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BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)
TRANSPORTATION COMMISSION,)Docket UE-032065
Complainant,)Volume II
)Pages 34-108
v.)
)
PACIFICORP d/b/a PACIFIC POWER &)
LIGHT COMPANY,)
Respondent.)

A pre-hearing in the above-entitled matter was held at 10:09 a.m. on Monday, August 30, 2004, at 1300 South Evergreen Park Drive, Southwest, Olympia, Washington, before Administrative Law Judge DENNIS J. MOSS, Chairwoman MARILYN SHOWALTER, Commissioner RICHARD HEMSTAD, and Commissioner PATRICK OSHIE.

The parties present were as follows:

COMMISSION STAFF, by Shannon Smith, Assistant Attorney General, 1400 S. Evergreen Park Drive, S.W., P.O. Box 40128, Olympia, Washington, 98504-1028.

PACIFICORP, by James Van Nostrand, and Stephen C. Hall, Attorneys at Law, Stoel Rives, LLP, 900 S.W. Fifth Avenue, Suite 2600, Portland, Oregon 97204.

Barbara L. Nelson, CCR
Court Reporter

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1 PUBLIC COUNSEL, by Robert Cromwell,
Assistant Attorney General, 900 Fourth Avenue, Suite
2 2000, Seattle, Washington 98164.

3 INDUSTRIAL CUSTOMERS OF NORTHWEST
UTILITIES, by Melinda Davison, Attorney at Law,
4 Davison Van Cleve, P.C., 1000 S.W. Broadway, Suite
2460, Portland, Oregon 97205.

5 NATURAL RESOURCES DEFENSE COUNCIL, by
6 Ralph Cavanagh, Northwest Project Director, 71
Stevenson Street, Suite 1825, San Francisco,
7 California 94105. (Appearing via teleconference
bridge).

8 CITIZENS UTILITY ALLIANCE OF
9 WASHINGTON, by John O'Rourke, Program Director, 212
W. Second Avenue, Suite 100, Spokane, Washington
10 99201. (Appearing via teleconference bridge.)

11 THE ENERGY PROJECT/THE OPPORTUNITY
COUNCIL, by Chuck Eberdt, 1701 Ellis Street,
12 Bellingham, Washington 98225. (Appearing via
teleconference bridge.)

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1 JUDGE MOSS: Let's be on the record. Good
2 morning, everyone. My name is Dennis Moss. I'm an
3 Administrative Law Judge, Washington Utilities and
4 Transportation Commission. I'll first remind
5 everybody, when they speak today, to turn on their
6 microphones.

7 We are convened for purposes of conducting a
8 pre-hearing conference in the matter styled
9 Washington Utilities and Transportation Commission
10 against PacifiCorp, doing business as Pacific Power
11 and Light Company, Docket Number UE-032065.

12 We had previously been scheduled to begin
13 our evidentiary hearings today. In the last week,
14 we've had the development of a multi-party
15 settlement, that is to say a settlement between some,
16 but not all the parties in the proceeding being
17 filed, and this has led to some informal discussions
18 with me involved and the parties, and we needed to
19 have a formal discussion concerning how best to
20 proceed in light of the development. And so that is
21 our essential purpose today.

22 Let me take the appearances, and then we
23 will talk a bit about the event of the settlement
24 filing, our process and procedure, what we'll need to
25 do and related matters, and then we'll see if there's

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1 other business we need to conduct. I'm hoping we can
2 finish up this morning. So let's begin with
3 appearances by the Company.

4 MR. VAN NOSTRAND: Thank you, Your Honor.
5 On behalf of Applicant PacifiCorp, James N. Van
6 Nostrand and Stephen C. Hall.

7 JUDGE MOSS: And we can do the short form,
8 since everybody's previously entered an appearance.

9 MS. DAVISON: This is Melinda Davison, on
10 behalf of the Industrial Customers of Northwest
11 Utilities.

12 JUDGE MOSS: Thank you.

13 MR. CROMWELL: I'm Robert Cromwell,
14 Assistant Attorney General, on behalf of Public
15 Counsel.

16 MR. CAVANAGH: Ralph Cavanagh, for the
17 Natural Resources Defense Council.

18 MS. SMITH: Shannon -- I'm sorry, Shannon
19 Smith, for Commission Staff.

20 JUDGE MOSS: Was that you, Mr. Eberdt?

21 MR. EBERDT: This is Chuck Eberdt, from the
22 Energy Project. Thank you, Judge.

23 MR. O'ROURKE: This is John O'Rourke, for
24 the Citizens Utility Alliance.

25 JUDGE MOSS: All right. Well, I believe

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1 that covers all of our parties, so we have all of our
2 appearances. We can launch immediately, then, into
3 our discussion. And of course, we'll want to hear
4 the parties' thoughts this morning, and of course
5 we've had some discussion informally, but I'll remind
6 you all that we have -- this is our formal
7 discussion.

8 And of course the Commissioners are sitting
9 with us this morning and they, of course, are the
10 ultimate decision-makers here. And we haven't made
11 any decisions, although we talked about some
12 tentative possibilities.

13 Essentially, we are operating in an
14 environment where there are a couple of fundamental
15 procedural options. One is to take the settlement up
16 by its terms, which includes the term whereby if the
17 settlement -- if the Commission rejects the
18 settlement or if the Commission conditions the
19 settlement in such a way that one or the other of the
20 two settling parties finds unacceptable, then they
21 may withdraw. And in either of those eventualities,
22 the settlement, by its terms, provides that we will
23 then go back to our litigation posture and proceed as
24 if the settlement had not been filed, I suppose.

25 There is a statement in the settlement

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1 agreement, and by the way, when I refer to the
2 settlement agreement this morning, I am referring to
3 the revised settlement agreement. Although it is not
4 substantively different from the original, it does
5 include the NRDC provision.

6 So in any event, the settlement does provide
7 that if we follow the settlement by its terms and the
8 circumstances eventuate such that the settlement is
9 taken off the table, so to speak, then the Company --
10 the settlement says the Company will consider waiving
11 the suspension date, which is a matter that I
12 mentioned in informal conversation with the parties
13 of some significance because of the timing here. We
14 are up against the previous hearing schedule, which
15 was determined with the suspension date in mind, and
16 so we are in a very tight situation if we were to
17 follow the settlement by its terms and end up having
18 to essentially have two hearings.

19 The other fundamental option is that the
20 Commission can consider the settlement as a statement
21 of joint position by PacifiCorp and Staff, a joint
22 position as to the appropriate resolution of the
23 case, and I'm sorry, and NRDC, considering such
24 evidence as the parties elect to put on through
25 previously-scheduled witnesses and those witnesses'

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1 pre-filed testimonies and exhibits, and then, of
2 course, in either case we could allow for
3 supplemental testimony and, of course, the settling
4 parties have already filed some supplemental
5 testimony on Friday, and that, in turn, accompanied
6 by, I think, seven exhibits.

7 So those are the two fundamental options
8 that we see as we sit here this morning, and I
9 suppose I should open the floor -- well, first, ask
10 if any of the Commissioners wish to comment and then
11 open the floor to the parties to tell us what they
12 think.

13 CHAIRWOMAN SHOWALTER: I don't -- I just
14 would like to hear from the parties as to how they
15 feel the timing and proceedings ought to go. We have
16 done this both ways, as Judge Moss has indicated.

17 MR. VAN NOSTRAND: Your Honor, we hadn't
18 really considered that second option, that being
19 filed as a joint position. I guess, looking at the
20 first option, considering the settlement and moving
21 forward on that basis, I guess one of the
22 complications that we see is that we are proposing to
23 offer, as testimony in support of the settlement
24 agreement, all the pre-filed direct and rebuttal
25 testimony of the Company and all the pre-filed

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1 testimony of Staff. And it seems when the Commission
2 considers that settlement, we would want that
3 evidence to be considered along with the settlement
4 agreement and the testimony supporting the settlement
5 agreement, and it seemed like the opposing parties,
6 ICNU and Public Counsel, would want to have the right
7 to cross-examine those witnesses comprising the
8 Company's direct and rebuttal case before that
9 evidence is included in the record for the Commission
10 to consider in support of the settlement agreement.

11 So that was sort of a concern that we'd
12 identified. Just taking the settlement agreement by
13 itself is -- I mean, it's obviously whatever ICNU and
14 Public Counsel want in terms of calling the Company's
15 and Staff's witnesses, but it's not just the panel
16 supporting the settlement agreement's testimony that
17 would be in the record. We would want all the other
18 supporting testimony, and that opens the right for
19 cross-examination.

20 CHAIRWOMAN SHOWALTER: Well, that --
21 actually, that sounds more like the second option.
22 That is, we simply proceed with the case, all the
23 evidence comes in, the witnesses on the stand may
24 say, Yes, this was my testimony then, but this is --
25 this settlement position is a reasonable compromise

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1 of our position.

2 That was similar to our handling in the
3 Qwest Dex case. That is, we went ahead with the
4 proceeding, but there had been a settlement of all
5 parties, actually, but one, and we were able to
6 handle both the original testimony that came in and
7 the settlement testimony that came in later. So
8 maybe that's the way to do it.

9 MS. SMITH: Your Honor, this is Shannon
10 Smith, for Commission Staff. That's what we were
11 anticipating would be our preferred option for going
12 forward with this case, would be to put on our cases
13 and put on the settlement and put on the settlement
14 panel and hear the testimony -- or hear the
15 cross-examination on the settlement and hear any
16 opposing testimony that the parties who aren't
17 joining the settlement would like to bring forward,
18 as well.

19 CHAIRWOMAN SHOWALTER: And actually, I
20 believe it also gives the opposing parties the most
21 flexibility in terms of cross-examining either the
22 original testimony or the settlement testimony.

23 JUDGE MOSS: It raises in my mind the
24 question, then, what would be the purpose of the
25 contemplated process that would follow if the

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1 Commission said, Well, we've considered everything
2 and we don't think the settlement is the appropriate
3 resolution, but we have all the evidence before us,
4 we think this is the appropriate resolution? Or if
5 the Commission said, Well, we've got all this
6 evidence and we accept the settlement as an
7 appropriate resolution of nine of its 10 points, but
8 on its tenth point, we fundamentally disagree and
9 make this decision instead of what the parties,
10 through settlement, have proposed.

