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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

3 BELLINGHAM COLD STORAGE)
4 COMPANY AND GEORGIA-PACIFIC)
5 WEST, INC.,)
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9 GEORGIA-PACIFIC WEST, INC.,)
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15 A prehearing conference in the above matters
16 was held on July 19, 2000, at 9:30 a.m., at 1300 South
17 Evergreen Park Drive Southwest, Olympia, Washington,
18 before Administrative Law Judge DENNIS MOSS and
19 CHAIRWOMAN MARILYN SHOWALTER and COMMISSIONER RICHARD
20 HEMSTAD.

21 The parties were present as follows:
22 PUGET SOUND ENERGY, INC., by James M. Van
23 Nostrand, Attorney at Law, 600 University Street, Suite
24 3600, Seattle, Washington 98101.
25 Joan E. Kinn, CCR, RPR
 Court Reporter

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1 GEORGIA-PACIFIC WEST, INC., by John Gould,
Attorney at Law, 601 Southwest Second Avenue, Portland,
2 Oregon 97204.

3 BELLINGHAM COLD STORAGE COMPANY, by JOHN
CAMERON, Attorney at Law, 1300 Southwest Fifth Avenue,
4 Suite 2300, Portland, Oregon 97204.

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

7 THE COMMISSION, by Robert D. Cedarbaum,
Assistant Attorney General, 1400 South Evergreen Park
8 Drive Southwest, Olympia, Washington 98504-0128.

9 ATLANTIC RICHFIELD COMPANY, by Michael J.
Myers, Attorney at Law, 911 Kilmary Lane, Glendale,
10 California 91207.

11 AIR LIQUIDE, AIR PRODUCTS, THE BOEING COMPANY,
EQUILON ENTERPRISES, and TESORO NORTHWEST COMPANY, by
12 Melinda Davison, Attorney at Law, 1300 Southwest Fifth
Avenue, Suite 2915, Portland, Oregon 97201.

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

2 CHAIRWOMAN SHOWALTER: Good morning. This is
3 a meeting or a hearing of the Washington Utility
4 Transportation Commission on Dockets Number UE-001014
5 and also UE-000735. I'm Marilyn Showalter, the Chair of
6 the Commission, and with me is Commissioner Hemstad.
7 Commissioner Gillis is unavailable.

8 We're here today so that the commissioners
9 can get an early and direct sense of the issues and how
10 we might best resolve them appropriately and
11 efficiently, but at this point I'm going to turn the
12 proceeding over to our administrative law judge, Dennis
13 Moss.

14 JUDGE MOSS: Good morning, everyone. We have
15 a basic agenda today, which as Chairwoman Showalter has
16 indicated includes as an important feature discussion of
17 the issues in these two proceedings. Our first order of
18 business, however, will be to take appearances. We will
19 take up petitions to intervene in the 001014 docket,
20 there are none in the other docket, and any other
21 motions that may be brought to the attention of the
22 Bench. Then we will have that discussion of the issues.
23 Finally, we will talk about our process and procedural
24 schedule and then, of course, take up any other business
25 the parties may wish to bring to the Bench this morning.

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1 So let's begin with the appearances, and I'm
2 going to do this in the order of the docket numbers, but
3 I think we will focus first on the 1014 docket when we
4 get to the discussion of the issues so everyone will be
5 alert to the manner in which we're going to proceed. I
6 think the most efficient thing to do will be we will
7 take appearances in 000735, and if you're also appearing
8 for the same client in the other docket, just indicate
9 that, and we won't have to go through the litany twice.
10 So let's begin with the complainant in 735. That would
11 be Mr. Gould, I think.

12 MR. GOULD: Yes, John Gould, Lane Powell
13 Spears Lubersky, 601 Southwest Second Avenue, Portland,
14 97204. My E-mail address is gouldj@lanepowell.com,
15 appearing for Georgia-Pacific West Inc. in both
16 proceedings.

17 JUDGE MOSS: Okay, thank you, Mr. Gould, and
18 let me ask you to add your phone and fax numbers, if you
19 would, please.

20 MR. GOULD: Phone is (503) 778-2161. Fax is
21 (503) 778-2200.

22 JUDGE MOSS: Thank you very much. And I
23 think we will probably have the same counsel for
24 Respondent, but let's go ahead and take the Respondent's
25 counsel in 735.

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1 MR. VAN NOSTRAND: That you, Your Honor, on
2 behalf of Puget Sound Energy, James M. Van Nostrand with
3 the law firm of Stoel Rives LLP, 600 University Street,
4 Suite 3600, Seattle, 98101, telephone (206) 386-7665,
5 fax (206) 386-7500, E-mail jmvannostrand@stoel.com.
6 Also appearing on behalf of Respondent Puget Sound
7 Energy are Mark Quehrn, Q-U-E-H-R-N, and Kirstin,
8 K-I-R-S-T-I-N, Dodge with the Bellevue office of Perkins
9 Coie. The address is 411 - 108th Avenue Northeast,
10 Bellevue, 98004, telephone (425) 453-6980, fax (425)
11 453-7350. The E-mail address for Mr. Quehrn is
12 quehn@perkinscoie.com and for Ms. Dodge is
13 dodgk@perkinscoie.com.

14 JUDGE MOSS: In both dockets, I think you
15 said?

16 MR. VAN NOSTRAND: Yes.

17 JUDGE MOSS: And you would be lead counsel
18 for purposes of service; is that correct?

19 MR. VAN NOSTRAND: We can assume so for
20 purposes of this morning, yes.

21 JUDGE MOSS: Okay, if that changes, let us
22 know, because we do designate one counsel where there's
23 multiple representation as the lead for purposes of
24 service.

25 Is staff appearing in this proceeding?

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1 MR. CEDARBAUM: Yes, we are, Your Honor. I'm
2 Robert Cedarbaum, Assistant Attorney General,
3 representing Commission Staff. My business address is
4 the Heritage Plaza Building, 1400 South Evergreen Park
5 Drive Southwest in Olympia, Washington, 98504. My
6 telephone number is area code (360) 664-1188, the fax is
7 area code (360) 586-5522, and my E-mail address is
8 bcedarda@wutc.wa.gov.

9 JUDGE MOSS: Thank you.

10 Mr. ffitch, are you entering an appearance in
11 this proceeding?

12 MR. FFITCH: Your Honor, yes, public counsel
13 is entering an appearance in both proceedings, but
14 initially in this proceeding. Simon ffitch, Assistant
15 Attorney General, Public Counsel Section, Washington
16 Attorney General's office, 900 Fourth Avenue, Suite
17 2000, Seattle, Washington, 98164. Phone is (206)
18 389-2055, fax (206) 389-2058. E-mail simonf@atg.wa.gov.

19 JUDGE MOSS: Thank you very much.

20 Do we have anybody else who wishes to enter
21 an appearance in the 735 docket? I did not receive any
22 petitions to intervene with respect to that docket.

23 Now let's turn to the 1014. We have had
24 indications from several counsel that they are appearing
25 in both, but we need to pick up the representation for

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1 Bellingham Cold Storage in that docket.

2 MR. CAMERON: Good morning, Your Honor, my
3 name is John Cameron. I'm appearing for Bellingham Cold
4 Storage Company. I'm with Davis Wright Tremaine, Suite
5 2300, 1300 Southwest Fifth Avenue, Portland, 97201. My
6 phone number is area code (503) 778-5206, fax number
7 (503) 778-5299, and my E-mail address is
8 johncameron@dwt.com.

9 JUDGE MOSS: Thank you.

10 And we've got staff's appearance is the same
11 in this proceeding. Public counsel has indicated the
12 same. And then we do have two petitions to intervene,
13 so I will ask for appearance from the counsel for Public
14 Utility District Number One of Watcom County. Is anyone
15 present for that posed intervener?

16 MR. CAMERON: Your Honor, I was informed by
17 Ms. Carol Arnold that she would not be attending this
18 morning's hearing.

19 JUDGE MOSS: Thank you.

20 We also have a petition, a joint petition to
21 intervene by Air Liquide, the Boeing Company, Equilon
22 Enterprises, and Tesoro Northwest Company. Ms. Davison,
23 I believe you will be entering an appearance.

24 MS. DAVISON: Thank you, Your Honor. And
25 also we filed a supplemental petition to intervene. We

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1 were unable to contact Air Products in advance of our
2 first petition to intervene. I wanted to make sure that
3 the Commission received that petition in advance of the
4 prehearing conference, and Air Products is joining on to
5 that petition to intervene as we filed in our
6 supplemental petition. And for shorthand, I refer to
7 them as the Schedule 48 customers.

8 With that background, my name is Melinda
9 Davison with the law firm of Davison Van Cleve. My
10 address is 1300 Southwest Fifth Avenue, Suite 2915,
11 Portland, Oregon, 97201. My phone is (503) 241-7242.
12 My fax number is (503) 241-8160. And my E-mail is
13 mail@dvclaw.com.

14 Thank you, Your Honor.

15 JUDGE MOSS: Thank you.

16 Anybody else wish to enter an appearance this
17 morning?

18 MR. MYERS: Yes, my name is Michael Myers. I
19 represent Atlantic Richfield Company, Jerry Point
20 Refinery. I filed a notice I intend to intervene early
21 this morning. It may not have reached you. We will
22 file a formal petition tomorrow.

23 With that background, my name is Michael
24 Myers, M-Y-E-R-S, address is 911 Kilmary, K-I-L-M-A-R-Y,
25 Lane, Glendale, California, 91207. Telephone number is

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1 (818) 241-9154. Fax number is (818) 545-9063. E-mail
2 is mjmyersgln@aol.com.

3 JUDGE MOSS: I was writing hurriedly there,
4 was that mjm?

5 MR. MYERS: Yersgln.

6 JUDGE MOSS: Thank you very much.

7 All right, now I have not received your
8 client's petition, and nor have I received a
9 supplemental petition for Air Products. So if you have
10 those, I would ask that you hand me a copy now.

11 MR. MYERS: I don't have one with me yet,
12 Your Honor.

13 JUDGE MOSS: Ms. Davison, is this petition
14 identical in terms of its substance to that previously
15 submitted?

16 MS. DAVISON: Yes, Your Honor. The only
17 change is the addition of Air Products.

18 JUDGE MOSS: We're going to take these
19 petitions to intervene up, Mr. Meyers, so I think it
20 would be a good idea if we can get a copy of that
21 upstairs.

22 MR. MYERS: I do have a copy of what I filed
23 this morning.

24 JUDGE MOSS: Okay, well, that's what I would
25 like to see. Have counsel been provided with a copy of

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1 this?

2 MR. MYERS: Yes, they have, with the, I
3 believe, the exception of Puget. I have given them to
4 Mr. Gould and to Mr. Cameron and Ms. Van Cleve.

5 MR. CEDARBAUM: I have not received one, Your
6 Honor.

7 JUDGE MOSS: All right. And it was your
8 intention to file a formal motion to intervene or a
9 petition to intervene as we style it --

10 MR. MYERS: Yes.

11 JUDGE MOSS: -- in our rules today?

12 MR. MYERS: It should be on file tomorrow
13 morning, Your Honor.

14 JUDGE MOSS: All right. Well, we're going to
15 take it up today.

16 And let me just ask if there are objections
17 to any of the petitions to intervene?

18 MR. VAN NOSTRAND: Yes Your Honor.

19 JUDGE MOSS: All right, why don't we proceed
20 to hear those objections then, and then we will allow
21 the petitioning parties to respond.

22 MR. VAN NOSTRAND: Turning first, I believe,
23 I guess to the Schedule 48 complainants, I noticed from
24 the petition, I'm not sure what the specific interest in
25 the outcome of the proceeding is. I think as you're

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1 aware, Your Honor, and the commissioners from the
2 Schedule 48 case, that the contracts here with Georgia
3 Pacific and Bellingham Cold Storage did provide some of
4 the background and the development of what turned into
5 Puget's Schedule 48 tariff.

6 But the particular matters at issue here seem
7 to be two. One is that the index according to the
8 complainants, is broken, and we need to have some
9 different mechanism substituted. And the second being
10 what is PSE's obligation to provide transmission
11 services under the special contracts.

12 And I guess with respect to the Schedule 48
13 customers, both of those terms are materially different
14 in Schedule 48 as it now exists from what is currently
15 at issue in this proceeding with respect to the index.
16 Pursuant to the accord and satisfaction and the
17 amendments that have been filed since the Commission
18 approved last week, it's the Mid Columbia firm index
19 minus 1.07 mils, which is in effect for the special
20 contract customers. Under Schedule 48, as the
21 Commission is aware from that complaint proceeding last
22 year, it's the Mid Columbia non-firm index. So there's
23 not an identity of positions or interest on that issue.

24 As to the obligation to provide unbundled
25 transmission service, the language that appears to be in

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1 contention from the special contracts has to do with the
2 ability of the customer to buy through in the event
3 non-firm energy is not available. Similar language did
4 appear in Schedule 48, and under the stipulation and
5 settlement approved by the Commission in November of
6 1999, that language no longer appears in Schedule 48.
7 So on the transmission issue as well, the link between
8 the special contract and the interest of the Schedule 48
9 customers no longer exists.

10 And the Schedule 48 customers, it's our
11 position that they have no substantial interest in the
12 outcome of this complaint proceeding, and their
13 intervention would no doubt broaden the issues to more
14 of a generic index transmission type proceeding, which
15 would unnecessarily delay and complicate this
16 proceeding. So Puget respectfully opposes the
17 intervention of the Schedule 48 customers.

18 JUDGE MOSS: All right, let's hear from
19 Ms. Davison.

20 MS. DAVISON: Thank you, Your Honor. First I
21 apologize, I handed you the wrong document, so if I may
22 approach you and give you the correct one.

23 JUDGE MOSS: I have looked at it, yes. I
24 didn't recognize your error. Thank you.

25 MS. DAVISON: Your Honor, I would respond to

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1 the points made by Mr. Van Nostrand this way. It is
2 true that there are differences between the Schedule 48
3 tariff and the special contracts that are at issue here.
4 However, having said that, there is a very, very
5 extensive record that was established in the Schedule 48
6 complaint case that recognized that Schedule 48 was
7 modeled after the special contracts. There are a lot
8 more similarities than perhaps differences between the
9 special contracts and the tariff.

10 With regard to the issue of us bringing up
11 generic issues or intending to broaden or delay this
12 proceeding, that is not our intention at all. As I
13 stated in the petition to intervene, we are not taking a
14 position with regard to the merits of the issues raised
15 in this complaint. My clients would like to intervene
16 in this case for the purposes of monitoring the
17 proceeding, for the purposes of determining whether
18 something does develop in this proceeding that may have
19 adverse consequences to a particular application or
20 interpretation of Schedule 48 given the similarity
21 between the tariff and the special contracts. Depending
22 on how the case turns out, we may not be terribly active
23 in this case. But I do believe that we have a unique
24 interest in intervening in this case, and I believe that
25 given our knowledge and our expertise and perhaps the

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1 length of the litigation regarding Schedule 48 that we
2 can play a constructive role in this proceeding to the
3 extent that is necessary.

4 In addition, as I said, I believe that in
5 many ways, the Schedule 48 customers are similarly
6 situated to the special contracts customers, and I
7 believe they do have a legitimate interest that needs to
8 be protected in this proceeding.

9 JUDGE MOSS: And you were asking for full
10 party status?

11 MS. DAVISON: Yes, we are, Your Honor.

12 JUDGE MOSS: Does the staff have any input on
13 this?

14 MR. CEDARBAUM: Staff does not object to the
15 intervention of these customers. I would just point out
16 one clarification in response to Mr. Van Nostrand's
17 statement with respect to the Commission's open meeting
18 last week where the Commission approved an amendment to
19 the special contract. He stated that the Commission
20 also approved an accord and satisfaction. That did not
21 occur. The company had withdrawn that request as part
22 of the filing that came before you last week, so that
23 all that was approved last week was the contract
24 amendment itself.

