn't come through, and maybe that would likely be
18 in a situation where power in general was short,
19 supply in general was short. And so as a result, at
20 least in part because of that, Puget had to curtail.

21 Does that situation, in which Puget
22 curtails other customers, as well as 449 customers,
23 depending on protocol, result in any kind of adverse
24 impact to the other customers, perhaps because of the
25 unreliability of the supplier that 449 customers use,

02129

1 or is there an assurance or a buffer that protects
2 the other customers?

3 MR. BERMAN: I'm going to ask Mr. Bill
4 Gaines to address that particular type of scenario.
5 I've a legal answer, but I think, frankly, you're
6 going to issues of what power supply look like and
7 whether the company is able to meet the needs of its
8 remaining loads and how confident it is that it's
9 going to be able to meet the needs of its remaining
10 loads if some of these customers decide to rely on
11 fly-by-night operations. And I think that's better
12 for Mr. Gaines.

13 CHAIRWOMAN SHOWALTER: Okay.

14 MR. WILLIAM GAINES: I don't know that it's
15 better, but I'll give it a try. I think the direct
16 answer to your question is that in the limit, in the
17 limit, that probably there is slightly greater risk
18 that core customers would be curtailed if these
19 customers are not bearing all of the burden and other
20 risks of their supply choices, and I think the way to
21 illustrate it is, mechanically, if the power supply
22 for one of these large customers were to fail, the
23 company's obligation is to go to the market, procure
24 supply, pass the supply along to the customer at the
25 market cost on an interim basis until it can restore

02130

1 its power supply. So clearly, all of that works very
2 well until the market is exhausted.

3 So in that limit, when the market is
4 exhausted and there really would need to be
5 curtailment, the curtailment would be spread more
6 broadly than it might otherwise if these customers
7 were bearing all of that, all the curtailment risk
8 associated with their own supply decisions. But I
9 think it's a very limited and unlikely scenario that
10 would cause that to occur.

11 COMMISSIONER HEMSTAD: Is that arrangement
12 spelled out in the settlement agreement?

13 MR. WILLIAM GAINES: Not specifically, I
14 think. I think it refers back, as Mr. Berman has
15 indicated, to the curtailment scheme that's
16 contemplated by the company's Schedule 80, the
17 general risk that --

18 COMMISSIONER HEMSTAD: But I would have
19 thought -- I thought the whole point of this was
20 these are big boys now and they're on their own. But
21 from what you're saying, that if there is a shortage
22 and curtailments occur, then there would be across
23 the board with everybody sharing -- I would have
24 thought that there was a power shortage, it would
25 depend upon who was the provider, if it's Puget's

02131

1 core customers, and you've got a resource stack
2 sufficient.

3 But the Schedule 449 customers are on their
4 own, and if they run out of power, they run out of
5 power, and your core customers aren't affected by
6 that. They shut down their plants, but everything --
7 but the lights stay on elsewhere. Apparently, that's
8 not what's contemplated here.

9 MR. BERMAN: It's not what's contemplated
10 here. A different deal, frankly, could have been
11 struck, that left the customers more on their own. I
12 guess there's a balance there. If we left them more
13 on their own, we'd probably be getting harder
14 questions on obligation to serve than -- instead of
15 questions about, well, are you putting the core
16 customers at some slight risk because of some very
17 extreme and remote situation that might occur.

18 A point that's been made to me, and I
19 apologize for not being an expert on Schedule 80, but
20 I'm told that Schedule 80 has arrangements so that
21 industrials do turn off first in the sense that,
22 generally speaking, these guys would be treated like
23 other industrials and would turn off before
24 residential customers, for instance, we're hit by a
25 power supply emergency that struck the region.

02132

1 COMMISSIONER HEMSTAD: But that's an
2 interesting point, further illustrating the
3 difference between whether you're a member of the
4 club of 449, with whatever advantages or
5 disadvantages it provides and other industrials that
6 were not. Apparently, they don't want to be treated
7 the same here, might be treated differently, however,
8 with regard to buying the power.

9 MR. BERMAN: I guess one thing I'd add in
10 this regard, I don't know if you'll find it helpful
11 or not, is that when I look, by analogy, at the FERC
12 open access tariff arrangements that apply throughout
13 the country, it's become common practice that
14 customers who are relying on wholesale wheeling
15 services around the country get to rely on energy and
16 balanced service provided by the local utility, and
17 get to be curtailed on the same basis as the native
18 load customers.

19 And in some way a similar structure has
20 been set up. That is, guys who want to go out on
21 their own and for the most part want to be
22 independent and treated differently, when it comes to
23 issues of the hard issues of curtailment in the case
24 of an emergency, it's hard to treat them differently.

25 For us to have negotiated a deal that

02133

1 treated them differently would have been hard, and
2 this was a hard sticking point for the customers.
3 And it's part of our deal, and we're going to live by
4 the deal we negotiated.

5 MR. CAMERON: Commissioner, if I may, let
6 me address the issue slightly differently. I believe
7 the customers and the company have an alignment of
8 interests with regard to the reliability of power
9 supply. Part of the concern my clients had about
10 Schedule 448 was the involvement of Puget and
11 clouding the question of privity of contract between
12 the end use customer and the supplier.

13 We definitely wanted privity of contract,
14 we definitely wanted to enforce our rights to receive
15 power. If for any reason our power supplier or our
16 self-generation fails to perform, we immediately get
17 a punitive price from Puget. We get back on that
18 same Mid-Columbia Index that we've grown to hate. In
19 fact, if our power supply varies outside the range of
20 the bandwidth, we pay a penalty atop the
21 Mid-Columbia.

22 COMMISSIONER HEMSTAD: I understand. But,
23 of course, one of the reasons we're here is the
24 unpredictability of future prices.

25 MR. CAMERON: Yes, sir.

02134

1 COMMISSIONER HEMSTAD: At one time, they
2 were very attractive.

3 MR. CAMERON: But unlike any other
4 industrial customer -- any other customer of Puget,
5 we pay hour for hour the full market price at its
6 worst, giving us as great an incentive as anyone to
7 make sure that our power plant or power supplier
8 perform as promised. For us to do more almost gets
9 us involved in the utility business, and we don't
10 want to operate our own load control area, we don't
11 want to assume utility responsibilities. Instead, we
12 have struck a deal to source our own power supplies,
13 either on site or from remote suppliers, using the
14 transmission, distribution and ancillary services of
15 the company.

16 We've done just about all we can do,
17 enforced principally through contracts we have with
18 power suppliers, to make sure that we get our power
19 delivered as promised and that we're not otherwise a
20 burden on the system.

21 MR. BUCKLEY: I'd like to comment on the
22 curtailment issue. It's my understanding that much
23 of the curtailment within Schedule 80 is, and the
24 scenarios are, it was established to maintain the
25 reliability of the system, and some of these

02135

1 scenarios, you maybe in a situation where, to
2 maintain that reliability, you'd have to look at
3 curtailing in certain areas, certain lines, and they
4 may or may not have these customers there.

5 Under that, you look at the industrial
6 customers first, but you may have a situation where
7 you'd be curtailing other industrial or even
8 commercial customers at the same time not curtailing
9 any of these customers, because they're in an area
10 that in effect would have no reason to be curtailed
11 to maintain that reliability.

12 Therefore, we couldn't spell out that these
13 customers would be curtailed first or in any
14 position. The company needs to do what it needs to
15 do to maintain reliability of the system, and
16 Schedule 80 is what that's done under.

17 MR. FFITCH: I guess I would just add, for
18 Public Counsel, sort of agreeing with the comments
19 that have already been made, and I think our sense is
20 that while there is, as Commissioner Hemstad has
21 mentioned, some risk perhaps of curtailment risk
22 being spread onto other core customers, we feel that
23 risk is minimal. And if it occurs, it may occur for
24 some of the reasons that Mr. Buckley's just
25 mentioned, so we're comfortable with it as part of

02136

1 the agreement.

2 COMMISSIONER HEMSTAD: On the issue of
3 obligation to serve --

4 CHAIRWOMAN SHOWALTER: Can I -- before we
5 -- I've just got a follow-up to Mr. Berman. I'm
6 looking at Schedule 449, Section 9.2. And this is
7 where it says that -- I'll wait till people get
8 there. This is where it says that 449 customers are
9 subject to Schedule 80, but you also said that, under
10 449, if a power supplier fell through for the 449
11 customer, that Puget has the obligation to go and
12 find some power and charge appropriate price for it.
13 Is that in Schedule 449?

14 MR. BERMAN: That's described in -- well,
15 we have Section 2.4, which is retail load following
16 service, which generally describes differences
17 between what's coming in and what the load actually
18 is.

19 CHAIRWOMAN SHOWALTER: So that would be a
20 deviation if something fell through.

21 MR. BERMAN: Yes. Section 2.5, in my mind,
22 is a subset of 2.4, but in some people's minds is
23 different.

24 CHAIRWOMAN SHOWALTER: Okay.

25 MR. BERMAN: 2.5 specifically deals with

02137

1 supplier failure to deliver and addresses that
2 specific case, and it basically says that the pricing
3 comes out the same as the retail load following
4 service described in Section 2.4.

5 CHAIRWOMAN SHOWALTER: Okay. That is that
6 arrangement that you were referring to.

7 MR. BERMAN: Yes. And just to fully
8 complete the thought, if you then look at Section
9 3.2, you find that the same arrangement basically
10 applies for backup energy for self-generation, and I
11 would describe that as saying that this kicks in
12 whether you have a deviation because you mispredicted
13 your loads, if you have a deviation because your
14 power supplier didn't come through, and that can
15 happen for a variety of reasons. It could happen
16 because a transmission line went out somewhere in the
17 distance, not just because you had a bum power
18 supplier. And also, this applies if you have
19 self-generation and if your self-generation fails to
20 operate.

21 So in each of those circumstances, the
22 customer can obtain power, but they obtain power
23 according to the retail load following service rates.

24 CHAIRWOMAN SHOWALTER: Okay. And then the
25 other follow-up question I wanted to ask, when you

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1 said -- I think I used the term that the customers
2 are renouncing various rights to power, and I want to
3 turn your attention to page 18 of the stipulation of
4 settlement, Section 7.11, second sentence, Schedule
5 449 customers renounce all rights to energy from PSE
6 resources at locations served under Schedule 449.
7 Accordingly, PSE is not obligated to use energy from
8 its own resources to provide supplied power, retail
9 load following service, backup energy, or to meet
10 supplier failures to deliver.

11 Then, notwithstanding their status as
12 non-core customers, Schedule 449 customers will only
13 have their power curtailed in accordance with the
14 provisions of PSE's Schedule 80, which we've just
15 finished talking about.

16 And maybe we've gone over this already, it
17 does seem clear to me that the customers are
18 renouncing certain claims on PSE's energy in lieu --
19 in light of their being served in another manner,
20 perhaps not directly or fully by PSE on both energy
21 and distribution, but served nevertheless.

22 MR. BERMAN: I think I agree with your
23 characterization. They're most definitely renouncing
24 some things in this deal with respect to both where
25 their power is coming from, and they also renounce,

02139

1 you know, certain rights they have in relation to
2 pending litigation of various sorts. So I didn't
3 mean to say that they're not renouncing anything, but
4 when it comes to the obligation to serve, it's
5 notable that that notwithstanding is there in that
6 same clause.

7 CHAIRWOMAN SHOWALTER: Right.

8 MR. BERMAN: We were making clear that
9 although they're renouncing that right, and of course
10 that right is most important in my mind for the
11 economics, you know, as it relates for the economic
12 claim that will be made some day or that could be
13 made some day by some customer that they have a right
14 to power at a certain price. That's the main reason
15 for the renouncing. That's distinct from the issue
16 of whether they will be served.

17 CHAIRWOMAN SHOWALTER: Okay. The second
18 statute, yeah. The other RCW I alluded to some time
19 ago.

20 MS. DAVISON: Chairwoman Showalter, before
21 we move on, I would just like to briefly state for
22 the record our interpretation of the obligation to
23 serve issues that you have just explored with Mr.
24 Berman. I think I see it a little more
25 straightforward and simply with regard to the

02140

1 obligation to serve. I do not see that any of the
2 complainants are renouncing broadly the obligation to
3 serve, but what they are agreeing to for certain
4 customers that elect to take service under 449, and
5 large customers have to take service under 449 or
6 448, the small customers, you know, have the choice.