11 What, then, would be the purpose of this
12 apparently contemplated second round of litigation in
13 you all's mind?

14 MR. VAN NOSTRAND: Well, I think we're
15 talking about a bunch of what-if scenarios, but that
16 seems to be the scenario that the Commission's rules
17 contemplate in this area, that if the settlement is
18 approved with different conditions, that the parties
19 go back to as if the settlement hadn't occurred and
20 the proceedings continue from there. And I guess we
21 hadn't spent a whole lot of time thinking about what
22 could happen in that second round of hearings, but we
23 were trying to conform with what the rules themselves
24 seem to contemplate.

25 CHAIRWOMAN SHOWALTER: Well, that's where,

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1 in the Qwest Dex case, I think we thought we were
2 just deliberating on the whole case, and we had in
3 front of us a settlement position that was contested
4 and we deliberated on it, and then we accepted the
5 settlement.

6 So it's hypothetical, but I believe had we
7 said, Well, we accept a settlement, but we don't like
8 two conditions, that we would have thought that was
9 our final decision.

10 COMMISSIONER HEMSTAD: Well, or we could
11 have, I think, rejected the settlement and decided
12 that case on the testimony as filed. For example,
13 having -- we could have agreed entirely with the
14 Staff position, who were the non-settling party, and
15 entered an order accordingly.

16 CHAIRWOMAN SHOWALTER: That would be my
17 view, too, but I think we didn't think at that time
18 that all the parties could start over with another
19 case because the settlement was rejected. In other
20 words, that the settlement came in really as a
21 position in the case, which we then proceeded to
22 decide.

23 MR. VAN NOSTRAND: In this case, I guess
24 what you would be missing is we would not be -- the
25 Company would not be cross-examining the Staff

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1 witnesses, the Staff would not be cross-examining the
2 Company witnesses.

3 CHAIRWOMAN SHOWALTER: Right.

4 MR. VAN NOSTRAND: I think there's also the
5 issue of the revised protocol, whether or not that's
6 in the record. There's a motion to strike by Staff,
7 which, for purposes of the settlement, the Company
8 has agreed not to offer their revised protocol
9 testimony.

10 So if we had another round of hearings, we
11 would, I think, have to decide that motion to strike
12 on the merits and decide whether the revised protocol
13 would be considered in an additional round of
14 hearings. I think that's an issue of great
15 contention between Staff and the Company, and it
16 would potentially have -- it would mean that that
17 additional round of hearings, I think, would have
18 some substance to it that would be considered issues
19 that were potentially different than in the initial
20 round of hearings.

21 CHAIRWOMAN SHOWALTER: So this is really --
22 I think what you're proposing is maybe just a third
23 way to think of this, which is a very full and
24 complete hearing on the settlement, which includes
25 all the original testimony, but that if, at the end

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1 of it, we did not accept the settlement, the parties,
2 in particular, the settling parties, but also the
3 others, would have the right to have another round.

4 That, though, brings us -- if that's the
5 case, then we don't have enough time under the
6 statutory deadline to ensure that all of that might
7 happen, which would mean, in order to go that route
8 and not simply decide the case based on whatever
9 evidence we received in the first round, before we go
10 there, we pretty much have to have a waiver of
11 something like two months, I'm not sure, of the
12 statutory deadline. Otherwise, we can't be assured
13 that we can get through both rounds, if that's where
14 it all leads.

15 MS. SMITH: Your Honor, I might offer
16 another perspective on this, too, and this may be
17 something that the Company doesn't -- the Company may
18 not be in agreement with Staff's position on this
19 issue, but Staff contemplates that whatever
20 subsequent hearing is necessary, if the Commission
21 were to accept the settlement in part or reject the
22 settlement, any further process would be informed by
23 the Commission's decision in that regard.

24 So we would have a Commission order and the
25 Commission order would be out there, and the parties

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1 would have to go forward under the terms of that
2 order. So our position is that whatever would come
3 after that would be very well informed by that order.
4 So I guess we're not really looking so much at a
5 clean slate as we are looking at an opportunity to
6 bring some other issues for the Commission's
7 consideration that are informed by the Commission's
8 order.

9 CHAIRWOMAN SHOWALTER: And that surely would
10 probably be true. You'd have some sense of what we
11 thought about the whole case. We're just thinking of
12 the time, that is, our calendars. Really, that's all
13 it is. If there's any more process that is needed,
14 and there could well be, then it's got to occur
15 sometime and there have to be some briefing
16 afterwards and that kind of thing.

17 Now, obviously our opinion might inform all
18 the parties on some settlement, but we certainly
19 wouldn't count on that. So that's -- I think that's
20 our dilemma, is how do you go forward with this as a
21 settlement hearing where we're not ultimately going
22 to take that evidence and decide the case without
23 having some kind of extension of time on the other
24 end?

25 MS. DAVISON: Your Honor, this is Melinda

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1 Davison, and I'd like to weigh in on this issue. I
2 think the two options that you presented are quite
3 interesting, from our perspective, and we would
4 support option number two for a variety of reasons,
5 not the least of which is we couldn't quite figure
6 out logistically how we could work to have all of the
7 evidence coming in, as Mr. Van Nostrand said, have
8 the settlement rejected, and then do we have a
9 hearing again on the same evidence and do we
10 cross-examine the same witnesses and -- procedurally,
11 I couldn't get it clear in my mind exactly how that
12 would work.

13 I think that option number two is a very
14 good way to efficiently proceed, and I agree with Ms.
15 Smith that if there is a need for a second hearing,
16 then that second hearing should be limited to the
17 issues that are identified by the Commission based on
18 the Commission's order.

19 Otherwise, I think you have this very, very
20 unusual situation of potentially having two hearings
21 on the same evidence and giving the Company
22 essentially two shots at this rate increase. And we
23 would have some difficulty with that, as well.

24 One side point that I did want to respond to
25 that Mr. Van Nostrand raised with regard to the

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1 motion to strike on the revised protocol. It is my
2 client's hope that the Commission will substantively
3 rule on that notwithstanding the settlement, because
4 I think the settlement raises some very serious
5 issues as it relates to the revised protocol, and
6 from our perspective, the settlement, in effect,
7 dictates that the revised protocol stay in the case,
8 because the settlement proposes to actually have the
9 Company submit regulatory filings based on the
10 revised protocol. I'm not sure how that can happen
11 without there being a revised protocol in evidence in
12 this record.

13 So perhaps I'm overreacting to what Mr. Van
14 Nostrand said, but I think that the issue of the
15 revised protocol is very front and center in this
16 case based on the settlement, as proposed.

17 JUDGE MOSS: Now, I think your concern is
18 well-stated. Indeed, it's on my agenda that we need
19 to discuss the matter of the pending motion to
20 strike, as it's styled, because we do have the
21 response filed by ICNU, and I honestly don't recall,
22 was that the joint response with Public Counsel?
23 Yes, it was, a joint response with the idea being
24 that the appropriate way to proceed is to not, if you
25 will, strike the testimony on the revised protocol,

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1 but for us to consider it, but to do so in the light
2 of an opportunity for ICNU and Public Counsel, at
3 least, to file surrebuttal testimony.

4 That's basically your argument, that that's
5 the right way to proceed.

6 The Company, in the meantime, has agreed,
7 through the settlement process, that they would
8 simply not oppose, I think, Staff's motion.

9 Your point is taken that the revised
10 protocol is, in a sense, a part of the settlement in
11 that that's what's provided on a going forward basis
12 for filings. So that is something we need to
13 consider this morning in connection with the other
14 matters that we're considering.

15 CHAIRWOMAN SHOWALTER: I just have a
16 practical question. If we go ahead, hearing the
17 settlement, bringing in all the testimony and hearing
18 cross-examination on it, starting -- well, starting
19 next Monday -- or, no, not Monday, Tuesday --
20 sufficient? Is that -- I mean -- Ms. Davison, you're
21 shaking your head, so I just want to get a sort of
22 practical sense of what you think you need and why.

23 MS. DAVISON: We would need several weeks to
24 prepare for hearing, and the reason why is that, on
25 Friday, all the numbers in this case changed. There

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1 is a new grid model run, there are new numbers that
2 both the Company and the Staff are proposing. We
3 don't understand the basis for those numbers. We
4 need to conduct discovery on those to understand what
5 -- some aspects of the settlement are the classic
6 black box, some aspects of the settlement are not,
7 and it is our view that we need to have the
8 opportunity to understand completely what the basis
9 is for these various settlement numbers, and there is
10 a fair amount of disagreement as it relates to the
11 allocation methodology, as well.

12 These are not simple, you know, matter of
13 arithmetic kinds of issues. There are issues that
14 are raised by the settlement that deal with the --
15 with two deferred accounts. There are issues in the
16 settlement that deal with prudence of resources that
17 we just, quite frankly, can't understand what the
18 parties are agreeing to there. They're saying that
19 they're not making findings with regard to the
20 prudence of these resources, but yet they're asking
21 that these resources be put in rates. We can't
22 understand that. We need to have some discovery to
23 figure out what that means.

24 I can give you lots of examples along those
25 lines. This is a very complex settlement that, on

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1 its face, isn't obvious.

2 CHAIRWOMAN SHOWALTER: Well, I guess I'd
3 like to ask some questions about that, because, in
4 the past, the settlement is the settlement and we try
5 to understand what its terms are, but we do not
6 inquire into the why of the settlement, because to do
7 so pries into the negotiations that are informal, and
8 it compromises, really, the confidentiality of the
9 discussions that went on and that we're not part of,
10 and so we try to understand that the terms of the
11 settlement are, first of all, understandable, and
12 then have some basis which, traditionally, has been
13 the parties have had different positions, but this is
14 sort of a reasonable balance of those positions.