25 JUDGE MOSS: Okay.

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1 MR. CEDARBAUM: Just with that clarification,
2 we have no objection.

3 JUDGE MOSS: So neither support nor oppose?

4 MR. CEDARBAUM: Correct.

5 JUDGE MOSS: Public counsel.

6 MR. FFITCH: Public counsel does not oppose
7 the petition for intervention.

8 JUDGE MOSS: Any inquiry from the Bench on
9 these matters?

10 CHAIRWOMAN SHOWALTER: No.

11 JUDGE MOSS: All right. And I understand
12 from the petition that Bellingham Cold Storage and
13 Georgia-Pacific have indicated to you that they have no
14 objection, so we have that matter resolved, okay.

15 Let's go ahead and hear argument with respect
16 to any other objections you may have. I think the best
17 course will be for us then to probably we will consider
18 retiring for a few moments to take this up or at least
19 have a conference here at the Bench, so why don't we get
20 all the objections and argument.

21 MR. VAN NOSTRAND: Okay. Next, I guess, with
22 respect to Arco, Your Honor, it's not clear, I guess,
23 what their stated interest is in this proceeding other
24 than they happen to be located within the same county,
25 and they have another special contract with Puget, which

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1 again has an entirely different pricing provision and
2 has entirely different provisions as far as whatever
3 Puget's transmission obligation may be under that
4 agreement.

5 And this particular complaint proceeding is
6 limited to the special contracts between Bellingham Cold
7 Storage and Georgia-Pacific and the specific terms of
8 those agreements as they relate to the index term and
9 whatever Puget's obligation may be to provide
10 transmission under that agreement. And if we're to
11 address those issues and resolve them in an expeditious
12 manner, as the complainants request, I think it would be
13 helpful to limit the issues to those that are within the
14 scope of those special contracts and to the parties that
15 are party to the contract along with staff and public
16 counsel.

17 It's difficult to see how the outcome of this
18 proceeding will affect Arco or what the substantial
19 interests that Arco alleges it has in this proceeding.
20 It has an entirely different agreement that was approved
21 by the Commission last year and with entirely different
22 provisions on these points. And I don't believe that
23 there has been any substantial interest demonstrated,
24 nor does the public interest otherwise warrant their
25 intervention, so Puget respectfully opposes the

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1 intervention of Arco as well, Your Honor.

2 JUDGE MOSS: All right. Well, let's hear
3 from Mr. Meyers, and we will learn more about what
4 interest Arco asserts.

5 MR. MYERS: Certainly, Your Honor.

6 Arco has over time had two special contracts
7 with Puget Sound Energy. The current contract which was
8 approved last year has a price mechanism based upon the
9 Mid Columbia price index. As I understand the basic
10 gravamen of the Bellingham Cold Storage and
11 Georgia-Pacific petitions, there's something wrong with
12 the Mid Columbia price index. It has broke or is
13 broken. If there's going to be something in this
14 proceeding that "fixes" that Mid Columbia price index,
15 it's going to have a direct impact on our contract. I
16 will -- based upon the description of the index, there
17 may be some minor differences in how a supply, but the
18 underlying index, the Mid Columbia firm, is the same.

19 We have had extensive experience in this area
20 of special contracts over the last five years. In fact,
21 I think you wind up with the Schedule 48 paper, the
22 Bellingham Cold Storage and Georgia Pacific, you
23 basically have the universe of these special contracts.
24 And for us to be excluded from this proceeding where
25 something may happen to that concerns us. We, I think I

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1 can adopt Ms. Davison's comments, we probably will not
2 be terribly active in it. We're kind of monitoring and
3 protecting our interest. But we do bring a good deal of
4 experience to the table. We understand these issues,
5 and we are concerned that something might happen in this
6 proceeding that's adverse to us. So at the very least,
7 we want to monitor it on a detailed basis.

8 JUDGE MOSS: Thank you, Mr. Meyers, and we
9 don't have anything in writing yet, so I will ask if
10 Bellingham or Georgia Pacific have any comment on this
11 particular petition to intervene.

12 MR. CAMERON: Bellingham Cold Storage has no
13 objection.

14 MR. GOULD: Georgia-Pacific has no objection.

15 JUDGE MOSS: Mr. Cedarbaum.

16 MR. CEDARBAUM: Your Honor, I guess staff
17 would oppose the intervention of Arco, and I should say
18 I see this differently as the intervention of
19 Ms. Davison of her clients because of the similarities
20 between Schedule 48 and the special contracts that are
21 at issue in this proceeding. As I heard Mr. Meyers, his
22 main point of interest concerns whether or not the
23 Commission should revise the index that is currently in
24 the special contract because that index is broken. In
25 other words, not an interpretation of the special

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1 contract, but whether or not the current index provides
2 results in a reasonable rate and should be changed
3 because it's an unreasonable rate.

4 Looking at RCW 80.04.110 which Mr. ffitch
5 reminded me of this morning, that statute indicates
6 that:

7 No complaint shall be entertained by the
8 Commission except upon its own motion as
9 to the reasonableness of the schedule of
10 the rates or charges of any electric
11 company unless the complaint is signed
12 by the mayor, counsel, or commission of
13 the city or town in which the company
14 complained of is engaged in business or
15 not less than 25 consumers or purchasers
16 of such electricity or at least 25% of
17 the consumers or purchasers of the
18 company's service.

19 So there are standing requirements with
20 respect to a complaint against the reasonableness of a
21 rate, and to the extent that this complaint asks the
22 Commission to examine the reasonableness of the index
23 which results in a rate, I think we have an issue as to
24 whether or not in this complaint proceeding given the
25 standing requirements the Commission can actually do

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1 that.

2 CHAIRWOMAN SHOWALTER: But doesn't, in a way,
3 aren't you getting at maybe the merits of the argument
4 that the complainants are raising. That is, maybe your
5 characterization there would be a response to why the
6 contract provision couldn't be changed, but at the level
7 that the complainant is asking us to change something in
8 the contract, and to the extent that we entertain that
9 issue, isn't that same issue relevant to the other
10 customers? That is, what kind of a contract is this.
11 Can the index be changed or not. So it's not just what
12 the index says, whose index says what at this time, but
13 what is the nature of a contractual obligation to abide
14 by an index.

15 MR. CEDARBAUM: Well, I think that's right.
16 But as I read the complaint itself looking at this is on
17 page 9 of the complaint starting at line 12 under item
18 3, the complainants at least, and I'm speaking just to
19 the 001014 docket, they're asking the Commission to
20 order the company to price power according to the White
21 Horn simple cycle combustion turbine as opposed to the
22 Mid C index. And so in that sense, they're asking the
23 Commission to establish a new rate.

24 CHAIRWOMAN SHOWALTER: Right, but let's just
25 say on the merits we denied it because the contract

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1 doesn't permit it. Well, in that case, maybe the
2 interveners don't need to be here. But since that's the
3 issue in the case, don't they need to be here until we
4 rule on that question?

5 MR. CEDARBAUM: I guess until you -- if what
6 you're saying is that you would entertain a motion to
7 dismiss that portion of the complaint, and that's not
8 before you yet, then I guess my answer to your question
9 is yes. So maybe in a sense I'm raising and teeing up
10 the issue now.

11 CHAIRWOMAN SHOWALTER: Right.

12 MR. CEDARBAUM: We know about it.

13 CHAIRWOMAN SHOWALTER: Right.

14 MR. CEDARBAUM: We can deal with it.

15 CHAIRWOMAN SHOWALTER: Depending on which way
16 that question is resolved, assuming there is a motion --

17 MR. CEDARBAUM: So basically --

18 CHAIRWOMAN SHOWALTER: -- then maybe they may
19 not be interested in the case any more. I don't know
20 that at this point, we haven't resolved it.

21 MR. CEDARBAUM: So maybe I will restate my
22 objection. At least subject to presenting the objection
23 at a later time once this issue is ruled upon, I would
24 have to no objection at this point in time.

25 JUDGE MOSS: Is it staff's intention to

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1 submit a motion to dismiss that aspect of the complaint?

2 MR. CEDARBAUM: Quite frankly, I just thought
3 about this issue this morning. I don't know.

4 COMMISSIONER HEMSTAD: I would like to pursue
5 this so I understand it. What is the difference in the
6 issue of the Schedule 48 customers and Arco, in your
7 view?

8 MR. CEDARBAUM: As I heard Mr. Meyers, his
9 main focus was on the request by the complainants to
10 change the index in the special contract as opposed to
11 interpreting what the current index says. And as I read
12 the statute that I referenced, 80.04.110, there's a
13 standing requirement with respect to who can bring that
14 kind of a complaint before the Commission, which has not
15 yet been met.

16 COMMISSIONER HEMSTAD: But they're not
17 bringing a complaint. They're asking to intervene.

18 MR. CEDARBAUM: I guess what I'm saying is
19 that to the extent that if my interpretation is correct
20 and the Commission sustained that, a motion to dismiss
21 would sustain my interpretation of that statute, then
22 Arco as I heard them would not have an interest in this
23 proceeding. So their intervention, well, if granted
24 today, we could come back at that issue and perhaps
25 dismiss it later.

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1 JUDGE MOSS: All right. Then, Mr. ffitch,
2 anything on this?

3 MR. CAMERON: Your Honor, may I be heard just
4 for a moment, please. Just to direct the Commission's
5 attention to Exhibit C to the complaint, which is a
6 letter from the mayor of the City of Bellingham, in
7 which both complainants do business, authorizing them to
8 attach the letter requesting that complaint proceedings
9 be initiated under the cited provision or the provision
10 cited by Mr. Cedarbaum. If that was overlooked, I hope
11 you will direct his attention to it.

12 JUDGE MOSS: All right, thank you.

13 Now, Mr. Ffitch.

14 MR. FFITCH: Your Honor, I guess I would just
15 echo the prior discussion about the issue under the
16 statute. And with that in mind, we don't have any
17 objection at this point to the intervention of Arco.

18 JUDGE MOSS: All right. Do we need to hear
19 anything else on this one?

20 Mr. Meyers.

21 MR. MYERS: Well, I have listened to the
22 concerns of the staff and the attorney general. The
23 fact is that this is a case where we have a similar
24 pricing mechanism. The results of this case may have a
25 significant impact on a major element of our costs and

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1 operations. And it may well be that you handle the case
2 in such a fashion that it has no impact at all, but it
3 is so important to us that we have a vital interest in
4 at least monitoring the proceedings closely and may have
5 something to offer of benefit to the proceedings based
6 upon our experience and understanding of the matter.

7 JUDGE MOSS: Okay.

8 Mr. Van Nostrand, you have heard now Arco's
9 asserted interest in the proceeding, and so I wanted to
10 give you an opportunity to respond to that.

11 MR. VAN NOSTRAND: Thank you, Your Honor. I
12 guess it's a question of if these parties are allowed to
13 intervene and this becomes some sort of a generic
14 proceeding on the index, then are these same parties
15 bound by the outcome of this proceeding? Meaning the
16 fear is that this is turning into a proceeding where
17 we're going to rewrite the Schedule 48 tariff, the
18 special contract with Arco.

19 The Arco special contract was a unique
20 situation. It had to be approved by the Commission as a
21 special contract, which by its very nature depends upon
22 the unique circumstances of that case. You're
23 addressing a legitimate bypass threat, and you price
24 accordingly. And special contract proceedings by their
25 very nature depend upon the particular circumstances in

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1 that proceeding.

2 And it's concerning if we're going down this
3 path that we're going to investigate generically an
4 index that may be used in some way in the Arco contract,
5 and therefore imperil that contract as well without
6 looking at the particular circumstances that caused the
7 Arco contract to come into existence.

8 I just fear we're going down this path where
9 we're allowing parties to be in for the purposes of
10 maybe affecting the outcome here, but will they be bound
11 by the outcome that they helped affect here, and how do
12 we go back and address the particular issues in Schedule
13 48 or in Arco which caused those particular mechanisms
14 to come into place.

15 JUDGE MOSS: Thank you.

16 MR. VAN NOSTRAND: I believe intervention is
17 still not warranted, Your Honor, or in the public
18 interest.

19 JUDGE MOSS: Thank you.

20 All right, let's go ahead and hear, do you
21 have opposition to the Public Utility District Number 1
22 of Watcom County, who has not made an appearance today,
23 but who has filed a written petition, and so we have
24 that before us, and there is not a requirement that they
25 appear, so let me ask if there's opposition.

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1 MR. VAN NOSTRAND: Yes, Your Honor. PSE
2 opposes that intervention as well. It's not clear from
3 the petition to intervene what the substantial interest
4 is in this proceeding. Watcom's position is that under
5 the agreements that it has with these customers, they
6 will begin providing the service under the agreements to
7 Georgia-Pacific and Bellingham Cold Storage beginning on
8 May 31 of 2001.

9 If you look at their interest in this
10 proceeding, they claim that PSE won't sell facilities to
11 Watcom PUD and that PSE opposes providing wheeling
12 service under the FERC tariff, although Watcom admits it
13 hasn't asked for such service under the FERC tariff.
14 The allegations in the complaint read more like
15 something you would see in a civil action based on
16 antitrust theory, with the consistent references to
17 essential facilities and persistent pattern of conduct
18 and certain anticompetitive behavior, which may be
19 fascinating, but really don't have any bearing on the
20 matters at issue in this particular complaint
21 proceeding, nor are they matters which this Commission
22 may have the authority to address.

23 And it seems Watcom PUD's intervention, if
24 allowed, would certainly broaden the issues in this
25 proceeding if we're going to take up these sort of

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1 antitrust allegations that are raised in their
2 complaint. Watcom PUD does not have a substantial
3 interest in the outcome of this proceeding, and PSE
4 respectfully opposes their intervention.

5 JUDGE MOSS: Has anyone arrived to represent
6 the interests of Public Utility District Number 1 of
7 Watcom County?

8 Apparently there's no one present. Let me
9 ask the petitioners, or complainants rather, whether
10 they have anything on this one. There's no indication
11 in the intervention itself.

12 MR. CAMERON: Was provision made for a phone
13 bridge, Your Honor? I had some indication that
14 Ms. Arnold might phone in.

15 JUDGE MOSS: There was provision made for
16 monitoring by telephone conference bridge, but the
17 prehearing conference notice indicated quite plainly
18 that anyone who wished to participate needed to show up
19 here today.

20 MR. CAMERON: I see.

21 JUDGE MOSS: So it's available for monitoring
22 only.

23 MR. CAMERON: I see.

24 JUDGE MOSS: Staff.

25 MR. CEDARBAUM: Yes, Your Honor. We would

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1 join in the objection of Puget to the intervention of
2 Watcom County PUD for the reasons stated by Mr. Van
3 Nostrand. And I would just add to that, the decision of
4 the State Supreme Court of Cole versus the Washington
5 Utilities and Transportation Commission as 79
6 Wa.2nd.302. In that case, the Commission denied the
7 intervention in the Washington Natural rate case of an
8 entity called the Oil Institute. It was a commission
9 unregulated business. And because it was a business
10 that the Commission did not regulate, the Commission
11 denied the intervention, and that denial was approved in
12 that case by the State Supreme Court.

13 So although the Commission's rule on
14 intervention allows intervention if there's a
15 substantial interest or if the public interest is
16 warranted, there's still this gloss of the type of
17 interest that the Commission can recognize in the case.
18 I read the Cole decision to say that the interest of a
19 non-regulated entity like the PUD would not be an
20 interest subject to intervention before the Commission,
21 so denial of the intervention would be consistent with
22 that Cole decision.