7 But for the 449 customers, the way that I
8 see this is that Puget is agreeing to provide
9 distribution services, they're agreeing to provide
10 transmission services, they're agreeing to provide
11 ancillary services. What the customers have agreed
12 to is that they will no longer make any claim to the
13 PSE-owned system generation. And now, that's not to
14 say that these customers are giving up their right to
15 secure power from PSE, and that's why we've had this
16 discussion about the Schedule 80 backdrop and the
17 ability, with 90 days' notice, to switch over to 448
18 if something very terrible should happen.

19 But we don't see it necessarily as giving
20 up our rights under the obligation to serve statute,
21 but we're being treated -- certain customers are
22 being treated differently voluntarily with regard to
23 their rights to generation.

24 CHAIRWOMAN SHOWALTER: Okay.

25 JUDGE MOSS: Also, before we move on, I had

02141

1 a follow-up question on this question of the
2 curtailment and curtailment priorities, and I
3 acknowledge also that I am not an expert on Schedule
4 80, but I'm focusing on 7.11 we just referred to.
5 And looking at the things that PSE is not obligated
6 to use energy from its own resources to provide, the
7 question comes to my mind, PSE will continue to have
8 certain industrial customers that are core customers.

9 And I'm wondering, in terms of curtailment
10 priorities, let's assume for a moment that PSE has
11 adequate power to meet all of the needs of its core
12 customers, including its industrial core customers,
13 but some of the 449 customers, for whatever reason,
14 find themselves in a situation where their power
15 supply has failed.

16 Those customers, then, PSE would have no
17 obligation, as I understand it here, than to make
18 efforts to provide its own generation. In other
19 words, it would not curtail those core industrial
20 customers partially in order to provide backup power
21 to a 449 customer in the situation I've described.
22 In other words, there's a general shortage in the
23 power market and somebody's going to get curtailed.

24 On the one hand, there is an effort hereto
25 treat customers of similar class the same, but on the

02142

1 other hand, there's the opportunity here to allow, to
2 the extent there's a shortage in the market, these
3 449 customers will be the first, perhaps, to go off
4 the system.

5 MR. BERMAN: I don't think I can give you
6 the answer you're looking for. The way we've spelled
7 it out is that you look to Schedule 80 and you follow
8 the priorities there. And I think they're somewhat
9 complex. It can depend on location, it can depend on
10 a bunch of different issues, but if there really is a
11 system emergency throughout the region, and there's
12 really not enough power in the region to serve
13 everyone, and if Puget Sound Energy is really short
14 in a way that it can't get enough supplies to serve
15 everyone, there could be an instance where 449
16 customers are curtailed on the same basis as some
17 core customers. And so that could happen.

18 Part of that relates to the fact that when
19 it comes to an emergency, quite frankly, Puget Sound
20 Energy is not going to sit there thinking about, Am I
21 getting my power from this generator or that
22 generator, they're going to whip it up from wherever
23 they can and try to serve as many customers as they
24 can, consistent with the way they try to do business,
25 which is to serve their customers in accordance with

02143

1 their obligations.

2 CHAIRWOMAN SHOWALTER: And I have to say,
3 going beyond that, I find it more reassuring, rather
4 than less, that Schedule 80 takes over, because of
5 this possibility of somebody like King County, should
6 they end up going on this, causing sewage to run down
7 the street. In other words, I think it would be
8 highly problematic for a customer to be cut off when
9 it does create an emergency.

10 And the distinction that I think has been
11 drawn here is one between the guaranteed availability
12 of PSE's power and any guaranteed availability of
13 price, which are -- which are being given up, but not
14 -- what is not being given up is -- well, the right
15 to be one of the gang when it comes to curtailment
16 and Schedule 80. And my guess is that that's a good
17 thing. However, it does -- it does mean that this
18 group is really not totally on its own, for all
19 purposes.

20 MR. BERMAN: It does mean that if this
21 group were to engage in some flaky deals, that would
22 be a problem. We have to assume that this group,
23 knowing that it's setting up a set of arrangements
24 that matter a lot and knowing that if it fails to
25 meet its obligations here gets hit with a price that

02144

1 is higher than the Mid-C, because there's actually a
2 percentage adder on top of the Mid-C, if they draw a
3 significant amount of energy from Puget Sound Energy,
4 that that will be -- that that real dollar penalty
5 will be an inducement for them to be really careful
6 and work very hard to set up arrangements that make
7 sense.

8 MR. BUCKLEY: I'd like to point out, too,
9 that Schedule 80 works both ways. If you're in a
10 situation where the customers, these particular
11 customers' power suppliers are delivering their full
12 nomination and you're in a situation or in an area
13 there needs to be a curtailment, Schedule 80 works
14 under kind of a share the pain, starting with
15 industrial customers. So that you would curtail all
16 industrial customers, including these customers who
17 may not have anything to do with the problem, down an
18 equal percentage under Schedule 80, work its way down
19 and kind of share in the pain. So the curtailment
20 works both ways.

21 MR. CAMERON: If I could make two quick
22 points. First, you're positing the situation in
23 which the whole region is short of power. The
24 markets just aren't coaxing out supply. That's the
25 sort of situation that --

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1 CHAIRWOMAN SHOWALTER: It's going on today
2 in California.

3 MR. CAMERON: It is. There's been an
4 attempt over time to comprehend that within the one
5 short, all short negotiations that led to agreements
6 among the various utilities and states. Also in that
7 situation, the governor has almost plenary authority
8 in instances of energy alerts, energy emergencies.
9 My suspicion is that the governor will weigh in in a
10 situation like that and chances are the governor's
11 action will take into account things like the
12 avoidance of sewage running down the street.

13 So in that sort of situation, Schedule 80
14 and the governor's authority will probably address
15 how curtailments occur.

16 The second point I wanted to make is that
17 we've talked mostly about power supply, not about
18 transmission and distribution. Mr. Berman, a moment
19 ago, spoke about contractual obligations that are
20 taken by the company with regard to transmission and
21 distribution. I want to make it clear that the
22 customers are not relinquishing or renouncing any
23 rights with regard to transmission and distribution
24 services. Those continue to be vital. Such
25 contractual promises that Puget made are

02146

1 complementary to our underlying rights. We're only
2 talking about power supply; not about tiered
3 transmission and distribution.

4 COMMISSIONER HEMSTAD: That was the point I
5 was going to raise earlier. I really want to address
6 this to Staff Counsel. And it goes back to our first
7 discussion on jurisdiction. You're apparently
8 comfortable, then, that at least in the
9 conceptualizing of the jurisdiction issue, that this
10 can be a group that's not part of the public with
11 regard to power supply, but it is part of the public
12 with regard to transmission distribution. In other
13 words, taking the triumvirate of what we consider the
14 function of a utility and splitting off a third of it
15 and leaving the other two-thirds as part of the duty
16 to serve.

17 MR. TROTTER: Well, I think the analysis is
18 a little different for transmission and distribution,
19 because -- I mean, if you could just conceive of a
20 power supplier that strung a single line to a single
21 customer, that would be, I suppose, some form of
22 transmission and/or distribution. But would that be
23 jurisdictional? I think you still have the to the
24 public and the other standards, legal standards that
25 might apply. And they might not be, if it's just a

02147

1 single customer. Seems to be the trend of the law in
2 this state.

3 Puget, on the other hand, has an extensive
4 transmission and distribution system, which they hold
5 themselves out to the public to serve in their
6 geographic territory. They're plainly a public
7 service company. There's an infinite number of fact
8 patterns in between those two. I think when you look
9 at transmission and distribution, it's conceivable
10 that a power supplier could come into the State, set
11 up a plant and string a line to somebody, and you
12 have to take a look at that. I don't think the
13 analysis is too much different than what we've talked
14 about previously in terms of are they offering it to
15 the public or is it a single customer private deal
16 situation. But, obviously, they wouldn't be a 449 or
17 448 customer since they they'd be bypassing.

18 JUDGE MOSS: And if they did bypass, there
19 are provisions in the settlement agreement, as I
20 recall, that leave parties open to advocate whatever
21 rights they choose to advocate.

22 MR. TROTTER: On the distribution side,
23 yes, the company is waiving any claims for stranded
24 costs for generation and transmission.

25 JUDGE MOSS: But I'm thinking, my

02148

1 recollection is that there is an express carve-out
2 right to present argument in the event of a suggested
3 bypass? And that's right, isn't it?

4 MR. TROTTER: Yes.

5 CHAIRWOMAN SHOWALTER: I'm ready to get to
6 my second statute. It was RCW 80.28.010(9), and it's
7 just one sentence. I'll read it. An agreement
8 between the customer and the utility, whether oral or
9 written, shall not waive the protections afforded
10 under this chapter.

11 And the reason I raise it, I guess, is no
12 matter what the parties go off and do with one
13 another, arguably they cannot waive their protections
14 under the chapter. Now, that begs the question of
15 how the chapter protects them, which I think then
16 gets back to the statute we just spent so much time
17 on, is what are they reasonably entitled to.

18 So I'll ask anyone this. Would you say
19 that the settlement agreement is consistent with this
20 in that no one is waiving or causing some future
21 person to waive their protections under this chapter
22 because, in your view, the settlement affords
23 reasonable service from Puget under the 449, 448?

24 MR. BERMAN: Your Honor, I would agree that
25 the settlement affords reasonable service and that

02149

1 it's not going to go into effect unless you, in fact,
2 make that determination that it does provide just and
3 reasonable service to these customers meeting not
4 only -- dealing not only with issues related to
5 obligation to serve, but as it relates to all aspects
6 of the service, we're hoping and expecting that you
7 will find that the service is just and reasonable and
8 will state so.

9 MR. TROTTER: I would just add that in
10 Section 3.1 of the stipulation on page four, the
11 parties --

12 CHAIRWOMAN SHOWALTER: Why don't you wait
13 till we get there.

14 MR. TROTTER: Page four, Section 3.1,
15 starting around line 12. Parties agree that the
16 rates, terms and conditions resulting from approval
17 of the stipulation and the stipulated schedules are
18 fair, just, reasonable and sufficient within the
19 meaning of 80.28.010 and the requirements of other
20 applicable Washington statutes and regulations.

21 I think this dovetails back to the previous
22 discussion about these are conditions of service that
23 the parties and the customers, in particular, have
24 agreed are fair, just and reasonable and in
25 compliance with the Washington statutes. So it's a

02150

1 description of the obligation to serve and -- with
2 which they are willing to abide.

3 CHAIRWOMAN SHOWALTER: And it becomes a
4 little dicier when you get to the next customer who
5 buys from one of the customers who agreed to this,
6 but that's our next section, enforceability. And we
7 might be ready to move there, but let's take it up a
8 little bit later, while we finish up obligation to
9 serve.

10 COMMISSIONER HEMSTAD: Well, again, that
11 language, when it says an agreement shall not waive
12 the protections afforded under this chapter, the
13 settlement agreement and the whole package here,
14 obviously an impressive amount of work and effort has
15 gone into this, but I shouldn't say but -- I don't
16 mean not to sound negative.

17 It strikes me it's crafted in the context
18 of the existing circumstances as we know them today.
19 One thing about this industry that strikes me in
20 contrast maybe with some of its history is that the
21 rate of change is accelerating. You see that with
22 recent price volatility, but also with accelerating
23 technological change.

24 And if we could have predicted, we would be
25 sitting here today three or four years ago, I find it

02151

1 hard to predict what we or our successors will be
2 looking at five or ten years hence. But these
3 documents are written almost like they're immutable,
4 and what is your response to that?

5 The rapidity of change occurring and the
6 like, I think it is almost a certainty that at some
7 point some party to these arrangements is going to
8 say, Time out, we don't like the new situation. And
9 we're getting hurt. And whether that's the company
10 or whether it's one of these parties or whether it's
11 someone not at the table here, but who themselves is
12 affected by it, what then about the argument that the
13 parties can't waive the protections afforded under
14 this chapter.

15 MR. BERMAN: Your Honor, I would suggest
16 that this provision of the statute does not mean and
17 cannot mean that parties can't reach agreements. One
18 thing is is that we're not reaching an agreement in
19 the abstract. We're reaching an agreement that you
20 intend to -- that will be subject to your review and
21 approval as a just and reasonable arrangement, and I
22 think that's a little bit different than just an
23 agreement in the abstract.

