

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application
Of Rocky Mountain Power for Approval
Of the Power Purchase Agreement
Between PacifiCorp and Blue Mountain
Power Partners, LLC,

Docket No. 13-035-115

And

In the Matter of the Application
Of Rocky Mountain Power for Approval
Of the Power Purchase Agreement
Between PacifiCorp and Latigo Wind
Park, LLC.

Docket No. 13-035-116

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PREHEARING CONFERENCE

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TAKEN AT: Heber M. Wells
160 East 300 South
Salt Lake City, UT

DATE: September 16, 2013

TIME: 1:30 p.m.

REPORTED BY: Kellie Peterson, RPR

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Prehearing Conference

September 16, 2013

PROCEEDINGS

HEARING OFFICER WHITE: Good afternoon. This is the time and the place for the dually noticed prehearing conference in Docket No. 13-035-115, in the matter of the application of Rocky Mountain Power for approval of the power purchase agreement between PacifiCorp and Blue Mountain Power Partners, LLC, and also in Docket No. 13-035-116, in the matter of the application--in the matter of the application of Rocky Mountain Power for approval of the power purchase agreement between PacifiCorp and Latigo Wind Park, LLC.

I'm Jordan White. The Commissioners have asked me to act as the presiding officer for the matters. I want to go ahead and begin by taking appearances, if that is okay. We will start here with Mr. Solander.

MR. SOLANDER: Daniel Solander, on behalf of Rocky Mountain Power. I also wanted to confirm this is being streamed. We have a number of folks who were not able to be here today but wanted to be able to listen to the proceedings.

HEARING OFFICER WHITE: Yes, this is being streamed, yes.

MR. JETTER: Justin Jetter, on behalf of the Utah Division of Public Utilities.

MR. SACKETT: Gary G. Sackett for Latigo Wind

1 Farms.

2 MR. DODGE: Gary Dodge on behalf of Blue
3 Mountain Power Partners, LLC.

4 MR. SACKETT: And that's a correction, it's Latigo
5 Wind Park, pardon me.

6 MS. WOOD: Mary Anne Wood and Stephen Wood
7 on behalf of Ellis-Hall.

8 MS. HAYES: Sophie Hayes with Utah Clean
9 Energy, and I would just like to add at this point that it's my
10 intention to participate by observing today.

11 HEARING OFFICER WHITE: Understood. Just to
12 be clear for today, we will be dealing with some motions but
13 there will be some issues to deal with, with respect to kind of
14 the process for the hearing, so that may be a good point for you
15 to get involved.

16 MS. HAYES: Thank you.

17 MS. BECK: Good afternoon. My name is Michelle
18 Beck from the Office of Consumer Services. The Office's
19 counsel was unable to attend today and we are not a party to
20 most of those sub motions, but we are here if something comes
21 up procedurally. So with your indulgence, I'll sit in the
22 audience, but if something arises procedurally, perhaps I can
23 come back to weigh in, if necessary.

24 HEARING OFFICER WHITE: Understood, and I
25 appreciate it very much. And just for my clarification, is it

1 Lateego (sic) or Latigo?

2 MR. SACKETT: Latigo.

3 HEARING OFFICER WHITE: Okay, that is helpful.

4 I apologize for mispronunciation thus far.

5 Okay. The first matter I would like to address today
6 is just the pending motions. Let's start by with Docket
7 13-035-115. We have an August 26, 2013 motion to leave to
8 file overlength of objection to approval of Blue Mountain power
9 purchase agreement from Ellis-Hall. That motion is granted.

10 We also have, in Docket 13-035-116, a motion to
11 leave to file overlength objection of approval of Latigo power
12 purchase agreement, also filed by Ellis-Hall, and that motion
13 has also been granted.

14 Okay. Let's--we have a series of motions to compel
15 discovery. Let's start with Docket No. 13-035-115. We have
16 Ellis-Hall's--by Ellis-Hall, I apologize, I mean Ellis-Hall
17 Consultants. I am just briefing that. I apologize--August 26,
18 2013 statement of discovery issues and motion and
19 memorandum to compel Blue Mountain. So I've read the
20 pleadings with respect to this motion, and what I would like to
21 do today, with your indulgence, is just to--I am going to have the
22 parties, you know, provide any additional information or
23 arguments they think are beyond or pertinent to the scope of
24 their pleadings, just to help inform the decision today.

25 So, you know, we are going to start with the motion

1 to compel Blue Mountain, so why don't we start with Ms. Wood
2 or Mr. Wood, whoever wants to address this for the motion to
3 compel Blue Mountain.

4 MR. WOOD: Would you like us to approach the
5 lectern?

6 HEARING OFFICER WHITE: Whatever you're
7 comfortable with. Typically, it's fine for you to sit down.
8 Whatever you're comfortable with, Mr. Wood.

9 MR. WOOD: Thank you. I think we have laid out
10 our arguments fairly clearly in our briefing. You know, I think
11 from a starting point, it's fundamental to understand that
12 discovery is important to due process. All parties are entitled to
13 reasonable access to all evidence that bears on the controversy
14 before them, and I think it's undisputed here that Blue Mountain
15 has failed to produce all the documents that we've requested in
16 our discovery request.

17 They have failed to produce documents based on
18 boilerplate unsubstantiated objections, which we have
19 demonstrated is contrary to law. In order to state an objection,
20 the objection must be non boilerplate specific and supported
21 with facts. You don't get to just--you don't get to avoid
22 discovery with a litany of overbroad and unduly burdensome,
23 and they have failed to substantiate their objections in both of
24 their responses and in their response to our motion to compel.

25 And I would just focus the Commission on the

1 prejudice that this causes to Ellis-Hall. Ellis-Hall has been
2 forced to make its claims on an expedited basis. Blue Mountain
3 and PacifiCorp were in support of an expedited hearing. Blue
4 Mountain's counsel thought that this could all be done in a
5 week; yet when we filed discovery requests, we got stonewalled
6 and documents have not been produced to us.

7 And to force Ellis-Hall to go before the Commission
8 and support all of its allegations without those essential
9 documents works a substantial prejudice against Ellis-Hall, the
10 denial of Ellis-Hall's due process rights, and Blue Mountain
11 cannot fail to provide documents without substantiating its
12 objection. It's failed to do so.

13 I don't know if the Commission has any questions
14 for me specific. I think it's pretty clear what has been withheld.
15 What has been withheld has been set forth in the responses.
16 Almost all of the documents were objected to based on
17 relevancy and on the basis of being overly broad and unduly
18 burdensome. I don't think either one of those objections, even
19 though they aren't substantiated, stands up to the merits.

20 It's been Blue Mountain's position throughout this
21 proceeding that Ellis-Hall's project has nothing do with the
22 approval of Blue Mountain's PPA, that its claims of disparage
23 treatment are not properly before the Commission, that its
24 diverging representations to the Commission and to City and
25 County officials in San Juan County and Monticello have no

1 bearing on whether its PPA should be approved. I don't think
2 any of those arguments hold water, but, in any event, the
3 Commission has granted our Motion to Intervene, we have made
4 those allegations; therefore, our discovery requests are directly
5 relevant to the claims of defenses asserted in this matter and
6 we respectfully ask for the Commission to grant our motion to
7 compel.

8 We'd ask that the documents be provided to us,
9 that Ellis-Hall be granted a sanction of its attorneys' fees, and
10 we further request that, you know--really, we give the
11 Commission an option; if Ellis--if Blue Mountain is not going to
12 produce the documents, then we think an adverse inference
13 should be taken against Blue Mountain's representation. If Blue
14 Mountain is willing to produce the documents, then we think that
15 the hearing should be rescheduled for a date one week after
16 they have made full and complete disclosures, and we
17 respectfully ask that our motion be granted.

18 HEARING OFFICER WHITE: Okay, thank you, Mr.
19 Wood. Mr. Dodge?

20 MR. DODGE: Thank you, Mr. White. This case
21 has, very frankly, strained my own belief in my ability to
22 communicate. Mr. Wood started with saying it's undisputed that
23 documents have been withheld. To the contrary, we have stated
24 very clearly that we've produced every document that my client
25 can locate in their files responsive to any of the nine requests.

1 That is my representation here based on my client's
2 representation to me, that he does not have access to any other
3 documents responsive to the request.

4 I could, and probably should, stop there. I have
5 said that. They refuse to accept it. They seem more intent on
6 throwing out accusations and insisting upon delays than they do
7 on actually getting the documents, but I think I do need to
8 address a couple of things that Mr. Wood said.

9 First of all, there is no prejudice because the
10 documents were produced. There was initially an objection and
11 I believe a proper one. Mr. Wood likes to cite documents from
12 all over the country as though it's textbook law as to how he
13 chooses to interpret the discovery objections and responses.
14 It's not. It's not nearly as clear as he likes to say it, but
15 notwithstanding that, we, ultimately, decided, rather than fight
16 over relevance because the schedule was what it was, what it is,
17 that we would simply produce them and we have done that.
18 We've produced them weeks ago now. He's had several weeks
19 with the documents prior to the hearing. There is certainly no
20 prejudice.

21 I do understand that Mr. Wood is used to court
22 cases that draw on for four years. Before this Commission,
23 multibillion dollar rate case decisions are made in much shorter
24 time than these kinds of hearings, for QF usually proceeds on a
25 much shorter schedule than the one here today, so this is not an

1 expedited schedule. This is a normal schedule for this kind of
2 process.

3 Mr. Wood and his client have chosen to raise
4 issues that, in my view and in my continuing view, are
5 completely irrelevant to anything this Commission has before it
6 for approval or needs to resolve, notwithstanding that we
7 produced every document that we could find and I don't know
8 what more we can do.

9 It's hypocritical in the extreme for them to demand
10 here and demand sanctions. First of all, they are inappropriate
11 and the Commission doesn't have the authority to grant what
12 they've asked for, but that aside, it's hypocritical in the extreme
13 given that Ellis-Hall has refused to produce even one document,
14 even one, to either Rocky Mountain Power or Blue Mountain in
15 response to our data request.

16 They stand here and say that their PPA is not
17 before the Commission and so correspondence and drafts of
18 that agreement are irrelevant at the same time they claim that
19 they were treated in a different way. However are we to resolve
20 those issues if they refuse to produce them. That is a different
21 issue. That is the next phase of the hearing when we talk about
22 issues before the Commission. We accept their representation
23 that they are irrelevant and we've said the same thing all along,
24 but then to turn and claim that claiming irrelevance on our part
25 was somehow inappropriate and ask for sanctions is kind of

1 beyond the pale.