23 MS. SHOWALTER: You say would not be or could
24 not be? In other words, I mean --

25 MR. CEDARBAUM: I think --

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1 CHAIRWOMAN SHOWALTER: It seems to me that
2 the case you were quoting said should we deny
3 intervention, there's probably a case supporting that
4 idea. But if the matter is within our discretion, is
5 your view that we can grant intervention?

6 MR. CEDARBAUM: I think you're right. I'm
7 not reading the case to say that you can not. I think
8 it is within your discretion. I'm just saying that
9 denial of the intervention here would be consistent with
10 the Cole decision, but not required by the Cole
11 decision.

12 JUDGE MOSS: Public counsel.

13 MR. FFITCH: Your Honor, public counsel does
14 not have a position in favor or in opposition to the
15 Watcom County intervention.

16 JUDGE MOSS: Thank you.

17 All right, that's the universe of petitions
18 that I have unless anybody else has something to bring
19 forward at this time. I think not. All right. We're
20 going to retire to chambers to discuss the pending
21 petitions, and so we will be in recess let's say ten
22 minutes, and it may stretch a few beyond that, so please
23 stay in the area.

24 (Recess taken.)

25 JUDGE MOSS: All right, let us go back on the

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1 record.

2 With regard to the three petitions to
3 intervene, the Commission has determined that it should
4 grant intervention as to all three limited to the
5 purposes stated today and limited to the issues raised
6 by the complaint and counterclaim. The Commission will
7 articulate further on this in a written order.

8 And I want to mention as well that it may
9 turn out that dispositive motions, if any are received
10 and ruled upon, may narrow the case to the point where
11 the matter of these parties' participation may be
12 reconsidered consistent with the administrative
13 procedure act and our rules of procedure which allow for
14 that process.

15 All right, are there any motions that the
16 parties wish to bring before the Bench at this time?

17 Hearing nothing, let us move to a discussion
18 of the issues. I think again we want to let's start
19 with the Docket Number UE-001014 case, and I think we,
20 of course, we have the pleadings, but I think it would
21 be useful to hear briefly from the complainants and the
22 respondent and get the other parties an opportunity to
23 comment as well, and then we can have, as we go along,
24 we may have inquiry from the Bench. Or at the
25 conclusion of those brief statements, we may have some

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1 inquiry at that point in time. So we have two
2 complainants, but by circumstance, Bellingham Cold
3 Storage is listed first, so let's hear from Mr. Cameron.

4 MR. CAMERON: Your Honor, I believe you're
5 starting with the docket in which BCS is not a party.
6 Is that the Georgia Pacific complaint, or are we in --

7 JUDGE MOSS: We're starting with 001014,
8 styled Bellingham Cold Storage Company and
9 Georgia-Pacific West, Inc. against Puget Sound Energy.

10 MR. CAMERON: Well, that would be me then,
11 Your Honor. The complaint is styled to comprehend both
12 pricing issues and transmission issues, all arising in
13 the context of our special contract. As we tried to
14 explain to the Commission in our complaint, our special
15 contracts were executed back in 1996 at a time when the
16 competitive pricing was the goal, but the pricing bench
17 marks were very much in formative stages. Since then,
18 it has been a history of trial and error of trying to
19 match the intention of the parties to come up with a
20 competitive price with which to price energy under our
21 five year power sale against such indicators that were
22 available in the market.

23 We have always striven to have indicators
24 developed by third parties subject to audit, minimizing
25 the possibility of manipulation. We began with the

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1 California-Oregon border price, and then shortly into
2 the contract, I believe after a lapse of six months, we
3 reverted to the Mid Columbia index as our pricing bench
4 mark indicator, and there have been problems with that
5 index as well.

6 As you well know from the Schedule 48
7 complaint, the Mid Columbia index was changed a couple
8 of years ago to a point where Puget had problems
9 believing that the index as recast no longer reflected
10 at least its intention in Schedule 48. And because our
11 contract also tracked the Mid Columbia index as well as
12 Schedule 48, we had problems as well.

13 Schedule 48 complainants went forward before
14 you. We stood back telling Puget that we stood ready to
15 work this out amicably and would await the result of the
16 Schedule 48 complaint and then come to closure, which in
17 fact we did.

18 Now more recently we believe that there's a
19 new problem with the Mid Columbia index such that it no
20 longer tracks fundamentals in the industry, underlying
21 fundamentals, and no longer provides us with that
22 competitive bench mark which again has been our goal
23 since we signed the five year contracts in 1996. We
24 believe that warrants a remedy. We first approached the
25 company, talked it out, and then decided we really had

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1 no recourse but to file a complaint because resolution
2 was not forthcoming.

3 And as you know, during July we faced
4 production disruptions. The mill was shut down.
5 Production during the critical food processing months
6 was disrupted at Bellingham Cold Storage. Ultimately we
7 did cover ourselves, as I believe has been publicly
8 stated, with a financial hedge for the month of July,
9 both Georgia-Pacific and Bellingham Cold Storage. I can
10 tell you without getting into quantitative detail that
11 those hedge prices were ruinous, incredibly high.

12 We also find that financial hedges, or
13 derivatives as they're sometimes called, carry an
14 insurance premium that make them much more costly or can
15 make them much more costly than physical commodities.
16 That is, you can go out and buy a physical supply for
17 one price. If instead you buy a financial hedge or
18 derivative, you pay a considerable premium. In a period
19 when underlying energy prices are already sky high, the
20 idea of buying derivatives, which by the way we can do
21 without recourse to our contract, we can do that with
22 any third party entity, the idea of buying derivatives
23 still leaves us facing the prospect of what we do to
24 survive.

25 We faced the problem in May, June, July, and

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1 we anticipate with great trepidation the experience we
2 expect to happen in August without remedy coming from
3 the Commission. For that reason, we requested expedited
4 proceedings. We really need relief. There are 2,000
5 employees in Bellingham whose jobs are at risk, many of
6 whom were already laid off for a period of time and who
7 may be laid off again in August.

8 Especially in the case of Bellingham Cold
9 Storage, we also have secondary suppliers and vendors.
10 As you my know, Bellingham Cold Storage provides food
11 processing and storage space for a number of tenants,
12 major processors of the food stuffs and fish seafood
13 products produced in Western Washington as far up as
14 Alaska. That entire market is dependent on us.

15 My client has already been talking to tenants
16 about the dire energy charges they may face during the
17 month of August, and they face the possibility they may
18 shut down production, limiting their exposure to energy
19 prices, which energy is just such a big part of the
20 production that it may leave these people with no
21 recourse but to limit production even at the risk of not
22 processing or storing the foods now being produced and
23 brought to market. That's basically it. We're in
24 emergency.

25 We have been told by Puget that basically

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1 they shopped the spot market for us. The price is a
2 flow through. The rate is set by formula established in
3 the contract. What we're struggling for right now is to
4 come up with a different place holder, a different
5 price, one that will allow us to pay energy prices that
6 all -- that may continue to be high, but are lower than
7 what the Mid Columbia index is producing right now and
8 certainly less volatile.

9 Volatility is a killer in this industry as
10 well as high energy prices. It's just impossible to
11 budget. It is impossible for our business managers to
12 go forward with literally unbounded liabilities that
13 they have to report on their budgets and balance sheets.
14 What will energy cost? Well, we don't know, but it may
15 be 10 or 12 times what we have experienced in the past.
16 Those are not decisions that allow these industries to
17 maintain their sustainability. We need some recourse.

18 And again, as you recall or may recall from
19 the 1996 order, we are non-core customers. Puget does
20 not plan for our energy supply needs as non-core
21 customers. We share that status with the Schedule 48
22 customers and with Arco in that regard. What we are
23 basically saying is planning is still a good idea. If
24 Puget has been relieved of that responsibility, the
25 customers themselves working in a fairly open process

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1 here at the Commission would like to take control for
2 their own planning decisions, like to assume that
3 responsibility and use the contract as a vehicle whereby
4 they can have sustainable energy prices over the future.

5 The second set of issues relate to
6 transmission services.

7 CHAIRWOMAN SHOWALTER: Mr. Cameron, can I ask
8 you a few questions --

9 MR. CAMERON: Yes, ma'am.

10 CHAIRWOMAN SHOWALTER: -- before you go on to
11 the second set of issues.

12 MR. CAMERON: Yes, ma'am.

13 CHAIRWOMAN SHOWALTER: First, does the
14 amendment to the contract that was filed and approved
15 last week change the scope of the issues that you in
16 your complaint, since the amendment, the approval of the
17 amendment, occurred after your complaint?

18 MR. GOULD: I would like to respond to that.

19 MR. CAMERON: In a minute.

20 We certainly appreciate what the Commission
21 did last week. We for some time had contemplated the
22 approval of that amendment. It does address a problem
23 that Puget raised with regard to the Mid Columbia index,
24 because the process yielded refunds for Bellingham Cold
25 Storage. I would say it is welcome, but it certainly

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1 does not relieve the problem.

2 As I stated in the letter tendered to the
3 Commission before your action last week, what we're
4 doing this week is quite discreet, quite different from
5 what was done last week. I think the relevance of the
6 amendment last week is that it points to a history of
7 reformulation of contract pricing under these special
8 contracts reflecting problems just picking an indicator
9 that works for both sides over time.

10 CHAIRWOMAN SHOWALTER: So you are asserting
11 that despite the amendment to the contract last week, I
12 don't know, the index is still broken, or there is still
13 some route by which this Commission has to -- should
14 designate a different index?

15 MR. CAMERON: Yes, ma'am, very definitely.

16 CHAIRWOMAN SHOWALTER: And then if you could
17 focus for a minute on the time period up to June 1st,
18 2001, as opposed to the time period after 2001. Are you
19 acknowledging that you have an obligation to buy power
20 through some mechanism from Puget during that period, or
21 are you asserting you don't have that obligation in that
22 -- in the first five year period if you get a
23 transmission contract?

24 MR. CAMERON: Oh, okay. The special contract
25 approved by this Commission in 1996 provided for a five

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1 year power sale, and it was described in the Commission
2 order and the staff memorandum as a five year contract.
3 That is our position as well. Our obligation to Puget
4 as a non-core customer is determined by contract, and
5 that is the contract in question. After that period of
6 time for which Puget bears no planning responsibility,
7 we see ourselves as having no further obligation to
8 purchase energy from Puget unless we come to term on the
9 contract.

10 CHAIRWOMAN SHOWALTER: Right, but I'm just
11 trying to get you to focus for the moment on the first
12 five years. Are you asserting that you do not have an
13 obligation to buy from Puget in the first five years if
14 you get a transmission contract, or are you
15 acknowledging you do have an obligation to buy in the
16 first five years, but you also are entitled to a
17 transmission contract and, you know, maybe therefore buy
18 from somebody else as well? That is my -- is the
19 wheeling that you're demanding in the first five years,
20 first of all, are you demanding that in the first five
21 years, and if so, is that in your view a substitute for
22 your other -- your apparent, I guess, obligation to buy
23 from Puget, or is it in addition to any obligation under
24 the contract to buy power from Puget in the first five
25 years?

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1 MR. CAMERON: Okay, the first five years, of
2 course, ends next May. That's the end of the five year
3 term.

4 CHAIRWOMAN SHOWALTER: Right.

5 MR. CAMERON: During that period of time we
6 do have a power sale agreement, we do have obligations
7 related to power supply. Our point regarding that
8 contract though is twofold. One, we do have
9 transmission rights during that period of time specified
10 by contract. We believe that there is an argument that
11 Puget is unable to deliver power right now as
12 contemplated by the contracting parties allowing us to
13 buy through by means of our transmission rights provided
14 by contract.

15 I would point out though --

16 CHAIRWOMAN SHOWALTER: Is that your argument,
17 that it's economically impossible for them to deliver?

18 MR. CAMERON: Yes, ma'am.

19 CHAIRWOMAN SHOWALTER: So you're saying that
20 because it's economically impossible for them to
21 deliver, that triggers the provision in the contract
22 that says it's not available, then you can wheel; is
23 that right?

24 MR. CAMERON: Yes, ma'am.

25 CHAIRWOMAN SHOWALTER: Okay.

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1 MR. CAMERON: I would point out one further
2 thing. We are not trying to leave Puget holding the bag
3 here. As I said, we willingly accept responsibility for
4 planning for our own loads. If you look at the price
5 mechanism on the contract, it is basically a flow
6 through of the index price, and Puget has informed us
7 that basically it goes to the market to buy on a daily,
8 hourly basis for all of its non-core customers. There
9 may not be a one-to-one parity between the total load
10 and Puget's purchases during any day. We can count on
11 them to be more opportunistic than that.

12 But basically the contract provides they go
13 to the market on a daily and hourly basis and procure
14 our energy needs at the Mid Columbia price plus a markup
15 plus taxes plus an adder for losses. Basically what
16 we're saying is, don't do that any longer, or let's work
17 to a solution where you don't have to go to the Mid
18 Columbia index. Let's go to a lower, more stable source
19 of supply. You will still get your adder, you will
20 still get your tax rider, we will still provide for
21 losses. You should be economically indifferent, and we
22 will survive.

23 CHAIRWOMAN SHOWALTER: All right. So getting
24 to how this issue gets resolved, is this a factual
25 question then in your view if something is economically

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1 impossible versus a legal issue of I suppose whether the
2 index is the index, it says what it says?

3 MR. CAMERON: I believe it is a mixed
4 question of fact and law, and we are prepared this
5 morning to put on a witness, Robert McCullough, if it
6 would be within your pleasure. Mr. Gould will be
7 handling that. Mr. McCullough has prepared an affidavit
8 explaining our position about the current situation in
9 the market and particularly the problems related to the
10 Mid Columbia index. To that extent, it is a factual
11 issue which we would substantiate our position with
12 expert testimony. On the law, well, we will handle the
13 law in the briefs. That, I believe, is basically the
14 position of Bellingham Cold Storage on the power issue.

15 COMMISSIONER HEMSTAD: If I can pursue the
16 point, it's your position that a change to a different
17 mechanism would leave Puget, I think in your phrase,
18 indifferent? That is to say, it will be in no better or
19 no worse position were a different mechanism to be used?

20 MR. CAMERON: Aside from any question related
21 to whether Puget has acted improperly under the contract
22 or overcharged us. If you look at the pricing mechanism
23 that applies during these five years of the power sale,
24 you will find basically it's a pass through of Puget's
25 costs plus a markup. We're just saying pass through a

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1 different price stream plus your markup. You should be
2 indifferent to that.

3 COMMISSIONER HEMSTAD: But they would have to
4 be, I would assume, they would have to be buying
5 differently then?

6 MR. CAMERON: Yes, sir.

7 COMMISSIONER HEMSTAD: So is your position
8 they can buy better in the market than they're doing?

9 MR. CAMERON: Perhaps looking at periods of
10 time longer than an hour, you might be able to find
11 lower, more stable prices.

12 CHAIRWOMAN SHOWALTER: Before you leave that,
13 I just want to get a sense of what the issues are. One
14 seems to be that you say that I guess as a matter of --
15 as a matter of fact, it's economically impossible for
16 Puget to deliver you power, or it's economically
17 impossible for you to pay for it, therefore I guess as a
18 matter of contract interpretation, that triggers a
19 provision that they're not supplying firm energy, and
20 therefore you should be able to wheel. That's one line.