24 If you were to go to the extreme and say
25 that parties couldn't reach agreements, there are --

02152

1 there are a whole lot of arrangements that go on all
2 the time in the state that would be in violation of
3 the statute.

4 COMMISSIONER HEMSTAD: No, I understand,
5 but I'm struck by the language in the settlement, and
6 I'm sure it's in response to the fact that the
7 Complainant has brought this action, that they waive
8 their rights. I think the term is forever. Well,
9 forever is a long time.

10 MR. BERMAN: And we meant forever and ever.

11 COMMISSIONER HEMSTAD: My point is that, in
12 the contemporary world, ten years is more than
13 forever for lots of arrangements.

14 MR. BERMAN: With respect to that, I have
15 to say that that's, one, an essential part of the
16 deal; and two, it interrelates with a whole lot of
17 other things relating to how Puget Sound Energy
18 serves -- does business and serves its customers.

19 We have to plan to serve our customers, and
20 if we don't know who our customers are and who we're
21 obligated to buy resources for, that makes a huge
22 difference. In the world we're in today, where power
23 can have prices that are as volatile as they are
24 today, it's just immensely -- an immensely different
25 story. You might suddenly find that your load is

02153

1 going to increase to a different place than you think
2 it is today.

3 COMMISSIONER HEMSTAD: Let me ask -- oh,
4 I'm sorry.

5 MR. TROTTER: Let me just offer one thing
6 here. If you read the release of claims section,
7 which is in 17.8 on page 46, and I would also say, in
8 other parts of the document, you'll notice there the
9 releases by the complainants and intervenors and not
10 Commission Staff or Public Counsel or the Commission.

11 I think in an extreme case that none of us
12 can think of today, which I think is what your
13 question's getting at, I don't perceive there's a
14 legal impediment for the Commission to initiate a
15 proceeding if it decides this tariff is unjust and
16 unreasonable.

17 Now, having said that, the point just made,
18 Puget will not plan for these loads. Actually, they
19 haven't been since Schedule 48 was implemented.
20 That's an issue that would have to be taken into
21 account in the impact and terms and conditions of
22 that.

23 But these customers have said that this is
24 the bargain that they've made. But the Commission
25 itself, we were very, hopefully, careful. When you

02154

1 see releases, we're very careful what the Staff would
2 put its name to and what it wouldn't, very careful
3 selections so as to protect not just the Staff, but
4 of course the Commission itself.

5 So I think at the extreme margin, which
6 hopefully we'll never get to, I believe you would
7 have jurisdiction to file a complaint if you felt
8 that was necessary.

9 MR. BERMAN: I would note in that regard
10 that we were careful not to describe in here just
11 what the Commission's jurisdiction would be in
12 particular, in those particular circumstances. I
13 don't want to necessarily acknowledge that there's
14 some circumstance where you would have a right to
15 involve yourself. It's something we don't state
16 there.

17 Where we chose the words complainants and
18 intervenors, we chose that on purpose, but I don't
19 want to suddenly change the deal right now in our
20 interchange.

21 COMMISSIONER HEMSTAD: Let me ask another
22 question. There are a series of tariffs here that
23 are spelled out. Now, normally, again, taking into
24 account that the kind of evolution this industry has
25 always been part of, the company from time to time

02155

1 files amendments to tariffs. Are you foreclosed from
2 doing amending 448 and 449 by this settlement without
3 the agreement of all the other parties.

4 MR. BERMAN: I believe that there are
5 various terms relating to that. With respect to the
6 issue of power supply service, I think the issue is
7 we really have resolved our arrangements between the
8 customers and the company going forward, and said
9 that on the issue of power supply, we fixed that.
10 There are a lot of other arrangements that are
11 spelled out in here. Most particularly, distribution
12 arrangements and interconnection arrangements, and a
13 whole lot of other stuff.

14 And I would acknowledge that with respect
15 to that whole lot of other stuff, that those are
16 things that parties can, at various points, come back
17 to the Commission to address and I would expect,
18 given the amounts of dollars that can be at stake
19 even on a small distribution matter, that you
20 probably will see the parties again sometime in the
21 future on those -- on that other stuff, but when it
22 comes to the power supply, the parties intended to
23 fix their arrangements going forward, and that was
24 what this stipulation does.

25 COMMISSIONER HEMSTAD: Call that the whole

02156

1 lot of other stuff exception two.

2 MR. CAMERON: If I could address one
3 particular attribute of the tariff. There was a lot
4 to be done. And my clients, and I'm sure other 449
5 customers, as well, are looking at self-generation as
6 one of the flexible tools they could use to manage
7 their power supply and power supply cost. You will
8 see reference in the tariff to the distribution
9 backup charge, which has not been filed, which is in
10 development right now. We have had a discussion of
11 principles. We await the formulation of that rate
12 within the next -- well, within some period of 60
13 days. I forgot when it started to run. That will be
14 filed with

15 you. The customers who are depending on
16 self-generation as a way of reducing the power supply
17 obligations of Puget are very much concerned about
18 the development of that charge. That is an element
19 that we're all critically concerned about and you
20 will be hearing from us shortly on that one.

21 MR. BERMAN: I would just note, by the way,
22 that I was perhaps a little bit flippant in
23 describing the whole lot of other stuff. But there
24 are a lot of detailed provisions in here, and one
25 example is that when it comes to the rate issues that

02157

1 are spelled out, and even for distribution service in
2 Schedules 448 and 449, there is an agreement that
3 neither the complainants nor the intervenors nor the
4 company can propose or support any changes to the
5 rates in Schedules 448 and 449 prior to PSE's next
6 general rate case.

7 So of course the implication is that after
8 PSE's next general rate case, that the distribution
9 rates, for instance, are fair game.

10 MR. FFITCH: Commissioner Hemstad, if I can
11 just sort of add a couple of thoughts here, really
12 directed perhaps a little bit back to your question
13 about the long-term reach of this agreement. I think
14 that I certainly can't disagree with you about our
15 inability to predict the future. And Commissions
16 have an ongoing regulatory responsibility to deal
17 with what comes before them.

18 I think, though, I want to put in a pitch
19 for one the -- of the real goals of this agreement,
20 one of the reasons why we're here supporting it is to
21 bring some peace to this particular issue or this
22 area of issues with these particular customers of
23 this company. As you can see by the number of
24 dockets that are attempted to be resolved here and as
25 you know from the history of Schedule 48, this has

02158

1 been a contentious area over the years.

2 There is really, truly an effort here to
3 try to come up with a long-term solution. I think we
4 will all agree that our human ability to do that
5 perfectly is limited, but this has been a very
6 carefully worked out effort to do the best we can, I
7 I think, and that's one reason we're supporting it,
8 is because the -- some of those controversies and
9 disputes that we have felt over the years have
10 threatened core customers, and we think that this is
11 an offer for some longer term benefits for them, as
12 well.

13 CHAIRWOMAN SHOWALTER: Well, on that point,
14 this is a lot of language in here that sounds kind of
15 permanent and definite, but just as the parties can't
16 waive their statutory rights, we can't waive our
17 statutory obligation. So to put it blunt bluntly, if
18 ten years from now, someone, maybe no party here,
19 complains and says 448 and 449 are not fair, just and
20 reasonable in today's environment, I take it you
21 would agree that we would have the statutory
22 authority to make that determination. We would not
23 be precluded by the fact that a Commission ten years
24 earlier had said at that time, 448 and 449 are fair,
25 just and reasonable?

02159

1 MR. FFITCH: I think I would have to agree
2 with that as a general legal proposition. That's the
3 nature of ongoing regulatory authority, that facts
4 change. You would be, presumably, looking at a
5 different set of facts than you are now.

6 CHAIRWOMAN SHOWALTER: I mean, I think
7 parties might well argue we shouldn't change 448 and
8 449, but -- at some later date, because of the clear
9 intention in here that this last a long time and set
10 up a more or less permanent arrangement, but that
11 that's a matter of the Commission's discretion at a
12 later date, based on the facts before it.

13 MR. FFITCH: And then the parties might
14 also argue that there's been no material change of
15 the facts.

16 MR. TROTTER: I would just add to that that
17 certainly the signatories to this agreement,
18 customers having agreed that the rates are fair, just
19 and reasonable, that chances are that that will be
20 argued to be held against them in the next
21 proceeding, if a complaint were to be filed by a
22 customer. But you're not bound by that, as I read
23 it.

24 MR. BERMAN: I can assure you that if
25 customers were to bring a claim in ten years, we'd

02160

1 argue that they should be held to the deal.

2 CHAIRWOMAN SHOWALTER: You never know. You
3 might be representing one of those customers. We're
4 going to keep those words of yours, Mr. Berman.

5 COMMISSIONER HEMSTAD: You don't know how
6 facts might change.

7 CHAIRWOMAN SHOWALTER: Are we ready to move
8 on to a slightly different topic? It is logically, I
9 think, the next topic, which is the parties here have
10 given this a lot of thought, and they, I think, have
11 a firm understanding of what they are renouncing or
12 waiving or agreeing to.

13 But the next part of this stipulation is
14 that purchasers of your properties are going to be
15 bound by the same agreements if they use a large
16 amount of power or continue on in the same form of
17 business. And I'd just like to explore that a little
18 bit.

19 First of all, how would the mechanics work?
20 What are the obligations, for example, of one of the
21 449 customers to inform a prospective buyer of this
22 restriction. It's the kind of thing that often gets
23 -- that in other contexts get recorded at the
24 courthouse. It's a burden that runs with the land.

25 Now, I'm not that kind of attorney and I'm

02161

1 aware that there are restrictions about what you can
2 or can't record. But what is the way that a buyer
3 will know what the buyer's getting into, and then, on
4 top of that, even if they know, should they be bound
5 by this kind of agreement.

6 MR. BERMAN: Your Honor, the -- this carry
7 over right or the transfer of the 449 or 448
8 obligation in general applies to transfers of
9 facilities with loads greater than or equal to 7.5
10 megawatts. We're not talking about someone selling a
11 house; we're talking about a very large industrial
12 concern. Even a very large commercial establishment
13 doesn't use 7.5 megawatts. We're talking about a
14 very, very large industrial concern that's getting
15 sold or transferred.

16 When a very large industrial concern is
17 sold or transferred, there's a lot of due diligence
18 involved in such a transaction involving a whole lot
19 of issues, everything from environmental issues to
20 permitting issues to every aspect of the commercial
21 arrangements that relate to the industrial concern.
22 And I think the issue of how the new buyer is going
23 to find out about this is not one that you have to
24 worry about in the same way as if this applied to
25 residential customers.

02162

1 COMMISSIONER HEMSTAD: Let's assume that it
2 is aware of it. Is a new owner of either the stock
3 of one of these complainants or of all or some
4 portion of its assets, is it bound by it?

5 MR. BERMAN: Under this deal, yes. And if
6 I would say that given the dollars that are at stake
7 here, if you don't put in a provision like this,
8 people will find ways around this deal if they find
9 it to be in their interest.

10 If millions and millions of dollars are at
11 stake every year and if you can reduce your
12 obligations by millions and millions of dollars a
13 year by engaging in some transaction -- for instance,
14 let's suppose you had a portion of your facility and
15 right now you do the work yourself, but if by selling
16 that portion of the facility to someone else who then
17 continues to do the same work and builds the same
18 product and then sells it to your portion of the --
19 to the other portion of the facility, you get to a
20 situation where suddenly the millions of dollars in
21 expense are avoided.

22 And that's a very serious problem if it can
23 just get flipped in that way, and so easily. It's a
24 problem when it comes to dollars, and of course
25 there's great incentive to engage in those

02163

1 transactions, and we have large multi-billion dollar
2 companies that engage in many complex transactions
3 all the time.

4 In addition, it's not just dollars for
5 what's at stake in a particular contract at a
6 particular time, but it relates to planning for Puget
7 Sound Energy. If these things can flip over at a
8 moment's notice, suddenly Puget Sound Energy could
9 find, if we didn't have a provision like this, that
10 it's responsible for serving at core a whole bunch of
11 megawatts.

12 COMMISSIONER HEMSTAD: I don't think the
13 questions that we're posing go to the concerns the
14 company has to protect its interests. It really goes
15 to the ramifications of the enforceability against
16 that third party.

17 Anyway, you apparently are comfortable that
18 this agreement of the parties and the approval of
19 this Commission will bind that stranger.