15 We have not treated the settlement as a
16 brand new set of testimony positions with -- as if
17 it's a brand new case, a new filing, and I guess I'd
18 like to hear from the parties, because we generally
19 do want to encourage settlements if they're
20 reasonable, and what would that kind of approach do
21 to the settlement process?

22 MS. DAVISON: Perhaps, if I could just
23 clarify what I'm referring to first before the other
24 parties respond. We're not seeking discovery into
25 the whys, you know, why did you take a million and

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1 zero and settle on 500,000. That's not the kind of
2 discovery that we're interested in. We, quite
3 frankly, can't really square what's happened with the
4 allocation methodology, for example. It doesn't make
5 sense to us.

6 So we're trying to understand what the
7 parties are proposing, because they're saying, Well,
8 we're -- for the settlement purposes, we're using
9 original protocol, but on a going-forward basis,
10 we're using revised protocol. We don't know what
11 that means. That's the kind of discovery that we're
12 looking for and that we need to understand.

13 We're also trying to understand what they
14 did in the settlement, because they have this unknown
15 \$600,000 attributable to Public Counsel and ICNU
16 adjustments, but we don't know what those are. So
17 we're trying to figure out what's happened to our
18 case, as well.

19 MS. SMITH: Well, Your Honor, this is
20 Shannon Smith, with Commission Staff. I don't know
21 what all has happened to ICNU's case or Public
22 Counsel's case. Their case is their case. The
23 Commission Staff has its litigation position, the
24 Company has its litigation position, and we've come
25 to an agreement where we think we can agree on rates

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1 that we believe are a compromise, and we believe the
2 rates are fair, just, reasonable and sufficient.

3 We don't have a case, so to speak, built
4 around the settlement. We have our litigation
5 positions and we have our compromise to reach a
6 settlement, and we don't believe it's proper for any
7 of the parties to probe into the whys behind why do
8 we agree on this particular adjustment when it's
9 different than our litigation position. That's the
10 very nature of settlement and that's the very nature
11 of compromise.

12 And with respect to allocations, for
13 purposes of settlement, to have a common ground, the
14 Commission Staff has agreed to use the original
15 protocol for purposes of setting the rates, but in
16 the future, when the Company has to file, when the
17 Company has to make filings, we've agreed that the
18 Company can use the revised protocol. We don't agree
19 that the revised protocol is adequate for setting
20 rates in this docket and we did not agree to settle
21 on the basis of setting rates with respect to revised
22 protocol.

23 We don't see it as being part of the
24 settlement in that regard, we don't see it as being
25 part of the case in that regard; we see it as a

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1 starting point, once the rates are determined, a
2 starting point for the Company to file additional
3 filings in the hopes that we can, at some point,
4 agree on an allocation methodology on a going-forward
5 basis.

6 JUDGE MOSS: Mr. Cromwell.

7 MR. CROMWELL: Thank you, Your Honor. Very
8 briefly, Your Honor. Chairwoman Showalter, to
9 address the last question you posed, I believe Ms.
10 Davison is correct in that the majority of what I'm
11 interested in understanding is the what, not the why.

12 That said, I think there are proper areas of
13 discovery that get to why, and I'll give you some
14 examples. During the course of discovery in the last
15 few months leading up to and including the filing of
16 the Company's rebuttal case and discovery thereafter,
17 one of the whys that I believe is appropriate is when
18 parties acknowledge maybe an error or a
19 miscalculation in their case, you know, the opposing
20 party conduct discovery and brings light to the
21 testifying witnesses -- brings attention to an issue
22 or, you know, a calculation of time, for example, on
23 taxes or some such thing, where that witness then
24 acknowledges that, Okay, yes, I made that mistake and
25 that needs to be addressed.

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1 I think that the majority of what Public
2 Counsel needs to understand about the settlement
3 agreement and the testimony that was filed on Friday
4 concerns the what, but there certainly are
5 outstanding issues of why certain issues were
6 resolved in the fashion that appears to be
7 represented here.

8 So I guess I see it as a two-step process.
9 One, I need to understand that, when they use a
10 certain phrase, exactly what they're meaning when
11 they're describing an element of the settlement, and
12 then, second, without attempting to breach the
13 confidentiality of settlement negotiations, you know,
14 was this an acknowledgement by one party to the
15 settlement that there had been a miscalculation and
16 they were trying to adjust the numbers to reflect
17 that and that's how they came to that resolution, or
18 was it simply a -- you know, I think Ms. Davison used
19 a zero, one million, we settled on 500, but --

20 CHAIRWOMAN SHOWALTER: Well, I mean, it
21 seems to me your second area gets right into those
22 issues. The important thing in a settlement is
23 simply to understand the what. How does this work,
24 what would be reported, that kind of thing. Then
25 it's up to the parties and the Commission ultimately

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1 to decide, Well, is that a reasonable way to proceed.
2 But asking was this a compromise between zero and a
3 thousand or was this an admission of an error, I'm
4 not sure why that is relevant to looking at a
5 settlement proposition.

6 MR. CROMWELL: Well, I think it's relevant
7 because if the Commission allows the non-settling
8 parties the opportunity to respond with testimony to
9 the settlement, for example, with revenue requirement
10 adjustments, if you've had the opportunity to review
11 the testimony, you'll notice that there is some
12 degree of overlap between Staff revenue requirement
13 witnesses, Public Counsel revenue requirement
14 witnesses, and ICNU revenue requirement witnesses.
15 Excuse me if I'm speaking too quickly.

16 And one of the things we need to understand
17 is does -- where does this settlement parse out, if
18 you will, and I'm visualizing this as a Venn diagram
19 of overlapping circles, and what portion of my
20 witnesses' testimony, if I can figure that out, is
21 addressed by the settlement and, you know, really
22 need not be -- I need not beat that horse before you
23 in hearings, and we can focus on just the issues that
24 still are in contest before you.

25 If I can't do that through discovery and

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1 trying to narrow down the focus of the proceeding
2 that's before you, then I believe, to competently
3 represent the interests that I'm here to represent, I
4 need to present the entire case that my witness has
5 testified to, and I just fear that's really going to
6 be very inefficient.

7 I think that some discovery as to why, to
8 loop it back to the original question, is relevant
9 and is proper. And I've got other issues I wish to
10 address today, but I'll just limit that to that.

11 On the second point you raised much earlier
12 regarding the suspension period, I did want to
13 comment, you know, perhaps taking a step back and
14 looking at this a bit abstractly, I think the real
15 crux of this, the legal issue that's going to come,
16 is if the Commission partially accepts a settlement,
17 then you have a question of the due process rights of
18 the settling parties in conflict potentially with the
19 suspension period, because I, frankly, having been on
20 the other side of this, I would see it if, were I in
21 that position, as my right to then come forward with
22 evidence that I had foregone presenting as a
23 consequence of entering that settlement,
24 cross-examination I had foregone on my co-settling
25 parties, and would want to have that occur.

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1 You used the Dex asset transfer case as an
2 example. I think in that case we didn't really have
3 the suspension period, so we didn't have that
4 tension, but, frankly, I mean, I think, you know, we
5 see it as a due process question in terms of our
6 ability to fully understand the settlement agreement,
7 the new evidence that's been brought forward to the
8 Commission last Friday, and present the case that we
9 believe should be presented on behalf of the folks
10 that we represent.

11 I think if, again, hypothetically, if we end
12 up in a situation where the settlement is partially
13 accepted and partially rejected, it may very well be
14 the settling parties, one or both of them, that are
15 seeking additional process and opportunity, and
16 that's really, I think, where the crux of the legal
17 issue's going to be in terms of the waiver of the
18 suspension period.

19 CHAIRWOMAN SHOWALTER: That's for them to
20 say. I mean, you have the right to put on whatever
21 case you want next week. I mean, that is, there's
22 been no change, I take it, in your position, so --
23 and the parties are allowing all the testimony to
24 come in, so it seems like your part of the case can
25 simply proceed however you determine is best.

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1 It would be the settling parties, I think,
2 that have to take one position now, and if it doesn't
3 work out, they want the right to prosecute the other
4 position.

5 MR. CROMWELL: I would add the nuance that I
6 think for me to properly present my case, it's going
7 to be very difficult to do so next week without
8 having the opportunity to completely understand the
9 settlement agreement, because I believe it's going to
10 be virtually impossible to present the case without
11 addressing the issues presented to the Commission,
12 assuming that there's a settlement panel of some sort
13 presented.

14 You know, I believe that we need additional
15 time to understand this, to have the opportunity to
16 respond to it formally, whether that's through
17 written testimony, oral surrebuttal, you know,
18 something. I just find it very difficult to be able
19 to do that within one week time.

20 CHAIRWOMAN SHOWALTER: Yeah, but now you're
21 speaking to a different point. The point you were
22 talking about before was what happens if we reject
23 the settlement and more time is needed to go to the
24 fuller case.

25 MR. CROMWELL: I think they're related,

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1 though. Again, as I stated before, using Mr. Dittmer
2 as the example, because it's the easiest one, there
3 are certain revenue requirement issues that he
4 testified regarding -- that I believe are probably
5 resolved through this settlement agreement.

6 It would be inefficient, at best, for me to
7 essentially beat the redirect on all those issues
8 when some of them may very well not be at issue here.

9 CHAIRWOMAN SHOWALTER: Okay. But which is
10 more efficient, taking the next three weeks, or at
11 least next two weeks and proceeding as you would have
12 proceeded or somehow finding a longer period of time
13 in order to have a fuller hearing later? In other
14 words, can't a lot of this occur in the next -- let's
15 say the following two weeks, which we have set aside
16 for this period, and then -- well, if we skip those
17 two weeks, if we don't have those this three-week
18 period, then we have a very difficult time finding
19 the time.

20 So why not proceed with the witnesses and
21 the testimony that you're all prepared for, I would
22 think, and maybe you do inquire into more than you
23 would have had you understood every implication of
24 the settlement, but I suspect it will all come out
25 anyway. I mean, why not go with where you want to go

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1 in this -- in a full proceeding?