21 But then I also hear you saying that because
22 -- that the current index doesn't meet the intent of the
23 parties, original intent of the parties, or is not
24 competitive, and are you asserting that the contract is
25 no longer operative because it doesn't meet intent? Or

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1 I mean this issue of the index is broken, the index is
2 -- there is an index, and the parties adopted an index
3 last week, so are you -- what is the legal issue in
4 front of us that we're looking at? It's clear you're
5 unhappy with it, but then I -- what is the legal issue
6 that it's -- can't be used?

7 MR. CAMERON: Well, the legal issue is that,
8 one, there is a history of trial and error under this
9 contract as the parties attempted to achieve competitive
10 pricing using external indicators. There has been a
11 history of changing from one indicator to another.
12 There has been a history of broken indices, just to use
13 the jargon that was used in the complaint.

14 Last time it happened, Puget was begrudged by
15 it as the index was reported not as a single number but
16 as firm and non-firm. Puget felt it no longer reflected
17 the intention of the parties. An attempt was made to
18 resolve it amicably. Ultimately it came down to a
19 decision by the Commission to fix the index.

20 We have another situation like this, and now
21 we have come to you requesting another fix, not one that
22 leaves Puget holding the bag, but one that in the end
23 allows us to have a pricing mechanism that reflects
24 competitive fundamentals in the market or alternatively
25 allow us to flow through something other than hourly

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1 purchases with all the price --

2 CHAIRWOMAN SHOWALTER: But when you're
3 asserting that it's broken or needs to be fixed, is it
4 because it doesn't exist or because it exists and the
5 price is high? I mean that is, what is the basis to say
6 that it's broken? In the Schedule 48 case, there was an
7 index that really basically didn't materialize, and so
8 there was sort of a void. Well, here there is an index,
9 which I take it is the index adopted last week, not
10 originally. Am I correct on that, that that's what's in
11 front of us, the index that we --

12 MR. CAMERON: That's what the contract
13 reflects right now, yes, ma'am.

14 CHAIRWOMAN SHOWALTER: So that index, are you
15 saying the Commission should replace it --

16 MR. GOULD: Yes.

17 CHAIRWOMAN SHOWALTER: -- because -- because
18 why is the question?

19 MR. CAMERON: We're asking it be replaced
20 because we don't believe it any longer tracks
21 fundamentals in the competitive market.

22 CHAIRWOMAN SHOWALTER: Okay, so then is a
23 legal --

24 MR. CAMERON: It's gone --

25 CHAIRWOMAN SHOWALTER: Is a legal issue that

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1 -- is it a legal issue that the index adopted has to
2 track fundamentals?

3 MR. CAMERON: Yes.

4 CHAIRWOMAN SHOWALTER: And that if an index
5 does not track fundamentals despite the fact that it is
6 there, that is, it is not valid under the contract any
7 more?

8 MR. CAMERON: Yes.

9 CHAIRWOMAN SHOWALTER: Okay.

10 MR. CAMERON: It's gone so far as to have
11 major players in the market, particularly California,
12 raise allegations of potential manipulation, under
13 reporting, under scheduling, other things that
14 individual players, suppliers, might do to raise prices
15 abnormally during periods when there really isn't a
16 scarcity of energy, just outright market manipulation.
17 We don't think that by any stretch of the imagination
18 would match the intention of the contracting parties,
19 that sort of gaming. In fact, our intention was to pick
20 third party indicators in hopes of limiting gaming. If
21 we have not succeeded, then we believe we're entitled to
22 a remedy.

23 JUDGE MOSS: Mr. Cameron, would it be your
24 intention to bring forth evidence to demonstrate the
25 existence of such gaming in the market, which I have

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1 read in the trade press is a rather disputed question?

2 MR. CAMERON: We certainly have expert
3 testimony already prepared in the form of the affidavit
4 I have addressed that Mr. Gould will cover in greater
5 detail describing problems in the markets right now, the
6 susceptibility of these indices to manipulation. Cold
7 hard proof of whether actual manipulation has occurred
8 is something that awaits the discovery process, I
9 believe.

10 JUDGE MOSS: Mr. Gould, I think you wanted to
11 add a couple of points.

12 MR. GOULD: Yes, I'm congratulating myself on
13 my patience. You may not be, but John spoke to the
14 issue well.

15 But just to summarize it for the Chairwoman,
16 the matter of the index is -- turns on both the lack of
17 not following the intent of the parties originally, and
18 as a matter of law, we're asking you to declare that a
19 corrupted pricing mechanism is unjust and unreasonable
20 and needs changing.

21 CHAIRWOMAN SHOWALTER: Are we talking about
22 the Mid C firm index that was adopted last week?

23 MR. GOULD: Yes.

24 CHAIRWOMAN SHOWALTER: Okay.

25 MR. GOULD: Except I --

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1 CHAIRWOMAN SHOWALTER: So are you saying --

2 MR. GOULD: Excuse me, I believe that, my
3 understanding what you adopted last week, I wasn't here,
4 was the non-firm portion of that.

5 CHAIRWOMAN SHOWALTER: Maybe somebody can
6 clarify this. What my memory is is that with the
7 consent of all parties here, we approved the Mid C firm
8 index.

9 MR. VAN NOSTRAND: Minus 1.07 mils.

10 CHAIRWOMAN SHOWALTER: So that --

11 MR. GOULD: That isn't our understanding.

12 CHAIRWOMAN SHOWALTER: Okay. That would be a
13 factual issue, I think, that would be pretty easily
14 resolved. But if that's the case --

15 MR. GOULD: But it doesn't make any
16 difference.

17 CHAIRWOMAN SHOWALTER: But number one, it's
18 an index that was just approved last week with the
19 consent of the parties, so that's why I'm wondering
20 about the intent issue. But then the second question is
21 I guess it's an evidentiary one about that index. If
22 that index is broken or that index doesn't reflect
23 fundamentals and that makes a difference in the
24 contract, I guess that's where there are implications
25 for other parties.

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1 MR. GOULD: We are prepared to put on
2 evidence in that, yes, and we'll do it in an expedited
3 way.

4 CHAIRWOMAN SHOWALTER: Okay.

5 MR. GOULD: Because we're being harmed, this
6 is the -- I want to emphasize this part of it, we are
7 being harmed by the broken market, by the corrupted --
8 what I'm calling the corrupted market and harmed in a
9 way that is irreparable and causing our business makers
10 to have to make a decision daily as to whether to
11 conduct their operations.

12 Now what we're saying, we're not asking you
13 to be an employment agency. We're only asking you to
14 allow us to put on our proof in a quick fashion of a
15 corrupted pricing mechanism.

16 COMMISSIONER HEMSTAD: And so I understand
17 when you say a corrupted pricing mechanism.

18 MR. GOULD: Yes.

19 COMMISSIONER HEMSTAD: That goes to the point
20 that assuming the validity of the terms of the agreement
21 that the contract is impossible to perform; is that
22 where we are?

23 MR. GOULD: Well, it certainly -- you know
24 well that there are a number of theories by which one
25 can articulate any contract that is not performing as

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1 intended. And whether it's, you know, not meeting the
2 original intent of the parties is one way to express it,
3 void *avenitio* for not meeting that intent, I suppose
4 impossibility in the sense of economically irrational.
5 But, you know, all of those theories run into certain
6 boxes, and I'm not -- we do not want to get poked into a
7 certain box.

8 What we are saying at base is this, that you
9 have plenary power to affix an unjust and unreasonable
10 rate, and we're prepared to prove to you that this
11 pricing mechanism as it exists now is unjust and
12 unreasonable, and further that to the extent Puget is
13 using it, that is using the opportunity to play in that
14 market, that they are being unjustly enriched over our
15 -- over -- because -- and we're paying for it. Now
16 that's unjust and unreasonable, and we are asking you to
17 fix it.

18 COMMISSIONER HEMSTAD: Well, in that sense,
19 your position would be different than the arguments
20 earlier made that Puget is not indifferent to the
21 consequences of what we're about?

22 MR. GOULD: Well, that depends on to the
23 extent that they're in the market. We don't know that.
24 We have a discovery request drafted today. As soon as
25 we get into that phase, we will ask for permission to

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1 serve our first discovery request, and it will be, you
2 know, what are you doing in that market exactly.

3 CHAIRWOMAN SHOWALTER: I wonder if it would
4 be reasonable to hear from Mr. Van Nostrand on the power
5 issues before moving to the transmission issues just
6 because we will lose track of the arguments.

7 MR. CAMERON: Could I be heard on one more
8 point, please, and that is simply to state that time is
9 not our friend on this. When we get into the procedures
10 schedule, we will ask that provision be made for quick
11 consideration, that is quick turn around on comments on
12 a partial settlement that we would propose to tender
13 almost immediately. It is something that we have
14 discussed with the company over the past week or two. I
15 can make no representation with regard to their
16 response, but obviously we would like to get as much of
17 this behind us before the onset of August, if possible.
18 Or if not August, part of August. If not August,
19 September. Again, we face horrendous energy prices, so
20 we would like to resolve this any practical way
21 possible, reserving as many of our legal rights as
22 possible.

23 COMMISSIONER HEMSTAD: And may I say we would
24 be delighted if you would.

25 MR. GOULD: May I add something just as a

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1 factual matter. It has to do with this, with the
2 current state of the index. I would like to just be a
3 little didactic for a moment, and pardon me for doing
4 this.

5 COMMISSIONER HEMSTAD: I'm sorry, perhaps you
6 should speak more directly into the microphone.

7 MR. GOULD: Thank you, is it not close
8 enough?

9 CHAIRWOMAN SHOWALTER: It's not close enough.

10 COMMISSIONER HEMSTAD: Thank you.

11 MR. GOULD: Is that better?

12 COMMISSIONER HEMSTAD: Yes.

13 MR. GOULD: What you heard in the Schedule 48
14 proceeding about the index correction since June 1,
15 1996, do you recall that proceeding? What you did there
16 was to honor a request from the Schedule 48 customers to
17 allow them to have -- to take power under one of the
18 boxes that created in June 1, 1996, by a change in the
19 Dow mechanism to take under the non-firm box. We did
20 not join in that proceeding, either of these parties,
21 for the reason that we thought the proper box was
22 another one, was the firm, and for reasons that I won't
23 go into. And on the basis of that, we conducted our own
24 negotiations with Puget on a correction to that problem,
25 and that's the firm minus 1.07.

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1 Now there is a misunderstanding on what you
2 ruled last week. I just heard what Mr. Van Nostrand
3 said, I know what our side believes happened, and we're
4 going to have to look at your order and determine what
5 happened, and then we will report back on that issue.
6 But for the purpose today, it doesn't make any
7 difference, and here's the important point. That's
8 because there is still in our view a corrupted index
9 whether you use the firm or non-firm part of the Dow
10 reporting at the Mid Columbia. The difference is it
11 doesn't track in any mathematical sense, but in any case
12 both of them are way too high and don't follow
13 fundamentals. Both of them are that way and persist in
14 that.

15 JUDGE MOSS: Mr. Gould, I will ask you as a
16 follow up to that, what the Commission did was approve
17 an amendment to the special contract that was brought to
18 the Commission by the parties. Now that I don't think
19 is a matter that is subject to debate. Now what that
20 amendment provides may be a matter that you wish to
21 address, but that is what the Commission did. Do you
22 dispute that?

23 MR. GOULD: I certainly don't dispute that
24 the Commission took action. I'm just having trouble,
25 Your Honor, finding out exactly what the action was.

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1 CHAIRWOMAN SHOWALTER: Well also, we do need
2 to track it down, but it was prospective as well is my
3 understanding.

4 Do you remember that, Mr. Cedarbaum?

5 MR. CEDARBAUM: Yes, Chairwoman Showalter. I
6 have the orders that were issued on this contract
7 amendments, and both orders indicate that the effective
8 date was July 13th, which was -- there was an open
9 meeting on July 12th, so it was prospective only. And
10 that was the only thing the Commission approved at that
11 open meeting.

12 CHAIRWOMAN SHOWALTER: I mean it seems to
13 pose the question of the parties agreeing to a
14 prospective new index as of July 13th, but I think you
15 must -- you are now arguing that nevertheless something
16 is broken about that index that you just agreed to.

17 MR. GOULD: Absolutely, and one of the issues
18 we will want to brief is the extent to which you have
19 the ability to go backward and repair the problem, if
20 you find there is a problem, from the date that you find
21 the unjust and unreasonable rate attached, that's
22 correct.

23 CHAIRWOMAN SHOWALTER: Okay.

24 MR. GOULD: We're prepared to brief that.
25 That is an issue. It's a legal issue. I'm sorry, Your

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1 Honor, about this misunderstanding about what happened
2 last week. It's only that I tried to get the order, and
3 this is the first that I have, you know, seen even one
4 flash from far away, and so I simply don't know the
5 terms. And the terms as reported to me from our side
6 are not as represented by Mr. Van Nostrand or by Bob
7 Cedarbaum, so.

8 JUDGE MOSS: Well, perhaps you will have an
9 opportunity to review that a bit --

10 MR. GOULD: Right.

11 JUDGE MOSS: -- as we hear from Mr. Van
12 Nostrand --

13 MR. GOULD: Yes.

14 JUDGE MOSS: -- on the power issue.

15 MR. GOULD: But the factual point that I want
16 to make, if I may repeat, is that it doesn't make any
17 difference which box one takes out of from the Mid
18 Columbia Dow, both are infirm.

19 JUDGE MOSS: Maybe we better choose a
20 different word there since we talk about firm and
21 non-firm power. By infirm, you mean broken?

22 MR. GOULD: I do.

23 JUDGE MOSS: The colloquial perhaps is useful
24 on this occasion.

25 MR. CAMERON: Just one point of clarification

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1 if I could, also relevant to your action last week is
2 the letter of Puget I believe dated July 17 to Bob
3 Cedarbaum and to Ken Elgin regarding the matter of
4 refunds. That's a part of the --

5 CHAIRWOMAN SHOWALTER: Regarding the matter
6 of what?

7 MR. CAMERON: Refunds.

8 JUDGE MOSS: We don't have that letter before
9 us, I don't believe.

10 MR. CEDARBAUM: I'm not sure I do either. It
11 may -- there may have been a letter of that effect, but
12 I didn't receive one. It may have gone to staff
13 instead.

14 MR. CAMERON: Okay.

15 JUDGE MOSS: Mr. Van Nostrand, your turn at
16 the plate on the power issues, if you please, and we
17 will give you an opportunity on transmission, of course,
18 too.

19 MR. VAN NOSTRAND: Thank you, Your Honor. I
20 guess we're here trying to uphold the sanctity of the
21 contract as to the power pricing issue. As Mr. Cameron
22 mentioned, these customers elected back in 1996 to go to
23 non-core status. They elected to continue getting
24 bundled utility service with energy priced according to
25 an agreed upon market index.

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1 And at the time this contract was entered
2 into, the prices under that market index were
3 substantially lower than the tariff rates which these
4 customers would otherwise have paid. It was a special
5 contract situation. They could demonstrate a credible
6 bypass threat, and therefore the company was authorized
7 to enter into a special contract to retain these
8 customers' loads.

9 Now having secured over the last several
10 years at least an \$8 Million benefit by Puget's
11 calculations of having their energy priced according to
12 this market index rather than under the tariff rates
13 that they would have been charged, they now decided that
14 they don't like this market index anymore. And now they
15 don't necessarily want another market index, nor do they
16 want Puget's tariff rate or embedded rate. They're now
17 wanting the PSE's incremental cost. They're asking for
18 a pricing based upon the estimate of the cost of
19 operating a particular combustion turbine.