20 MR. BERMAN: We are comfortable with that.

21 COMMISSIONER HEMSTAD: Is Staff comfortable
22 with that?

23 MR. TROTTER: Yes. As you can tell from
24 the discussion, there were competing concerns,
25 Puget's concerns about its load, and actually, I

02164

1 think there might even be an interest that this is a
2 positive development. The purchaser would find this
3 to be an advantageous feature of a property sale at
4 some point, but also --

5 COMMISSIONER HEMSTAD: Depending upon
6 future price.

7 MR. TROTTER: Exactly. It can go either
8 way. But to prevent gaming and to establish a bright
9 line, so we don't have lots of litigation around it,
10 staff viewed this as being something that would be a
11 term and condition of sale, that the customer here,
12 current customer would put in the deal to its
13 purchaser. If it doesn't do that, there's obviously
14 going to be a lawsuit involved there. But we were
15 satisfied that, given this language and the
16 obligation incumbent upon the Schedule 449 customer,
17 that it would be handled appropriately.

18 CHAIRWOMAN SHOWALTER: Is there any
19 obligation anywhere in this settlement agreement of
20 the customers to inform prospective buyers of this
21 arrangement? I recognize due diligence is out there,
22 but is there anything in here that says explicitly
23 that will occur.

24 MR. BERMAN: I don't think we put in a
25 provision that explicitly required that such notice

02165

1 be provided to the buyer.

2 MS. DAVISON: The notice provision comes
3 from the fact that this language is contained in 449
4 and you, you know, that's a publicly filed tariff and
5 we would have an obligation to certainly inform and
6 explain to a potential buyer that there's 449, and
7 that's the service that would apply to this
8 particular property, and so while I think you raised
9 a very good question about, you know, you're not
10 going to do a search of the real estate title and
11 find it there, you do a search at the WUTC and you'll
12 find that obligation contained within 449.

13 CHAIRWOMAN SHOWALTER: But we don't have
14 platting records here. I mean, you'd have to know
15 that the parcel you were buying was one that is
16 subject to 449, or really this order, I suppose, the
17 order that you're asking.

18 MS. DAVISON: You would have to know that
19 these are the customers that are subject to this.

20 CHAIRWOMAN SHOWALTER: Right.

21 MS. DAVISON: And without trying -- I don't
22 want to get us into other issues, because there's an
23 aggregation issue and other aspects of it, but I
24 think that it's a very safe assumption that any of
25 these large customers, anybody that purchases their

02166

1 property -- you know, we would have an obligation as
2 sellers and under, you know, basic obligations under
3 real estate laws to inform the purchasers of this
4 arrangement, and then, as I said, 449 or any changes
5 that may happen to 449 would be on file at the
6 Commission.

7 CHAIRWOMAN SHOWALTER: Is there any problem
8 adding a little paragraph or sentence to the service
9 agreement under 449, 448, that customer agrees to
10 inform any prospective seller of the limitations?

11 MS. DAVISON: There is absolutely no
12 problem with that. That's -- I believe we have that
13 obligation, in any event, and it's certainly fine to
14 add that to the service agreement.

15 MR. BERMAN: For the company, we think that
16 adding such a sentence would be entirely consistent
17 with the settlement and would support such a
18 sentence.

19 MR. TROTTER: Staff agrees.

20 COMMISSIONER HEMSTAD: The settlement may
21 spell this out. Assume one of the customers with
22 multiple locations sells one of them, but less than
23 the seven and a half megawatts. What results?

24 MR. BERMAN: The settlement does spell that
25 out.

02167

1 MS. DAVISON: This was a very carefully
2 negotiated -- he's laughing because we spent an awful
3 lot of time on this very issue.

4 COMMISSIONER HEMSTAD: I can see a company
5 selling off each of its multiple locations.

6 MS. DAVISON: There's a 10-mile radius
7 component to that.

8 MR. BERMAN: I'd be hesitant to try to
9 describe it in one sentence, given that it really
10 occupies pretty much all of Section 7.2 and 8.2.
11 There are many complex provisions there that interact
12 with one other.

13 COMMISSIONER HEMSTAD: I won't ask you to
14 spell it out.

15 CHAIRWOMAN SHOWALTER: Let me take an
16 example. Am I right that under the current 449, a
17 customer is not prohibited from self-generating, but
18 must agree to have backup distribution service from
19 PSE. Am I right on that?

20 MR. BERMAN: By current, you mean the 449
21 that's in this stipulation?

22 CHAIRWOMAN SHOWALTER: Right, yes, that's
23 what I'm saying currently. I'm going to get ahead to
24 tomorrow's 449.

25 MR. BERMAN: Yes, they can put in place

02168

1 self-generation. They must have appropriate backup
2 service. I would note that, of course, if they put
3 in place self-generation, they have to meet whatever
4 requirements there exist in terms of any permitting
5 or anything else. We're not trying to shortstop or
6 shortcut around any obligations that would exist
7 aside from working out the deal with Puget Sound
8 Energy.

9 CHAIRWOMAN SHOWALTER: All right. But my
10 example, then, is let's take a new buyer, who was
11 informed of all of this, decides to self-generate,
12 but does not take backup distribution service from
13 PSE, as required by -- I think it's Section 71.17.
14 That would be a violation of their obligation, I
15 think, under this scheme. Am I right on that?

16 MR. CAMERON: Yes and no.

17 CHAIRWOMAN SHOWALTER: I'm trying to get to
18 the enforcement issue.

19 MR. CAMERON: 449 provides for basic
20 distribution service for all comers. There is backup
21 distribution service that applies to those who
22 self-generate. The term backup is a little bit of a
23 misnomer, because it suggests a power supply pool of
24 costs, but instead it's distribution costs.
25 Distribution costs are recovered alternatively, so

02169

1 the distribution charge or the backup distribution
2 charge.

3 Part of the issue I mentioned before wanted
4 to be before you within 60 days is how those two
5 charges work together. We obviously don't want to be
6 double charged. But you are right. We pay either of
7 those, either the distribution charge or the
8 distribution backup charge, depending on whether we
9 self-generate or not.

10 There's one issue that I want to mention in
11 regard to that. There is a reservation of a right to
12 terminate the 449 service agreement if the customer
13 self-generates and if it -- let me take the example
14 of ARCO. We're talking about self-generation at the
15 Cherry Point Refinery. Depending on size, it may be
16 economically best, electrically best, to either stay
17 on the Puget 115 kV system, where we are now, or
18 interconnect into the nearby 230 kV system.

19 We are agreed with everyone I believe,
20 that, depending on the size of the resource, the best
21 electrical plant of interconnection should be
22 accommodated. The stipulation in the tariff allow a
23 customer, allow ARCO in this case, to terminate its
24 service agreement either at the end of the term or
25 within the term in this special circumstance.

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1 That's the only instance in which the
2 customer wouldn't pay any charges to Puget, because
3 it would be tied into the 230 kV system instead. In
4 that situation, there is an issue preserved, and that
5 is distribution of stranded costs.

6 If we sever from the 115 kV system, which
7 we can do consistent with the agreement, the Staff
8 and Public Counsel asked to look at what costs might
9 be left behind. In this case, ARCO is served through
10 three substations. There's no issue with regard to
11 those. We have leases with the company.

12 We will pay under those leases or we will
13 pay them off. We don't think that there are other
14 stranded costs because the lines that serve us tie
15 into White Horn, as well. But I did want to point
16 out that possibility, because it is quite important
17 to ARCO as it contemplates self-generation at the
18 refinery.

19 Other than that, you are right. Any
20 customer who has a service agreement will pay either
21 the distribution charge or the distribution backup
22 charge.

23 CHAIRWOMAN SHOWALTER: Okay. So let's say
24 a subsequent buyer of one of these customers here
25 today moves in and self-generates and is very happy

02171

1 with their self-generation and saying why am I paying
2 this charge or I don't want to pay the charge or I
3 just won't pay the charge. How would Puget propose
4 to enforce against that customer? Would it come here
5 before us or go to court or what?

6 MR. BERMAN: I'm thinking, because I had
7 not worked through previously the issue of how we
8 would go about enforcing the agreement in those
9 cases. I think that, most likely, we would enforce
10 those aspects of the agreement here at this
11 Commission. I'm not sure that that's the exclusive
12 place we could enforce it, but I think that we would
13 have a right to enforce it.

14 That customer who bought the facility from
15 one of these customers would assume the obligations
16 under 448 or 449 if they met the criteria established
17 in say 7.2 or 8.2 of the stipulation, and as they're
18 further spelled out in the body of 448 and 449.

19 And then, if they were to put in place
20 self-generation, both 448 and 449 spell out what you
21 do if you have self-generation, and that includes
22 obtaining the appropriate distribution backup service
23 or -- and potentially being subject to distribution
24 stranded costs. And it provides that the parties can
25 fight about distribution stranded costs in some

02172

1 instances and not in other instances.

2 And if they had a fight about that, I would
3 expect that certainly the level of distribution
4 stranded costs that were owed would be something that
5 we would fight about at this Commission. The issue
6 of whether a customer's paying their fair share of
7 the distribution system and whether they get to not
8 pay for their fair share of the distribution system
9 because they've put in place some arrangement seem
10 like ultimately questions that are jurisdictional to
11 you.

12 MR. CAMERON: I think the answer's pretty
13 simple. That is so long as the customer remains
14 electrically connected to Puget, they pay either the
15 distribution charge or the distribution backup
16 charge. If the size of generation causes them to
17 seek another electrical plan, they face distribution
18 stranded costs. If they decide they can operate in
19 isolation on their own power, then truly they are an
20 island, I suppose it's possible they might disconnect
21 from Puget and operate in total isolation at the end
22 of their service agreement.

23 The other alternative is bypass, and as you
24 can see, the issue of bypass is preserved.

25 CHAIRWOMAN SHOWALTER: I think I have one

02173

1 more question about future buyers. We started this
2 discussion out by saying the customers here are
3 special. They have special contracts or they're
4 different because they pay transition charges;
5 therefore they can be treated as a certain class
6 that's not the public and it's fair, just and
7 reasonable to give them 448, 449.

8 Now comes along a buyer of one of these
9 customers. The buyer, of course, wasn't here five,
10 four years ago, isn't here today, didn't pay
11 transition charges, but is stepping into the shoes of
12 or buying the property of one of today's customers.
13 And I think in terms of being on notice, I think it's
14 possible to give a prospective buyer notice of what
15 kind of power current customer gets and what the
16 terms of it are.

17 They get over that hump, but then, what
18 about on the merits of, well, why should this new
19 buyer either be entitled to this special deal or be
20 burdened by this special deal? We've kind of lost
21 one of the underpinnings of the rationale for this,
22 which is the history of this dispute and these
23 customers.

24 MR. TROTTER: I'm not sure we have
25 entirely, at least. I think we do, as human nature,

02174

1 look at these in terms of specific customers, but
2 we're really looking at it in terms of loads. As you
3 can see, the larger load is the focus here. So I
4 think that's the proper way to evaluate that.

5 CHAIRWOMAN SHOWALTER: Is it the anthro --
6 what is that word, anthro --

7 MR. TROTTER: Anthropomorphic?

8 CHAIRWOMAN SHOWALTER: Anthropomorphic of
9 electrons. They have special personality for loads.
10 I mean, it wasn't the customers that paid the load,
11 it was the load that paid -- or the transition
12 charge.

13 MR. TROTTER: I think that's the nature of
14 the load that imposes the costs on the company, not
15 certainly the type of customer dictates how the load
16 is configured and so on. It's fundamentally the load
17 that causes the cost of planning and so on. So
18 that's how we would look at it.

19 MR. CAMERON: I think it's not a perfect
20 answer, but looking at the commercial terms of
21 transactions, assuming there's a duty to disclose
22 that you're putting into the service agreement, that
23 pretty much flags it as a material issue for purposes
24 of due diligence, for purposes of reps and
25 warranties, I think the buyer so informed will either

02175

1 dictate the value of the property, reflect a bad
2 power deal, or concede to a premium if it's a better
3 deal, but I think that the seller will have taken
4 care -- the buyer will have taken care of this issue
5 to its satisfaction or walked away from the deal,
6 assuming that there's notification.

7 CHAIRWOMAN SHOWALTER: But that's the issue
8 of notification and that the buyer deserves what he
9 gets because the buyer took on this, but it doesn't
10 really get at our issue, which is why is it still
11 fair, just and reasonable?