2 MR. CROMWELL: Well, I think we certainly
3 could try to do that. That would not be what we
4 would request. I think that the question then would
5 be is there some other opportunity to respond to
6 what's been presented to us on Friday, or would it be
7 the Commission's expectation that that seven-day
8 period is going to be sufficient for us to develop
9 any response we wish to have.

10 You know, I think our position would be that
11 that is not an adequate time period to develop a
12 proper response in terms of presenting to the
13 Commission a record upon which it should base its
14 decision.

15 So I don't know if you're contemplating some
16 additional process that would be available for -- I
17 guess what I'm hearing, the question is aren't you
18 ready to go forward with your case that you would
19 have had to have gone forward with absent the
20 settlement agreement, and we could very well do that.

21 I don't know how to do that without having
22 some opportunity to thereafter then address the
23 issues here. We can talk about the original protocol
24 and the different options that are and aren't on the
25 table. We can talk about revenue requirement issues

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1 that may or may not be contested, but I think that
2 you have before you a very different case today than
3 you had before you a week ago.

4 MS. DAVISON: The question that is raised in
5 my mind -- yes, I am prepared to go with the original
6 case, I have cross-examination questions drafted, I
7 have 150 exhibits ready to be sought to be admitted.
8 However, I can visualize that I go with my original
9 questions and the answers I'll get is, Well, that's
10 been superseded by the settlement. My settlement
11 position now is X.

12 And so it will take some time for us to sort
13 through what is relevant for your consideration at
14 this hearing and what's not.

15 MR. VAN NOSTRAND: If I may address this
16 briefly. I agree that the case is significantly
17 different than it was a week ago. It's a lot
18 narrower. And I think the settlement agreement is
19 fairly unusual in the fact that we specifically
20 identified the adjustments of ICNU, Staff and Public
21 Counsel that we are accepting. And there may be a
22 little bit of confusion, but not much. It's fairly
23 clear which adjustments are being accepted. There's
24 a line item in the settlement agreement. We go down
25 through each of the adjustments that are being

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1 adopted. The case is substantially narrower than it
2 was a week ago.

3 And I'm skeptical as to all this additional
4 discovery that supposedly needs to be done. Frankly,
5 we've been served with a couple of sets of ICNU data
6 requests between Staff and the Company on the terms
7 of the settlement, there was a request for three-day
8 turnaround, the answers will be provided today. I
9 mean, many of the questions were inappropriate. They
10 go into the why and not the what.

11 But I think those answers that we think we
12 can answer we have provided, but there is -- these
13 issues have been litigated for the last six months.
14 And there was nothing new about the settlement
15 agreement. Some of the issues may have been
16 compromised, some have gone away, but there aren't
17 new issues that are raised. There are compromised
18 positions that settle those issues, and that's what
19 the settlement agreement clarifies, the issues that
20 have gone away because we've settled them.

21 But there's no additional discovery that
22 needs to be done on the underlying issues. We've
23 been doing that for the last six months.

24 CHAIRWOMAN SHOWALTER: I wonder if it's
25 reasonable to go ahead, use our time as proposed, and

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1 the question then, at the end of the hearing, would
2 be, to the opposing parties, Okay, is there something
3 else you need. That is, have you not understood the
4 settlement proposal, have you not found out something
5 you need to find out, have you -- is there more due
6 process on a settlement agreement.

7 This boils down to what is the right -- what
8 process is due on the settlement agreement, and I
9 think some is, but I'm not sure it's the same as a
10 full-blown case, but at the end of the time period,
11 perhaps it's easier to answer that question, what you
12 have not been able to determine.

13 It still doesn't answer the question of this
14 statutory deadline. Should we -- that's a separate
15 issue, but I guess my interest is in trying to use
16 the time we have set aside to get as far as we can go
17 and worry about, you know, the further processes
18 needed when you can -- we've all understood what has
19 occurred over several days of hearings, and see where
20 that leads.

21 In other words, having the hearings next
22 week does not preclude need for further witnesses,
23 but maybe there will not be a further need or further
24 need for hearings.

25 Now, that's different than the statutory

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1 deadline question, which turns on what we in the end
2 decide, based on the hearings we do have.

3 MR. VAN NOSTRAND: If I could briefly
4 address it. I guess the concern that we have is when
5 you get to the end and what additional issues you
6 need to explore. I think, looking at the ICNU/Public
7 Counsel response to the motion to strike is fairly
8 revealing in that regard. They clearly want a six to
9 eight-week delay to allow the Commission to consider
10 the revised protocol.

11 Well, the revised protocol was accepted by
12 the parties in Oregon. There was agreement with the
13 Company, Staff and CUB. ICNU, in Oregon, is opposing
14 consideration of the revised protocol. Their
15 purposes of this motion to strike, we're asked to
16 consider extending the suspension period to allow six
17 to eight weeks of additional discovery so, in
18 Washington, we can consider the cost allocation
19 methodology that ICNU is opposing in Oregon.

20 And it's curious that Public Counsel would
21 join in the response to the motion to strike, because
22 Public Counsel doesn't even utter the words protocol
23 or revised protocol. Public Counsel would have this
24 case decided on an entirely different cost allocation
25 basis called the hydro situs proposal, which keeps in

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1 Washington all the cheap hydro benefits and reduce
2 the Company's rates by \$25 million.

3 The notion that we need to have additional
4 time to do discovery on the revised protocol because
5 Public Counsel wants to consider it, it's belied by
6 the Public Counsel testimony, because they don't care
7 what cost allocation methodology the Company
8 proposes. And so I'm reluctant to go down this path.
9 And we're going to wait till the end of the hearings
10 to see what more you need, because what we're going
11 to hear is we need six to eight weeks to do discovery
12 on a cost allocation methodology that we've decided
13 in Oregon is not acceptable.

14 JUDGE MOSS: Mr. Van Nostrand, I don't mean
15 to diminish your passion with which you represent
16 your client, but please slow down a little bit for
17 the sake of our court reporter.

18 MR. VAN NOSTRAND: Sorry, Your Honor.

19 JUDGE MOSS: That's quite all right.

20 MS. DAVISON: Your Honor, I guess I feel
21 compelled to respond to this, although I will keep in
22 mind your constant reminders of tit-for-tat kinds of
23 arguments, but I will say that I believe that Mr.
24 Van Nostrand's argument that he just presented to you
25 is highly inappropriate, it's prejudicial, it's

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1 incorrect, and it presumes to know what ICNU's
2 position is on several things, which he just flat out
3 misrepresented.

4 We are not asking for six to eight weeks;
5 we're asking for a couple of weeks. We are not
6 taking the position in Washington that suggests --
7 which is -- I mean, I don't even know where to start
8 on this Oregon comparison. The two cases are
9 dramatically different.

10 Our view is that if we are going to be stuck
11 with protocol in the state of Washington, at least
12 use revised protocol, because it reduces our rates by
13 \$2.5 million. That's the essence of what our concern
14 is here. But I don't think it's really the time or
15 the place for us to go into how we feel about
16 protocol. But I do feel compelled to clear up some
17 inaccurate statements.

18 MR. CROMWELL: If I may respond, as well,
19 Your Honor?

20 JUDGE MOSS: Go ahead, Mr. Cromwell.

21 MR. CROMWELL: Thank you. First, Mr. Van
22 Nostrand characterized the settlement as narrowing
23 the case, not creating any new issues. I would say
24 that page nine, the last sentence of Section D,
25 wherein the Company conditioned its consideration of

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1 extending the suspension period on what appears to be
2 an interim rate request would very clearly place new
3 issues in question.

4 As to the revised protocol, Mr. Lazar's
5 testimony stands on its own. I think it is not
6 appropriate to characterize a party's concern based
7 on whether they believe a given methodology is
8 appropriate or not. I would say that we are quite
9 concerned and informed about the two proposals the
10 Company has placed before this Commission, both the
11 original and the revised, as well as its ongoing
12 efforts in other states, such as Utah, where it has
13 entered into settlement agreements that cap rates and
14 do other things that are quite of interest to Public
15 Counsel. So I would share and expand on Ms.
16 Davison's concerns.

17 MS. SMITH: Your Honor.

18 JUDGE MOSS: Ms. Smith, I think you have
19 something to say.

20 MS. SMITH: Thank you, Your Honor. First I
21 would address Public Counsel's interpretation of this
22 settlement agreement, that the extension of the
23 suspension period is conditioned upon an interim rate
24 request, which would, in and of itself, expand the
25 issues in this docket. The settlement agreement does

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1 not contemplate an interim rate relief request; it is
2 a statement that the Company and the Commission Staff
3 would recommend and would agree to a temporary rate
4 increase, subject to refund, pending whatever length
5 of time is necessary for the Commission to reach
6 final resolution.

7 An interim rate request adds a lot of other
8 elements to a case, and that's not what we have here.
9 This is temporary, subject to refund, and it is a
10 recommendation from the settling parties to the
11 Commission.

12 Second, with respect to the protocol, the
13 Commission Staff and the Company have not agreed on a
14 proper allocation method. The Commission Staff has
15 its own allocation method that we've put forward in
16 our direct case, the Company has its, plus the
17 revised protocol. We didn't agree to accept a
18 particular allocation methodology in the settlement;
19 we agreed to use one as a starting place and go
20 forward with some adjustments to that. We certainly
21 do not agree with the original protocol on a
22 going-forward basis, so we are not asking that the
23 Commission accept protocol on a going-forward basis.
24 We're asking that the Commission set rates that we
25 believe are fair, just, reasonable and sufficient,

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1 without adopting an allocation methodology.

2 We weren't able to reach agreement on an
3 allocation methodology, and the settlement
4 contemplates that we will continue to have
5 discussions with the Company and other interested
6 parties with respect to an allocation methodology,
7 but we had to find a way to get to some numbers that
8 we could all agree on, and that's where we started.
9 But we did not -- we are not recommending one or
10 another or anything with respect to the settlement.

11 The settlement is to get to rates, and
12 that's all it does. And it's not very complicated,
13 and I would agree with Mr. Van Nostrand that it
14 really does narrow the issues in this docket. It
15 doesn't broaden them.