20 I think the allegations that they're making
21 as far as this corrupted pricing mechanism are very
22 serious indeed. I think it's going to require
23 considerable evidence to demonstrate that allegation.
24 That obviously, as the Judge has referred to, has been
25 considerable discussion in the trade press and other

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1 industries that are similarly situated who aren't served
2 by Puget who are having the same sort of problems
3 regarding the impact of high energy cost.

4 And there is the ability to purchase
5 financial hedges. And I know the complaint was rather
6 alarming in its tone as to the need to have immediate
7 relief, and this has been handled on an expedited
8 schedule based on the threat of layoffs, but it did not
9 get near as much attention when these customers were
10 both able to secure financial hedges which allowed the
11 plants to remain open for the next 30 days. Those sort
12 of financial arrangements have been in place. They are
13 available to customers. They are available to the
14 Schedule 48 customers. And many industries are not
15 having the sort of repercussions when they're managing
16 their energy costs that these two customers are facing.

17 But we're talking about serious allegations
18 about corrupted pricing mechanisms based on particular
19 impacts on these customers and the manner in which they
20 have handled their energy procurement and decisions they
21 made about seeking or not seeking financial hedges.
22 These are very serious allegations.

23 I don't believe it's been shown, there is
24 certainly not a consensus, that this pricing mechanism
25 is corrupted. As the Chair pointed out, just last week

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1 we agreed on a new pricing mechanism effective as of
2 July 13th, and it's the firm index minus 1.07 mils, and
3 these are -- these are serious allegations, and they
4 need to be tested.

5 I think there's a -- there's a notion that
6 whether or not Puget is indifferent, I think there needs
7 to be an understanding. This is still bundled utility
8 service. The parties under this contract have agreed
9 that the energy component is going to be priced
10 according to a market index, but it seems like
11 Mr. Cameron would have you believe there is an electron
12 for electron tracking as to what power Puget is
13 acquiring and delivering to these customers. There is
14 no sort of a buy-sell arrangement where Puget goes out
15 into the market and buys to match the particular needs
16 of these customers. Puget provides the energy. It's
17 priced according to this agreed upon index, but it is
18 still bundled, bundled utility service.

19 And so it's entirely inaccurate to say that
20 Puget would be indifferent if rather than being priced
21 upon this agreed upon market index, we're going to
22 substitute the estimated cost of operating with White
23 Horn combustion turbine. I assume Puget's -- all of
24 Puget's customers would like to get electricity priced
25 according to the incremental cost of a selected

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1 combustion turbine. That's not what this proceeding is
2 about.

3 JUDGE MOSS: Would it be the Bench's pleasure
4 to hear from other parties on whether they have comments
5 on the price issue, the commodity issue at this point?

6 CHAIRWOMAN SHOWALTER: And I guess, you know,
7 we don't want to go too far into the merits of the
8 issues. It's sort of what are the issues and how we
9 move to resolve them, or it's an articulation of the
10 issues. We're not deciding the issue today.

11 MR. CEDARBAUM: I'm glad you said that. I'm
12 trying to absorb all the factual allegations that have
13 been going back and forth, which is difficult to do
14 without a record and without the time.

15 I think from staff's perspective, the issues
16 that are raised by the complaint are ones of contract
17 interpretation, and that's the focus that we will take.
18 Essentially what does the contract exactly provide for.
19 If those terms are ambiguous, then we will take a look
20 at the parties' intent underlying the contract and try
21 to interpret the contract. So that will be our focus,
22 and we will wait to see what the evidence is on that.
23 We don't have that evidence ourselves other than to the
24 extent there might be some overlap of Schedule 48. So I
25 think that's really all I can say at this point.

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1 JUDGE MOSS: And that would be the contract
2 as amended by action of the Commission?

3 MR. CEDARBAUM: That's correct.

4 JUDGE MOSS: July 12th, was it?

5 MR. CEDARBAUM: July 12th, to be effective
6 July 13.

7 JUDGE MOSS: Thank you.

8 MR. FFITCH: Your Honor, you're looking at
9 me, so I will start talking.

10 JUDGE MOSS: Expectantly, Mr. ffitich.

11 MR. FFITCH: Simon ffitich, public counsel. I
12 certainly -- we don't have a finalized position, if you
13 will, on the contract interpretation issues that have
14 been laid out. I guess I would agree with
15 Mr. Cedarbaum, that this at first perhaps most directly
16 is a contract interpretation matter. These companies
17 have entered into a contract with Puget. The question
18 is now whether they will have to live with it or whether
19 there are bases which will permit them to depart from
20 it, and presumably that's sort of the core focus of this
21 litigation.

22 As the Bench may be aware, public counsel has
23 historically not been favorably inclined towards special
24 contracts entered into by industrial customers. Our
25 general interest in the proceeding is to first of all

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1 try to ensure that whatever relief is provided in this
2 case that Puget's rate payers be protected from any
3 adverse consequences from that relief. And secondly,
4 that any kinds of decisions that are made in this case
5 do not create a precedence that reverberates more widely
6 with respect to some of the bigger issues with regards
7 to the transition to competition, which may or may not
8 be occurring in Washington state. That's a summary of
9 where we're at.

10 JUDGE MOSS: Before we move on to others for
11 comments, I'm puzzling here, what contract
12 interpretation does the Commission need to do? There
13 doesn't seem to be any dispute but that the contract
14 provides as amended just recently that the price is
15 pegged to the Mid C index less 1.07 mils. What other
16 provisions of the contract are implicated by the
17 complaint, and what is the dispute about the meaning of
18 those provisions?

19 And, you know, I have to confess that sitting
20 here today, I have more in mind Schedule 48 and what it
21 provides since I presided in that case than I do the
22 special contracts which may have some different
23 provisions. But under Schedule 48, as I recall, there
24 was an index provided, and the Commission was asked in
25 that case to determine and to interpret the contract to

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1 ascertain what of several alternative indexes that were
2 actually out there was contemplated by the terms of
3 that, and that's what the Commission did.

4 But I also recall that there was argument in
5 that case and the Commission had some occasion in its
6 order to rule on the matter of how the index changed,
7 would be changed. And as I recall again, just relying
8 on memory, it was that if the customers and the company
9 agreed that the index no longer reflected the market,
10 then they could together select an alternative
11 mechanism. And is that at issue?

12 CHAIRWOMAN SHOWALTER: I don't think it was
13 if it no longer reflected the market. It was if they no
14 longer agreed on the index. It was not a test, in my
15 memory, whether something did or didn't reflect the
16 market, just did or didn't the parties want to continue
17 with whatever index they had.

18 JUDGE MOSS: But either way, the question I
19 have is in the special contract at issue here, are we
20 being asked, is the Commission being asked to interpret
21 the means by which the index may be changed, or is it
22 being asked to interpret what the index provision
23 provides, the one that was approved last week, or being
24 asked to interpret something else?

25 Because if, you know, if somebody is going to

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1 come forward with the argument here shortly that this is
2 a simple little contract dispute that the Commission can
3 resolve on motions for summary determination, then I
4 would like to know what aspect of the contract it is
5 that we are being asked to find is unambiguous and
6 therefore susceptible to that sort of determination.

7 MR. CEDARBAUM: I guess complainants have a
8 better handle on what their complaint is asking that
9 than I do.

10 JUDGE MOSS: Sure.

11 MR. CEDARBAUM: But I think one provision
12 unrelated to the power index is Puget's obligations for
13 transmission. That's the issue we haven't gotten to yet
14 in this discussion, but I think that's an interpretation
15 in contract issue as well.

16 And I should point out, I failed to earlier,
17 the issue with respect to whether or not the Commission
18 -- whether the index is broken and whether the
19 Commission has the power to change it in this
20 proceeding, which is an issue I raised, is something
21 that is still there. And I think I owe it to the
22 parties to either put up or shut up on that one, and so
23 I will endeavor to file a motion or advise the
24 Commissioners that I will not be filing a motion as soon
25 as possible and try to get that resolved so that we know

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1 -- so that you can decide where we're headed on that
2 issue. And I think that boils down my perspective. As
3 Mr. Cameron pointed out, the Mayor of Bellingham
4 attached a letter of support to the complaint. I really
5 just need to examine whether that satisfies the statute.

6 COMMISSIONER HEMSTAD: I would like to ask
7 really on that point, Mr. Gould, to your assertions, and
8 I believe you said that the Commission has plenary power
9 to adjust and affix an unreasonable or irrational -- the
10 provisions of that, because of that unreasonable or
11 irrational market.

12 MR. GOULD: Yes.

13 COMMISSIONER HEMSTAD: Is it your view that
14 this Commission has say more authority than a superior
15 court would have in a contract dispute because of the
16 nature of our oversight of this industry?

17 MR. GOULD: Yes.

18 COMMISSIONER HEMSTAD: So in --

19 MR. GOULD: As a matter of primary
20 jurisdiction, yes.

21 COMMISSIONER HEMSTAD: So in that sense, our
22 role, we have more expansive authority than a court
23 would have --

24 MR. GOULD: Yes.

25 COMMISSIONER HEMSTAD: -- to address this

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1 contract?

2 MR. GOULD: I do, yes, sir.

3 Your Honor, excuse me for interrupting, I
4 have a witness available who, I'm sorry, has a flight
5 which requires him to leave at noon, and I don't know
6 whether the Commission is interested in taking a prima
7 facie case on the question of the market. He's
8 available to speak to that, and we have his comments
9 rendered in affidavit form. If the Commission is
10 interested in that, I would like to request that perhaps
11 we could do that rather sooner than later.

12 JUDGE MOSS: Are you contemplating a
13 dispositive motion?

14 MR. GOULD: I don't have a motion. What I
15 have is a grave concern that the emergency nature of our
16 plea may not be attended to, particularly when we get
17 down to scheduling the case, and I would like the
18 opportunity, if the Commission deems it appropriate, to
19 simply present to them a prima facie case of the state
20 of the market so they can hear from an expert of the
21 kind of evidence that we would be presenting under the
22 hearing later.

23 CHAIRWOMAN SHOWALTER: But do we have an
24 affidavit to that effect?

25 MR. GOULD: I do, yes.

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1 CHAIRWOMAN SHOWALTER: Has it been filed?

2 MR. GOULD: I have not filed it. I'm

3 prepared to tender it right now.

4 JUDGE MOSS: Normally an affidavit would be

5 tendered in association with a motion asking for some

6 form of relief. I guess I'm a little puzzled as to what

7 end --

8 MR. GOULD: Well, I --

9 JUDGE MOSS: -- would you tender this witness

10 today?

11 MR. GOULD: I would append it to an oral

12 motion for an expedited -- for continued expedited

13 handling of this matter under the Commission's broad

14 powers in the public interest. This will resonate

15 itself in the scheduling of the hearing as we go

16 forward.

17 (Discussion off the record.)

18 JUDGE MOSS: Mr. Gould, the Bench doesn't

19 really see any need to have the witness presented today,

20 although you certainly would be free to file the

21 affidavit perhaps preferably in association with some

22 motion asking for relief as to which that affidavit

23 might support.

24 But putting that to one side, let me comment

25 that the Commission, of course, takes this matter

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1 seriously, and as reflected by the very quick scheduling
2 and short notice of this prehearing conference, has
3 every intention of proceeding as expeditiously as it can
4 consistent with providing due process to all parties.
5 And what we're trying to do today is get a better handle
6 on the issues and what will be necessary in the way of
7 evidentiary hearing.

8 And, of course, we haven't gotten to all of
9 this yet, but we certainly will, and I have hinted at it
10 a couple of times. I want to hear from the parties with
11 respect to any intentions to file early dispositive
12 motions, whether they be motions for summary
13 determination or motions to dismiss, as Mr. Cedarbaum
14 has alluded to, that sort of thing.

15 But the Commission has every intention of
16 proceeding expeditiously, and we don't need to hear from
17 a witness to bolster that intention.

18 MR. GOULD: Thank you, Your Honor. May I
19 have just a moment?

20 JUDGE MOSS: Are you asking for a recess,
21 Mr. Gould?

22 MR. GOULD: I just would like to leave the
23 Bench.

24 JUDGE MOSS: You may certainly do that.

25 MR. CAMERON: Your Honor, could I make two

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1 more points in response to your earlier question about
2 what we're doing here with regards to the contract as
3 amended?

4 JUDGE MOSS: I would like to learn more about
5 that.

6 MR. CAMERON: Well, we have been talking at
7 some length about the issue. I would go back a week ago
8 to when the contract amendment was approved. Both in
9 writing and at the session, we stated our understanding
10 of the situation. And that is the amended as tendered
11 by the company on June 28 or 29 was intended to resolve
12 a problem that the company had, Puget had, when the Mid
13 Columbia index ceased to be reported as a single number
14 and instead was reported as two numbers, one firm and
15 one non-firm. That was a resolution that we reached
16 with the company at the end of the Schedule 48
17 proceedings. There is a history of that resolution
18 going back to the accord and satisfaction and then
19 finally the amendment. We made it clear that that was a
20 different issue, and we intended to reserve our rights
21 with regard to the issue before you in the complaint,
22 which was on file and I believe reviewed by you
23 beforehand.

24 One other point I wanted to make about the
25 contract in terms of what you look at, I would invite

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1 your attention as well to a provision called optional
2 price stability, found in page six of the contract. It
3 is a contract intended to provide us with price
4 stability, the types of remedy we seek here today. It
5 is a provision yet to be implemented. To date we have
6 not been able to implement it consensually with the
7 company. That is certainly implicated in what we seek,
8 and we apologize for not covering it in the complaint
9 thus far, but as you can gather, things have been a bit
10 hurried.

11 We're looking for a reasonable and stable
12 price. We have problems with the Mid Columbia index,
13 but there are other ways to skin the cat as well.
14 Optional price stability goes more to the point of what
15 power source you look to. Do you look to the daily
16 volatility of the Mid Columbia index, or do you look to
17 transactions of different durations, hopefully with
18 stable lower prices. That is certainly implicated in
19 what we brought to you.

20 CHAIRWOMAN SHOWALTER: We need to move on to
21 transmission, but before we do, from what I understand
22 on the power issues, you have got a witness, in terms of
23 what we're going to need to resolve this issue, you have
24 a witness who will give evidence about call it the
25 corruption or the --

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1 MR. GOULD: State of the market.

2 CHAIRWOMAN SHOWALTER: -- the state of the
3 index and why --

4 MR. GOULD: The state --

5 CHAIRWOMAN SHOWALTER: -- and why that index
6 is no longer -- well, with that evidence would lead to
7 your argument that either it doesn't meet the intent of
8 the parties or that it presents an economic
9 impossibility, and therefore something needs to be done
10 about the contract. But is there any other -- are there
11 other witnesses on the power issue?

12 MR. GOULD: I don't follow your question, on
13 the power issue?

14 CHAIRWOMAN SHOWALTER: Well, the question
15 we're trying to figure out what kind of a proceeding
16 we're having, going to have here, and how much can be
17 resolved an motions, briefs, written documents versus
18 evidentiary hearings with witnesses. So what is the
19 need here for us to resolve in terms of hearing time is
20 what we're getting at? On the power issue, do you have
21 one witness, two witnesses or --

22 MR. GOULD: No.

23 CHAIRWOMAN SHOWALTER: -- what are we going
24 to need?

25 MR. GOULD: No more than two or three

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1 witnesses. We have one witness primarily on the power
2 issue.

3 CHAIRWOMAN SHOWALTER: Is it --

4 MR. GOULD: On the market issue. It is the,
5 in my mind, it's a question of a broken market, not a
6 broken index.

7 CHAIRWOMAN SHOWALTER: So it's an index that
8 reflects a broken market?

9 MR. GOULD: Yes.

10 CHAIRWOMAN SHOWALTER: Mr. Van Nostrand,
11 would you have any witnesses?

12 MR. VAN NOSTRAND: We have at least two or
13 three witnesses that would address that very issue.
14 This goes beyond the intent of the parties obviously.