12 MR. CAMERON: Well, if the buyer has
13 discounted the value of the property to reflect the
14 extra cost of the power supply, assuming that
15 hypothetical, then, if they come to you, they've
16 already gotten their deal. They've already
17 discounted the extra cost of power in their purchase
18 price. Certainly that's got to reflect on the
19 justness and reasonableness of their demand, that
20 they get put on core.

21 CHAIRWOMAN SHOWALTER: Well, I guess I'm
22 thinking of the other customers who aren't one of
23 these buyers, who say why does this person get this
24 deal just because they happened to buy this piece of
25 property and I don't get the same deal. They didn't

02176

1 pay transition charges, I didn't pay transition
2 charges. You know, have we --

3 COMMISSIONER HEMSTAD: I was going to
4 answer that in part. They're buying the plant that
5 -- you can say that plant has paid its transition
6 charges already. And I assume that's a partial
7 answer to -- as against the new entrant who has to
8 build the plant and develop his operations.

9 MR. BERMAN: Your Honor, I have a hard time
10 seeing this as being different from so many other
11 successor and assigned relationships. I don't think
12 that anyone has a problem saying that if someone were
13 to come along and buy Puget Sound Energy, that
14 whoever that new utility is would get stuck with what
15 all the obligations that Puget Sound Energy has, and
16 pick up all the rights that Puget Sound Energy has.

17 And for any of these folks, if, you know,
18 Airbus comes along and buys Boeing or whatever, then
19 the fact is that whatever their arrangements are will
20 get transferred to the buyer, and those things
21 happen. Boeing picked up some other airplane
22 suppliers recently, and they got the different
23 arrangements that those airplane suppliers had in
24 place. It's really not so different from anything
25 else.

02177

1 Every -- all kinds of commercial
2 arrangements get passed forward to other commercial
3 entities who may not have been there originally.
4 That's the way it works with corporations. It's
5 notable, by the way, that you won't see Equilon or
6 Tesoro's name on any of the initial Schedule 48
7 stuff. Those were other guys who owned those
8 refineries and entered into those deals, but now
9 Equilon and Tesoro have stepped into the shoes of
10 those other guys.

11 So to me, it's just more of the same, that
12 now, if someone else in turn steps into those shoes,
13 it should carry forward.

14 JUDGE MOSS: I wonder if there is a legal
15 distinction, though, in the case between a stock sale
16 versus an asset sale that we have to take into
17 account. I think everything you say is absolutely
18 true in the case of a stock sale, but I'm not so sure
19 it's true in the case of an asset sale.

20 MR. BERMAN: My answer to that is that
21 there can be differences between a stock sale and an
22 asset sale or they can be the same. We've tried to
23 answer some of those questions in the way we've
24 framed the agreement. I don't think that that's a
25 problematic thing that we've done that. We've just

02178

1 clarified the way the successor and assign
2 arrangements work in this particular arrangement.

3 CHAIRWOMAN SHOWALTER: Should we take a
4 break? I want to ask one question before the break.

5 JUDGE MOSS: Okay. Well, let's ask one
6 question, and then we'll take a break.

7 CHAIRWOMAN SHOWALTER: I want to ask it of
8 a witness, so that we have some evidence in the
9 record, as opposed to a lawyer. And the question is
10 how many of the customers in this settlement reside
11 in cities, and what's the total amount of megawatt
12 load represented by that group? This is going to get
13 at the tax questions later.

14 MR. BUCKLEY: Of the large customers or the
15 total number of customers?

16 CHAIRWOMAN SHOWALTER: Okay. I'm sorry, of
17 customers eligible for 449, how many reside in -- how
18 many customers reside in cities and what is the total
19 load of that eligible group?

20 JUDGE MOSS: I wonder if we should leave
21 that question on the table during the recess and let
22 the parties confer or --

23 CHAIRWOMAN SHOWALTER: No, I want to work
24 up a question based on the answer. That's the reason
25 I'm asking it.

02179

1 JUDGE MOSS: We'll take a chance on the
2 record for conferencing.
3 MR. TROTTER: You're talking about within
4 the --
5 MR. STEUERWALT: Some incorporated area;
6 right?
7 MR. TROTTER: -- city limits of a first,
8 second or third class city in the state of
9 Washington?
10 CHAIRWOMAN SHOWALTER: A city that can
11 impose or receive utility tax.
12 MR. STEUERWALT: None of us can think of
13 one that doesn't reside.
14 CHAIRWOMAN SHOWALTER: Okay. What is the
15 total estimated megawatt load of the group of
16 eligible four 449 customers?
17 MR. STEUERWALT: Are you including the
18 folks who are -- yeah, the large and small, or just
19 the large ones who are initially going to 449?
20 CHAIRWOMAN SHOWALTER: Anyone who could be
21 on 449.
22 MR. STEUERWALT: Okay.
23 MS. DAVISON: Give us a second.
24 MR. SCHOENBECK: We're working on this.
25 CHAIRWOMAN SHOWALTER: Okay.

02180

1 MR. BERMAN: Do counties count?
2 JUDGE MOSS: No.
3 MR. BUCKLEY: We think we have the size.
4 Around 298, don't we?
5 MS. DAVISON: No, it's lower.
6 MR. SCHOENBECK: That would be the total.
7 I guess the answer, sitting here at this moment,
8 we're not a hundred percent sure, but we believe
9 there are at least two, and possibly as many as four
10 locations where they may not be in incorporated
11 areas. Just a very rough estimate, though. We would
12 expect the load not to be more than about 40
13 megawatts. That would put -- I've always used 300.
14 CHAIRWOMAN SHOWALTER: Forty megawatts that
15 are or aren't in cities?
16 MR. SCHOENBECK: Are not in.
17 CHAIRWOMAN SHOWALTER: Okay.
18 MR. SCHOENBECK: Okay. We are still not
19 certain, but a rough estimate instead of 40, maybe as
20 much as 60.
21 CHAIRWOMAN SHOWALTER: Out of --
22 MR. SCHOENBECK: I always use 300 as a
23 round number.
24 CHAIRWOMAN SHOWALTER: Really, for purposes
25 of my question that I'll work up, we can use 240, and

02181

1 tomorrow this could be corrected if it's wrong.
2 MR. SCHOENBECK: Thank you.
3 CHAIRWOMAN SHOWALTER: Thanks.
4 MR. CAMERON: I think ARCO is in Blaine,
5 but I can't say for sure. I know it has a Blaine
6 address and Blaine qualifies as municipality.
7 MR. STEUERWALT: Right.
8 MR. BUCKLEY: Right.
9 MR. SCHOENBECK: And that was not assuming
10 ARCO in the 60, so that's -- you can still use.
11 CHAIRWOMAN SHOWALTER: Two-forty is still a
12 good number for purposes of this afternoon's
13 questions?
14 MR. SCHOENBECK: Right.
15 CHAIRWOMAN SHOWALTER: Right.
16 JUDGE MOSS: All right. If we're set with
17 our ground work, then let's take a 15-minute recess
18 until 3:30.
19 (Recess taken.)
20 JUDGE MOSS: The bench is ready and counsel
21 are ready. Let's go on the record. We are ready to
22 move into the issue of state and municipal public
23 utility taxes, and the pop quiz has been passed out,
24 parties have had on opportunity to run their
25 calculations, so let's begin with our questions from

02182

1 the bench on that subject area.

2 CHAIRWOMAN SHOWALTER: All right. I'll
3 begin. First of all, I appreciate the Staff
4 memorandum pointing out that there are many types of
5 taxes that go up and down, according to different
6 assumptions, but my concern is that the parties are
7 asking us to approve an arrangement that potentially
8 includes a way to avoid the indirect payment of
9 public utility taxes; i.e., the utility taxes paid by
10 the utility, but it is passed through to customers
11 and it's -- it can be a significant tax in that it
12 can be almost ten percent if both state and municipal
13 portions are included, which is a significant
14 difference in the price of electricity, a ten percent
15 differences.

16 So I want to explore what that absolute
17 value is that might be achieved if all the eligible
18 customers who could receive their power in a way so
19 as to avoid that indirect payment of the public
20 utility tax. So that is why this example has been
21 passed out. And as the Staff memo pointed out, it's
22 -- the tax implications compared to what?

23 And the comparison that I think is the most
24 relevant here is comparing 449 to 448, or at least
25 that's what I would like to explore in this

02183

1 particular exercise, because it strikes me that 448
2 maintains the tax base that exists today, whereby
3 Puget would pay a utility tax, but 449 may or may not
4 maintain that base, and to the extent that 449 allows
5 a pretty good deal, maybe a ten percent differential,
6 I would expect that the customers might well elect to
7 use 449 for that reason, among others.

8 So that's why I would like to proceed with
9 this example. And I saw Mr. Gaines with a
10 calculator, Mr. Bill Gaines with a calculator, so
11 I'll direct the question to him, and anyone else can
12 listen, but the first scenario is 448. I first want
13 to assume that all of the eligible 448 customers go
14 on 448, that they're buying power through Puget,
15 through the buy-sell arrangement at \$100 a megawatt
16 hour from some ultimate source that is not otherwise
17 subject to the tax, and that 240 average megawatts of
18 the 448 service are located in a municipal government
19 that imposes a tax rate of six percent. So Mr. Bill
20 Gaines, have you done that calculation?

21 MR. WILLIAM GAINES: I know how to run a
22 calculator, but I disclaim any expertise on taxes.

23 CHAIRWOMAN SHOWALTER: All right.

24 MR. WILLIAM GAINES: But yes, I've done the
25 calculation. And --

02184

1 CHAIRWOMAN SHOWALTER: I take it you
2 probably have a state portion and a --

3 MR. WILLIAM GAINES: That's right.

4 CHAIRWOMAN SHOWALTER: Maybe if you could
5 just tell us how you get to that.

6 MR. WILLIAM GAINES: I've made an
7 approximation that the state utility tax is four
8 percent.

9 CHAIRWOMAN SHOWALTER: Right. You know,
10 while we're on that, I think estimates are okay here.
11 Obviously, \$100 a megawatt hour is just an estimate.
12 I think it's a good one because it's not out of the
13 ballpark, but also it allows an easy mental
14 adjustment if a price is higher or lower.

15 MR. WILLIAM GAINES: So if we assume that
16 there's approximately 300 megawatts of index loading
17 in total, and if it buys power for 8,760 hours a year
18 at \$100 a megawatt hour and that's taxed at four
19 percent, the taxes are about \$10.5 million annually.

20 CHAIRWOMAN SHOWALTER: So that's the state
21 public utility tax?

22 MR. WILLIAM GAINES: The state portion,
23 yes.

24 CHAIRWOMAN SHOWALTER: All right.

25 MR. WILLIAM GAINES: I said 300. Because

02185

1 she asked for all the load.

2 CHAIRWOMAN SHOWALTER: Right.

3 MR. WILLIAM GAINES: And then, in number
4 three, the municipal tax, and the example here is
5 applying the municipal tax only to 240 megawatts per
6 load. That's approximately \$12.6 million.

7 CHAIRWOMAN SHOWALTER: So that was a 240
8 times 8,760 hours times \$100 a megawatt hour times
9 four percent?

10 MR. WILLIAM GAINES: Times six percent.

11 CHAIRWOMAN SHOWALTER: Oh, six percent.
12 I'm sorry. And that was how much?

13 MR. WILLIAM GAINES: Approximately 12.6
14 million.

15 CHAIRWOMAN SHOWALTER: Okay. So the total
16 for the 448 scenario would be 10.5 million plus 2.6
17 million, 12.6 million?

18 MR. WILLIAM GAINES: That's right, 23.1
19 million.

20 CHAIRWOMAN SHOWALTER: 23.1 million, okay.
21 Now, let's turn to -- first of all, does anyone want
22 to comment on that calculation?

23 MR. TROTTER: I'm sorry, what was the
24 question?

25 CHAIRWOMAN SHOWALTER: Would anyone like to

02186

1 comment on that calculation?

2 MR. TROTTER: Well, because the tax rate he
3 picked was four percent, and I think the actual tax
4 rate is .3873 percent, and that does shift quite a
5 few dollars around. I think we figured, at 240
6 average megawatts, that was -- at 300 average
7 megawatts, that's 10.2 million, and at 240 average
8 megawatts, that would be 8.142 million.