16 And with respect to what process is due in a
17 settlement, we are contemplating a process where
18 those parties who are not joined in the settlement
19 will have the opportunity to cross-examine the
20 settling parties, to put forward their evidence as to
21 why they believe the revenue requirement and the
22 resulting rates are not fair, just, reasonable and
23 sufficient, and to put on a case offering their
24 alternative, which we would presume would be their
25 direct case in this docket that they've already

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1 prepared and they've already filed.

2 They have an alternative for the
3 Commission's consideration and they have fair
4 opportunity to bring that alternative forward. Due
5 process doesn't require anything else.

6 MR. CROMWELL: Your Honor, if I -- I'm
7 sorry.

8 JUDGE MOSS: Go ahead.

9 MR. CROMWELL: If I may, I believe Ms. Smith
10 has illustrated a point that I raised earlier, which
11 is understanding the what of the settlement
12 agreement. I believe she used the term a temporary
13 rate increase subject to refund. I think, again,
14 that this language in the settlement presents a
15 question of what is the proper legal character of a
16 rate increase that this Commission might order prior
17 to its entry of a final order.

18 CHAIRWOMAN SHOWALTER: Well, don't you agree
19 that it's, whatever it is, it's the parties agreeing
20 among themselves to recommend it? That is, it does
21 not bind this Commission -- and the sort of conundrum
22 is it only occurs if we reject the settlement. So
23 clearly, even if it were that the Commission had to
24 do something, if it rejected the settlement that said
25 we had to do it, we wouldn't have to do it, but it

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1 doesn't say that. So that seems to be about two
2 steps removed from something that proposes to the
3 Commission an actual decision.

4 MR. CROMWELL: I would agree with you that
5 the parties' settlement does not bind the
6 Commission's legal authority regarding its entry of a
7 final order.

8 I think that the issue here is, (A), from a
9 discovery standpoint, understanding what the parties
10 to the settlement mean when they are now proposing
11 this as their joint position before the Commission,
12 (B), are there new legal issues that are raised as a
13 consequence of the entry of the settlement, legal or
14 factual, actually. I believe there are. (C), I
15 would agree with Ms. Smith and Mr. Van Nostrand to
16 the extent that there may be a narrowing of certain
17 revenue requirement issues, but, again, that gets
18 back -- that gets me back to understanding whether
19 we've narrowed issues or not in my Venn diagram.

20 You know, and finally, really, you know,
21 maybe taking two steps back, when this Commission
22 entered its Sixth, Eighth Final Order in the deferral
23 docket and permitted the filing of this rate
24 increase, the Commission posed a number of questions.
25 It's my reading of this settlement agreement that it

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1 proposes, at best, to defer the answer to several of
2 those questions. Quite frankly, we did that four
3 years ago and we're here.

4 I won't restate Public Counsel's position
5 regarding those issues. That's subject of another
6 proceeding. But I think it's fair enough to say
7 that, you know, it's our position that this
8 settlement agreement does present a number of
9 significant legal and factual questions that we
10 believe justify additional time to prepare a response
11 to them prior to going to hearing.

12 JUDGE MOSS: Let me interject and see if we
13 can maybe cut a little more to the heart of the
14 procedural concern here and ask the Company this.
15 Let us -- and we are dealing with what-ifs, as Mr.
16 Van Nostrand observed earlier, and that's what we're
17 trying to resolve, the range of possibilities.

18 What if we proceed as informally
19 contemplated and begin hearings next Tuesday and
20 allow for cross-examination of the panel, the various
21 party witnesses who are sponsoring testimony, allow
22 the opposing parties to put on their witnesses if
23 they elect, those witnesses, in turn, would be
24 subject to examination and so forth, proceed in that
25 fashion. And we get to the end of that process and

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1 the Commission deliberates on its own and comes back
2 and says, You know, we think we're going to need some
3 additional process here because of X, Y or Z, because
4 we've already reached a decision that we're going to
5 reject the settlement, or because we're going to
6 condition it in this way and we then ask you and you
7 say, No, that's unacceptable to us. So it's clear
8 we're going to need additional process.

9 My concern is that we have time to conduct
10 that process. And my second concern, as I expressed
11 last week in our informal discussion, is that the
12 Company has been rather tentative in making a
13 commitment to giving us that time. We face a
14 statute. What happens to us is if we say, You know,
15 we need some additional time, and you say no, is the
16 rates automatically go into effect on November the
17 16th, and there's not a thing if the world we can do
18 about it.

19 Now, that puts us, as a Commission, in a
20 rather difficult spot when we are being asked by you,
21 settling parties, to disrupt our long-planned
22 procedural schedule in order to consider a proposal
23 you've put before us, which we are willing to do,
24 interested in doing, and are trying our best to
25 accommodate, but it's a little difficult for us to do

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1 that in the context of, But if, Commission, you find
2 you need additional process, we may or may not give
3 you the time to do it.

4 So I'd just like to hear from the party,
5 from the Company, really, as to what your thinking is
6 in this regard, if you understand the dilemma that
7 this poses for us from a process perspective, which
8 is something near and dear to my heart.

9 MR. VAN NOSTRAND: You got me with that last
10 phrase there. Well, I think, as we indicated last
11 week, Your Honor, I think the Company is flexible and
12 will accommodate the Commission's request. I mean,
13 this Commission has a great track record for
14 processing cases expeditiously, working till all
15 hours of the night, if necessary, to bring cases to
16 an expeditious conclusion. I think that's the spirit
17 that this proceeding would be conducted in. I think
18 we have put it on the table that we will extend the
19 suspension period, if necessary, to accommodate the
20 proceedings.

21 I mean, I think we have a concern that that
22 not be, you know, an open-ended waiver. I think we
23 take some comfort from the language in the rules that
24 talks about the extension necessary that would
25 correspond roughly with the time that was consumed by

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1 processing the settlement, subject, of course, there
2 has to be some time on the hearing calendar of the
3 Commission. And I think that was an issue that,
4 along with that extension of the suspension period,
5 is the point was raised in the settlement agreement
6 that there may be interim -- a temporary rate relief
7 subject to refund because, after all, the Company has
8 filed for \$25.7 million in its rebuttal case, the
9 settlement comes in at 15.5 million. We're talking
10 in excess of a million dollars a month, and the
11 Company, we think, has demonstrated a need for rate
12 relief.

13 And so while we certainly don't want to
14 give the impression it's an open-ended offer to
15 waive, I think we're definitely open and will grant
16 the Commission necessary time to process this case.

17 CHAIRWOMAN SHOWALTER: Well, I mean, between
18 now and November 16th is about two and a half months.
19 And is it reasonable to request the Company to waive
20 the statutory period for two and a half months, if
21 necessary, to complete the process, and we don't --
22 we would not preclude, we wouldn't decide today, we
23 would not preclude the Company from requesting a
24 temporary rate increase, as contemplated by the
25 parties for that period. We just wouldn't cross that

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1 bridge till we came to it.

2 But in a way, if we don't know now that --
3 if you don't waive the statutory period today, it is
4 difficult for us to grant all of this process,
5 because we don't know how long the whole process will
6 take. And I'm not sure what the alternative is. If
7 you don't waive, then it seems to me we just go ahead
8 with our hearing. How that all plays out, I'm not
9 sure, because then you are put to the dilemma of, all
10 right, do you go back to your corners with your
11 original positions or do you have a common position
12 or kind of play it all ways. That seems to me to be
13 -- it doesn't advance your settlement position as
14 much as a more orderly process would.

15 MR. VAN NOSTRAND: I'm definitely going to
16 have to confer with my client before we grant such a
17 waiver.

18 I guess a couple of observations. I mean,
19 it seems like we're being asked to cross that bridge
20 before we come to it.

21 There is definitely a scenario by which this
22 case could easily be concluded within the statutory
23 suspension period. The Commission could accept the
24 settlement agreement, it could accept the settlement
25 agreement under terms that the settling parties find

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1 to be acceptable, and I'm just -- I worry about the
2 opportunities that are created for bringing other
3 issues into the case to use up the available time.

4 If we say this morning, Yes, we'll give you
5 another two and a half months to settle this case, I
6 think we're in the uncomfortable position that -- I
7 think Staff and the Company and NRDC have worked very
8 hard to bring a settlement to the Commission. We
9 think it settles the issues in the case as among us,
10 and I don't want to be in the position where we're
11 being penalized by having to waive the suspension
12 period when we think we've pursued the policy
13 interests of the Commission by actively pursuing
14 settlement and achieving settlement with the Staff.

15 CHAIRWOMAN SHOWALTER: Well, all right.
16 I'm, you know, thinking out loud at my peril, but
17 supposing you waive it only under the circumstance
18 that we reject the settlement? I mean --

19 MR. VAN NOSTRAND: That's what we --

20 CHAIRWOMAN SHOWALTER: This Commission
21 doesn't have any intention of dallying on its duties.
22 We're just trying to see all of the possibilities.
23 But it is true that I -- it should be -- we should be
24 able to get to a decision on the settlement by
25 November 16th.

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1 JUDGE MOSS: I would just add the other
2 circumstance being if the Commission conditioned the
3 settlement in a way that the parties found
4 unacceptable, I think it's important to keep in mind
5 that, in a sense, while it seems that the burden is
6 being pushed on the company, it is also the company
7 that holds the cards here. It's your statutory
8 right. And so, in a sense, it does focus attention
9 on you. You're the only one that can do it.

10 CHAIRWOMAN SHOWALTER: Maybe we should take
11 a break.

12 MR. VAN NOSTRAND: It seems, Chairwoman
13 Showalter, that what you're talking about is the
14 language. It seems to me we're largely there, in
15 terms of if this happens, then we will extend the
16 suspension, but I think you're taking issue with the
17 Company will consider extending the suspension
18 period. And we can say that --

19 CHAIRWOMAN SHOWALTER: All right. But all
20 of that is in your settlement agreement, which we
21 haven't approved. In other words, outside of your
22 settlement agreement, you need to give us some kind
23 of assurances, because we aren't going to make any
24 decision on what is inside the corners of the
25 settlement agreement until we have had enough process

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1 to do so.