15 CHAIRWOMAN SHOWALTER: Well, I guess that's
16 -- it's independent of the question whether there are
17 motions prior to that point. That may make the
18 witnesses unnecessary depending on which way there are
19 rulings. But if we get to the issue, then there would
20 be it sounds to me like six witnesses or so on the
21 question of whether the market is broken or the index is
22 broken.

23 MR. GOULD: Yes.

24 JUDGE MOSS: Well, then let's do move on to
25 the transmission side of things, and Mr. Cameron, I

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1 think you may have touched on this, but perhaps you may
2 have some additional points, and we will ask Mr. Gould
3 if he has anything further to say about the complaint in
4 terms of the transmission side.

5 MR. CAMERON: The complaint as it regards the
6 transmission issue relates to provisions in the contract
7 that are operative both during the five year power sale
8 and intended to be operative thereafter, providing us
9 with transmission services from Puget. If you look at
10 the contract, you will see that it comprehends us
11 becoming non-core customers, making our own way on the
12 power side. We prepaid certain amounts related to PURPA
13 costs and demand side management costs that have been
14 capitalized by the company. In return, we received
15 contractual commitments to Puget. We have imposed no
16 exit fee, stranded cost, or transmission charge on us
17 once those amounts were paid. We're not attempting to
18 stand down from any payment obligation. The PURPA
19 charges have already been paid. There is a remaining
20 schedule to be paid on the demand side charges.

21 We believe that the contract both expressly
22 and in its totality reflects the fact that as non-core
23 customers, after our five year power sale we were going
24 to make our own way on the power side, that Puget would
25 provide a transportation service under a transmission

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1 contract, which we believe should be the FERC open
2 access transmission tariff and that we are eligible
3 customers because Puget voluntarily agreed to provide us
4 with transmission service within the meaning of the
5 availability clause of that FERC regulated tariff.
6 That's basically it in its essence.

7 We, as you know or may know, through the
8 intervention of Watcom PUD, Watcom has a contract with
9 each of the complainants whereby it would provide our
10 power needs after the expiration of this power contract,
11 that is after the five years and not before.

12 COMMISSIONER HEMSTAD: You say you have an
13 actual contract or a letter of intent?

14 MR. CAMERON: We have actual contracts with
15 Watcom PUD. Now Watcom PUD can serve us in either of
16 two ways. It can build transmission facilities on which
17 the permitting is now underway whereby it would reach
18 these two utilities or these two customers by tapping
19 off of a BPA transmission substation. Watcom already
20 has a transmission contract with BPA, so this merely
21 entails adding a new point of delivery under the
22 Bonneville contract.

23 Alternatively, no new facilities need to be
24 constructed if Puget will honor the commitment we
25 believe it has under the contract and provide us

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1 transmission services for which we would compensate
2 them. That's transmission services and such ancillary
3 services as the local incumbent utility alone is
4 physically capable of providing.

5 That's basically our position with regard to
6 the transmission issues. We have requested those
7 services, and they have been denied us.

8 CHAIRWOMAN SHOWALTER: In terms of the
9 management of this case and what needs to be handled
10 first or second, are the transmission issues in your
11 view also an emergency or a matter that needs to be
12 handled immediately, or does that have a longer time
13 period to resolve it?

14 MR. CAMERON: Let's call them priority two
15 emergencies. We can deal with those after the power
16 issues. We do face the expiration of our contract. We
17 would like resolution to the transmission issues so we
18 can determine our destiny either through construction of
19 new facilities or transmission or transportation
20 services provided by Puget.

21 CHAIRWOMAN SHOWALTER: Well, when the
22 contract, when the original contract was signed, my
23 recollection is that the parties said they needed eight
24 months to construct an alternate transmission line if
25 things didn't work out. Is that generally still the

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1 case, and is that your time line, that you want to know
2 more or less eight months before May 31st of 2001 what
3 your status is?

4 MR. CAMERON: I would say that, well, time is
5 of the essence here. We need as much time as possible.
6 The preconstruction activities actually take more time
7 than the actual construction. We are in the midst of
8 the preconstruction activities, and until that
9 preconstruction permitting activity is concluded, we
10 really can not break ground, as you can understand. So
11 the sooner, the better I would say. I can't tell you
12 that it's limited to eight months. I think the process
13 is elongated, and so we will certainly need as much of
14 the time remaining between now and the end of the
15 contract as possible. But I would certainly suggest
16 that you cue those issues in terms of priority after the
17 power issues.

18 JUDGE MOSS: And what is the interplay with
19 the 000735 docket, if any?

20 Mr. Gould.

21 MR. GOULD: There are issues in that docket
22 that require resolution if, in fact, there's a transfer
23 of service from Puget to the PUD. And in that sense, if
24 it comes to that point, BCS will have to file a similar
25 paper asking for similar relief because there are -- the

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1 transition itself requires probably your intervention to
2 make certain. That's what we have pled.

3 CHAIRWOMAN SHOWALTER: But those issues also
4 involve contractual interpretation, as I read it.

5 MR. GOULD: Yeah.

6 CHAIRWOMAN SHOWALTER: That is whether or not
7 the contract requires Puget to provide transmission
8 services with or without a fee.

9 MR. GOULD: Well, there are some contractual
10 matters that are purely interpretive and -- but broader
11 because -- and invoking your power of again plenary
12 relief, in this sense we have pled in that case that
13 certain inaction by Puget should not be tolerated by
14 this Commission regarding the transmission as a matter
15 of public policy.

16 CHAIRWOMAN SHOWALTER: Does it make sense in
17 your view to hear and proceed on the transmission issues
18 in both docket numbers together?

19 MR. GOULD: That would be fine. I certainly
20 agree that the transmission issues as well as the issues
21 in the Georgia-Pacific case, and I have forgotten the
22 number, I'm not as facile with numbers, should be a
23 second priority. The ultimate priority right now is the
24 pricing problem, the pricing mechanism.

25 CHAIRWOMAN SHOWALTER: And then I guess this

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1 may be if -- since it is a second priority, maybe it can
2 be addressed at a later stage, but to the extent that
3 you're asking us to order a transmission contract with
4 terms dictated by FERC, is that -- do we have in your
5 view authority to order a transmission contract to be
6 developed on, you know, some reasonable terms, and these
7 terms just so happen to be available so we should plunk
8 them in, or in your view are these the only terms
9 appropriate for a transmission contract? Because I
10 gather on a FERC tariff -- and I'm not familiar with the
11 tariff.

12 MR. CAMERON: I believe I would answer it
13 this way, FERC is claimed on a rate jurisdiction under
14 the federal power act over transmission service,
15 everything related to wholesale transactions and also on
16 bundled retail transmission. Puget fought that, fought
17 against that interpretation and just lost in an opinion
18 decided by the United States Court of Appeals for the
19 District of Columbia Circuit. It is our belief that the
20 law is that if Puget has a transmission obligation under
21 the contract, then the FERC tariff applies.

22 Now in terms of your jurisdiction vis a vis
23 FERC, that has yet to be sweated out. But in a footnote
24 to the complaint, we contemplated that issue and
25 suggested that if there were concerns or reservation

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1 about jurisdiction, at the very least we would like a
2 declaration that we were voluntarily offered or provided
3 transmission service by Puget, which triggers the
4 availability clause of the open access transmission
5 tariff on file with FERC in my petition.

6 JUDGE MOSS: Have I mentioned in that
7 connection, Mr. Cameron, that to the extent the parties
8 do wish to Commission to entertain a declaratory
9 judgment type action, that our WAC makes specific
10 provisions for the bringing of such an action.

11 MR. CAMERON: Yes, sir.

12 JUDGE MOSS: And that would need to be
13 conformed with as opposed to bringing a footnote in the
14 complaint.

15 MR. CAMERON: I appreciate --

16 JUDGE MOSS: So you will need to focus on
17 that if that's something you think --

18 MR. CAMERON: Yes, sir.

19 JUDGE MOSS: -- needs to be a part of this.

20 MR. CAMERON: Thank you.

21 JUDGE MOSS: All right, Mr. Gould, we didn't
22 really give you a direct opportunity to follow up
23 Mr. Cameron on the transmission issues. Did you have
24 anything to add to what was already said on that side of
25 it before we turn to Mr. Van Nostrand for his comments?

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1 MR. GOULD: Just these two things. The
2 transmission prayers are based on section one of the
3 agreement. That has to do with the term time economic
4 unavailability issue that the Chairwoman talked about,
5 and so that question can be resolved by looking at that
6 language and resolving it as a matter of interpretation.

7 The broader question of transmission over
8 time beyond the current supply load is under section 4,
9 and again, those words could be construed by the
10 Commission after taking evidence on tender of the
11 parties to resolve the intended meaning.

12 JUDGE MOSS: So you're asserting that those
13 contract provisions are ambiguous and require
14 interpretation based on the intent of the parties?

15 MR. GOULD: Well, I'm saying that the
16 Commission may so find. I think they're not ambiguous,
17 and my argument would be that they mean the things that
18 we have asserted that they mean. But the Commission may
19 find them ambiguous and may wish to find after taking
20 evidence according to the evidence as stated, presented.

21 JUDGE MOSS: The question is whether that's
22 your assertion. Your assertion is they're not
23 ambiguous?

24 MR. GOULD: Yes.

25 JUDGE MOSS: So we would be expecting some

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1 sort of dispositive motions to the meaning?

2 MR. GOULD: Oh, summary motion?

3 JUDGE MOSS: Yes, summary determination we

4 call it.

5 MR. GOULD: We certainly would consider that.

6 MR. CAMERON: We certainly have witnesses
7 available to address the intent of the parties, if need
8 be. We just have not resolved the issue of whether we
9 would seek resolution as a matter of law or present
10 testimony on that issue.

11 JUDGE MOSS: But, of course, you understand
12 there's a fundamental difference between asserting that
13 a contract provision is ambiguous and requires
14 interpretation with acknowledgement of the intent of the
15 parties through evidentiary presentation versus claiming
16 it's unambiguous, its meaning is plain on its face, and
17 so on and so forth.

18 MR. CAMERON: I certainly appreciate that the
19 issue that awaits us is whether we move for summary
20 judgment based on the express language of the contract.
21 I would characterize it only as a tactical question on
22 our part.

23 JUDGE MOSS: The reason I focus on this at
24 least briefly is that all these things, how we're going
25 to proceed affects the timing of this. I understand the

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1 press that the complainants feel here. They have
2 expressed it quite plainly. But certainly there's a
3 very material difference between having to have a full
4 blown record on a question as opposed to being able to
5 dispose of it in some more summary fashion, so this is
6 important in terms of our timing.

7 That's not to say we can't set our proceeding
8 contemplating one process and then have that shortened
9 substantially by dispositive motions, so that would be
10 another alternative. But if we're going to have to have
11 evidence on some of these issues, then we have to allow
12 time for the discovery process to play itself out for
13 the evidence to be furnished and perhaps through live
14 direct testimony as opposed to prefiled, which might be
15 a little quicker, these sorts of considerations when we
16 get into the process and procedures, so that's why I'm
17 asking these questions.

18 MR. CAMERON: We certainly want to do
19 everything that we can to help you manage your docket,
20 Your Honor.

21 JUDGE MOSS: Mr. Van Nostrand, let's give you
22 an opportunity to comment on the transmission side of
23 the case if you wish.

24 MR. VAN NOSTRAND: Thank you, Your Honor.
25 I'm not sure where it falls in terms of ambiguous versus

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1 unambiguous, but I think it's the company's pretty clear
2 position that it's a complete mischaracterization of
3 this contract to suggest that Puget has committed to
4 offer unbundled transmission service. The obligation to
5 provide transmission service at the end of the five
6 years is modified by the term. If and to the extent the
7 retail wheeling is generally made available by the
8 company to retail customers in the State of Washington,
9 then indeed the company does have the obligation to
10 provide retail wheeling to these customers. And these
11 customers in turn have an obligation to take
12 transmission service from the company for the 20 year
13 period as stated under the contract.

14 And that was an element of, a very key
15 element, of the decision to enter into this, this
16 special contract, was these customers committed
17 basically not to bypass, that they would be continuing
18 to contribute to Puget's fixed costs beyond the power
19 supply term to the extent Puget would still be getting
20 transmission revenues from these contracts.

21 But there's no obligation under this contract
22 that the notion there would be a finding made that Puget
23 voluntarily offered unbundled transmission service to
24 these customers was certainly not the intent of the
25 parties and is not born out by the plain language of the

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1 agreement.

2 The section Mr. Gould refers to regarding the
3 non-availability of energy has frankly never been
4 triggered because energy has never been not available to
5 the customers. So that provision has never been
6 invoked, and you're left with the general obligation to
7 provide transportation service. And again, that's in
8 the context of retail wheeling having been generally
9 made available, which is not the current state of
10 affairs by the company or in the state of Washington
11 generally.

12 JUDGE MOSS: Thank you.

13 CHAIRWOMAN SHOWALTER: I have a question on I
14 think your pleadings say that you have no obligation or
15 ability to wheel power because the legislature hasn't
16 acted. And I think the complainants are saying, or at
17 least implicit in what they're saying, alleges that the
18 state of the law is that it's silent, and therefore
19 wheeling is available to anyone who asks for it, I
20 guess. And this is an issue that I think has been or is
21 a set of counterposing legal arguments that have been
22 floating around for some time.

23 But as far as I know, no court has addressed
24 those two propositions. One, that we don't have
25 restructuring, because the legislature hasn't said so,

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1 and the other that, well, we do have it because the law
2 is silent. And what I'm wondering is whether that is a
3 necessary issue for us to address. Have we arrived at
4 the moment where we have got to entertain those two
5 legal propositions versus is there anything in the
6 contract or anything more specific about this situation
7 which obviates the need to make that legal call.

8 And actually I was just -- you caught my
9 attention a little bit by focusing on the language of
10 the contract, because it says:

11 If and to the extent that retail
12 wheeling is generally made available by
13 the company to retail customers.

14 That's almost a factual issue, it seems to
15 me, rather than a legal one. And maybe my question is
16 really posed to the complainants, but it doesn't say
17 legally available. It says is being made available. So
18 are we back at a kind of factual issue of does or
19 doesn't Puget generally make available retail wheeling,
20 which is different than the legal question of whether it
21 has to if asked. Maybe -- I'm sorry, go ahead Mr. Van
22 Nostrand.

23 MR. VAN NOSTRAND: Well, the problem is the
24 company can not selectively make retail wheeling
25 available without triggering possible discrimination

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1 provisions, as you will be deemed to have opened your
2 system up. If one customer can get retail wheeling,
3 then others can argue they're being discriminated
4 against to the extent retail wheeling is not being
5 offered to them.

6 And the issue which we have been very careful
7 to avoid throughout the years with the pilot program and
8 the various dancing around this cost issue, there are
9 huge policy issues associated with opening up retail
10 wheeling and allowing customers to buy unbundled utility
11 service, and we have not crossed this path. There are
12 large policy questions that would have to be involved,
13 and the fact of the matter is you can't offer retail
14 wheeling to one or two customers without opening the
15 whole inquiry and addressing those issues.

16 And this contract does not voluntarily commit
17 to providing transmission service. The intent was to
18 provide a clear out to the extent the industry is
19 restructured in Washington and retail wheeling is
20 generally made available. Obviously these customers
21 shouldn't be disadvantaged by having to continue to buy
22 bundled power service from Puget. They should get the
23 same deal as everyone else does. So if retail wheeling
24 becomes a available, you can buy your power from
25 somebody else.