9 CHAIRWOMAN SHOWALTER: The 240 is still
10 times the six percent, isn't it?

11 MR. BUCKLEY: That's 12.6 million.

12 CHAIRWOMAN SHOWALTER: 12.6. So the new
13 revised figure is 10.29 plus 12.6 million, which is
14 22.8 million. Is that --

15 MR. TROTTER: I think that's right.

16 MR. BUCKLEY: That's right.

17 CHAIRWOMAN SHOWALTER: So a little
18 refinement there.

19 MR. WILLIAM GAINES: Accept that.

20 CHAIRWOMAN SHOWALTER: So if everyone
21 elected 448, the state general fund would receive
22 10.2 million, and the cities that are involved, if
23 they levied the maximum of six percent, would receive
24 12.6 million. Now, can we move to the 449 scenario?

25 MR. BUCKLEY: I want to make clear, this is

02187

1 just from the power portion of the revenue, not the
2 distribution and the --

3 CHAIRWOMAN SHOWALTER: Yes, yes, I'm trying
4 to just isolate the difference between 448 and 449,
5 not other charges. All right. Could we move to the
6 449, scenario, Mr. Bill Gaines?

7 MR. WILLIAM GAINES: We can.

8 CHAIRWOMAN SHOWALTER: Is this a
9 calculation even I can do in my head?

10 MR. WILLIAM GAINES: Well, yes. Well, the
11 numbers, of course, are the same. You know, the
12 question is, you know, do the taxes apply in the case
13 of 449?

14 CHAIRWOMAN SHOWALTER: Right. Well, is
15 there anyone who would make an argument that, in this
16 scenario that I've drawn, that taxes would apply?
17 Mr. Trotter.

18 MR. TROTTER: I think it's at least an open
19 question whether that out of state firm is doing
20 business in the state of Washington. And it could
21 depend on where the delivery point was. And I don't
22 think that question has been resolved one way or the
23 other.

24 CHAIRWOMAN SHOWALTER: Well, let me relate
25 it back to our discussion at the beginning of the

02188

1 day, when we are asked to make a judgment that a
2 power marketer is not under our jurisdiction, among
3 other reasons, because they're not in the light and
4 power business. If that is true, which all of you
5 have urged, then isn't it true they're not in the
6 power and light business, therefore, they're not
7 subject to the public utility tax?

8 MR. TROTTER: Not necessarily.

9 CHAIRWOMAN SHOWALTER: Okay.

10 MR. TROTTER: Under the tax laws, the
11 analysis is a bit different. Let me think of an
12 example. Let's assume you have a car wash and that's
13 subject to some tax classification. And as part of
14 your interest in car washing, you put together a book
15 on car washing and you publish it and sell it at your
16 car wash. The revenue from the book would be under
17 the tax -- likely under the publishing
18 classification. I don't think anyone would probably
19 say you're a publisher. It's an isolated, one-time
20 thing. But under the tax laws, you're taxed on your
21 activity. And so if you made one sale of
22 electricity, for example, and the rest of your
23 business was something completely different, you
24 could be conceivably taxed as a light and power
25 business for that activity. It's an activity-based

02189

1 concept under the Washington law and the various tax
2 classifications.

3 Shifting over to regulation, where it's
4 public interest, are you holding yourself out to the
5 public, should you be subject to the public service
6 laws and all of the benefits and burdens that go with
7 it, that's an entirely separate question. So you
8 could get a separate result.

9 MR. BERMAN: Your Honor, my answer on that
10 is that I frankly don't know the answer as to whether
11 the tax laws would be applied to the supplier there.
12 Because the company was concerned about whether the
13 governmental entity would assess the taxes, we put in
14 protections in Section 7.6 of the stipulation that
15 provide that if the taxes get assessed, that the
16 customer will be responsible, rather than the
17 company. But it's not readily apparent to us whether
18 taxes apply or not.

19 And in any case, when we asked for the
20 jurisdictional finding in relation to power
21 suppliers, we weren't asking for a finding in
22 relation to taxes. We don't think you could give
23 such a finding, because you have, as far as I know,
24 no authority whatsoever in that regard.

25 CHAIRWOMAN SHOWALTER: And I'm not

02190

1 proposing to give that finding. I was questioning
2 whether the same rationale applied as to what is a
3 light and power business, and I know this isn't a tax
4 proceeding, but on the other hand, Mr. Trotter does
5 have some experience in tax matters.

6 However, I read that a portion that says if
7 taxes are owed, somebody will pay them. My concern
8 is are taxes owed and what are you asking us to do?
9 And if what you're asking us to do could arguably
10 have the effect or probably have the effect of
11 allowing a \$23 million hit to the general fund or to
12 state general funds, that is a serious issue for me.
13 And I think anyone who's been over in the legislature
14 generally, or especially this session, would know it.

15 I will not lightly approve a package that
16 allows the avoidance of taxes, and I want to point
17 out that Mr. Trotter said that we'll take actions all
18 the time that have tax effect, and I agree with that.
19 If we lower rates generally, that's less money in the
20 door to the utilities and less money in the -- to the
21 general fund.

22 I think it's very different if we are
23 affirmatively approving an arrangement whereby the
24 taxes simply aren't owed compared to another
25 arrangement, 448, where they are owed and compared to

02191

1 other general arrangements for other customers who
2 owe them.

3 So you get -- there are two questions here
4 for me. One is what's the absolute dollar amount
5 that the state general fund or municipal general
6 funds could be out, and the second question is a kind
7 of discrimination issue of whether we are giving
8 undue preference to some customers by allowing this
9 arrangement for them, but nothing comparable for
10 others.

11 And while I'm on this question of municipal
12 general funds, I do want to point out, I'm glad
13 Cunningham is here, that we heard testimony earlier
14 in this proceeding that the lack of public utility
15 tax into municipalities was grounds for an emergency.
16 I think I pointed out, in questioning Mr. Cunningham,
17 that actually, in fact, the cities received more, not
18 less revenue as a result of the very high Mid-C
19 prices.

20 But now we're in a situation here, this
21 proposal, I believe, does -- and I'll use the word
22 probably or may allow a way to avoid these taxes
23 being paid, and I don't think I can move very far
24 without understanding what the real consequences are
25 going to be.

02192

1 The easiest thing to do is to compromise or
2 settle on the backs of someone who's not in the room.
3 And if state legislature or the general fund
4 beneficiaries or the cities are going to be suffering
5 as a result of this settlement, that's something we
6 absolutely must take into account in determining what
7 the public interest is. So that is my concern, which
8 is also why if there is some other way to resolve
9 this or give some assurance that the money gets paid
10 somehow, whether through voluntary payments or going
11 to the legislature or some other mechanism, that
12 could also lend some assurance, but I want to
13 understand the tax implications in detail before
14 going forward with this.

15 MR. CAMERON: If I could make a point of
16 clarification. Before the break, I stated my
17 understanding that ARCO was within a municipality.
18 During the break, I had people run that down. We
19 have a Blaine post office address, but we are not in
20 a municipality. We do not currently pay municipal
21 taxes, so the number of 240 average megawatts shown
22 in the example should probably be reduced by about 80
23 average megawatts, to 160.

24 CHAIRWOMAN SHOWALTER: Okay. So we're now
25 at 160?

02193

1 MR. CAMERON: Yes, ma'am.

2 CHAIRWOMAN SHOWALTER: So let's do that
3 calculation. That would be 160 times 8,760 times 100
4 times six percent. What is that?

5 MR. WILLIAM GAINES: I came at it the other
6 way, but the impact of ARCO is about 4.2 million.

7 COMMISSIONER HEMSTAD: Well, in a certain
8 sense, whether ARCO is in or out, doesn't make a lot
9 of difference. It makes -- in the absolute number,
10 it may make a difference, but to the -- particularly
11 any local jurisdiction affected, it's the same
12 result. And the fact that the number may be smaller
13 doesn't change the impact on any given municipality
14 that's receiving the funds now.

15 I really concur in everything that
16 Chairwoman Showalter said. It seems to me that that
17 does affect the public interest. I've had some
18 discomfort with this impressive proposed settlement,
19 but going back to my law school legal process days, a
20 contract can be seen as legislation between private
21 parties. Well, we have a group of private parties
22 who are legislating among themselves what their
23 ground rules will be, but now they come to a public
24 agency for us to sprinkle some holy water on it.

25 But collectively, we are doing something

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1 that is, at least in most other states, was done by
2 the legislation, and now being done in the settlement
3 of litigation. I frankly don't know what the
4 reaction of the legislature or legislators will be to
5 this.

6 But I certainly do know if we add to it
7 particular additional factor of, oh, by the way, it's
8 going to be an impact on the general fund, we will
9 hear from them and we will all collectively be over
10 in front of the legislature at some point to explain
11 our actions and justify why we are doing what they
12 should have been doing if this were to be done.

13 I emphasize, if there is not an answer to
14 this where no one is hurt, I think this is a deal
15 killer. And so when you say that we are not -- we
16 are not a tax-setting body and it's not our
17 jurisdiction, that just doesn't cut it, because it is
18 part of the public interest that we have to address.

19 CHAIRWOMAN SHOWALTER: Or put another way,
20 you're right. We're not a tax-setting body and we
21 are not going to take the responsibility of gutting
22 somebody's general fund. It's too serious a matter.

23 MR. TROTTER: Your Honor, if I could
24 respond, because I think there is a legal issue and
25 we alluded to it in our response, albeit in a

02195

1 footnote.

2 You both have indicated that you believe
3 the impact on general fund or local jurisdiction
4 projects is a factor you can consider under the
5 public service laws, and we have not had an
6 opportunity to research that adequately. And if it
7 appears that maybe we should take the opportunity to
8 do that and be able to take a position on that that's
9 more definitive.

10 The tax laws are what they are. And in my
11 experience, taxpayers, including public entities who
12 are taxpayers, do many things to minimize their tax
13 liability in a legal way. And of course, if they do
14 it in an illegal way, that's problematic, and we all
15 do that -- the former.

16 CHAIRWOMAN SHOWALTER: Not the illegal way.

17 MR. TROTTER: We do the former in our own
18 tax planning in instances, if we have enough revenue
19 to justify it. So -- and also, I think it is
20 important to consider the alternative scenario. When
21 we started this case, customers were self-generating.
22 No one gets tax revenues under the public utility tax
23 in that scenario. Like it or not, that appears to be
24 a scenario very much in the future of electrical --
25 large electrical customers generally in this region.

02196

1 So there are many different impacts at
2 work. We also pointed out in the memo, and there was
3 a study, which I have here, on electricity and
4 taxation by the state in December of 1999, looking at
5 the state system and how it would hold up under a
6 restructured environment.

7 And certainly all of the concerns you've
8 articulated disappear if the tax is on consumption
9 instead of on the person generating it. And that's
10 certainly something that the study considers and I'm
11 sure the legislature will be called upon to consider
12 that at some point in time, albeit not now.

13 But there is a legal issue as to whether
14 this is a legitimate concern under the public
15 interest -- under the public service laws. And
16 whether there is anything inherently problematic
17 about applying the law, tax law as you find it, we
18 did provide a calculation of about 42 in the range of
19 a million from the rate reduction in the US West
20 case, but it is different. That is a different
21 docket. But by the same token, that was a very
22 sizeable impact on state and local taxing.

23 CHAIRWOMAN SHOWALTER: Yes, but there, if
24 we lower the rate generally, we have found that a
25 particular company's revenue requirement is lower

02197

1 than previously, and we wouldn't -- we could not --
2 we wouldn't have the discretion to say, Well, we know
3 you don't need all this revenue, but we want the tax
4 effect. We're required to set the revenue where it's
5 appropriately set. And that is perfectly within the
6 traditional scheme of regulatory rate setting that
7 the legislature understands we do.

8 And this, I think, is different, because
9 we're making a discretionary affirmative choice or
10 you're asking us to make that decision that allows
11 the avoidance of tax. I -- I mean, whether -- I'd be
12 very surprised -- I'll be interested in your
13 arguments tomorrow that perhaps might say this is not
14 a legitimate consideration for us. I think a
15 legislator would just be totally confounded and a
16 city would be confounded by that view, that we can't
17 look at the energy system as a whole and how it
18 relates as integrated into our state and what
19 assumptions are made by legislators or cities, why we
20 have a public utility tax. It's because that's how
21 most people get their energy.