2 So I will close by saying we have produced
3 everything we know how to. If they want to come rummage
4 through our drawers, we can allow them to do that, but it is
5 inappropriate to grant any kind of continuance or any kind of
6 sanctions. Thank you.

7 HEARING OFFICER WHITE: Thank you.

8 MR. WOOD: May I rebut a few statements?

9 HEARING OFFICER WHITE: I understand there are
10 things to rebut. What I was planning on doing, if it is okay with
11 the parties, is allowing--we have four of these motions to
12 compel and would it make sense to allow--again, to go to
13 whatever, the applicant or the proponent, and then the party
14 that is being compelled, to go through each of these. And if
15 Ellis-Hall has--you know, if they want to rebut in total or do you
16 want to do these--I am just trying to expedite this. If you want,
17 we can do it piece by piece.

18 MR. WOOD: I think it would make more sense to
19 handle them one at a time just because the issues presented by
20 each one are slightly different, so if I could just rebut --

21 HEARING OFFICER WHITE: That would be helpful,
22 if there are different issues. If you would point that out, that is
23 fine.

24 MR. WOOD: First, Blue Mountain makes the
25 statement that they've produced all responsive documents and

1 that is simply demonstratively not true. Ellis-Hall request No. 4
2 asked for, please produce all documents relating to turbine
3 specifications wind project, including but not limited to any
4 documents submitted to PacifiCorp, San Juan County or the City
5 of Monticello. That document request has not been complied
6 with.

7 Request No. 5: Please produce all documents and
8 communication between you and any official or employee of San
9 Juan County regarding you wind project. That has not been
10 complied with.

11 Request No. 6: Please produce all communications
12 between you and any official or employee of the City of
13 Monticello regarding your wind project. That has not been
14 complied with.

15 Please produce all documents relating to your LGIA
16 application. That has not been complied with.

17 Please produce all documents relating to your
18 conditional use permit or building permit applications submitted
19 to San Juan County. That request has not been complied with.

20 Please produce all the maps of.

21 Your proposed wind farm sites submitted to
22 PacifiCorp, San Juan County, or the City of Monticello by you.
23 That has not been complied with. These requests have not
24 been complied with.

25 What Blue Mountain has produced is

1 correspondence with PacifiCorp but it has objected to a whole
2 basis of documents and refuse to produce those. So that
3 statement that they produced everything is just not true. The
4 only way you get there is if you ignore our request.

5 Second, Blue Mountain takes exception to our
6 citing of federal law. I would note that in our brief we cite that
7 the Utah Supreme Court has held that federal law addressing
8 analysis federal rules of civil procedure is equally applicable as
9 Utah law. That is because Utah law has not addressed the wide
10 body of issues that federal law has. Our citations are correct.
11 Mr. Dodge says that there is some kind of split among the
12 authority. He has cited no case that supports the manner in
13 which he's logged his objections or to support the way he did his
14 objections. So if he has something, he should have cited.

15 And, lastly, Mr. Dodge argues that Rule 37 does not
16 apply here and that the court--that the Commission does not
17 have the power to award sanctions. That is directly rebutted by
18 the Commission's rules. Rule 37 is applied in the Commission
19 rules and in dealing with discovery motions. So it's easy to
20 make arguments without any support but when you look at the
21 underlying document request, when you look at the applicable
22 law, and when you look at the rules of the Commission, there is
23 no basis to assert that they have complied with our discovery
24 request. Thank you.

25 HEARING OFFICER WHITE: Thank you.

1 MR. DODGE: Can I respond the factual part of that
2 and won't argue the legal part? I delivered to Mr. Wood a disk
3 that looks just like this one.

4 Did you look at it?

5 MR. WOOD: I did.

6 MR. DODGE: On this document are documents that
7 we've submitted to San Juan County, any documents that we've
8 submitted to Monticello, there are none, any documents we've
9 submitted in connection with the LGIA. They were produced in
10 the first round and in this one. Any documents we submitted for
11 our conditional use permit. There were dozens of them literally
12 in here and any maps that we have, they were on here. I mean,
13 if he is going to sit here and lie about what we've produced, we
14 may have a different proceeding we need to get into where I
15 show you the thousands of documents we've produced and let
16 them prove that there is something missing because there is
17 not.

18 HEARING OFFICER WHITE: I appreciate the
19 arguments. I think there is a disagreement of what has been
20 produced and what hasn't and I also have the pleadings, you
21 know, that have been argued with respect to relevance, etc., so
22 I think that--you know, I am not sure if this is the time or place
23 to go through a document by document review and I am just
24 going to have to, you know, take the arguments, you know, with
25 the weight they are given with respect to what has been

1 provided and what hasn't.

2 So with that, let's go ahead and move on to the
3 second motion to compel, which is the motion to compel also
4 filed in docket 13-35-115. This is the Ellis-Hall August 26, 2013
5 statement of discovery issues and motion of memorandum to
6 compel Rocky Mountain Power.

7 Again, if it makes sense, Mr. Wood, if you want to
8 proceed with, you know, anything additional beyond what has
9 been pled thus far.

10 MR. WOOD: I would just say I think the situation
11 as to PacifiCorp is slightly different. PacifiCorp was more
12 responsive to our discovery request and they produced many,
13 many more documents than Blue Mountain did, which I think
14 would evidence that Blue Mountain didn't release all their
15 documents if PacifiCorp has three times the number of
16 documents that Blue Mountain has and their correspondence
17 went back and forth. Perhaps, Blue Mountain can explain why it
18 doesn't have those documents but in event, PacifiCorp made a
19 more substantial effort to comply with our discovery request.

20 A couple points I would point out where PacifiCorp
21 stepped out of line. First is with response to numerous
22 requests, PacifiCorp has taken the position that publicly
23 available documents are available on a certain websites, either
24 referring to the PSC's main heading website or its main heading
25 website as a response to request for discovery. That is

1 improper. You can't just say, "Here is a website. You go figure
2 out and you find the documents." So that is one area in which
3 PacifiCorp made improper responses.

4 The other would be that PacifiCorp did not produce
5 many documents until well past the deadline, the seven-day
6 deadline. In fact, we got a large portion of documents,
7 hundreds and thousands of pages, a couple of days ago, and,
8 once again, that--it's not a no harm, no foul situation. We are
9 dealing with an expedited docket. We have come in as counsel
10 at the last minute, we are trying to get a feel for all of the
11 documents, and to produce things with less than a week before
12 a very substantial hearing prejudices Ellis-Hall's abilities to
13 make its case.

14 And I find it--you know, we note this in our brief
15 and I find it very disingenuous that PacifiCorp can withhold
16 documents for nearly a month and at the same time, object to
17 our--or respond to our objection by saying that we have
18 produced no documents, no materials, to support our objections.
19 Now that, obviously, is not true, and if the Commission has seen
20 our objection, our objection is 20 pages long. It cites dozens of
21 PacifiCorp's own documents and we have supported our claims
22 with the best available documents that we have.

23 But for them to not produce documents and
24 simultaneously make the argument that we don't have enough
25 material to support our claims is--that strains the whole purpose

1 of discovery, and we are entitled to have documents in a timely
2 manner. I understand that the Commission often responds,
3 often addresses issues on an expedited basis. This is--our
4 claims are very serious claims and it necessitates serious
5 discovery and Ellis-Hall is being forced to push through and
6 argue these claims on a more than expedited basis. They are
7 getting an expedited basis, plus being prejudice by not having
8 the documents in a timely manner.

9 HEARING OFFICER WHITE: Just so I understand,
10 have you somewhat--your motion for Rocky Mountain Power is, I
11 guess, is not so much a motion to compel but you're,
12 essentially, making arguments that you need additional time?

13 MR. WOOD: There are still missing documents.
14 There's still some missing documents. As we note, they make
15 an objection to some of the LGIA documents, saying that they
16 are confidential. As we note, court uniformly hold that you can't
17 withhold documents based on third party confidentiality
18 agreements. That is a common objection that is being lodged
19 by all the parties here. It is improper.

20 So it's twofold; we haven't gotten all the
21 documents, we have numerous requests for documents were
22 responded to by merely referring us to a website with no specific
23 information on where the documents can be found, and, lastly,
24 the prejudice that is rendered by not having responses for one.

25 HEARING OFFICER WHITE: Okay. Mr. Solander.

1 MR. SOLANDER: Thank you. Honestly, all of the
2 issues that have been raised in Ellis-Hall's motion to compel
3 would have been handled much more quickly and probably more
4 to the satisfaction of Ellis-Hall if they has chosen to pursue--not
5 to pursue a formal complaint.

6 When Mr. Wood called me regarding the meet and
7 confer on the original motion to compel, I told him that we would
8 be willing to produce those documents, all of those documents,
9 with the exception of the QF applications which were already
10 provided in the initial response. Rocky Mountain Power came
11 from the transmission group, which took additional time to
12 compile and provide to Ellis-Hall. They--all of the responses
13 document were provided with the exception of the Blue Mountain
14 LGIA, which, as Mr. Wood pointed out, is confidential. We will
15 produce that document if ordered to, but pursuant to its terms,
16 we cannot produce it without a request and an order from a
17 regulatory body as part of a proceeding, a regulatory
18 proceeding.

19 The remainder of the documents were
20 hand-delivered to Ellis-Hall's attorneys on September 10th. I
21 have the disk which contain all those responses if the
22 Commission wishes to make an in camera review. I don't intend
23 to offer it as an exhibit because it is confidential.

24 With respect to public available information, Rocky
25 Mountain Power routinely in its cases points parties to

1 documents that are publicly available. It's never, honestly, been
2 an issue in previous proceedings before the Commission. We
3 routinely do that due to the large volume of requests and the
4 large amount of data that is responsive to the requests.
5 Organizing, compiling, producing takes time and resources from
6 the company, and, quite frankly, it is easier for all parties
7 involved if the information is publicly available to get it from the
8 original source.

9 I have a few additional comments when we get to
10 the Latigo motion but that is all I have regarding the Blue
11 Mountain proceeding.

12 HEARING OFFICER WHITE: I appreciate that. That
13 is a good segue into the next motion we have is in the Latigo
14 document, which is 13-035-116 and this is--again, this is
15 Ellis-Hall's motion to compel Latigo. Mr. Wood.