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1 But these complainants are obligated to
2 continue buying transmission service from Puget. This
3 was to address the bypass situation, which they are now
4 breaching by continuing to pursue a bypass alternative
5 through Watcom PUD. The very provision which they think
6 is enforceable in this proceeding, they are violating
7 themselves by going down a path that would take bundled
8 power service from Watcom PUD and thereby breaching
9 their obligation on this agreement to take transmission
10 service from Puget in any event for 20 years.

11 JUDGE MOSS: Ms. Davison, I believe you had
12 something.

13 MR. CAMERON: Could I make one response.

14 JUDGE MOSS: Let me get Ms. Davison's turn.

15 MR. CAMERON: That's fine.

16 MS. DAVISON: Thank you, Your Honor. This is
17 an issue that is very near and dear to my heart. I have
18 been involved in disputes or interpretation issues
19 regarding the definition of eligible customer and the
20 transmission issues for, I believe, four years now.
21 There has been a pending open access transmission tariff
22 case involving Puget Sound Energy at FERC that as of
23 today remains unresolved. And that, as we know, among
24 other things, the definition of eligible customer has
25 been brought up there as well as in the BPA transmission

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1 tariff proceedings. I can delineate a list of various
2 matters that I have been involved in in which this issue
3 has been raised.

4 I want to bring to your -- and I also believe
5 that some of the questions that Chairwoman Showalter has
6 raised is -- those are very important issues and legal
7 issues. And I believe that you are correct, that they
8 have not been resolved to date.

9 And that takes me to my real point, which is
10 that these are very, very important issues to us, and we
11 would certainly like to have an opportunity to fully
12 brief those issues. I would hate to see an expedited
13 consideration of issues that are of such paramount
14 importance to the industry, and particularly to the
15 industrial customers in the state of Washington, which
16 are somewhat uniquely situated, because there are no
17 service territories other than through agreement among
18 the utilities in this state. There are lots of unique
19 issues presented in this state.

20 I would like to just briefly comment on what
21 I believe to be the answer to your jurisdictional
22 question. And I believe that yes, FERC has the legal
23 authority to order transmission. But I believe that you
24 have the legal authority to interpret the contract and
25 make determinations with regard to eligibility. So I

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1 believe you have the jurisdiction to decide this.

2 JUDGE MOSS: Doesn't the jurisdictional
3 question come down to wholesale versus retail? The FERC
4 has jurisdiction over wholesale power and transmission,
5 and the state agency has jurisdiction over the retail
6 side. Isn't it just quite as simple as that? In other
7 words, is anybody asserting that this Commission has the
8 authority to order wheeling of wholesale power? Are the
9 complainants asserting that?

10 MR. GOULD: No.

11 CHAIRWOMAN SHOWALTER: But isn't the issue
12 the reverse. Does FERC have some authority over retail
13 customers?

14 MS. DAVISON: Some.

15 COMMISSIONER HEMSTAD: Well, what I'm
16 understanding it should be is whether contract terms are
17 such that Puget would have a duty to provide that
18 service. In that sense it's a matter of contract
19 interpretation, therefore not a matter of FERC versus
20 the state jurisdiction. You would agree with that.
21 Would the parties agree with that?

22 MR. GOULD: I certainly agree with that.

23 COMMISSIONER HEMSTAD: Is that your
24 understanding Mr. Van Nostrand?

25 MR. VAN NOSTRAND: It sounds like that's the

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1 -- according to Mr. Cameron's remarks this morning about
2 whether or not by this agreement PSE has voluntarily
3 offered transmission service is that's where they're
4 going, to be an eligible customer under the FERC access.

5 MS. DAVISON: So.

6 JUDGE MOSS: Okay.

7 COMMISSIONER HEMSTAD: Well, are we done with
8 the -- I mean do we have others?

9 JUDGE MOSS: We have to give an opportunity,
10 I think, to staff and public counsel if they wish to
11 comment on this transmission side of the complaint.

12 MR. CEDARBAUM: I was just going to agree
13 with Commissioner Hemstad's statement of the issue.
14 That was our take on it as well, that we're interpreting
15 the transmission provision of the contract, not this
16 Commission's legal authority to order transmission
17 versus FERC's jurisdiction over that. So that was our
18 focus as well.

19 JUDGE MOSS: Thank you.

20 Mr. ffitch.

21 MR. FFITCH: Your Honor, I think the
22 transmission issues have been well laid out. I don't
23 have anything to add for public counsel.

24 JUDGE MOSS: All right.

25 MR. CAMERON: I just wanted to add one more

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1 thing if I could just keying off of what Mr. Van
2 Nostrand said a moment ago. He refers repeatedly to our
3 obligations regarding the transportation contract. As
4 you will read in our reply and throughout this case, we
5 find it impossible to understand the logic that says we
6 have to take a transportation contract that was never
7 offered to us, and the key words are transportation
8 contract. It's not bundled service.

9 And again, the power supply service ends in
10 five years. We're talking principally about a period
11 after that five years. We were to be offered a
12 transportation contract. We have not been offered a
13 transportation contract, although we have asked. The
14 company is basically construing transportation contract
15 to mean bundled service contract.

16 And because we are non-core customers, they
17 construe that further to mean that for 15 years after
18 the expiration of our power supply contract, they
19 believe they have a right to force us to take energy at
20 the Mid Columbia index price found in the five year
21 power sale contract, although as we said that Mid
22 Columbia index price is ruinous to us. So it is both
23 insulting to our businesses as well as we believe
24 legally untenable.

25 CHAIRWOMAN SHOWALTER: What about the

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1 evidentiary needs on this transmission question and also
2 the other docket number, the leasing equipment.

3 MR. GOULD: The leasing equipment case I
4 would like to defer.

5 CHAIRWOMAN SHOWALTER: Okay.

6 MR. GOULD: Until we get rid of this matter.
7 I think that's the easiest way to do that.

8 As to the transmission witnesses, again the
9 answer is two or three.

10 CHAIRWOMAN SHOWALTER: And Mr. Van Nostrand.

11 MR. VAN NOSTRAND: Probably two for the
12 company.

13 COMMISSIONER HEMSTAD: May I ask, when you
14 say witnesses, in the factually disputed sense or
15 witnesses in an affidavit sense so that we would end up
16 with matters in front of us that are presented for
17 summary determination based on that?

18 MR. GOULD: This brings us back, Your Honor,
19 to the question that you raised earlier about proceeding
20 by way of summary motions. We think that the
21 transmission issues identified as contractual provisions
22 and obligations or not need the support of witnesses.
23 They are subject to cross and examination processes.
24 The company has already said that it disputes our
25 interpretation or our view of those provisions, and we

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1 certainly dispute their view. And so it will come down
2 to the intent of the parties, and you will hear
3 witnesses who were at the negotiations and wrote the
4 language and be asked to decide what those provisions
5 mean.

6 COMMISSIONER HEMSTAD: And would that require
7 discovery or just put the people on the stand and listen
8 to them?

9 MR. GOULD: I think I have been thinking of a
10 normal process, although greatly speeded up, in which we
11 have because -- because of the way that you normally do
12 business, which I think is correct, prefiled testimony,
13 so that there are no surprises and simply that we hurry
14 up that process. That's what I had in mind.

15 CHAIRWOMAN SHOWALTER: But is there a
16 consensus here, because Mr. Van Nostrand, I don't think
17 we have heard from you on this, but is the power issue
18 severable from the transmission issue in terms of
19 phasing resolution of it, and is there an agreement that
20 that seems to be the most pressing issue to resolve?

21 MR. GOULD: We think it's severable and the
22 most pressing, yes.

23 MR. CAMERON: I would say the concept of
24 phasing within a single docket is favorable to break out
25 into a separate docket.

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1 CHAIRWOMAN SHOWALTER: But in terms of
2 hearing time and briefing time, et cetera, does it make
3 more sense to proceed with the power issue and proceed
4 as quickly as we can with it and let the next thing come
5 later?

6 MR. GOULD: That makes sense.

7 COMMISSIONER HEMSTAD: Then it would seem to
8 try to minimize or eliminate discovery, either
9 dispositive motions or live witnesses here, and you're
10 the ones who are asking for a resolution as quickly as
11 possible.

12 MR. GOULD: Yes, sir, but we do need some
13 discovery.

14 MR. VAN NOSTRAND: The company, I believe the
15 power issues probably are severable and could be held
16 first.

17 JUDGE MOSS: It seems that there is a
18 consensus among these parties at least in terms of
19 process issues. I suppose we need to hear from others,
20 but what I'm hearing at this juncture is a suggestion
21 that we would have a phased hearing with the power
22 issues to be taken up in phase one. And then let's talk
23 a little bit about what phase two would be, because I
24 think I have heard a couple of different things.

25 On the one hand, I have heard that there is a

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1 relationship between the issues raised by
2 Georgia-Pacific in the 735 docket and the transmission
3 issues in the 1014 docket, and that would seem to be in
4 favor of having a phase two that would encompass those
5 issues from the two dockets. Alternatively, I have
6 heard the suggestion that we could take up the
7 transmission issues in the 1014 docket as phase two of
8 this proceeding, and then we could actually conduct the
9 735 docket on a separate tract or procedural schedule.
10 So that's where we are in terms of suggestions, as I
11 understand them. And we need to hear about that.

12 MR. CAMERON: Speaking on behalf of
13 Bellingham Cold Storage, we would prefer the phasing
14 within the single docket, that is with power going as
15 phase one, transmission as phase two, leaving for a
16 separate proceeding the substation issue, transformer
17 issue, whatever it is, in which we are not involved.

18 MR. GOULD: That would be acceptable. I
19 think there is a joinder of those of the GP issues in
20 the transmission questions, but I believe also that that
21 case resolves out of those transmission issues.

22 JUDGE MOSS: Mr. Van Nostrand, in terms of
23 the procedural suggestions we are entertaining here, do
24 you have any comment?

25 MR. VAN NOSTRAND: I think it seems like it's

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1 logical to have the 735 handled separately. I'm not
2 sure there's going to be the same level of interest in
3 that proceeding nor the same urgency, so phase one and
4 phase two as to this proceeding, maybe 735 on a
5 different tract entirely.

6 CHAIRWOMAN SHOWALTER: But does it make sense
7 to have 735 trailing the 1014 docket? It sounds to me
8 as if it does.

9 MR. VAN NOSTRAND: I think so, but it's more
10 or less Mr. Gould's call. It's his complaint, and he
11 knows more about the urgency.

12 CHAIRWOMAN SHOWALTER: Or trailing maybe
13 simultaneously or contemporaneous.

14 MR. GOULD: Contemporaneous is good unless it
15 gets in the way of resolving the 1014 docket, but it can
16 lag a bit, because it spins off of the transmission
17 resolutions.

18 JUDGE MOSS: Other parties wish to comment on
19 the process suggestions that we're hearing?

20 MR. CEDARBAUM: The staff is flexible,
21 whatever works best for everybody, we can process that.
22 I just wonder if one of the options would be to
23 consolidate the two dockets, have the phase one on the
24 power issues, and phase two would be transmission and
25 the lease arrangement. But that's just a mechanical

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1 thing as opposed to maybe a substantive one.

2 JUDGE MOSS: That would be an alternative
3 procedure to what we're hearing. What we're hearing
4 from the parties is they would prefer to see the 735
5 docket handled separately, and you're suggesting
6 handling them together within the phase two of the 1014
7 docket.

8 MR. CEDARBAUM: I'm just offering that as a
9 suggestion, because it sounded like the parties are in
10 agreement about phase one and phase two. But with
11 relationship in phase two about the two complaints, if
12 that makes it easier for the Commission to process the
13 case because of one proceeding instead of two, that's
14 fine with staff.

15 JUDGE MOSS: Okay, we appreciate the
16 flexibility there.

17 Mr. ffitch, do you have any comment on the
18 process we're discussing?

19 MR. FFITCH: Thank you, Your Honor. Public
20 counsel is amenable to the phasing of 1014 and has no
21 objection to the separate handling of the 735 docket as
22 proposed by the parties.

23 JUDGE MOSS: And the interveners in 1014, do
24 they have any comment on the proposed process?

25 MS. DAVISON: No, Your Honor.

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1 JUDGE MOSS: Thank you. Now we have raised
2 the issue on a number of occasions and in a number of
3 ways of dispositive motions, whether they be motions to
4 dismiss or motions for determination or what have you.
5 I think if I'm, perhaps it's overly bold to attempt to
6 summarize all that, but as I understand it, the
7 suggestion from all sides is that these may not be
8 matters that are susceptible to motions for summary
9 determination, or am I hearing that correctly? I keep
10 hearing that we need evidence on these questions.

11 MR. GOULD: You're hearing correctly as to
12 Georgia-Pacific.

13 MR. CAMERON: And from Bellingham Cold
14 Storage both on the transmission and the power issue.

15 JUDGE MOSS: So I don't expect to hear
16 dispositive motions on the dispositive issue.

17 MR. VAN NOSTRAND: I think that's correct.
18 The only potential would have been if the party was
19 claiming the contract was unambiguous and does obligate
20 Puget to provide transmission service, but I don't think
21 they can make that argument that it's ambiguous.

22 JUDGE MOSS: And is staff, I think you said
23 earlier you're not sure yet whether you're planning a
24 motion to dismiss all or part of --

25 MR. CEDARBAUM: That's correct, Your Honor,

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1 although I would note in the statute that I referenced
2 earlier regardless of what the complaint -- who signs
3 the complaint, the Commission on its own motion can tee
4 up the reasonableness of rates. And so if you today or
5 in your prehearing conference order just want to do
6 that, you can, and then I won't bother with my motion,
7 or I won't bother thinking about it anymore. But if
8 that's not the route you want to go, if you want to
9 respond to a motion, then I will still consider that.
10 But you do have the option just on your own motion of
11 dispensing the issue that I raised this morning.

12 JUDGE MOSS: In connection with that, did it
13 have any influence, the fact that there is a statement
14 attached by the mayor?

15 MR. GOULD: That was put there to fulfill
16 that obligation.

17 MR. CEDARBAUM: And I think I'm leaning
18 fairly strongly towards agreeing with the complainants
19 on that.

20 JUDGE MOSS: Okay.

21 MR. CEDARBAUM: Because in reading the letter
22 from the mayor, it's not just a boiler plate supportive
23 letter. The mayor actually did read the draft complaint
24 and the support of it, and I suppose you could also just
25 -- Commission allows for amendments of complaints, so

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1 maybe that's a process to fix any deficiency. I'm not
2 sure I'm at that point quite yet. I still need to think
3 about it, but that's at least the issues that come to
4 mind.

5 CHAIRWOMAN SHOWALTER: I just wanted to --
6 the one -- the issue I'm wondering whether is a legal
7 issue or a factual issue, but we don't have a sort of
8 course of -- sort of specific motion from you. We have
9 a complaint, but it seems to me that you have to make
10 first the legal case that if you can show that the
11 market is broken, that then you do have a legal right,
12 or either you have a legal right or we have a legal
13 ability to modify the contract. And that seems to me --
14 I mean in other words --

15 MR. GOULD: That is --

16 CHAIRWOMAN SHOWALTER: -- essentially looking
17 at the facts most favorable to you, you say we can show
18 the market is broken, or we can show that we intended to
19 have competition here, and the intent of the parties is
20 not being honored. Then you have to show that the
21 contract language notwithstanding either -- we either
22 must or should do something about it. Is that a legal
23 issue? Is that something that can be argued or should
24 be argued without the -- before the evidence, or should
25 it just be part and parcel of the whole?