22 It's true that anyone right now can
23 self-generate and no tax is paid on that. And I
24 think that's a good point. But that is the status
25 quo under the tax system today. If you

02198

1 self-generate, you don't owe a tax. What is
2 different about this is we are approving a new
3 arrangement that allows the tax to be avoided.
4 You're asking us to approve it.

5 MR. TROTTER: Yeah. When you say avoidance
6 of tax, that has some connotations to it. I think
7 what is happening is that if you do have another
8 supplier and revenues are paid to that supplier in
9 another jurisdiction, there are going to be
10 potentially different tax consequences to that.

11 Under this particular hypothetical, I think
12 what you're looking for here is this is the maximum
13 that could possibly occur. The average tax rate, the
14 local PUT, public utility tax effective rate is less
15 than six percent, and it can go higher. The voters
16 can vote in a higher tax under that statute.

17 Also, if Washington Water Power is a seller
18 here, it's a potential that the -- and if the local
19 PUT is not going to be assessed to the customer this
20 side of the mountains, maybe it will be assessed in
21 the city of Spokane.

22 CHAIRWOMAN SHOWALTER: But that's not my
23 example. The reason I chose this example is not just
24 because no tax is paid, but because no tax is paid,
25 there is a ten percent benefit. In other words, it's

02199

1 -- because no tax is paid in this state, there is an
2 advantage. Now, if taxes were being paid in some
3 other state or country, that might compensate for it.

4 MR. TROTTER: Yeah, under our tax scheme in
5 the state, particularly under the retail sales tax,
6 retailing, business and occupation tax and so on,
7 there's a strong incentive to structure transactions
8 so that delivery occurs outside the state or in a
9 state that has a lower tax rate, and so, and it has
10 use tax consequences and so on and so forth. But the
11 tax laws contemplate legitimate transactions.

12 COMMISSIONER HEMSTAD: But --

13 MR. TROTTER: And the supplier in Canada
14 may well pay taxes in Canada, I mean, so --

15 COMMISSIONER HEMSTAD: The analogy to the
16 sales tax, of course, you can avoid the sales tax if
17 the transaction can be moved. If it's under the
18 fixed, you can't avoid it. Historically, at least,
19 utility taxation was such that it was fixed and
20 couldn't be avoided. Now we're creating a situation
21 that is analogous to the sales tax, where you can pay
22 it or not.

23 MR. TROTTER: The evidence for that, of
24 course, is the fact that the rates are so high
25 compared to other taxes. The public utility tax are

02200

1 higher rates than the business and occupation tax.

2 COMMISSIONER HEMSTAD: But, again, our
3 discomfort is those are the kinds of decisions for
4 the legislature to make or to make adjustments. If
5 there's going to be self-generation, I suspect there
6 will be new proposals put forward to tax that anyway
7 in some way to, if nothing else, to level the playing
8 field.

9 MR. TROTTER: I suggest that that's the
10 proper course here, to demonstrate -- and the study
11 certainly demonstrates it, as well, because it does
12 talk, I think in here somewhere, about considerations
13 similar to that ten percent tax advantage. I recall
14 that being addressed before this Commission in some
15 form over the past several years, as well. And it's
16 a legislative decision whether that is acceptable or
17 not.

18 MR. CAMERON: Let me take issue with a
19 proposition that seems to be coming quite current,
20 and that is self-generation is a means of tax
21 avoidance. Everyone seems to be focused right now on
22 the diesel generation, which is, after all, just a
23 90-day wonder. We cannot run those for any period of
24 time. They are stopgap measures.

25 As you look toward self-generation that my

02201

1 clients are exploring, and I suspect others, as well,
2 they are founded on natural gas. They are
3 reciprocating gas engines or they are gas turbines.
4 In either event, they are more than 90-day wonders.
5 They are sustainable resources over the foreseeable
6 future, given the market. For every btu of natural
7 gas run through those machines, we pay a tax. It's
8 not an electric tax, but it comes in through the gas
9 side. From assets we put on the ground, and they are
10 substantial in the case of these machines, we pay a
11 property tax.

12 So yes, the electric tax drops, but of
13 course we're going to pay an electric tax with regard
14 to the imbalance energy Puget is providing and the
15 transmission and distribution services, but there's
16 no free ride on the commodity side, either, because
17 we'll pay the gas portion of the tax, the flipside of
18 the electric side, and we'll pay increased property
19 taxes.

20 CHAIRWOMAN SHOWALTER: I agree with that.
21 I was going to -- that it is a good point that
22 self-generators do pay taxes that end up in
23 Washington State coffers either on the gas or the
24 sales tax for the equipment or the --

25 MR. CAMERON: Yes, ma'am.

02202

1 CHAIRWOMAN SHOWALTER: -- lease, et cetera.
2 But I think that only proves my point more on this
3 other question and this scenario, that I don't know
4 where the tax under the second scenario, 449, with
5 Canadian supplier and marketer, I don't see how it
6 gets into our state.

7 MR. BUCKLEY: Could I also add another
8 scenario that Staff looked at before, you know, it
9 started supporting the settlement, is that at the
10 time during the original hearings, when we were
11 dealing with the rate cap proposal and before we
12 started on settlement discussions, I mean, we had
13 real choices before us. One of those was -- another
14 scenario was that either under existing Schedule 48
15 or under the forms of rate cap proposal that we had
16 out there, that there was the real likelihood that
17 some of these companies would have simply closed.

18 And so under that scenario, their tax
19 revenue would have been totally lost, as well as
20 wages and et cetera. And part of this is we felt
21 that under Schedule 448 -- 448 is not the problem.
22 We felt that if 448 was the only option that was out
23 there for this, that many of these companies would
24 not have supported this settlement and we would have
25 been back at square one. So we felt that having 449

02203

1 out there at least provided an opportunity for some
2 future actions to take place, such as Mr. Trotter has
3 described, where taxes may be collected. But if
4 these businesses shut down and were gone, that would
5 be foreclosed from happening.

6 So those are just, you know, another story
7 or another scenario that I think needs to be
8 included, that some of these customers were saying
9 that they just wouldn't be in business any longer.

10 CHAIRWOMAN SHOWALTER: That is a common
11 argument that's often made before the legislature.
12 That is, if you don't reduce our taxes or give us a
13 tax break, we're going to go out of business and you
14 won't get any taxes at all, which is a good argument,
15 a good discussion to take place, but usually it is
16 before the legislature.

17 It occurs to me to ask, has there been any
18 consultation with either the legislature or OFM or
19 Department of Revenue on the potential effects of
20 this settlement?

21 MR. CAMERON: There has been consultation,
22 but on a different issue. As you know, the governor
23 has been promoting self-generation as a solution to
24 the current energy problem. So to the extent you
25 embark on 449, which is friendly to self-generation,

02204

1 you certainly have an argument for the governor and
2 others, and that is that you are doing what's
3 necessary to implement that sort of energy
4 self-sufficiency for the state.

5 In terms of the hundred megawatts from
6 Canada, I can see how you would want to portray the
7 worst case, and I suspected that is it, but to my
8 knowledge, for the foreseeable future,
9 self-generation with its tax consequences is far more
10 likely not to eliminate tax revenues for the state,
11 but to morph them into a different form. Now, over
12 time --

13 CHAIRWOMAN SHOWALTER: Can I just stop you?
14 Can't you do self-generation with or without 449? If
15 448 is approved, does that give a right of
16 self-generation?

17 MR. CAMERON: 449 is certainly more
18 flexible than 448, in terms of management of total
19 power supply costs. I'm not -- my sense is that
20 customers are going to rely on self-generation for
21 the -- at least the intermediate future, allowing the
22 legislature sufficient time while revenues continue
23 to flow in on the gas side and on the property side
24 to fashion a solution more at its leisure.

25 There won't be the panic associated with

02205

1 the loss of all revenues, because we'll be paying tax
2 on gas, we'll be paying property tax on new
3 resources, and of course once we invest in new
4 resources, self-generation is going to be the rule of
5 road for us for the foreseeable future, because we'll
6 not install a new gas-fired machine and then just let
7 it sit idle.

8 COMMISSIONER HEMSTAD: Well --

9 MR. CAMERON: At least not without
10 continuing to pay the property taxes.

11 COMMISSIONER HEMSTAD: Is it possible,
12 setting aside the self-generation issue, which will
13 be what it will be, can the parties by the contract
14 here, on 449 power purchases, agree to pay
15 contributions in lieu of taxes to whatever would have
16 been the tax receiving entities?

17 MR. TROTTER: I don't see that happening.

18 COMMISSIONER HEMSTAD: You mean because
19 parties wouldn't agree to that?

20 MR. TROTTER: Yes.

21 MS. DAVISON: Perhaps I could take a moment
22 and address the tax issue from my clients'
23 perspective. Madam Chair started her remarks with a
24 notion that 449 may be an option that is selected
25 because it has a tax advantage. I would like to make

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1 it clear for the record that that is not my clients'
2 perspective.

3 Our point of view is that we do not see 449
4 as a tax avoidance mechanism for us. We're looking
5 at this issue very carefully right now and it is
6 unclear to us whether, in fact, 449 is an ability to
7 avoid taxes. Other taxes that are comparable in
8 percentage size, such as use taxes, may very well
9 come into play. That was an issue in the natural gas
10 situation that was resolved a few years ago through
11 some legislation at the state level.

12 It is our very clear anticipation that, one
13 way or another, we're going to be paying taxes,
14 whether we're going to be paying taxes immediately
15 through the imposition of a use tax or whether the
16 legislature will come up with a mechanism along the
17 same lines as what happens with natural gas.

18 COMMISSIONER HEMSTAD: But I don't
19 understand that. The use tax is a tax asserted in
20 place of a sales tax. We're talking about utility
21 tax. It's something entirely different.

22 MR. SUMMERS: Your Honor, I think there is
23 a very serious question --

24 COMMISSIONER HEMSTAD: And say who you are.

25 MR. SUMMERS: I'm Dan Summers, with Boeing.

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1 There is a very serious question whether, as the
2 state use tax is structured, that it may apply to
3 this situation. It has to be researched further.
4 I'm not a tax lawyer, so I'm not willing to say
5 that's my opinion, but there's a very serious
6 question, and I think we have to look at it.

7 CHAIRWOMAN SHOWALTER: Well, if it does
8 apply, then most of my -- my concern here goes away.
9 But you say you're not going to do this just to avoid
10 taxes. I'm sure that's true. But I think price will
11 be a big factor in what supplier a customer chooses.
12 And let's take Power X in Canada. I know they have
13 good prices, so they're very likely to be
14 competitive. I assume they can market their power
15 either directly or through a marketer. So I think
16 that's a -- and these customers, many of them are up
17 that way. So I assume that's a reasonable assumption
18 that somebody might use this very scenario.

19 If someone can show or concede that it is a
20 taxable event, then the number is going to be the
21 same as the 448 scenario.

22 COMMISSIONER HEMSTAD: It wouldn't be the
23 same, would it? I mean, the local utility tax is
24 independent of the sales and use tax.

25 CHAIRWOMAN SHOWALTER: Well, wasn't it --

02208

1 oh, I thought one of the arguments was that this
2 marketer, this Canadian person, might be a power and
3 light business. Maybe that's one line by which it
4 might be taxable. Maybe there's another line.

5 MR. BERMAN: Your Honor, Mr. Trotter had
6 raised the issue of whether it was a business that
7 was operating within the state of Washington. I
8 would note to clarify that, that as a general matter,
9 whoever the supplier is will have to deliver the
10 power to a delivery point on the Puget Sound Energy
11 system. In general, that will be a point within the
12 state of Washington, so the power supplier will in
13 fact be delivering power to a place in Washington
14 state where it transfers the power onto the Puget
15 system.

16 And even from then, if it's under 449,
17 Puget doesn't take ownership of the power. It gets
18 moved across the system and is transferred to the
19 customer -- it's transferred directly to the customer
20 in Washington State.

21 So I think that there are -- again, I don't
22 claim to be a tax lawyer, but there are reasons to
23 believe that the tax could apply. Again, that's a
24 reason why the company, being very cautious, put in
25 that Section 7.6. We were fearful that a tax could

02209

1 be assessed and wanted to be sure that it was the
2 customers who continued to bear the responsibility
3 for that tax.