16 MR. WOOD: Thank you. Once again with respect
17 to Latigo, Latigo refused to produce a number of documents
18 based on boilerplate and unsubstantiated objections. Many of
19 the same arguments with respect to Blue Mountain also apply to
20 Latigo.

21 Latigo has also taken the position of instead of
22 responding to our discovery requests, arguing the merits of our
23 claims. And as we note, courts have held that that's improper.
24 They don't substantiate their objection. They instead attack our
25 ability to intervene in this matter, whether our claims are

1 relevant or meritorious, if a party can avoid discovery simply by
2 disagreeing with the other side--the merits of the other side's
3 case, there never be any discovery. We fully expect that Latigo
4 may have some disagreements with our claims but that does not
5 provide an excuse to not provide discovery.

6 And, once again, if a party does not substantiate
7 their objections, if a party do not supply case law to support
8 their positions, I don't think there is any possible way for the
9 Commission to say that the objections and the responses are
10 proper. And we need those documents and we are entitled to
11 those documents. We have made serious claims and--we will
12 leave it at that, thank you.

13 HEARING OFFICER WHITE: Thank you. Mr.
14 Sackett.

15 MR. SACKETT: Thank you. The elephant in the
16 room here is that Ellis-Hall is a potential competitor. I can't
17 speak to Blue Mountain so much as I can speak to my client.
18 So it's not a matter of sort of a standard party in a standard civil
19 litigation, having access to everything that is relevant, or if not
20 even relevant, may lead to relevant information, admissible
21 information. We have an unusual circumstance where we have
22 a party who insists on seeing everything about what are
23 potentially competing projects.

24 It's one thing for Ellis-Hall to note that the have
25 been granted intervention but what they don't note is the

1 Commission has authority to limit intervention. Simply being
2 granted intervention doesn't given them carte blanche to
3 participate in every respect. Here we have a situation where the
4 Commission's rules with respect to confidential information
5 directly affect what they can and cannot do. So we have we
6 have a party who have come to the table. They are not here to
7 be the watchdog in the way that the Division is or the way that
8 the Office is. They are here to delay the proceeding so that
9 their project can, in some way, go forward.

10 Now, that's--as I say, that's the elephant in the
11 room. It wasn't discussed earlier, so to the extent that Latigo
12 has not responded to every jot and tittle about what they want to
13 have from us, and then much of it is driven by the fact that we
14 are not interested in giving them information that, essentially,
15 gives them a competitive leg that they don't otherwise have. We
16 will, perhaps, argue this more with respect to our motion to
17 restrict access but they are closely linked.

18 So we have given them documents. We have not
19 stonewalled. We did give them a large collection of documents
20 with respect to the PPA and we also understand that PacifiCorp
21 has given them a large collection of documents, as well. One of
22 the touchstones of discovery, even out of the Utah rules that
23 Ellis-Hall continues to cite, is that parties shouldn't have to give
24 duplicative documents. Essentially, they have asked duplicate
25 data requests from both the parties, the QF's and from

1 PacifiCorp, to the extent that PacifiCorp has given them the
2 documents, there isn't any reason for us to duplicate that. That
3 is waste of resources and a waste of time and paper.

4 So that is the other thing; we are concerned about
5 the extent to which PacifiCorp has given documents that they
6 may have improperly used but that is for another matter. So we
7 have provided documents and to the extent that we haven't
8 provided documents, we believe that they are not entitled to the
9 documents because either, A, they are not relevant to the
10 Commission's--the Commission responsibility to make a
11 judgment about the approval of this PPA or it's competitive
12 information that they simply aren't entitled to.

13 So I think we have given them everything they are
14 entitled to and, obviously, if the Commission order us to
15 produce more, we will, but we think that is not necessary. We
16 think they have everything that they are entitled to through
17 PacifiCorp.

18 MR. WOOD: If I may, just in rebuttal, a couple of
19 few points; one, the Commission is not the only body that deals
20 with competitors going up against each other in lawsuits. That
21 happens all the time in commercial litigation. I worked on a
22 case between Apple and Samsung and you better believe those
23 two parties had disagreements and had documents that were--
24 that showed trade secrets, that showed patents and trademarks,
25 all those things are relevant in discovery.

1 So simply saying that we don't think that you should
2 have those documents because it might give you competitive
3 advantage is not a proper objection; moreover, it's not
4 supportive. If they want to make an allegation that there should
5 be an attorney's eyes only designation, which is what typically
6 happens when you're dealing with competitive documents and
7 then you have to support that. And whether there is a trade
8 secret is a question of law and that they are going to have to
9 demonstrate those documents are marked as trademark in their
10 usual course, they're secured, that they have employed
11 reasonable measures, they don't make any of those attempts to
12 substantial that objection, and that objection was not made in
13 the responses.

14 Second, the fact that you produce some documents
15 does not mean that you've been fully responsive, and Utah law
16 holds that an incomplete disclosure is a failure to disclose,
17 under Rule 37. And, lastly, this argument that somehow they're
18 not required to produce any documents that PacifiCorp
19 produced, I find that an interesting argument because both of
20 their responses were due on the same day. So how did Latigo
21 now what documents that PacifiCorp was going to produce
22 unless they combined together to make joint responses, which
23 would have been inappropriate in this matter. They didn't. They
24 just stonewalled us and didn't produce documents, and now that
25 PacifiCorp has produced some of the documents, they are going

1 to try and use that to excuse their own nondisclosure.

2 And, lastly, relevance is determined by the claims
3 and defenses in the action; not what one party thinks the
4 Commission has the right to do. And there is no way that Latigo
5 can make the argument that our discovery requests do not go to
6 our claims and defenses in this matter, which is the measure of
7 relevance. Thank you.

8 HEARING OFFICER WHITE: Just to be clear for
9 the parties, I guess I didn't--we will be addressing the motion
10 from Latigo regarding the applicability of the Nondisclosure
11 Agreement. My intention is to kind of put a placeholder in the
12 motions and then address some of the procedural matters and
13 then kind of hit that at the last because I understand at least
14 one of the parties have a hard stop at three o'clock and the
15 parties have agreed with that. So if that is okay, we will hit that
16 later. So I appreciate that.

17 Now our final motion to compel, which is also in the
18 116 docket, which is the Latigo docket and this is a motion to
19 compel by Ellis-Hall Consultants with respect to Rocky Mountain
20 Power. So with that, Mr. Wood.

21 MR. WOOD: That motion is identical to the one
22 from Blue Mountain, so I don't think with--

23 HEARING OFFICER WHITE: I appreciate it. Thank
24 you very much. Mr. Solander.

25 MR. SOLANDER: It is identical and it looks like it

1 was cut and pasted from the Blue Mountain one, just by
2 changing the name Blue Mountain to Latigo. What it failed to
3 note is that the Latigo LGIA was provided and delivered to
4 Ellis-Hall on September 10th. I know of no documents that are
5 responsive that have not been provided to Ellis-Hall regarding
6 the Latigo proceeding.

7 This is the second time that Ellis-Hall has filed a
8 pleading that states that documents were not received from
9 PacifiCorp, when, in fact, they were in the original motion to
10 compel. They sought the QF application and supporting
11 documents were initially provided in this reply. Rocky Mountain
12 Power did provide the Latigo LGIA as cited is the only document
13 that it has not provided.

14 HEARING OFFICER WHITE: Thank you.

15 MR. WOOD: If I can briefly respond to that, the
16 reason that we objected is that in your response, you claim that
17 you had not produced the LGIA because of confidentiality.

18 MR. SOLANDER: Only with respect to Blue
19 Mountain.

20 MR. WOOD: No, go back and read your brief. It's
21 in the 116 matter and you say you haven't produced it, which is
22 the point that we are addressing. So, obviously, we couldn't
23 have known what you were going to produce a couple of days
24 ago when we were preparing this motion.

25 MR. SOLANDER: I would just note the material

1 were delivered on September 10th, four days before this motion
2 was filed.

3 MR. WOOD: This motion was filed in August.

4 MR. SOLANDER: The reply.

5 HEARING OFFICER WHITE: Thank you. We have
6 had a lot of briefing on this. I appreciate everyone's arguments.
7 I know it's difficult to make arguments kind of on the fly like that
8 but I appreciate it. But, again, I have read all the pleadings but
9 this was helpful to hear the positions here today.

10 Based upon the pleadings, the arguments, etc., I
11 ultimately am not persuaded that additional discovery is
12 necessary for--to inform the Commission's consideration of A/B,
13 the PPA between PacifiCorp and Blue Mountain; and, B, the
14 PPA between PacifiCorp and Latigo; and, therefore, the motion
15 that have been previously discussed henceforth are denied.

16 Let's go ahead and move on to--we are at two
17 o'clock here, let's go ahead and move on to some procedural
18 matters with respect to the hearing on the 19th. If it is the
19 okay, I will ask each of the counsel to identify their witnesses
20 for Thursday. Go ahead and start with Mr. Solander.

21 MR. SOLANDER: We intend to call Paul Clements,
22 senior originator and marketer from PacifiCorp as our witness.

23 HEARING OFFICER WHITE: Okay. And Mr.
24 Dodge?

25 MR. DODGE: Mike Cutbirth of Champlain Wind will

1 be Blue Mountain's witness.

2 HEARING OFFICER WHITE: I apologize,
3 Champlain Wind?

4 MR. DODGE: Champlain Wind is the developer of
5 the Blue Mountain project--I should say the general partner of
6 Blue Mountain Power Partners, LLC.

7 HEARING OFFICER WHITE: And Mr. Jetter for the
8 Division?

9 MR. JETTER: The Division will call Charles
10 Peterson, likely as our only witness.

11 HEARING OFFICER WHITE: And, Ms. Beck, do
12 you have a witness the Office will be calling?

13 MS. BECK: Bela Vastag will be available to answer
14 questions or serve as a witness. The Office does not intend to
15 make any additional statements beyond the comments that were
16 submitted.

17 HEARING OFFICER WHITE: Thank you. And, Ms.
18 Hayes?

19 MS. HAYES: Thank you, Mr. White. Utah Clean
20 Energy is happy to make Sarah Wright available as a witness.
21 We are also fine just leaving what we have filed on the record
22 without making additional comments, but I can bring Sarah
23 Wright on Thursday, if parties have questions for her.