2 JUDGE MOSS: Maybe this would be a good time
3 to take a brief recess and you can consult with your
4 client and we can stretch our legs and then we can
5 come back in, say, 10 minutes. Say 10 minutes? Is
6 that sufficient?

7 CHAIRWOMAN SHOWALTER: Let's say 15.

8 JUDGE MOSS: Let's say 15 minutes. Okay.
9 So we'll be back at 25 after the hour.

10 (Recess taken.)

11 JUDGE MOSS: Let's be back on the record.

12 Mr. Van Nostrand, you've had a chance to consult with
13 your client?

14 MR. VAN NOSTRAND: Yes, Your Honor. I think
15 that we'd like to address the concern identified by
16 Chairwoman Showalter in terms of this language being
17 in the settlement agreement, and we can affirmatively
18 state the same representation that's in the
19 settlement agreement, that in the event the
20 Commission rejects the settlement or imposes
21 conditions other than are in the settlement, then
22 either of the settling parties can reject the
23 settlement and move forward, and in that circumstance
24 the Company will extend the suspension period to the
25 extent necessary to allow the additional proceedings.

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1 JUDGE MOSS: Thank you. Now, with that
2 concern resolved, we need to consider how to best use
3 our time. We had discussed tentatively last week
4 some ideas for that efficient use of our time. One
5 idea was, to the extent the opposing parties felt the
6 need to make some inquiry with respect in
7 understanding what the settlement provides, that sort
8 of thing, that we could have some sort of a technical
9 conference or deposition conference or something like
10 that. Other options may have occurred to people by
11 now for things that could be done this week that
12 would facilitate our beginning some examination of
13 witnesses next week.

14 And so let me just, having stopped there,
15 and ask what the parties think might be necessary in
16 terms of getting to these what questions as we
17 discussed earlier today.

18 MR. CAVANAGH: Judge Moss, this is Ralph
19 Cavanagh, from NRDC. If I could just enter a
20 preliminary request before what may be a lengthy
21 discussion. Assuming that the Commission decides to
22 have a panel assemble next Tuesday to discuss the
23 settlement, NRDC is, of course, a party and I'll be
24 glad to be part of that. My request is just that, if
25 possible, the one issue NRDC has raised, which is not

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1 changed by the settlement agreement, that that issue
2 be taken on in terms of any cross-examination of me
3 on Tuesday. I'd be grateful if we could do that.
4 I'll be available the entire day.

5 JUDGE MOSS: All right. Thank you. We'll
6 take that into consideration, too.

7 MR. CAVANAGH: Thank you.

8 MS. DAVISON: Your Honor, this is Melinda
9 Davison.

10 JUDGE MOSS: I'm not sure your mike is on.
11 Is it on?

12 MS. DAVISON: I thought it was on.

13 JUDGE MOSS: Okay. Sorry.

14 MS. DAVISON: Here are the things that we
15 need to do in a week. We need to be prepared on the
16 original case, we need to be prepared on the new
17 case, we need to compare the original case with the
18 new case, we need to prepare our witnesses for what
19 sounds like live surrebuttal testimony on the
20 settlement, and I don't think that we can do all that
21 and a deposition this week. To actually be effective
22 in terms of taking a deposition, it requires several
23 days of thoughtful preparation.

24 We are prepared to go forward, obviously, on
25 whatever basis that the Commission orders us to go

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1 forward on, but I would just like to reiterate our
2 request that we be given two weeks, and start the
3 hearing on September 13th, to allow for us to be
4 prepared on the settlement.

5 The other issue that I have is one that we
6 discussed with all the parties previously, which is
7 that Mr. Falkenberg is not -- who is our main witness
8 in this case -- is testifying at a hearing in Texas
9 on September 8th, and he would be the witness that I
10 would be utilizing to provide live surrebuttal
11 testimony on the settlement, so it would be extremely
12 difficult for me to utilize him in that fashion if
13 he's not here to see the actual settlement panel.

14 I know that Mr. Cromwell has some issues
15 with his witnesses, as well, and perhaps there is an
16 ability to begin later in the week of September 7th
17 to deal with cost of capital issues, but, you know,
18 there are several logistical problems, and I would
19 request the parties all be flexible in this, but I
20 have a lot of difficulty with beginning the hearing
21 with this new phase added on September 7th, for the
22 reasons I just stated.

23 JUDGE MOSS: Let me ask you, since you
24 clearly would have been all but fully prepared for
25 the hearing had this never occurred at the time it

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1 did occur, which was just a few days before hearing,
2 what sort of cross-examination time were we looking
3 at in terms of the original as-filed cases?

4 MS. DAVISON: I had eight and a half hours.

5 JUDGE MOSS: And Mr. Cromwell?

6 MR. CROMWELL: Your Honor, I -- shortly
7 after you sent out your list, I tried to tally
8 something up, but I did not bring that with me. I
9 don't have it at hand. I don't imagine that it would
10 be much in excess of what Ms. Davison has estimated.
11 You know, obviously, the cost of capital witness is
12 another issue. I don't know, frankly, how much
13 cross-examination is necessary there.

14 I think the parties' position -- to put it
15 better, I think the testimony of the witnesses that
16 is going to be before the Commission is fairly
17 well-defined, so I don't know that that is going to
18 be -- that a large amount of cross-examination there
19 is going to be particularly helpful, but there will
20 probably be some. I don't know how much that will
21 be.

22 As to scheduling, you know, I think we had
23 Mr. Hill originally tentatively scheduled for the
24 third, and so we'll need to roll him over. I
25 certainly share Ms. Davison's express concerns about

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1 beginning next Tuesday.

2 That said, I do have some witness
3 availability issues beginning on the 15th for both
4 Mr. Lazar and Mr. Hill. So my preference would be to
5 have them present their testimony and be available
6 for cross-examination prior to that date. Mr.
7 Dittmer's schedule is a bit more flexible.

8 CHAIRWOMAN SHOWALTER: I'm not sure how many
9 total days are necessary, but I will just put this
10 out as a possibility. What if -- this would be --
11 the proposal would be to take the 7th, which is the
12 Tuesday, the 9th and the 10th, which is Thursday and
13 Friday, and then the following 16th and 17th, which
14 is the Thursday and Friday. Now, that's five days.
15 I don't know if that's enough, but the idea would be
16 on Tuesday, we simply hear the witnesses, the
17 proposal, maybe you need more time on that day, I'm
18 not certain, but we would not meet on the 8th,
19 because we have an open meeting that day anyway, but
20 we would come back on Thursday and Friday, so this is
21 giving you more time, and then the following Thursday
22 and Friday.

23 Now, maybe that's not enough days, I'm not
24 -- I'm really not sure how it all shapes up, but --
25 and maybe we shouldn't even begin on the Tuesday. If

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1 we only need four days, we could take those four
2 days, and that would be -- if we can get it all
3 accomplished, that would be fine.

4 What I'm trying to do is give you enough
5 time, but get done in two weeks, and frankly, there's
6 some other meetings and things that we would like to
7 go to, ROC, et cetera. So if we could have those be
8 the four days, and I don't know about -- if we need a
9 fifth, but does that sound like it would meet your
10 needs?

11 MS. DAVISON: I appreciate --

12 CHAIRWOMAN SHOWALTER: It would give you the
13 rest of the time to do whatever else you might be
14 doing.

15 MS. DAVISON: I appreciate your
16 consideration on that. I guess, given that choice, I
17 would rather begin on the 9th and go for the four
18 days. The difficulty I have is that Mr. Falkenberg's
19 from Atlanta. So once I fly him out here, I'd like
20 to have him stay and not come back and forth, given
21 the logistical difficulties of getting from here to
22 Atlanta. So I would prefer to start on the 9th and
23 hopefully be done by the 14th. I certainly, from
24 what I know, sitting here today, I think that's
25 achievable.

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1 CHAIRWOMAN SHOWALTER: Is it the sense that
2 four full hearing days is enough to accomplish what
3 needs to be accomplished?

4 MR. CROMWELL: Your Honor, I'm perhaps
5 perennially skeptical in that regard, but I think the
6 unknowables is, of course, what remaining
7 cross-examination the Company or Commission Staff
8 might have for the witnesses that we've proffered,
9 the degree of interest from the bench on various
10 issues that are presented by the pre-filed cases, as
11 well as the settlement agreement is a similarly
12 unknown quantity of time.

13 JUDGE MOSS: Well, maybe the more we know,
14 the better off we are, so I'll put the question
15 directly to Staff and the Company, and if they know
16 what sort of cross-examination time they might
17 require for the ICNU and Public Counsel witnesses.

18 MS. SMITH: Your Honor, I'll start. This is
19 Shannon Smith, from Commission Staff. We haven't
20 estimated what we need for Public Counsel and ICNU,
21 because up until we agreed to settle with the
22 Company, we were looking at crossing the Company, and
23 we had significant cross for the Company that's now
24 gone away.

25 I can represent that I believe we can

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1 accomplish the hearing in the four days that had been
2 suggested. You know, certainly Staff is willing to
3 accommodate the scheduling needs of Public Counsel
4 and ICNU in terms of bringing their witnesses in, and
5 since the Company and Commission Staff will be
6 sponsoring the settlement, I'm sure we could work
7 together to streamline any cross-examination we would
8 have for the parties opposing the settlement to make
9 the most efficient use of hearing time and not double
10 up on any of those efforts.

11 MR. VAN NOSTRAND: Your Honor, I think we
12 probably have five hours total for the ICNU, Public
13 Counsel witnesses, and I think, along the lines of
14 what Ms. Smith said as far as streamlining the
15 hearing time, I think the -- any testimony offered in
16 response to the settlement agreement and the
17 testimony supporting the settlement agreement should
18 be pre-filed so that we're not -- we're not putting
19 on direct testimony and cross-examination on the fly,
20 which I think is pretty inefficient.

21 It seems to me, with this schedule, there is
22 enough time to pre-file any opposing testimony that
23 ICNU and Public Counsel might want to submit in
24 opposition to the settlement agreement.