4 MS. DAVISON: If I could add, again, as Mr.
5 Summers said, we're continuing to look at this issue,
6 but if, in fact, the use tax does apply, that may
7 very well result in higher taxes being paid than
8 under the utility tax.

9 We appreciate that this is a serious issue.
10 As I said, it's not our intent to avoid taxes. We
11 know that, looking at what's happened in the natural
12 gas industry, that the tax issue will be dealt with.
13 We're very cognizant of that. It's a complicated
14 issue, and we're continuing to look at it.

15 COMMISSIONER HEMSTAD: I take it in good
16 faith that it is not your intent to avoid taxes, but
17 it may be the consequence of whether there was an
18 intention or not. And I guess that's our concern.

19 MS. DAVISON: As a practical matter, we do
20 not believe that it's politically sustainable for us
21 to avoid taxes.

22 CHAIRWOMAN SHOWALTER: Well, then that may
23 be, but to say it will be addressed doesn't deal with
24 the this year and the next year and the next year.
25 That is, it takes time for the legislature to react,

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1 unless you all agree this will be addressed. And you
2 know, there's some days left before the session is
3 over.

4 What I am looking for is, one, a deeper
5 understanding of what the consequences are, and I
6 think this has been a good discussion, but it's not
7 going to be sufficient for me to say there's reason
8 to believe that the tax might have to be paid. I
9 want some better degree of understanding that it
10 probably will be or probably won't be or the very
11 strong argument is that it will be or it won't be,
12 and -- or just an agreement to pay it in some form or
13 an agreement to get a legislative change.

14 I don't know what the or is. What I know
15 is that a \$10.2 million hit to the general fund is a
16 big deal in this state at this time. And it's not
17 something to say, well, the legislature will get
18 around to it some year. We will hear from this
19 legislators immediately, unless I'm wrong. Because I
20 think the legislators and the governor's office and
21 others have a great interest in the customers before
22 us and the issue before us.

23 It's not that I am opposed to this
24 settlement. It's that there's very important players
25 who are not in this room who are concerned about

02211

1 revenue. And without knowing what they think, it's a
2 little hard for us to preempt them.

3 MR. BERMAN: Your Honor, I wanted to assure
4 you that the company certainly does not like a
5 situation that says that power sales by the company
6 are taxed and power sales by some others are not
7 taxed. That doesn't seem to be an equitable
8 situation to us. And so from our perspective,
9 legislation that cleared this up would be a good
10 thing.

11 Whether we could -- it's not clear to me
12 that we can make that happen on our own.

13 COMMISSIONER HEMSTAD: Well, it's not
14 realistic. I mean, there's one week left before the
15 cutoff. Well, you'd have to introduce a whole new
16 bill, and that's not realistic in this current
17 session.

18 CHAIRWOMAN SHOWALTER: Well, I guess I'd
19 say it's not very probable, but I will say there's
20 some parties in this room who've made some
21 legislation happen pretty quickly, so -- where they
22 want it.

23 COMMISSIONER HEMSTAD: But I repeat, this
24 whole settlement arrangement is, I think, treading on
25 legislative toes to begin with. It's given me some

02212

1 unease, not in a sense of whether it's desirable or
2 not, but in the sense of who sets policy. And the
3 legislature is always asking us that question. We're
4 the legislature, you're not. And when you overlay on
5 top of that this additional layer of a tax hit, all I
6 can say is we will collectively be in front of some
7 committee getting our butts kicked hard.

8 MS. DAVISON: If I could perhaps make an
9 offer that I may run the risk of my colleagues --
10 being very unpopular with my colleagues, but I would
11 like to retain some legal tax expertise and present a
12 legal brief to you on this issue so that we do know,
13 you know, we've begun the research, we did not have
14 time to reach a definitive conclusion on this, and I
15 would certainly feel more comfortable if we knew for
16 certain what the legal, you know, at least from one
17 perspective, what the legal ramifications are of
18 this.

19 JUDGE MOSS: Time to teach some tax lawyer
20 what it's like to be a trauma three adjudicator, huh?
21 Keep him up all night.

22 MS. DAVISON: Oh, I don't -- I didn't mean
23 to suggest we'd have a brief tomorrow.

24 MR. TROTTER: Your Honor, I'd also like to
25 at least request the opportunity to brief the issue

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1 as to whether this is an issue that ought to be
2 considered under the public service laws. I don't
3 know one way or the other. I'd like the opportunity
4 to consider that more closely than the time we've had
5 so far to do that.

6 MR. BERMAN: Your Honor, I would say that
7 it is important that we keep in mind that, under the
8 settlement, we have only up until April 9th for a
9 resolution to happen. Also, I would throw out there,
10 because this is cost-free to the company, that
11 perhaps the Attorney General's office might be able
12 to supply someone who has an opinion on the state tax
13 laws. And I know we've already heard from people
14 from the Attorney General's office, but perhaps there
15 are people who are currently involved in tax law
16 issues who have an opinion on this.

17 COMMISSIONER HEMSTAD: Mr. Trotter just
18 spent several years in that building.

19 MR. TROTTER: Well, but the point I think
20 is that the offering that the Staff has made, and it
21 was drafted by me and reviewed by Staff, but it is
22 just my opinion; it's not an opinion of the Attorney
23 General's office. I think everyone understands that.
24 But if we're shooting for April 9th, I can probably
25 assure you that it's probably not practical.

02214

1 JUDGE MOSS: Well, it does strike me, at
2 least, that the whole process would benefit by some
3 further effort in this regard along the lines of
4 what's been offered, because we've heard the
5 expressions of discomfort from the bench, and I don't
6 think we're going to raise that comfort level today.
7 I suspect people have offered as much as they
8 individually have to offer to do that today, and it
9 does not appear to me that we've achieved a
10 sufficiently high comfort level.

11 So it looks like we need to talk about some
12 means to get this information to the bench in a
13 timely way. And while I was making light about the
14 trauma three tax lawyer, we do need to talk a little
15 bit about timing and so forth. And you know, we --
16 of course, these settlements come to us with their
17 terms and provisions all worked out, and we don't
18 know why the April 9th date is particularly important
19 and whether there's any flexibility in that date, or
20 any of those sorts of questions. We don't have
21 answers to any of those, so you all will have to
22 inform us on those things and also talk about the
23 best means to proceed.

24 I wonder, and I'm just thinking out loud,
25 whether it would be useful to take a brief recess to

02215

1 allow the parties to discuss among themselves how
2 they might collectively wish to better inform the
3 bench on this subject, since it would appear to be in
4 your mutual interest to find some means of doing
5 that, if the bench is also agreeable with my
6 suggestion.

7 CHAIRWOMAN SHOWALTER: I am. I want to
8 make it clear, though. This isn't the end. I think
9 we've covered the basic subjects we're interested in.
10 But we do need tomorrow to go through sort of
11 page-by-page, clarifying words or things that we
12 don't understand. So there is time to reflect
13 tonight on this and come back. And whether it's
14 better to reflect right now and come back in half an
15 hour or better to come back tomorrow --

16 JUDGE MOSS: What do the parties prefer in
17 that way? Would you all wish to reflect overnight or
18 try to come up with something now and inform us?

19 MR. CAMERON: Well, I'd suggest we reflect
20 overnight. As we tender additional memoranda on the
21 tax issues, I don't think we want an overnight
22 wonder. We want to deliberate on it. We want to
23 probably contemplate a couple likely scenarios to
24 which we can attach numbers. We may do so
25 individually or at least exchange drafts before

02216

1 they're tendered, but I think we'd be well advised to
2 take the night on that one.

3 CHAIRWOMAN SHOWALTER: You know, I'll make
4 just another observation. I asked this question as
5 kind of a maximum, that is, the maximum 300. To the
6 extent that there are definite plans for
7 self-generation or something that reduces the 300,
8 because it's clearly going to be in another camp or
9 highly probably will be, that also can make a
10 difference.

11 MR. CAMERON: That's exactly what I was
12 thinking of in the case of ARCO.

13 JUDGE MOSS: Well, it does sound like the
14 better course of action, then, would be for us to go
15 ahead and recess for the day and let the parties
16 begin to make their plans for this sort of thing.
17 Although, having said that, it occurs to me, as I
18 look out and see Mr. Woodworth sitting there, that we
19 need to probably take up before the end of the day
20 whether you are going to need to make a statement or
21 argument on the record or whether something has been
22 worked out. I'd just like to get an update on the
23 status of King County's situation in the case.

24 MR. WOODWORTH: Yes, Thank you, Your Honor.
25 Don Woodworth, from King County Prosecutor's Office.

02217

1 We have been engaged throughout the day in sporadic
2 discussions about how to procedurally resolve the
3 status of King County in this matter. We have not
4 reached agreement. We have come close. I think I
5 would like to continue my reservation of the right to
6 make an opening statement and, as has been suggested,
7 reflect a bit more overnight and come back here
8 tomorrow.

9 JUDGE MOSS: All right. That sounds good.

10 COMMISSIONER HEMSTAD: Perhaps we can close
11 with your opening statement.

12 CHAIRWOMAN SHOWALTER: Well, I want to --
13 one follow-up question before I forget it, and it was
14 to Mr. Cameron, when we were talking about whether
15 448 customers can self-generate and why 449 is more
16 flexible and that.

17 I'm looking at Schedule 448, Section 3.5,
18 and it's called termination of service due to
19 self-generation. And it says customer may terminate
20 service under this schedule because it has installed
21 self-generation and will not be subject to
22 distribution, stranded costs, et cetera, et cetera.

23 I took this to mean that you didn't have to
24 be on 449 or 448 to be entitled to nevertheless
25 self-generate. What is it about 449 that's more

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1 beneficial for self-generation?

2 MR. CAMERON: It's only indirect. I would
3 agree that the provisions of 448 and 449 regarding
4 self-generation are symmetrical. It gets back to the
5 point about dealing directly with power suppliers.
6 Even assuming we go to self-generation and assuming
7 that it doesn't exactly match our load, which is
8 somewhat dynamic, there will be periods of time, both
9 short or conceivably long, when we either have too
10 little or too much generation, leaving us with a need
11 to go to the market.

12 And again, the idea of dealing with third
13 party suppliers with guaranteed privity of contract
14 to retail wheeling compared to the buy-sell
15 transaction, which has an intermediary and arguably
16 muddies up the privity of contract issue, that's
17 really the issue. It's the business flexibility of
18 dealing directly with third parties writing your own
19 contracts, having clear bilateral relationships where
20 there's no question about privity of contract.
21 That's really the issue.

22 It's the fundamental choice for us between
23 448 and 449, whether it involves self-generation or
24 purely off-system purchases.

25 CHAIRWOMAN SHOWALTER: Then I wanted to

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1 just make one follow-up comment to Mr. Trotter on the
2 issue of whether we can properly consider taxes under
3 the public service laws, and I -- I guess I'll just
4 pose two issues. One is don't we, in general, use a
5 public interest test, which is, we've always said,
6 and many, many Commission orders have said, is very
7 broad, but further, this is a settlement that we're
8 accepting, and the settlement has lots of provisions
9 in it that we could not otherwise order. We can't
10 order someone to renounce their rights, et cetera.
11 Their -- well, rights is not quite the right word.

12 But what I'm trying to get at is, in
13 considering a settlement of issues, as opposed to a
14 full adjudication of a dispute under the public
15 service laws, is there a broader realm of public
16 interest discretion, I guess, in whether to accept
17 that settlement?

18 COMMISSIONER HEMSTAD: I'd make one further
19 comment, also. I'd acknowledge Mr. Trotter's
20 comment, and I understand the trade-offs that
21 everybody makes in coming together with a settlement.
22 That having been said, at least I pose again the
23 issue of whether some device for contributions in
24 lieu of tax for those circumstances where the tax
25 otherwise would not be paid could be a solution.

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1 CHAIRWOMAN SHOWALTER: And I guess I would
2 like to close, if we're closing, where I began this
3 morning, to acknowledge again how much work has gone
4 into this settlement and how many pieces there are,
5 many which we're not inquiring about at all. Your
6 answers on the subjects we raised were very
7 informative and clarified a lot of issues for me, so
8 I hope that you can do just a little bit more work
9 and we can resolve some of the cloudier issues here.

10 JUDGE MOSS: Let us then, with a sense of
11 encouragement in our hearts, declare a recess for the
12 day until tomorrow morning at 9:00.

13 (Proceedings adjourned at 4:54 p.m.)

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