24 HEARING OFFICER WHITE: Okay, that sounds fair
25 enough. And, Mr. Wood, for Ellis-Hall?

1 MS. WOOD: We will be calling Mr. Fishback, we
2 will ask that he be made available; Mr. Clements; Mr. Cutbirth; I
3 am not sure who the representative is of Latigo but we will be
4 calling him. We reserve the right to cross the others.

5 HEARING OFFICER WHITE: I understand you will
6 have a right to cross-examine. So you are saying that--I guess I
7 am interested in Ellis-Hall's witnesses. I understand that you
8 may intend to cross-examine the other parties witnesses but are
9 there specific Ellis-Hall witnesses.

10 MR. WOOD: Well, Todd Fishback, so we want to
11 make sure that he is there.

12 MR. SOLANDER: Mr. Fishback is not available on
13 Thursday. We do not intend to call him as a witness.

14 MR. WOOD: Then we will call him.

15 HEARING OFFICER WHITE: Mr. Fishback is a
16 PacifiCorp employee consultant?

17 MR. SOLANDER: He is an employee, yes.

18 MR. WOOD: He is in charge of the LGIA site, and
19 as we note in our brief, there was correspondence and our
20 allegation is that the LGIA process got pushed through,
21 expedited, after we had filed an objection stating that no LGIA
22 had been secured before getting the PPA. And, of course, if the
23 merchant side and the transmission side coordinated in order to
24 push that through, that would go to our disparage treatment
25 claim.

1 HEARING OFFICER WHITE: So this witness is for
2 the purpose of the issue of Ellis-Hall's claim of disparagement?

3 MR. WOOD: Yes.

4 MS. WOOD: Disparage treatment.

5 MR. WOOD: Disparage treatment.

6 MS. WOOD: Discrimination, violation of FERC,
7 Schedule 38.

8 HEARING OFFICER WHITE: And do you have the
9 potential--where is this witness located, I guess?

10 MR. SOLANDER: Portland, Oregon.

11 HEARING OFFICER WHITE: Let's put a
12 placeholder on that one for just now. Mr. Fishback or beck?

13 MR. SOLANDER: Back.

14 HEARING OFFICER WHITE: So far we have a
15 potential Todd Fishback, Mr. Clements you will call through
16 cross-examine, and Mr.--

17 MS. WOOD: Well, we want Mr. Clements in our
18 case. We are willing to consolidate that with the
19 cross-examination but we want him in our case.

20 HEARING OFFICER WHITE: Okay, understood.

21 MS. WOOD: Then we want Tony Hall.

22 HEARING OFFICER WHITE: And Mr. Cutbirth, who
23 is he?

24 MR. DODGE: He is the Blue Mountain
25 representative.

1 HEARING OFFICER WHITE: And his first name
2 again?

3 MR. DODGE: Mike.

4 HEARING OFFICER WHITE: Okay.

5 MS. WOOD: And we want the Latigo
6 representative.

7 HEARING OFFICER WHITE: And whom is that?

8 MS. WOOD: We haven't heard from Mr. Sackett, so
9 I don't know who he is going to have here.

10 HEARING OFFICER WHITE: Okay. And, again, I
11 mean, typically with the Commission, the way it works is that,
12 you know, the party will, you know, lay the foundation for
13 pretrial testimony, or what have you, then put their witness on
14 the stand and the parties have the option of cross-examine, so
15 I'm assuming that is what you are --

16 MS. WOOD: Well, we haven't seen any pretrial
17 testimony.

18 HEARING OFFICER WHITE: I understand. What I
19 mean, in other words, we will get to that issue.

20 MR. WOOD: We are going to need to
21 cross-examine someone on the statements that--

22 HEARING OFFICER WHITE: Either the witness will
23 be made available for cross-examination, or if it's not available--
24 you are requesting you are going to call that as a witness?

25 MR. WOOD: Correct.

1 HEARING OFFICER WHITE: Okay. So, again, we
2 have Todd Fishback.

3 MR. SOLANDER: I believe it's Tom.

4 HEARING OFFICER WHITE: Tom, Paul Clements,
5 Mike Cutbirth, Tony Hall, then I guess we will discuss what
6 witnesses to be named may be available for cross-examination
7 or whether they will be called by Ellis-Hall for purposes of
8 Latigo. Correct?

9 MR. WOOD: Correct.

10 HEARING OFFICER WHITE: Okay. Is that all of
11 the Ellis-Hall--

12 MS. WOOD: Yes. Your Honor, and we have had
13 some cracks by people that Mr. Hall is not an expert. He is. He
14 is the owner and developer of the only wind project in British--in
15 the British Isles and an engineer. He is thoroughly familiar with
16 wind projects. In fact, he even helped Latigo when they were
17 having trouble with getting things through the San Juan County
18 Commission. He is clearly an expert.

19 HEARING OFFICER WHITE: Let's go ahead and
20 say if you're going to lay foundation for your witnesses, we can
21 save that for Thursday, if that is okay. Let's see here, so I got
22 off track on Ellis-Hall, so we have talked about Rocky Mountain,
23 the Division, Office, Ellis-Hall, so let's talk to about Latigo. Mr.
24 Sackett?

25 MR. SACKETT: We will have Christine Mikell,

1 M-I-K-E-L-L.

2 HEARING OFFICER WHITE: Okay. So did I
3 address all the potential parties witnesses thus far? Let me
4 know if I miss any. I will need to take a small recess to address
5 this question of a witness that is potentially unavailable when I
6 guess there is--let me ask this: We have heard the arguments, I
7 guess, thus far from Ellis-Hall regarding the need to call this
8 witness and, you know, for evidence. Does Rocky Mountain
9 Power have a rebuttal to that or an argument of opposition?

10 MR. SOLANDER: Yes, we would object to calling of
11 Mr. Fishback. The application that is before the Commission is
12 for the PPA. Mr. Fishback was not involved in the negotiation of
13 the PPA with Blue mountain or Latigo. He, as I side--or as
14 Ellis-Hall stated, he did work on the transmission side. That
15 had no bearing on the negotiation of the PPA that is before the
16 Commission at this point because of the separation of the
17 market and transmission function of PacifiCorp.

18 MR. WOOD: If I could, the statement that it has no
19 bearing is directly contradicted by your own documents. Your
20 own documents state that as you're trying to approve the PPA,
21 Paul Clements said that we need to be able to negotiate with
22 transmission side, you executed a waiver to be able to do that,
23 and you set that up so that you could get approval of the PPA
24 without an LGIA in place. So I don't think you can say it has no
25 bearing on the PPA. It has direct bearing to that specific clause

1 which is the basis of our objection that you approved a PPA --

2 MR. SOLANDER: The point that Mr. Wood is trying
3 to make is directly addressed in Schedule 38 and Mr. Clements
4 is more than capable of discussing 38 with the application.

5 HEARING OFFICER WHITE: This is with respect to
6 your claim of disparage treatment; is that right?

7 MR. WOOD: That is right.

8 MR. DODGE: Can I briefly address that, too,
9 because it could impact the Blue Mountain PPA approval. I
10 believe this goes directly to the point that I hope the
11 Commission--or Your Honor intends to address in the last phase
12 of this, the scope of the witnesses. To the extent the
13 Commission decides that whether or not FERC rules were
14 violated, I am confident they were not, but to the extent you
15 intend to address the issue like they have invited you, then Mr.
16 Fishback might have a more relevance than if not. If the
17 Commission identifies the issues that it finds relevant in
18 addressing the public interest standard for approval of a QF in
19 this context, I think many of the witnesses in many of the issues
20 they hope to raise will be irrelevant.

21 So I guess I would invite you in the context of
22 addressing of what to do about a witness that isn't here, to add
23 to that the issue of what issues does the Commission choose to
24 hear evidence on.

25 HEARING OFFICER WHITE: I appreciate that.

1 MR. WOOD: And just to clarify, we are not making
2 this basis on FERC. We set that forth in our objection, that our
3 objection is based on Utah law, and Utah law says that
4 PacifiCorp cannot offer any form of contract that it doesn't offer
5 to everyone. So you can get it both at FERC and by Utah law
6 but we have filed our objection based on Utah law.

7 MR. DODGE: Based on that, you can rule
8 summarily from the bench that Utah law does not prohibit Rocky
9 Mountain from offering different terms or conditions to suppliers.
10 I don't think that is a stretch for this Commission to do. I am
11 just pointing out that to the extent that you can narrow the
12 issues, this can either be a zoo on Thursday or it can be a
13 hearing that addresses the issues that the Commission finds
14 relevant to its determination.

15 HEARING OFFICER WHITE: Understood. If you
16 will bear with me for a bit of time and we will be off the record.

17 (A discussion was held off the record.)

18 MS. WOOD: We have one more witness to add,
19 Michael Roring.

20 HEARING OFFICER WHITE: Back on the record,
21 who is Michael Roring with?

22 MS. WOOD: Mr. Roring is one of the land owners.
23 He is the one that has the wind tower on his land or mass that
24 Blue Mountain is relying on.

25 HEARING OFFICER WHITE: Okay, Michael

1 R-O-R-I-N?

2 MS. WOOD: With a G, R-O-R-I-N-G.

3 HEARING OFFICER WHITE: So let's talk for a
4 second about what the Commission's consideration of these two
5 PPA's is about. It's about compliance with Schedule 38, Title
6 54. What it is not about is about, you know, alleged allegations
7 about, you know, potential disparage treatment with a supplier
8 of power. Right. So with that said, Mr. Wood or Ms. Wood, help
9 me understand whether Mr.--based upon that, how--what would
10 you require? What is the evidence you need from Mr. Fishback?

11 MR. WOOD: Well, Schedule 38 requires that the
12 company conduct vigorous due diligence, and one of the things
13 that they need to conduct vigorous due diligence is on is the
14 LGIA process and also site control. And so in addition to the
15 position that both PacifiCorp and the Division has taken, that an
16 executed LGIA is necessary before the execution of a PPA.

17 Now if the Commission is--I would be interested to
18 know the Commission's basis for believing that the Commission
19 does not have a duty to enforce the Utah code sections that we
20 have cited. Those code sections specifically state--they do not
21 talk about customer. They talk about person. And the
22 Commission is charged with ensuring that the regulatory body,
23 or in this case, PacifiCorp who is functioning as a
24 quasi-government entity, ensures that they are providing equal
25 treatment to all people. In fact, as we noted in our objection,

1 PacifiCorp itself has agreed in internal correspondence that they
2 have a duty to treat all customers the same, and they were
3 referring to this process.