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1 MR. GOULD: I think this should be part and
2 parcel. I would not be so bold as to make you -- ask
3 you to make that ruling without the evidence, but that
4 is the argument of plenary, you have the power to fix,
5 upon proper findings, to fix the problem.

6 JUDGE MOSS: Well, let me ask in that
7 connection then, Mr. Gould, both parties have asserted
8 through their pleadings a failure to state a claim upon
9 which a relief can be granted. And my recollection in
10 the way a court or tribunal views that sort of assertion
11 is that the assertion essentially is that under the
12 proof of no set of facts would the tribunal be empowered
13 to give relief no matter what facts you might prove.
14 Isn't that the basis of a failure to state a claim
15 defense?

16 MR. GOULD: I suppose that's what a demurrer
17 is, but I'm not comfortable that it's well stated.

18 JUDGE MOSS: Both sides have stated it so.

19 MR. GOULD: Well, we have not stated it. We
20 have stated it as to their counterclaim, and we could
21 spend time briefing that sort of thing, but where are
22 we. I don't see that you have any basis for resolution
23 really.

24 JUDGE MOSS: Well, where we are is if the
25 claim is sustained, we dismiss the case.

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1 COMMISSIONER HEMSTAD: What I hear is parties
2 aren't at least at this point prepared to pursue that
3 particular legal standard.

4 MR. GOULD: I think that's accurate, yeah.

5 JUDGE MOSS: All right. I'm just trying to
6 understand what issues we're joining here.

7 MR. GOULD: I think that's accurate. That's
8 a bit of bravado on both sides, I guess. But no, I
9 think we would be just spinning our wheels to go down
10 demurrer route and re-plea and start over. We need some
11 evidence that a finding can be made under the statute
12 and then a repair made as you deem appropriate if you
13 are willing to make the findings.

14 JUDGE MOSS: We certainly don't want to waste
15 time, but in other words, if we can identify an avenue
16 of which we can dispose of very quickly, which is what
17 I'm exploring, I want to do that. So that's not an
18 avenue now, that's a dead end?

19 MR. GOULD: No, I don't think so. Mr. Van
20 Nostrand said earlier this is a, I forget the word,
21 egregious pleading, or words to that effect.

22 CHAIRWOMAN SHOWALTER: A what pleading?

23 MR. GOULD: These are egregious charges, and
24 they are --

25 CHAIRWOMAN SHOWALTER: What does that mean?

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1 MR. GOULD: Well, it means that they are
2 major, and they are awful in their contemplation. I
3 mean we're talking about a situation which, if true,
4 should simply not be countenanced, that is to say the
5 pricing of things under broken markets.

6 CHAIRWOMAN SHOWALTER: But the question of
7 resolving it quickly, Mr. Van Nostrand, do you also
8 agree that we can't get through this without some
9 evidentiary hearing, or do you think from your point of
10 view you've got a legal case that says no matter what
11 they prove, the contract is still the contract? Or are
12 you planning to press that issue, is maybe a better way
13 to put it?

14 MR. VAN NOSTRAND: I guess I wouldn't want to
15 be necessarily precluded -- I need to consult with my
16 client. I don't want to preclude us from filing some
17 sort of a dispositive motion. But the allegation is
18 that the index or the market is broken. It seems to me
19 that needs to be established. Then you move on into a
20 remedy phase. But I can not imagine that fact being
21 established without evidentiary hearings and the ability
22 to cross-examine, the ability to put on opposing
23 witnesses.

24 CHAIRWOMAN SHOWALTER: So the most
25 expeditious way is to have a day of hearings with

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1 witnesses, it sounds.

2 MR. GOULD: Yes.

3 CHAIRWOMAN SHOWALTER: Establish some facts
4 and then take the legal arguments after those facts.

5 MR. GOULD: I believe so.

6 COMMISSIONER HEMSTAD: How much time is
7 needed for discovery?

8 MR. GOULD: I have a schedule that has you
9 issuing an order on August 17. It sounds like, you
10 know, we filed direct testimony as early as next
11 Wednesday on claims and counterclaims, we file rebuttal
12 two days later, we have a hearing August 3rd, we file
13 initial briefs August 8, reply brief August 10th.

14 COMMISSIONER HEMSTAD: Well, you're
15 contemplating then that this will be on written
16 testimony?

17 MR. GOULD: Yes.

18 COMMISSIONER HEMSTAD: Rather than just oral
19 testimony?

20 MR. GOULD: Yes, although if you believe --
21 yes, I think that's a sound way to do business. If you
22 believe that that necessarily gets in the way of
23 expedition, then we're prepared to come in live.

24 COMMISSIONER HEMSTAD: Well, I guess what do
25 the parties prefer?

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1 between the direct and the rebuttal. I'm not sure where
2 we fit in the respondent here.

3 COMMISSIONER HEMSTAD: They do get a chance
4 here.

5 CHAIRWOMAN SHOWALTER: I think he meant
6 Puget.

7 MR. CEDARBAUM: Or simultaneous direct and
8 simultaneous rebuttal; is that what you meant?

9 MR. GOULD: Yes.

10 JUDGE MOSS: I'm still confused. We have
11 direct, we have responsive, we have rebuttal.

12 MR. CEDARBAUM: I assume Mr. Gould plans
13 simultaneous direct testimony by all parties, not just
14 complainants, and then simultaneous rebuttal testimony
15 by all parties to each other. That's what I thought he
16 just said, which is not the usual practice, but it's --

17 CHAIRWOMAN SHOWALTER: Would it work is the
18 question.

19 MR. CEDARBAUM: Well, I think it would work.
20 I don't -- the time schedule that he just rattled off is
21 harder to, from staff's perspective, I mean I understand
22 the urgency from the plaintiffs' perspective.

23 CHAIRWOMAN SHOWALTER: Only talking here
24 about the power issue, right?

25 MR. GOULD: Yes, we are.

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1 JUDGE MOSS: This is phase one.

2 CHAIRWOMAN SHOWALTER: Right.

3 JUDGE MOSS: And did you have that schedule
4 written up in some fashion?

5 MR. GOULD: I did.

6 JUDGE MOSS: Maybe you could just share that
7 with the Bench.

8 MR. GOULD: I scratched out rebuttal and put
9 in responsive.

10 JUDGE MOSS: We do want to be clear on this.

11 MR. GOULD: Simultaneous claims and
12 counterclaims.

13 MR. CEDARBAUM: Your Honor, I would just
14 state for the record that if that type of schedule is
15 going to be adopted by the Commission, I am not sure
16 staff has a witness available during that week of July
17 to file testimony, so I would have to consult with staff
18 on that.

19 JUDGE MOSS: And so when you said earlier,
20 Mr. Gould, a brief period of discovery, you meant brief
21 indeed. Today is the 19th, and you're contemplating
22 discovery and prefiled written direct testimony by the
23 26th of this month, seven days from today.

24 MR. GOULD: Yes.

25 JUDGE MOSS: So you're looking at discovery

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1 in the course of a day or two.

2 MR. GOULD: Your Honor, I'm asking that it
3 start today, very short response. I think I put two
4 days in there. We have a discovery request ready to go.
5 We don't think it's burdensome. That would be for the
6 company to respond to you about. But that will
7 certainly get the thing started. And then if further
8 discovery needs come up, it has been suggested that we
9 would deal with them as we need to.

10 JUDGE MOSS: How about you, Mr. Cameron, do
11 you have your discovery ready to go?

12 MR. CAMERON: It will be joint on behalf of
13 both complainants, so it's ready to go.

14 JUDGE MOSS: Mr. Van Nostrand, is your
15 discovery ready to go?

16 MR. VAN NOSTRAND: I don't know about the
17 availability of witnesses or personnel along the lines
18 of the schedule that I just talked with five minutes
19 before the hearing started, so I can't commit that we
20 would be able to move that quickly or that we have
21 witnesses available. We will have discovery.

22 JUDGE MOSS: Well, I think certainly what we
23 want to do today if we can possibly accomplish it is
24 determine a reasonable schedule, a schedule that is both
25 quick but workable. And I see very little point in

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1 establishing something that says okay, we're going to
2 have a decision in 28 days from today if what we're
3 going to find here in a week is, well, we tried, and
4 it's impossible, there are discovery disputes, witnesses
5 can't be available. And then we have to go back and do
6 this again.

7 So I wonder if it would be a good possibility
8 here for us to take a luncheon recess and come back
9 after lunch, and perhaps the parties will have had some
10 opportunity to discuss among themselves and look at this
11 discovery and have some better and perhaps realistic
12 discussion, perhaps not. But I think that's only going
13 to be ascertained if the parties put their heads
14 together and discuss among themselves what realistically
15 can be done, and staff can have an opportunity to check
16 on the availability of its witness and so forth. Does
17 that seem like a reasonable suggestion to my colleagues
18 on the Bench as well?

19 CHAIRWOMAN SHOWALTER: It sounds like a good
20 idea.

21 Question, are the witnesses we're talking
22 about, at least some of them, expert witnesses on a
23 market, or are we talking about people from around town?

24 MR. GOULD: Expert witnesses on the market,
25 yes.

00109

1 CHAIRWOMAN SHOWALTER: So then part of the
2 scheduling requires their ability and our ability, all
3 of our ability to be in one place on the same day; am I
4 right?

5 MR. GOULD: Yes.

6 CHAIRWOMAN SHOWALTER: For cross-examination
7 purposes, so that might be difficult to determine in an
8 hour over the lunch hour. I don't know what to do about
9 that fact.

10 COMMISSIONER HEMSTAD: Seems to me that it's
11 unlikely that this can be resolved today. The parties
12 are going to have to deal with their witnesses, and some
13 kind of telephone conference call with the ALJ would be
14 appropriate if you had an opportunity to try to bring it
15 together as quickly as you can, but it's not going to be
16 done today.

17 CHAIRWOMAN SHOWALTER: One thing that
18 possibly we could do today before or after lunch, but
19 just outline a few days when the Commission is available
20 so that when you go to your witnesses, you're finding
21 out whether they're available on August 4 or August 28
22 or whatever the date may be that we have available,
23 because we have that ability today to give you some
24 dates.

25 JUDGE MOSS: All right. Well, why don't we

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1 get those dates up to the Bench and tell the parties
2 what those are.

3 MR. GOULD: That's good, thank you, and may
4 we begin discovery today?

5 JUDGE MOSS: We will certainly invoke the
6 discovery rule, and you may begin discovery today. And
7 again, I would encourage you, I think we may need to
8 have certainly some discussion among the parties, that
9 would be helpful in terms of what's realistic. Go ahead
10 and serve your discovery by hand, let them see what
11 they've got, and the company will say what it can and
12 can not do, and I'm certain will do so in consultation
13 with Mr. Van Nostrand and his client.

14 COMMISSIONER HEMSTAD: I think the Commission
15 and I are going to leave and allow this to be pursued by
16 the parties, but I just want to make one comment about
17 these interesting issues or the questions that it seems
18 to me presented to the Commission on the power issues.
19 One is the quite narrow issue of, obviously important,
20 of the is it a matter of contract interpretation.
21 Second, I heard here today issues dealing with call it
22 generically impossibility of performance. And third,
23 Mr. Gould's assertion that we have some plenary
24 authority in any event to examine the current
25 environment and apparently modify or rewrite the

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1 arrangements in a way that a trial court would not have.
2 I find that an interesting assertion, but so I see at
3 least three different levels of assertions as to what
4 our duties are here.

5 JUDGE MOSS: All right, I think we can
6 probably most usefully pursue our discussions about
7 scheduling off the record, and then we can come back on
8 the record at the appropriate time and make any record
9 that we need to in that regard. Let's take a few
10 minutes to do that now, and perhaps we will agree that
11 it's important that we take a recess for lunch and come
12 back and that sort of thing. I will certainly make
13 myself available for the balance of the afternoon, if
14 necessary, to accommodate the parties' desires. So
15 let's go off the record.

16 (Discussion off the record.)

17 JUDGE MOSS: We're back on the record after
18 having some very useful discussion among the parties and
19 with the Bench as well and Judge Wallis has joined us at
20 the Bench and has helpfully agreed to participate with
21 the Bench and help us out with some scheduling problems.

22 We have agreed that we should recess here
23 momentarily to give the parties an opportunity to confer
24 among themselves and with their clients regarding the
25 time requirements so that they can arrive at a realistic

00112

1 proposed schedule that will be presented to Judge Wallis
2 in my absence tomorrow. I am committed in another forum
3 tomorrow, and Judge Wallis will take that matter up.
4 And I gather there will be some written submission
5 through E-mail to Judge Wallis copied to me for
6 information.

7 And then was the idea that there would be a
8 telephone conference, as I recall? Is that what the
9 parties want to do, a telephone conference?

10 MR. CAMERON: Yes, sir.

11 JUDGE MOSS: Judge Wallis, should we initiate
12 that using the teleconference bridge or have one of the
13 parties made responsible to set that up?

14 JUDGE WALLIS: I will consult with our staff
15 about the availability, and if the parties consent, I
16 will work with Mr. Cedarbaum to make the physical
17 arrangements. Would that work for everyone?

18 MR. CEDARBAUM: This is a conference call
19 amongst the parties just to come up with a schedule?

20 JUDGE MOSS: Yes.

21 MR. CEDARBAUM: I guess I was just wondering
22 whether one of the complainants' attorneys can just
23 arrange a conference call rather than involving you.

24 JUDGE WALLIS: I see no need to participate
25 in the parties' conference call, but I was contemplating

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1 that the parties would want to jointly present or
2 discuss their proposal. If that's not the case, then we
3 need not look to those arrangements.

4 MR. GOULD: Well, I think it is the case. We
5 will be faxing you and faxing back and forth among
6 ourselves what we try to agree to. And if we get an
7 agreement, we will present to you for approval. If we
8 don't get agreement, then we will need a ruling, and
9 that would be the telephone conference, I think.

10 JUDGE WALLIS: Very well, so I will proceed
11 in conjunction with Mr. Cedarbaum to make arrangements
12 for a time for a conference call.

13 JUDGE MOSS: And that announcement can be
14 made. We have everybody's E-mail address, and so we can
15 use that means to communicate quickly among ourselves
16 and get these arrangements made.

17 MR. GOULD: Will this be like 3:00 in the
18 afternoon roughly?

19 JUDGE WALLIS: Yes.

20 JUDGE MOSS: The parties have asked for
21 discovery and the discovery rule WAC 480-09-480 will be
22 invoked or I should say is invoked. Discovery may
23 commence immediately. The parties have suggested there
24 may be a need for a protective order, and under the
25 circumstances of the case, it appears that the

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1 suggestion may be well taken. Accordingly, one will be
2 prepared for the Commissioners' signature. There is a
3 sort of standard form of protective order that the
4 Commission has used for some time, and that will be the
5 form of the order. The parties may proceed with
6 discovery at this time as if that order were in place,
7 and it will be published as soon as practically
8 possible.

9 Is there any other business we need to take
10 up on the record today, or barring that, we will recess.

11 MR. GOULD: I don't recall the times for
12 responses in the discovery rule.

13 JUDGE MOSS: Well, the discovery rule itself
14 provides, I believe, ten days, but I would anticipate
15 that part of the parties' discussions about a procedural
16 schedule would be one that would modify that somewhat.

17 MR. GOULD: So that's subject --

18 JUDGE MOSS: So you all try to work that out
19 among yourselves, and again, to the extent you can not,
20 you bring that question to Judge Wallis tomorrow, and he
21 will make a ruling.

22 MR. GOULD: Thank you.

23 JUDGE MOSS: Anything else?

24 All right, then we will stand in recess.

25 Appreciate all of you being here today.

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(Hearing recessed at 1:05 p.m.)