25 MS. DAVISON: That would not work for our

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1 schedule. That -- to conduct discovery, draft the
2 testimony, get it to the printer, get it filed in
3 time, I mean, that is, as I'm sure Mr. Van Nostrand
4 knows, is a logistical very difficult undertaking.

5 Now, the problem I have is that the witness
6 that I need to do that testimony is committed to a
7 hearing in Texas for several days. And I mean, that
8 would be an extreme burden to put on us to ask us to
9 do pre-filed written testimony in what is still
10 essentially less than a week.

11 JUDGE MOSS: What if we went back to the
12 schedule that Chairwoman Showalter suggested a moment
13 ago, and we had that testimony come in that second
14 week? Let's say we were talking about the 16th and
15 the 17th as hearing days. If we had that testimony
16 that week instead of the earlier week, would that be
17 a more reasonable idea?

18 MR. CROMWELL: Your Honor, if I may weigh
19 in, as well. I share Ms. Davison's concerns. My --
20 the problem that I face with my witnesses is not
21 simply the timing, but the reason why they're
22 unavailable is because they're involved in other
23 proceedings in other jurisdictions that essentially,
24 at this late date, their schedules are so tightly
25 packed that, you know, I cannot commit that I'd be

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1 able to have the witness have the time available to
2 draft and get the testimony to me that I could then
3 submit to the Commission. That's really the crux of
4 it for me.

5 JUDGE MOSS: Okay.

6 MR. CAVANAGH: Judge Moss, Ralph Cavanagh.
7 The one other quick logistical note, if the decision
8 is to begin the hearings on the 9th, as opposed to
9 the 7th, I should just note the 9th is the one day on
10 that schedule that I cannot be in Olympia.

11 JUDGE MOSS: Let's see if we can help
12 resolve this problem. Let me put a question out to
13 the parties and ask if anybody, based on what we have
14 seen in terms of the pre-filing, has
15 cross-examination for Mr. Cavanagh for the NRDC on
16 that party's issues.

17 MS. DAVISON: We do, Your Honor.

18 JUDGE MOSS: ICNU does. All right.

19 MR. CROMWELL: I might have a very little
20 amount, but I've had other discussions with Mr.
21 Cavanagh that I think have resolved most of the
22 issues that we may have had with his client's
23 position.

24 JUDGE MOSS: Then we will have to somehow
25 accommodate you into the procedural schedule, Mr.

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1 Cavanagh, but --

2 MR. CAVANAGH: I'm confident we can do that.

3 I was just concerned that if the first day were the
4 panel -- if you wanted the entire -- all the settling
5 parties on the panel, I just couldn't do it on the
6 9th. But I can presumably fill in on any of the
7 other days, if there are additional questions for me.

8 JUDGE MOSS: Okay.

9 CHAIRWOMAN SHOWALTER: Well, I'm wondering
10 if we can't use the 7th for just the presentation of
11 the settlement, and it would not preclude your
12 cross-examination of whatever witnesses you need at a
13 later date, but that we would make some headway on
14 getting the case in front of us on the 7th, which
15 could include Mr. Cavanagh and those needs, but would
16 not preclude your ability to cross-examine the
17 relevant witnesses on the other four days.

18 JUDGE MOSS: Just put the panel up on --

19 CHAIRWOMAN SHOWALTER: Yes.

20 JUDGE MOSS: And have the cross-examination
21 of the panel as the sponsoring witness panel for the
22 settlement agreement itself, and then some of those
23 same people might appear separately on the basis of
24 their pre-filed testimony.

25 CHAIRWOMAN SHOWALTER: But with the idea

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1 that Mr. Cavanagh, if it's possible, could be
2 cross-examined on that Tuesday. If that isn't
3 possible, then that idea won't work, and then we
4 would have -- he wouldn't be part of that main panel
5 that day; he would be part of the 9th or the 10th or
6 16th or 17th.

7 MS. DAVISON: I certainly can be prepared to
8 cross-examine Mr. Cavanagh on the 7th, but putting
9 the panel up on the 7th is probably the most
10 difficult day for me in terms of Mr. Falkenberg, who
11 will clearly be in Austin that day, and I would very
12 much like him, particularly if he's going to be doing
13 live surrebuttal testimony, to be here to hear all of
14 the panel presentation. So that, of all the days
15 we're looking at, unfortunately, the 7th and the 8th
16 are the worst days from my witness' schedule, but I'm
17 -- I guess the other challenge I have is that I would
18 much rather see this time be more compact in terms of
19 -- I think it will be more efficient that way. So
20 it's difficult to prepare several things
21 simultaneously.

22 CHAIRWOMAN SHOWALTER: Well, then, all
23 right. Back to the four-day idea. Would it be
24 reasonable to ask the parties to -- I don't know if
25 this is done with or without Judge Moss, but just

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1 figure out how to use the 9th, the 10th, the 16th and
2 the 17th in an efficient way so as to get everybody's
3 needs taken care of? Because it sounds as if that's
4 overall enough time.

5 MS. DAVISON: That would be fine. So it
6 sounds like your preference is not to have a hearing
7 on the 13th or 14th?

8 CHAIRWOMAN SHOWALTER: That's my preference.

9 MS. DAVISON: Okay. I'm sorry. It took me
10 a while to get there.

11 CHAIRWOMAN SHOWALTER: But it also gives you
12 more time to do what you need to do.

13 MS. DAVISON: I got it. Okay.

14 JUDGE MOSS: Well, another possibility would
15 be to put the panel off until the last day. I mean,
16 you know, I don't know that it really makes a
17 difference.

18 MS. DAVISON: Okay. We are fine to
19 accommodate the 9th, 10th, 16th and 17th.

20 MR. CROMWELL: Your Honor, I guess, looking
21 at this proposal of 7, 9, 10, 16, 17 -- no 9.

22 CHAIRWOMAN SHOWALTER: Nine, 10, 16, 17.

23 MR. CROMWELL: Nine, 10, 16, 17. Well, I
24 guess we're looking at some long days. I guess, in
25 that concept, I would want to try and get Mr. Hill

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1 and Mr. Lazar in the 9th and 10th window of time, and
2 then Mr. Dittmer somewhere in the 16th, 17th, but I
3 would need to call back and confirm with each of them
4 that that is physically possible for them to come on
5 those dates. We could do that over the lunch hour or
6 something and let Judge Moss know that separately.

7 MS. DAVISON: Right, I have some ideas, so
8 why don't we talk among ourselves offline.

9 MR. CROMWELL: I guess the only other thing
10 I would add is my preference would be for the
11 settlement panel to be first. Just seems like that's
12 where the horse belongs.

13 JUDGE MOSS: Well, of course we've got one
14 of the members of the settlement panel can't be here
15 on the 9th, so we're trying to -- we have to
16 accommodate all of our witnesses, and so that won't
17 work.

18 MR. CROMWELL: Well, I guess we could waive
19 cross of Mr. Cavanagh for that respect, or have him
20 on the phone another day. I don't know.

21 CHAIRWOMAN SHOWALTER: He could be here
22 another day.

23 MR. CAVANAGH: Yeah, I can be there any of
24 the other days.

25 JUDGE MOSS: Well, let me -- of course,

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1 we're doing a lot of thinking out loud today.
2 Certain risk involved in that, I suppose, but I'll go
3 ahead with that, anyway. Mr. Cavanagh's position in
4 the settlement is identical to his position in the
5 case, and so it seems to me that he does not need to
6 be here both for the panel and to stand
7 cross-examination on his direct or pre-filed direct
8 testimony. Therefore, the suggestion I'm thinking
9 about is we could have the panel without Mr.
10 Cavanagh, we could have Mr. Cavanagh later, and
11 accomplish what we need to accomplish for purposes of
12 our record.

13 The panel will presumably present a
14 spokesperson on individual issues and, as I said, Mr.
15 Cavanagh's is the same either way, so does that sound
16 -- I'm seeing nods of affirmance. First time all day
17 everybody's nodding affirmatively.

18 MR. CAVANAGH: Judge, that's fine with me.
19 This is Ralph Cavanagh.

20 JUDGE MOSS: Good.

21 MR. CAVANAGH: My request, then, is to
22 please put me on the 16th or the 17th, if that's how
23 we're doing it.

24 JUDGE MOSS: We'll do that. All right. We
25 solved one thing. All right. Now, as far as making

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1 this other piece work, four days, seems to me what we
2 need to do is determine a witness order and talk
3 about that, and I don't know that the Commissioners
4 need to sit through that painful exercise.

5 Is there any other business we need to take
6 up besides simply orchestrating the presentation of
7 the witnesses? I will want to discuss with you the
8 presentation of cross-examination exhibits prior to
9 the day we're actually in the hearing, because that
10 is far more efficient than trying to do it on the
11 fly, so we'll need to set a date for that, maybe the
12 8th or something, when the Commissioners are in open
13 meeting, but we can work on that other piece.
14 Anyway, we'll talk about all that.

15 But are there other matters of substance
16 that we need to take up, or more substance, I guess,
17 more substantial?

18 MR. VAN NOSTRAND: Your Honor, I think the
19 issue of whether or not any supplemental testimony on
20 the settlement agreement needs to be pre-filed or
21 given orally from the stand. I mean --

22 JUDGE MOSS: That needs to be resolved.

23 MR. VAN NOSTRAND: With respect to
24 discovery, we've already had two rounds of discovery,
25 with a three-day turnaround. I think allowing

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1 discovery -- I don't think any discovery at all is
2 necessary on the settlement agreement. A lot of it
3 has been done. It seems there is sufficient time to
4 allow testimony to be pre-filed, and that will aid in
5 the orderly and efficient processing of this case.

6 MR. CROMWELL: In response, Your Honor, as I
7 stated earlier, the problem I face is that my
8 witnesses are not employees of my organization and
9 are not at my availability. Rather, they are
10 contractors who, at this very late date, in terms of
11 their own work schedule, have other matters in other
12 jurisdictions that are fully occupying their time.
13 And I know I have certain windows of time available
14 for them, but I really do need to touch base with
15 them to see where we can fit them in.