4 And so there has to be some place for people like
5 Ellis-Hall to go when PacifiCorp comes before this body and
6 says on the approval of a PPA, "You have to have an executed
7 LGIA. Schedule 38 requires us to give you--to have an
8 executed LGIA," and then says to another party, "No, you don't
9 have to have that."

10 HEARING OFFICER WHITE: Okay.

11 MR. WOOD: And if the Commission has prejudged
12 that issue, there needs to be a legal basis for that decision.

13 HEARING OFFICER WHITE: So if I am hearing you
14 correctly, what you are saying is you need to talk to Mr.
15 Fishback, or you need to have him to cross-examine or what
16 have you, for--to address Ellis-Hall's contention that PacifiCorp
17 has treated Ellis-Hall disparaging and they have violated
18 Schedule 38; that is what I heard you say.

19 MR. WOOD: Not only that they've treated us in a
20 disparage way but they have not complied with Schedule 38.
21 Schedule 38 requires PacifiCorp to conduct rigorous due
22 diligence to ensure that an executed LGIA has been put in place
23 to ensure that the party has site control, which neither of these
24 parties have. And in the original hearing, we heard from
25 PacifiCorp that they conducted more due diligence as to these

1 projects than to any projects in their history and their documents
2 don't reveal that. And most importantly, the documents show
3 that neither of these parties have site control.

4 HEARING OFFICER WHITE: Mr. Solander, do you
5 have a--I need to understand if Schedule 38 requires what Mr.
6 Wood is arguing.

7 MR. SOLANDER: I believe Schedule 38 gives
8 Rocky Mountain Power the discretion to determine whether or
9 not an executed LGIA needs to be in place before the PPA is
10 executed. Mr. Clements can certainly address that point and
11 Mr. Fishback would not be needed to testify on that part point.

12 MS. WOOD: Let me say that--

13 HEARING OFFICER WHITE: I apologize, are you
14 finished?

15 MR. SOLANDER: I am finished.

16 MS. WOOD: They pulled that rabbit out of the hat,
17 when in the Burwood case, they say, "Oh, you have to have--
18 under Schedule 38, we are now vigorously enforcing Schedule
19 38 and you have to have an executed agreement," and then,
20 "Oh, but if we don't think you do, we don't have to." That is the
21 essence of what is happening here. For people we like--

22 MR. SOLANDER: I'm sorry, is she stating what she
23 thinks that Mr. Clements is going to testify to or is it some sort
24 of argument--

25 MR. WOOD: We are stating what the position you

1 have previously taken before the Commission.

2 HEARING OFFICER WHITE: The focus here again,
3 and I have heard your arguments, but, again, the precise focus
4 is what is the Commission's consideration about these PPA's.
5 And so you are saying that you need to have Mr. Fishback fly
6 down from Portland because you need to address the issue that
7 PacifiCorp has not followed Schedule 38--

8 MR. WOOD: That is correct.

9 HEARING OFFICER WHITE: --because they have
10 not done their due diligence?

11 MR. WOOD: That is right.

12 HEARING OFFICER WHITE: Are there any other
13 parties who to wish to weigh in on this?

14 MR. DODGE: I would like to weigh in, and if you
15 will please, I think you guys have had your say.

16 HEARING OFFICER WHITE: Please proceed, Mr.
17 Dodge.

18 MR. DODGE: It goes back to the point, and as you
19 know, Mr. White, I need to leave here shortly.

20 HEARING OFFICER WHITE: I understand.

21 MR. DODGE: I would like to make this point
22 because the Commission asked in its notice of this hearing what
23 ought to be the scope of the issues that you will hear. I think
24 the issues as you have identified them, compliance with
25 Schedule 38, compliance with Title 54, is the correct focus. I do

1 believe that is what the Commission looks at. This Commission,
2 to my knowledge, has never, in looking at a QF before it for
3 approval, looked at anything like did they do sufficient due
4 diligence. Schedule 38 doesn't require them to do any
5 particular level of due diligence. It is at their risk if they don't
6 because in a rate proceeding, something could challenge their
7 prudence if they didn't do due diligence.

8 There is a fairly limited role of the Commission.
9 This isn't pre approval like it is under the pre approval statute
10 where the rate bearers are forever bound by a contract. This is
11 simply to ensure compliance with the laws and the tariff that
12 deal with schedule--with QF contracts.

13 And so for them to say because we read title 54 to
14 say all contracts including supplier contracts have to be treated
15 equally, even though they couldn't cite a case in the country for
16 that notion. It's the most novel, ridiculous interpretation of the
17 code I have ever heard, they say that because we read it that
18 way, we can come in here and talk all we want about how there
19 was disparage treatment, all at the same time refusing to
20 produce any documents that will allow us to show a lack of
21 disparage treatment. They can't identify the scope of the issues
22 the Commission chooses to hear. That is why I am imploring the
23 Commission to identify the issues you want to hear and to tell
24 them no on the issues you don't--that isn't relevant to your
25 consideration.

1 As to Mr. Fishback, he is not a Schedule 38 expert.
2 He is an interconnection person. He is not relevant to this. The
3 FERC rules are not before you and Mr. Clements can answer
4 anything that needs to be answered about Schedule 38, which is
5 the issue before you.

6 I think the Commission can, again, either let this
7 become a zoo on Thursday and go into all kinds of issues that
8 have no relevance or it can tell the parties what it deems
9 relevant because it's ultimately the Commission that has to
10 decide what issues it cares about and not waste time on issues
11 that are not relevant.

12 HEARING OFFICER WHITE: I have heard the
13 arguments. I have made a statement with respect to what the
14 Commission's consideration of the PPA is. I am not persuaded
15 that Mr. Fishback is necessary to address those issues. Let me
16 just--before I go on to the additional witness that you have
17 identified, Mr. Roring, help me understand what time we are
18 dealing with because there are a few other preliminary issues I
19 would like to deal with before you need to leave, Mr. Dodge.

20 MR. DODGE: I have really got to go in about ten
21 minutes to the latest.

22 HEARING OFFICER WHITE: Let's put a pin in Mr.
23 Roring for a second and let me address this really quickly and
24 then we can chat about these.

25 With respect to documents, evidence, testimony,

1 now we don't have prefiled testimony here. That's--the time that
2 the Commission allows for prefiled testimony, etc. Are there
3 documents that have been filed thus far in the docket the
4 parties wish to, you know, have received into evidence? Does
5 that make sense? I am thinking off the top of m head. For
6 example, the application, comments.

7 MR. WOOD: All of our exhibits.

8 HEARING OFFICER WHITE: Yes. So do the
9 parties--and the parties can discuss or the parties, can they
10 agree as to, you know, do you want to get together before the
11 hearing to talk about that? Because I am thinking in any head
12 that, obviously, there may be other issues and I understand the
13 comments, reply comments, will contain both facts and legal
14 allegations that, obviously, the Commission can give the weight
15 due to, you know, facts versus you know legal arguments. Do
16 the parties want to talk about the day or is this too premature to
17 talk about, A, the application, the comments and reply
18 comments. And I am not talking again about motions, things of
19 that nature.

20 MR. WOOD: I don't quite understand. I mean, I
21 don't think that the actual comments or objections or the sworn
22 testimony, I don't see how we can agree to the admissibility of
23 those. As far as the documents, we have attached lots of
24 documents to support our objections that are their documents. I
25 don't see any reason why we can't agree on the admissibility of

1 those documents.

2 But argument is not testimony, and that's what I
3 see that the comments are, they are arguments. I mean, I am
4 not on the stand. I signed our objection. I am certainly not on
5 the stand as a witness.

6 HEARING OFFICER WHITE: Well, help me
7 understand, then, different parties, how would you like to
8 proceed. It sounds like we are not going to receive into
9 evidence any of the documents that are going to be filed, or we
10 are going to go through document by document with respect to
11 the filings, in term of exhibits, or how do we want to do this?

12 MR. WOOD: Like I said, I am fine as far as
13 stipulating to actual documents, stipulating to the application
14 whatever, but the comments are not--I am not testify. I signed
15 our objection. That is the point I am making. I am not the
16 witness.

17 HEARING OFFICER WHITE: Let me explain it a
18 little differently. I apologize. This is probably a little bit
19 different than other arenas, but for example, you know, on the--
20 sorry, Ellis-Hall's, you know, objections, basically their
21 comments, you know that would be received into evidence. It'd
22 got all their exhibits attached. And, again, those would be--you
23 know, whomever you want, which witness to adopt portions of
24 that as their sworn testimony, you know, again not legal
25 arguments, would be done. You know, we receive it into

1 evidence, and then that witness is basically adopt that would be
2 subject to cross-examination. That is not uncommon but we
3 understand if that is not--okay. So what do you propose, then?
4 Do you want to propose just your exhibits or do you want to do it
5 by exhibit by exhibit?

6 MS. WOOD: Well, I think this is too late to do
7 anything other than to do anything other than exhibit by exhibit.

8 MR. SACKETT: I have a suggestion, and what we
9 intend to do is with respect to comments that we filed, our
10 witness would, essentially, testify that the facts that are stated
11 in those documents, she can testify to. It is, in essence, to
12 establish that they are verified comments; that is to say to the
13 extent there are factual statements within those comments, Ms.
14 Mikell will testify that yes, I adopt them, and that those facts are
15 true to the best of my belief.

16 I mean, it is a little bit backwards. We might well
17 have filed those as verified reply comments or verified
18 comments and had her sign off of them on the outset, but I don't
19 see anything wrong with doing it sort of the back end, as well.

20 MR. WOOD: Did I understand correctly, so she will
21 be stating that under penalty of perjury, the statements in that
22 are true and correct?

23 MR. SACKETT: The factual statements.

24 HEARING OFFICER WHITE: That is what we
25 discussed earlier, factual statements versus --

1 MR. WOOD: If she is willing to do that.

2 HEARING OFFICER WHITE: That is not
3 uncommon. Do any of the other parties have an issue for like
4 the Division for their adopting the comments of sworn testimony,
5 etc.?

6 MR. JETTER: That is exactly what we intend to do.

7 HEARING OFFICER WHITE: Okay. Mr. Solander?

8 MR. SOLANDER: Same. We have Mr. Clements
9 offering additional testimony but yes.

10 HEARING OFFICER WHITE: Okay. Mr. Dodge?

11 MR. DODGE: I hadn't--I mean, it is common, you
12 know, Mr. Wood probably doesn't know the practice to--

13 MR. WOOD: Mr. Dodge, I really--can I--excuse me,
14 I find that incredibly unprofessional.

15 MR. SOLANDER: I wasn't attacking him. I was
16 saying that because of the fact that he doesn't practice here, he
17 is probably not aware of the facts that you're referring to.

18 HEARING OFFICER WHITE: This is unique, I
19 apologize.

20 MR. DODGE: And it isn't an attack. That is the
21 practical way of--I had not intended intend on having my witness
22 adopt our comments because I don't think it is going to be the
23 practice here, plus I will say not all the exhibits to Ellis-Hall's
24 comments are relevant, so I don't think we want to admit them.

25 HEARING OFFICER WHITE: There is a

1 disagreement here. You know, let's just reserve this for a
2 hearing. You know, again, if Ellis-Hall is not comfortable with
3 this process, you know, we can go through the process of the
4 parties who have agreed to it and we can take care of that on a
5 hearing on Tuesday--I am sorry, on Wednesday, sorry.

6 MR. DODGE: Thursday.

7 HEARING OFFICER WHITE: Thursday, sorry.

8 There is a lot of hearings going on right now. Thursday, thank
9 you. So we will just do that then.

10 The final thing, then I will circle back
11 to--the final thing I will process that probably Mr. Dodge needs
12 to be here for it, which is in terms of confidentiality. There has
13 been, you know, documents, you know, going back and forth on,
14 you know, paper. I'm assuming those will not be introduced into
15 evidence. There has been no notice under the rule that parties
16 intend to provide--or to produce into evidence confidential
17 documents; is that the case?

18 MR. WOOD: There is no way that can be the case
19 because PacifiCorp has indiscriminately marked by making their
20 CD yellow, every single document they produced to us as
21 confidential.

22 MS. WOOD: We have hundreds of emails saying
23 things like, "Can we start our conference call in 15 minutes
24 later," nobody made any effort to distinguish or say why one
25 document was confidential because it was a trade secret or

1 proprietary as opposed to a thousand others that obviously are
2 not.

3 HEARING OFFICER WHITE: But under the rule, I
4 am talking about R 746-100-16(3a), there is a process involved
5 where if there's a dispute amongst parties, but then, ultimately,
6 if you are going to go forward and plan to submit into evidence
7 confidential documents, that those have been identified, do
8 you--

9 MR. WOOD: And there is also, in that rule, the
10 requirement that the parties not mark things indiscriminately as
11 all confidential and we raised these arguments in our objection.

12 HEARING OFFICER WHITE: So help me
13 understand for Thursday, again, it becomes extremely
14 cumbersome. We have the potential for streaming, we have
15 parties in here who may or may not have signed the
16 nondisclosure Agreement, help me understand what the most
17 effective and efficient way to deal with confidential documents
18 will be on Thursday.

19 MS. WOOD: Well, to identify what documents are
20 truly confidential. That would have been the thing to do from
21 the beginning but nobody's bothered to do that, and we refuse
22 to treat 100,000 documents, emails inviting people to lunch and
23 so forth, as confidential. Nobody has identified--what they are
24 supposed to do is identify discrete, proprietary, confidential
25 documents; not treat every document in the case as

1 confidential.

2 MR. WOOD: And they can't seal an entire
3 proceeding and prohibit our clients from even having a view into
4 what is going on in the proceeding through that improper
5 process.

6 HEARING OFFICER WHITE: Parties, Rocky
7 Mountain Power, how do you propose doing this because, again,
8 I don't--the Commission doesn't view discovery--

9 MR. SOLANDER: If we had some idea of what
10 documents they intend to rely on, we could offer a scaled down
11 version of what is and isn't confidential but I don't know what
12 they intend to offer. And if you want to do a piece mail at the
13 hearing, it could take quite a long time.

14 MS. WOOD: Well, I think the way to do it would
15 have been for them to tell us from the get-go what they consider
16 proprietary.

17 MR. SOLANDER: Or they could have objected or
18 they could have said that we thought the confidential
19 designation was over broad prior to now.

20 MR. WOOD: We did say that.

21 HEARING OFFICER WHITE: Let me throw this out
22 here. If there is a dispute whether something is confidential or,
23 you know, marked overly broad, etc., can you at least identify
24 which documents are disputed that you plan--whether there is a
25 true basis for confidentiality or not, which documents you intend

1 to--

2 MR. WOOD: I have not seen any document that
3 they've produced to us that I think are truly properly designated
4 that way. In the face of this proceeding, there just aren't.
5 There is nothing there that gives a window into trade secrets or
6 proprietary information that can be used by my clients to their
7 competitive advantage. I mean, there is just nothing there.

8 Their comments back and forth between PacifiCorp
9 and Latigo and PacifiCorp and Blue Mountain are just--they are
10 not--they don't typically fall within the type of document that
11 would be interpreted by that designation. I understand they
12 designated them all that way but that puts a burden on us for
13 their improper designation.

14 Now, obviously, we are going to be relying on many
15 of the documents that we cite to in our objection, but these
16 proceedings are presumptively open, as are most proceedings.
17 And even in proceedings where you conceal it from the public's
18 view, the parties, at a minimum, have a right to see what is
19 going on regarding their claims. So I don't think the proceeding
20 needs to be streamed but my client needs to be able to know
21 what is going on.

22 HEARING OFFICER WHITE: We appreciate your
23 advice to the Commission; however, the Commission does
24 stream, typically, documents; however, in proceedings--however,
25 if there are claims of confidentiality, we stop the streaming and

1 we redact the transcription.

2 MR. WOOD: That is what I am saying. I don't have
3 any problem with that. I don't have any problem with the
4 Commission not streaming. But I am more concerned about my
5 client having to argue their claims and be barred from the
6 proceeding because every document that they gave to us has
7 been marked confidential. It's an over designation that would
8 bar our clients from having any view into the proceeding.

9 HEARING OFFICER WHITE: I am not sure if we
10 can, you know--it pains me to say this, but I think we are going
11 to have to deal with at the hearing, I guess, on a document by
12 document basis. I am not sure how else to deal with it in a
13 short time basis. So we will just leave it at that and deal it with
14 it for Thursday.

15 MR. SACKETT: I have a suggestion. One thing I
16 don't want to see happen on Thursday is for, to use a metaphor
17 that Mr. Dodge has used, to turn into a zoo, but if Ellis-Hall has
18 documents set aside, the fact that they have a whole set of
19 documents that are designated as confidential and not all of
20 which they think are confidential, if they intend to introduce
21 documents from that collection, then let them suggest to Rocky
22 Mountain Power, or to us for those who involve Latigo, ask if we
23 believe they are confidential and would have any objection to
24 their being publicly identified and testified about.

25 MS. WOOD: We are not going to have time to do

1 that.

2 HEARING OFFICER WHITE: Let me turn back to
3 the rule here because we turned away from that pretty quickly
4 and feel free to turn to it because it's extremely important to
5 look at. It's R 746-100-16(3a) and if you have the little, red
6 book, it is now blue. It's on page 157. So I am going to go
7 ahead and read this. I want you to help me understand, you
8 know, where I am off here, but it says, "Receipt into Evidence;
9 At least ten (10) days prior to the use of or substantive
10 reference to any confidential information as evidence, if
11 practicable, the person intending to use such confidential
12 information shall make that intention known to the providing
13 person. The requesting person and the providing person shall
14 make a good faith effort to reach an agreement so that the
15 confidential information can be used in a manner which will not
16 reveal its trade secret, confidential or proprietary nature."

17 Now I understand that, you know, that may or may
18 not happen but here is where it kind of comes to us, the
19 Commission; "If such efforts fail, the providing person shall
20 separately identify, within five (5) business days, which
21 portions, if any, of the documents to be offered or referenced on
22 the record containing confidential information shall be placed in
23 the sealed record."

24 So I guess I am trying to understand if there is a
25 dispute of whether something is overly marked as confidential,

1 etc., there's still a claim of confidentiality by PacifiCorp, or
2 whomever, and so the duty, at least as the way I see it, is the
3 notice is upon Ellis-Hall to provide those documents or identify
4 the documents.

5 MR. WOOD: You skipped over one word, if
6 practicable, and if you mark thousands and thousands of
7 documents, all designated one way, is it practical to require
8 Ellis-Hall on an expedited motion to go through document by
9 document, among thousands of pages, to make that designation.

10 MS. WOOD: We didn't even have them ten days
11 ago, so...

12 MR. WOOD: We got documents last week.

13 MS. WOOD: And Latigo never designated anything
14 as confidential.

15 HEARING OFFICER WHITE: I am going to take
16 this one under advisement. You know, honestly, I guess what
17 I'm--the claim of confidentiality was made some time ago and
18 there is still a dispute, so I guess I understand that but you are
19 supposed to identify disputed documents, in other words.

20 MS. WOOD: The claim of confidentiality was not
21 made according to the rules. You're jumping to conclusions.
22 The rule says that they have to have a certain entry on them,
23 and that the ones are confidential have to be on yellow paper.
24 What we got is CD's with thousands of documents with a yellow
25 sticker, with no way of knowing, and the rules are so clear that

1 you can't over designate.

2 HEARING OFFICER WHITE: Understood, but back
3 to the sentence I was talking about, that is what I am focusing
4 on, when I am--when I look at this issue further. In other words,
5 you have disputed documents that you say they claim thousand
6 of documents which is--

7 MS. WOOD: How do we know they are disputed?
8 We have no way of knowing what's disputed because we don't
9 know which ones they were claiming confidentiality and they had
10 an obligation to five days to prove their claims.

11 HEARING OFFICER WHITE: Let's table this for--
12 we will discuss at the hearing on Thursday, I guess.

13 So what I am--just so you know, Mr. Dodge, I am
14 going to address the issue of the remaining witnesses and then I
15 am going to talk about the motion of Latigo.

16 MR. DODGE: I certainly have no objection to your
17 continuing with that and I do apologize for having to leave. I
18 also apologize that I will miss the fun on Thursday. My partner
19 will be here. I have an unresolvable conflict that day.