16 From previous conversations I have had with
17 them, I know that it would be very difficult, if not
18 impossible for me to actually get testimony from
19 them, so, you know, the opportunity to pre-file
20 written testimony that I can't in fact get is a bit
21 of a hollow promise, if you will.

22 JUDGE MOSS: And your position is also that
23 it would be difficult, if not impossible, to
24 pre-file?

25 MS. DAVISON: Yes, it would, Your Honor,

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1 unless it occurred very late, and I'm not sure that
2 that would really help in the hearing. I think that
3 would actually hinder the hearing.

4 JUDGE MOSS: Okay. All right. Under the
5 circumstances, we are going to rule that you -- the
6 opposing parties may present live surrebuttal.

7 MR. VAN NOSTRAND: Your Honor, if we could
8 make the request, then, to reserve the right to
9 present live sur-surrebuttal. We believe, as the
10 proponents of the settlement, we have the right to
11 the last say, and we believe we would have the right
12 to respond to any rebuttal testimony, surrebuttal
13 testimony that's put on in opposition to the
14 settlement.

15 JUDGE MOSS: Well, I think what you can
16 count on and what all parties can count on is that
17 the Commission will follow its usual practice of
18 ensuring that everyone gets its due process rights,
19 and if we feel that it's appropriate and necessary at
20 the time that there be such testimony, we certainly
21 will allow for it. On the other hand, we may find
22 the state of the record such that we don't
23 necessarily agree with you, but we'll make that
24 determination if and when we need to.

25 In my experience, I've been doing this here

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1 at this Commission for about seven years now, we do a
2 pretty good job on that decision process. So I think
3 you can be comfortable that you won't be compromised
4 in your rights.

5 MR. CROMWELL: Thank you, Your Honor.

6 MS. DAVISON: Your Honor, we had one
7 additional issue, and I'll ask for your guidance on
8 how you would like for me to present it. I can raise
9 it today, I can do it in writing, or we can do it at
10 the beginning of the hearing.

11 JUDGE MOSS: Okay.

12 MS. DAVISON: But my concern is that there
13 was a Bench Request Number 3 that ICNU responded to
14 and we provided you with an answer. PacifiCorp
15 provided you with a different answer last week. That
16 answer is incorrect and very, very prejudicial, and
17 we would either like their answer stricken or we
18 would like the opportunity to file another answer
19 explaining why PacifiCorp's answer to our original
20 answer is incorrect and our original answer is
21 correct.

22 JUDGE MOSS: Well, a couple of points. One,
23 we do allow parties other than the party to whom a
24 bench request is propounded to respond. We also
25 allow for supplemental responses. So you would be

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1 within your rights to file such a thing without any
2 further permission.

3 As far as if you believe there is
4 information that is incorrect or unduly prejudicial
5 or what have you, then certainly I guess I would -- I
6 would say you can either file a motion or let's raise
7 it again at the time of hearing and, in the meantime,
8 we'll have an opportunity, now that you focused my
9 attention on it, I'll go and study it closely.

10 MS. DAVISON: Well, I will assume, then, in
11 the meantime, I should file a supplemental response,
12 then.

13 JUDGE MOSS: If you think that would be the
14 appropriate thing to do.

15 MS. DAVISON: Okay. We will do that. Thank
16 you, Your Honor.

17 JUDGE MOSS: All right. I think, other than
18 mechanics, which clearly there are a number of them
19 that we're going to need to sit here and everybody's
20 going to have a little bit later lunch today, except
21 the Commissioners.

22 Is there anything else that we need to raise
23 before the Commissioners from the parties? All
24 right. Commissioner Hemstad has a point he wishes to
25 raise, and other Commissioners may also have some

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1 comment in closing, and then we'll allow them to move
2 on to other business while we conclude the logistics
3 of the hearing.

4 COMMISSIONER HEMSTAD: This is really
5 addressed to Ms. Davison. I want to acknowledge on
6 the record that I have read the article from Clearing
7 Up of August 23, 2004, which doesn't discuss merits,
8 but the process of the proposed settlement. And I'm
9 concerned about the statement there in which you are
10 directly quoted, which says, quote, Kinds of behavior
11 that took place yesterday, August 18th,
12 unquestionably take us back to the days of the
13 smoke-filled room where utilities and Commissioners
14 get together and cut deals. I thought, 30 years
15 later, we were beyond that point, but I guess I was
16 wrong.

17 Literally, that would suggest that this
18 Commission had some involvement in the proposed
19 settlement between three of the parties. Is that
20 what you were intending to express?

21 MS. DAVISON: No, and I appreciate you
22 bringing that issue up. I very clearly made a quote
23 to Clearing Up saying Commission Staff, and actually
24 the reporter called me to double check my quote, and
25 I was very, very clear with him, and I would

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1 encourage you to pick up the phone and call him, in
2 which I said --

3 COMMISSIONER HEMSTAD: Which we can't, of
4 course, but anyway.

5 MS. DAVISON: In which I said to the
6 reporter, No, my concern is not with the
7 Commissioners, they had no involvement in this; my
8 concern is with the Commission Staff. And the
9 concern that my client had at the time and continues
10 to have is when parties get together, Staff and the
11 Company, and have settlement discussions in which
12 other parties are excluded, I had been made aware of
13 this settlement meeting and had requested that I be
14 allowed to attend. I was told that I could not
15 attend that settlement, and my clients were extremely
16 upset that settlement was allowed to happen in which
17 we had requested to participate and had been denied
18 that opportunity.

19 So I apologize for the misquote in Clearing
20 Up that suggests that the Commissioners were
21 involved. You clearly were not. My quotes and my
22 concern related to the settlement process amongst
23 Commission Staff and the Company.

24 COMMISSIONER HEMSTAD: That's satisfactory
25 in that context, and I don't wish to get into any

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1 other details about contacts between the parties and
2 the settlement process, but I would make the further
3 point that we have no prohibitions against parties
4 coming to joint positions as part of any settlement
5 process. In other words, the parties are free,
6 however they come together, with regard to limiting
7 issues or coming to joint positions. We have done
8 that consistently, or at least the time that I've
9 been Commissioner.

10 And so I'm not sure what the reference back,
11 even if to the Commission Staff, of smoke-filled
12 rooms makes any sense. We have consistently had
13 partial settlements over the years that don't
14 necessarily involve all of the parties, and we have
15 never had any limitations on that. When I say
16 partial settlement, partial proposed settlements, so
17 I'm still puzzled by the reference.

18 MS. DAVISON: In all the time that I have
19 been practicing before the WUTC, this is the very
20 first instance in which my client was denied the
21 right to or the ability to be involved in settlement
22 when we had explicitly requested that we be involved.
23 I cannot point to a single case in which we have been
24 excluded from the settlement process.

25 And we think that, to have a process in

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1 which Staff and the Company come together, have their
2 own settlement, in effect marginalizes the ability of
3 intervenors to participate effectively in the case.
4 And we may disagree about that, but from where my
5 clients are sitting, we think that's wrong.

6 COMMISSIONER HEMSTAD: That's all I have to
7 say.

8 CHAIRWOMAN SHOWALTER: I'll just add, I read
9 the article, too, and I concur in all Commissioner
10 Hemstad's remarks. I'll make just a couple
11 additional points. One is, as far as due process is
12 concerned, there is a formal place to have it, and
13 that is in this hearing room, and the parties always
14 have the right to come before the Commission with
15 objections, witnesses, cross-examination, et cetera.

16 Settlement is an area where, of course, the
17 Commissioners are not involved, but I think it's just
18 my observation that there are a range of types of
19 settlements that have come in front of us, and to
20 formalize it or to insist on particular modes of
21 settlement I think would probably frustrate the
22 purpose of settlements in some instances. In other
23 words, to insist that always settlement talks include
24 all parties I think probably goes further than one
25 wants.

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1 Now, it's obvious that a global settlement
2 has a better shot, simply because all the parties
3 concur in it, but I don't think we should preclude
4 all kinds of conversations from occurring, and it's
5 just going to depend, I think, on the parties, the
6 personalities, their positions, how much the
7 positions are known versus not known, and that's
8 really the business of the parties. And I'm sure
9 there are times when some parties are frustrated with
10 what other parties do, but the alternative, which is
11 to start trying to impose rules on how phone calls
12 and meetings occur, I think would, in the end,
13 probably be counterproductive.

14 MS. DAVISON: And just to be clear, we're
15 not suggesting that that be the case.

16 JUDGE MOSS: Okay. If there's nothing
17 further from the Commissioners, of course, they're
18 welcome to stay if they wish, but I think we're
19 probably going to discuss nuts and bolts logistics
20 now, so I'm just suggesting that they might wish to
21 do other business, and I'll come get you if I need
22 you. All right. And let's be off the record.

23 (Recess taken.)

24 (Discussion off the record.)

25 JUDGE MOSS: Let us briefly go back on the

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1 record. All right. We've had an opportunity for
2 some informal discussion over the course of the last
3 45 minutes or so concerning our process for moving
4 forward, and we have, through cooperative effort
5 among the parties and in conversation with the
6 presiding officer, determined a manner by which we
7 will proceed with our witnesses and dates certain for
8 a number of them, and a process for the rest of them.

9 We've also agreed that we will have an
10 exchange of cross-examination exhibits that will
11 occur at the earliest possible date, but no later
12 than noon on the 7th. Those will be in hand in my
13 office and in each other -- the parties' hands,
14 according to our previous arrangements for the
15 exchange of such exhibits.

16 The parties have agreed informally that they
17 will -- they are committed to a three-day turnaround
18 on discovery responses in connection with the
19 settlement agreement that was filed last week.
20 Anything else?

21 All right. Thank you all for being here
22 today. I think we made a lot of good progress and I
23 look forward to working with you as we move toward
24 our beginning of our hearing on the 9th.

25 MR. CROMWELL: Thank you, Your Honor.

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1 JUDGE MOSS: We'll be off the record.

2 (Proceedings adjourned at 1:00 p.m.)

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