20 HEARING OFFICER WHITE: Understood.

21 MR. DODGE: But I appreciate your time.

22 HEARING OFFICER WHITE: Thank you,
23 understood.

24 Okay. So back to the issue of Mr. Fishback. I was
25 not persuaded. I laid out what the issues--I am not persuaded

1 that his attendance from Portland is necessary to address those
2 issues. These are--I just don't believe it's necessary that the
3 Commission's consideration of the PPA between these two
4 separate counterparties.

5 MS. WOOD: Well, let me just make our record that
6 there were no grid connection agreements, no LGIA's between
7 these parties when the motion was made to have their PPA's
8 approved, and it was only after we made our objection that they
9 rushed through those.

10 MR. SOLANDER: I object to her characterization
11 and I also object to Ms. Wood testifying to this. She can call a
12 witness on Thursday to testify.

13 MS. WOOD: We want to call Mr. Fishback to show
14 that it was rushed through in response to our objection.

15 MR. SOLANDER: Objection, again.

16 MS. WOOD: We are going to make that proffer and
17 we should have a right to hear it. PacifiCorp is a big company.
18 They know this is a big issue. It was central in our objection,
19 and if they are going to rest on the fact that he is in Portland,
20 when we have no ability to compel him by subpoena or any
21 other way, that seems unfair, and we will make a proffer with
22 respect to what we think he would testify about. But we think he
23 should be available for cross-examination to explain the
24 noncompliance with Schedule 38 until we file--

25 MR. SOLANDER: I object again to Ms. Wood's

1 characterization. Mr. Clements will testify to the company's
2 handling of the PPA under Schedule 38.

3 HEARING OFFICER WHITE: You are proffering
4 statements, Ms. Wood.

5 Okay. So let's talk about Mr. Roring. What is the
6 intent of--who is Mr. Roring again?

7 MS. WOOD: Mr. Roring, he is sitting here, he is a
8 property owner. Blue Mountain is relying on wind data from his
9 property which is not part of their project. It goes to whether
10 Schedule 38 has been complied with.

11 MR. WOOD: This also goes to whether they had
12 site control. They have repeatedly, in our original--Ellis-Hall's
13 original intervention in the 100 matter, we noted that Blue
14 Mountain was moving forward on land on which Mr. Roring is the
15 owner and which Ellis-Hall has lease agreements. And Mr.
16 Roring is going to testify about where his land is and the fact
17 that Blue Mountain doesn't have a right to that land and that
18 Blue Mountain is using wind data from met towers on his land
19 that are not subject to their leases but are in fact subject to
20 Ellis-Hall's leases.

21 HEARING OFFICER WHITE: Do the parties have
22 an objection to that? I am fine if Mr. Roring is available. Okay,
23 let's move on.

24 So our last and final motion of the day is a motion
25 of Latigo Wind Park, and this is Docket 13-035-116, to which

1 restrict the application of a Nondisclosure Agreement in this
2 proceeding. I guess my first question is, based upon what I
3 have read in the pleadings from Ellis-Hall, do we have any
4 information that has been designated as confidential that has
5 been provided to counsel for Ellis-Hall, which pursuant to the
6 NDA, could be accessed by Ms. Ceruti or Mr. Hall? Again, this is
7 stuff--this is information that has been designated.

8 MR. SACKETT: As we understand it, information
9 that was provided by PacifiCorp to Ellis-Hall contained
10 confidential information, and we don't believe that Mr. Hall or
11 Ms. Ceruti are entitled to review any of that information.

12 HEARING OFFICER WHITE: Is this information
13 that is actually designated as confidential or--

14 MR. SACKETT: We don't know exactly. I mean,
15 our motion goes to the question generally, saying that whatever
16 it is that they have, and whoever has supplied it, whether we
17 supplied it or whether PacifiCorp supplied it, to the extent that
18 it's confidential and to the extent that they think that having
19 signed the confidentiality agreement gives them license to look
20 at it, we believe they do not. They do not--those two individuals
21 do not qualify under the applicable rule.

22 I mean, the sentence is so clear that I am not
23 sure why there should be much question about it. Persons
24 designated as experts, and experts are entitled to look at
25 information, but persons designated as experts shall not include

1 persons employed by the participants who could use the
2 information in their normal job functions to the competitive
3 disadvantage of the person providing the confidential
4 information.

5 The person providing it in the first instance would
6 have been Latigo, even though it may have come through
7 PacifiCorp. So those folks are simply not entitled to look at
8 that. That's the framework that the Commission setup to
9 separate out who are entitled, recognizing the parties do need
10 to have access. They have access through their independent
11 experts that can't harm the provider of the information, and to
12 their attorneys, and these two folks do not have those
13 qualifications.

14 MS. WOOD: Let me say, first of all, that the rule,
15 once again, contemplates the identification of specific
16 information that constitutes a trade secret or is otherwise of
17 such a highly sensitive or proprietary nature that public
18 disclosure would be appropriate. Latigo produced everything
19 they produced with no designations.

20 MR. SACKETT: We have no problem about that
21 information.

22 MS. WOOD: And they haven't designated anything-
23 -they haven't identified anything that was produced by
24 PacifiCorp that could be used in that fashion, but they also jump
25 over the rule, and the rule specifically provides that it's not

1 limited. It specifically provides that employees who need the
2 information--the specific language R 746-100-16(1d) specifically
3 provide that persons employed by the participants are granted
4 access to confidential information to the extent reasonably
5 necessary for performance of work on the matter.

6 These individuals undertook an undertaking to keep
7 it confidential for use only in this matter. They are specifically
8 allowed, under the rule, to have access to the information to the
9 extent reasonably necessary for performance of the work on the
10 matter. We could not do this alone. And, furthermore, this
11 objection didn't come in until after Rocky Mountain had
12 produced the information. The undertaking was made, the
13 information was provided. In compliance with the rule, we
14 provided that information, so what are they going to do about it
15 at this point?

16 HEARING OFFICER WHITE: Let me just refocus
17 up here. I am glad you brought up the rule because I want to
18 come back to talk about it, but the thing I am trying to get to is
19 that, do we need to address this? Are there documents that
20 have been disclosed that are still--someone is maintaining
21 confidentiality for that--in other words, whether these ones that
22 Latigo, or if there's one that Rocky Mountain Power, has
23 designated as confidentiality are still at issue.

24 MR. WOOD: Let me just say that to clarify, when
25 our clients undertook the undertaking, we provided them the

1 documents that were produced to us. When Latigo made it--

2 MR. SACKETT: It's Latigo, Mr. Wood.

3 MR. WOOD: Excuse me, Latigo. When Latigo
4 made its motion, we did everything that we could, we took back
5 all the documents from our client, we sequestered them, and
6 any additional documents that have come in, we have
7 maintained as sequestered, pending the resolution of this
8 motion. So there have been documents that have been
9 received, particularly the documents that PacifiCorp produced to
10 us last week that have not be shared with anybody but counsel,
11 and we felt that was the appropriate step to take given the
12 motion. So I don't know if that is what you are looking for with
13 your question.

14 HEARING OFFICER WHITE: That is, I appreciate
15 it. So let me turn back to the rule. So Ms. Wood quoted from
16 the rule, and the sentence that is after that, "To the extent
17 reasonably necessary for performance of work on the matter,"
18 but this is the one I am particularly interested in: "Persons
19 designated as experts shall not include persons employed by
20 the participants who could use the information in their normal
21 job functions to the competitive disadvantage of the person
22 providing the confidential information."

23 So, basically, we are left with the disagreement
24 between Latigo and Ellis-Hall as to whether Ms. Ceruti and Mr.
25 Hall are persons employed by Ellis-Hall who could use

1 confidential information in the normal job functions to the
2 disadvantage of Latigo.

3 MR. WOOD: But they are not employees. They are
4 the participants. They are the owners. They are not
5 employees.

6 HEARING OFFICER WHITE: Help me understand
7 your arguments. Help me square that sentence with--

8 MR. WOOD: Because they are the participants.
9 They are the two owners in Ellis-Hall. They are not employees
10 of Ellis-Hall. Documents haven't been shared with employees of
11 Ellis-Hall. They have been shared with the participants.
12 Obviously, the participants, in order to participate, have to see
13 the documents. They have to participate. They can't participate
14 without seeing the documents.

15 MR. SACKETT: That is not what the rule says.

16 MR. WOOD: The rule says about employees, not
17 participant.

18 MS. WOOD: And it also says that there has to be
19 some way to use the information to the competitive
20 disadvantage of the person providing the confidential
21 information, not Latigo but the person providing, which is Rocky
22 Mountain. And since Rocky Mountain was the producing party
23 here, they have to show that we could use the information that
24 they provided to their competitive disadvantage.

25 HEARING OFFICER WHITE: Well, let me ask you

1 this. You know, I mean, I don't want to get into a legal
2 argument. I think I have a pretty good idea of what I think the
3 intent and meaning of the rule is, but are you--is it your
4 contention that neither Mr. Hall or Ms. Ceruti, in their positions,
5 they could use the information contained?

6 MS. WOOD: None of the information that we have
7 seen or reviewed could be used to any competitive advantage.

8 HEARING OFFICER WHITE: That is my focus--

9 MS. WOOD: Nobody could use it.

10 HEARING OFFICER WHITE: So, help us
11 understand, if the focus again, putting aside our disagreement
12 about what the rule means, if the focus is are these two
13 participants, employees, whatever you want to call them, are
14 they--in their position, could they use this to the potential
15 disadvantage?

16 MR. SACKETT: I think that is fairly clear. We have
17 got two or three companies, organizations, that are in the
18 business of trying to develop wind projects and they are in
19 different states of progression, frankly, as we have indicated in
20 our comments. We, Latigo, is much further along than is
21 Ellis-Hall, and we will probably talk about that on Thursday. But
22 the fact is that the collection of information that is in the hands
23 of PacifiCorp provided, in large part, by Latigo because they
24 involve negotiations to get to a PPA and an interconnected
25 agreement, as well.

1 MR. WOOD: Excuse me--

2 MR. SACKETT: Will you let me--wait until I am
3 finished.

4 MR. WOOD: I have someone in the gallery here
5 taking a picture, I just saw you take a picture of me.

6 SPEAKER: Is that not allowed?

7 MS. WOOD: No, it's not.

8 HEARING OFFICER WHITE: We don't have a rule
9 of pictures taken--

10 MS. WOOD: No, this is very important. People
11 have the right of their privacy and we can't have people--

12 MR. WOOD: --shooting pictures from the gallery.

13 MS. WOOD: --shooting pictures from the gallery.

14 HEARING OFFICER WHITE: The gallery, please do
15 not take picture during the proceeding. We have a request for
16 no pictures, so please adhere to that. Thank you.

17 MS. WOOD: And please erase what she has taken.

18 HEARING OFFICER WHITE: Sorry, please
19 proceed, Mr. Sackett.

20 MR. SACKETT: I was saying that given the fact
21 that we have two companies that is are, indeed, competitors for
22 wind projects in certain respects and then Latigo having been
23 through, approximately, six years of development of a project in
24 getting toward the critical parts of the end of it, the information
25 that is now in the hands of PacifiCorp, essentially, is a roadmap

1 to how you do one of those projects. We don't know, frankly,
2 what they do and don't know. They can snicker about it, if they
3 like, but we don't know what they can and can't do on their own
4 hook, so that is the purpose of the Commission's rule, frankly.

5 And as to parsing the sentence, the way the
6 Commission set the rule up is that they expect that parties, who
7 have a serious intent to put on evidence in a case like this, will
8 bring an expert; that is to say, an outside expert. That is how
9 the rule is designed.

10 If Ellis-Hall wants to bring in an outside expert who
11 has a responsibility, ethical responsibilities to his profession to
12 analyze what is going on here, then they are entitled to do that.
13 But they are not entitled to paint "Expert" of the back of people
14 who are participants and say they are experts and they are
15 entitled to everything that is out there that may be commercially
16 sensitive or confidential.

17 MS. WOOD: Let's hear what the commercial
18 sensitive and confidential information is. We have used that
19 term as though it exists in these documents and our submission
20 is that it does not.

21 HEARING OFFICER WHITE: Why don't we do this:
22 Again, I am focused on that second sentence. I, frankly, don't
23 know what Ms. Ceruti or Mr. Hall does, so it's difficult for me to
24 understand that in the context of that second sentence about
25 whether or not they could use it in a competitive disadvantage.

1 Do we need to go ahead and swear them in and talk about what
2 they do? I don't know what they do.

3 MR. WOOD: Mr. Hall is in the UK right now. He is
4 there for the birth of his first grandchild, so he is not available
5 right now.

6 MS. WOOD: But if you are focusing on that, would
7 you please explain how you explain away persons employed by
8 the participants to the extent reasonably necessary for the
9 performance of work on the matter?

10 MR. SACKETT: I have a response to that, Your
11 Honor, and the response is that sentence is a subset of experts.
12 The way that is constructed is that including--it's a subset of
13 experts in the matter.

14 MS. WOOD: No, it's persons employed by
15 participants to the extent reasonably necessary for performance
16 of work on the matter. But all of that is beside the point if we
17 don't have any confidential information here, and we don't.

18 HEARING OFFICER WHITE: I think we can deal
19 with this and put aside the--we have claim of confidentiality. Is
20 Mr. Hall going to be at the hearing on Thursday?

21 MR. WOOD: He is hopefully flying back.

22 HEARING OFFICER WHITE: Okay. Well, again,
23 my focus is--I mean, I know you like to read those first few
24 sentences but I can't ignore that in the connection of that last
25 sentence. So the Commission's focus is on whether or not

1 those parties could potentially, in their normal job function--so I
2 guess what we would need to do is, you know, again, we were
3 hoping to the deal with this today but we can deal with this on
4 Thursday and address that motion with respect to restrictions
5 because we are not in position to know what the normal job
6 functions of Mr. Hall and Ms. Ceruti.

7 MR. WOOD: Well, Your Honor, you are not in a
8 position to know what the information is that will be brought out
9 in the hearing, and one of the--is proprietary. Nobody has
10 identified--I mean, we are sitting here talking about something
11 as though there was a secret sauce here. Now if they had
12 produced their financial information, information about their
13 analysis of the profitability of the project, something like that,
14 we'd have something to talk about. But all we are talking about
15 is turbine. Everybody knows turbines.

16 MR. WOOD: They haven't designated their
17 turbines.

18 MS. WOOD: They haven't designated their turbine,
19 so there is no secret there. What are we talking about that
20 could possibly be used by a competitor? And I appreciate Mr.
21 Sackett thinking they are leading the way but our client has
22 actually started construction because we have a building permit
23 and a conditional use permit, which his client doesn't have. So
24 for them to say they are further down the road and that
25 somehow we are going to see how they went about this --

1 MR. WOOD: We already have our own turbine.
2 We've selected a turbine. We are financed.

3 HEARING OFFICER WHITE: So let me understand,
4 Ms. Wood, you are essentially saying the horse before the cart
5 here is to identify the confidential information and then
6 determine whether or not--

7 MS. WOOD: Somebody could use it to competitive
8 advantage, yes.

9 HEARING OFFICER WHITE: So are you saying
10 that with respect to Mr. Sackett's motion, that it would be a
11 case-by-case determination of the applicability of the
12 nondisclosure agreement?

13 MS. WOOD: Absolutely, based on what information
14 is going to be presented at the hearing.

15 MR. WOOD: I mean, as it stands right now, we
16 have the email saying, "When do you want to go to lunch, "that
17 are designated as confidential and protected.

18 MS. WOOD: Well, if you accept that as confidential
19 the way Rocky Mountain Power did. Usually, in my experience,
20 when people have serious trade secrets, proprietary information,
21 they pull those out, and they say, "This is the secret sauce and
22 we don't want anybody to see them," and they haven't bothered
23 to do that.

24 HEARING OFFICER WHITE: This is going to be a
25 good thing to address in the context of we have two remaining

1 issues of process, I guess, to deal with on Thursday; one being
2 how to deal with the documents in question, which, you know,
3 have disagreements with respect to claims of confidentiality and
4 how to deal with kind of the document by document and receive
5 into evidence and how we deal with that.

6 And the second question is, you know, I guess we
7 are going to have to deal with this motion further on Thursday.
8 Does that sound okay? So I think--let me actually do this, I
9 apologize. Let me take one more brief recess--sorry, Mr.
10 Jetter?

11 MR. JETTER: Something procedurally that we
12 might want to talk about quickly is just what the Commission is
13 expecting parties to bring, as far as documents, just to cover
14 copies for each party, how they are going to present what into
15 evidence, what they are going to give to the court reporter,
16 because the parties may not be aware of what the Commission
17 requires for that and what the Commission is looking for in this
18 case.

19 HEARING OFFICER WHITE: Well--

20 MR. JETTER: That may expedite this issue if the
21 parties can bring the documents that they want to put into
22 evidence ideally, potentially labelled as what they are looking at
23 and then the other parties can look through them.

24 HEARING OFFICER WHITE: Are we talking about
25 premarked?

1 MR. JETTER: Yes, something we can look through
2 before and if--parties may decide that we think this small set of
3 documents intended to be entered into the record are
4 confidential, it might help to sort this out and expedite it a little
5 bit.

6 HEARING OFFICER WHITE: I think that is a good
7 suggestion and I would appreciate that. If there are going to be
8 documents, whether there is going to be a dispute about
9 confidentiality or not, have them premarked and, you know,
10 copies for, obviously, the court reporter, the parties, myself.

11 MS. WOOD: How do you want them marked?

12 HEARING OFFICER WHITE: It probably makes
13 sense to just mark them sequentially, for example, RMP No. 1,
14 you know, so forth, you know, Division, or DPU 1 and so forth. I
15 mean, that is typically with Commission practice. That is
16 typically how we--and if there's additional ones beyond that,
17 then we can, you know --

18 MS. WOOD: We can would go Ellis-Hall 1, 2, 3?

19 HEARING OFFICER WHITE: Yes, that makes
20 sense to me or you can do EHC or whatever is going to save on
21 ink is fine.

22 MR. SACKETT: With respect to documents that we
23 have already filed, for example, our comments and reply
24 comments and that sort of thing that we would have our witness
25 refer to, do you want us to bring separate copies of those, or

1 are they considered--

2 HEARING OFFICER WHITE: I think if parties are
3 going to request and there's no objection to receiving, for
4 example, the Division, I don't see the need to premark those.
5 We can refer to those as, you know--

6 MS. WOOD: It would be helpful to have a set, a
7 whole set, whatever it is, so we can work from it so we are not
8 guessing who is going--

9 HEARING OFFICER WHITE: Do parties have an
10 objection, for example, RMP No. 1, the application--

11 MR. SOLANDER: That is fine with Rocky Mountain
12 Power.

13 HEARING OFFICER WHITE: That is fine. I have
14 no problem with that. I am going to take one more brief--I
15 apologize to do this but I want to make sure, I have to think a
16 little clearly here, we are for nine o'clock on Thursday, so let me
17 take a quick--any other procedural matters that parties want to
18 address before--

19 MR. JETTER: I just want to make one comment
20 while we are still on the record. There was reference earlier to
21 the 12-035-100 docket and the position of the Division with
22 respect to Schedule 38 and the requirement of the transmission
23 agreement. To clarify, I think it was stated by one of the other
24 parties that the Division said that that was a current requirement
25 of Schedule 38 and I believe the Division's position in that

1 docket has been that we think it should be going forward but it
2 hasn't been in the past, and so I just wanted to clarify that while
3 we were still on the record.

4 MR. WOOD: I think that was docket 22, just for
5 clarification. I think you said the 100 matter. I think it's actually
6 13-035-22 or we referred to it as the Verba (sic) matter.

7 MS. WOOD: And we agreed with your analysis that
8 you said that it was going to be going forward.

9 MR. JETTER: I think we may have addressed it in
10 both dockets.

11 HEARING OFFICER WHITE: Understood. Please
12 bear with me for a moment if that is okay.

13 (A discussion was held off the record.)

14 HEARING OFFICER WHITE: Again, any other
15 procedural issues that need to be addressed today? I know we
16 have the two remaining issues. Hearing none, we are adjourned
17 today and go off the record and look forward to seeing you all
18 on Thursday morning. Thank you.

19 (The hearing was concluded at 3:45 p.m.)
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REPORTER'S CERTIFICATE

State of Utah)
)
County of Salt Lake)

I hereby certify that the witness in the foregoing deposition was duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken at the time and place herein named;

That the testimony of said witness was reported by me in stenotype and thereafter transcribed into typewritten form.

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the even thereof.

IN WITNESS WHEREOF, I set my hand this 17th day of September, 2013.

Kellie Peterson, RPR