

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION

3  
4  
5 TRANSCRIPT OF PROCEEDINGS

6 Evidentiary Hearing  
7 May 12, 2008  
8 Jefferson City, Missouri  
9 Volume 5

10 In the Matter of The Empire )  
District Electric Company of )  
11 Joplin, Missouri for Authority to )  
File Tariffs Increasing Rates for ) Case No. ER-2008-0093  
12 Electric Service Provided to )  
Customers in the Missouri Service )  
13 Area of The Company )

14

15  
16 CHERLYN D. VOSS, Presiding,  
REGULATORY LAW JUDGE.

17

18 JEFF DAVIS, Chairman,  
CONNIE MURRAY,  
19 ROBERT M. CLAYTON III,  
TERRY JARRETT,  
20 KEVIN GUNN,  
COMMISSIONERS.

21

22

23 REPORTED BY:

24 KELLENE K. FEDDERSEN, CSR, RPR, CCR #838  
MIDWEST LITIGATION SERVICES

25

## 1 APPEARANCES:

2 PAUL A. BOUDREAU, Attorney at Law  
JAMES C. SWEARENGEN, Attorney at Law  
3 DIANA CARTER, Attorney at Law  
DEAN L. COOPER, Attorney at Law  
4 L. RUSSELL MITTEN, Attorney at Law  
Brydon, Swearngen & England, P.C.  
5 312 East Capitol  
P.O. Box 456  
6 Jefferson City, MO 65102-0456  
(573)635-7166  
7 rmitten@brydonlaw.com

8 FOR: The Empire District Electric  
Company.

9  
SHELLEY WOODS, Assistant Attorney General  
10 P.O. Box 899  
Supreme Court Building  
11 Jefferson City, MO 65102  
(573)751-3321

12 FOR: Missouri Department of Natural  
13 Resources.

14 STUART CONRAD, Attorney at Law  
Finnegan, Conrad & Peterson  
15 3100 Broadway  
1209 Penntower Officer Center  
16 Kansas City, MO 64111  
(816)753-1122  
17 stucon@fcplaw.com

18 DAVID WOODSMALL, Attorney at Law  
Finnegan, Conrad & Peterson  
19 428 East Capitol, Suite 300  
Jefferson City, MO 65101  
20 (573)635-2700  
dwoodsmall@fcplaw.com

21 FOR: Industrial Intervenors.  
22  
23  
24  
25

1 LEWIS R. MILLS, JR., Public Counsel  
P.O. Box 2230  
2 200 Madison Street, Suite 650  
Jefferson City, MO 65102-2230  
3 (573)751-4857

4 FOR: Office of the Public Counsel  
and the Public.

5  
KEVIN THOMPSON, General Counsel  
6 STEVEN DOTTHEIM, Chief Deputy General Counsel  
STEVE REED, Chief Litigation Attorney  
7 JENNIFER HEINTZ, Assistant General Counsel  
P.O. Box 360  
8 200 Madison Street  
Jefferson City, MO 65102  
9 (573)751-3234

10 FOR: Staff of the Missouri Public  
Service Commission.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

2 (EXHIBIT NOS. 1 THROUGH 30, 200 THROUGH  
3 220, 300 THROUGH 309, 400 AND 401, 500 THROUGH 506 WERE  
4 MARKED FOR IDENTIFICATION BY THE REPORTER.)

5 JUDGE VOSS: We're here in the matter of  
6 the Empire District Electric Company of Joplin, Missouri  
7 for authority to file tariffs increasing rates for  
8 electric service provided to customers in the Missouri  
9 service area of the company, Commission Case No.  
10 ER-2008-0093.

11 We're going to begin by taking entries of  
12 appearance, beginning with Empire District Electric  
13 Company.

14 MS. CARTER: Law firm of Brydon,  
15 Swearengen & England, Jim Swearengen, Paul Boudreau, Russ  
16 Mitten, Dean Cooper and Diana Carter, 312 East Capitol  
17 Avenue, Jefferson City, Missouri.

18 JUDGE VOSS: The Commission Staff?

19 MR. REED: Yes. For Staff will be Steve  
20 Reed, Jennifer Heintz. Kevin Thompson will also be  
21 appearing, and Steve Dottheim. P.O. Box 360, Jefferson  
22 City, Missouri 65102.

23 JUDGE VOSS: Office of the Public Counsel?

24 MR. MILLS: On behalf of the Office of the  
25 Public Counsel and the public, my name is Lewis Mills. My

1 address is Post Office Box 2230, Jefferson City, Missouri  
2 65102.

3 JUDGE VOSS: The Department of Natural  
4 Resources?

5 MS. WOODS: On behalf of the Missouri  
6 Department of Natural Resources, Shelley Ann Woods,  
7 Assistant Attorney General, Post Office Box 899, Jefferson  
8 City, Missouri 65102.

9 JUDGE VOSS: General Mills, Praxair and  
10 Explorer Pipeline?

11 MR. WOODSMALL: On behalf of the Industrial  
12 Intervenors, David Woodsmall, firm of Finnegan, Conrad &  
13 Peterson. Also note the appearance of Stu Conrad,  
14 428 East Capitol, Suite 300, Jefferson City, Missouri  
15 65101.

16 JUDGE VOSS: Thank you. I'm going to  
17 remind everyone at this time to turn off your Blackberries  
18 and your cell phones, not just put them on silent, because  
19 it's actually the webcasting that they interfere with.

20 We have some preliminary matters, I  
21 believe, that need to be addressed before opening  
22 statements. First, a scheduling conflict with Mr. Gorman.

23 MR. WOODSMALL: Yes, your Honor. Last  
24 Friday we became aware of -- well, actually, last Thursday  
25 on the state holiday we became aware of a conflict that

1 Mr. Gorman has with a proceeding going on in the state of  
2 Texas. I've talked to the other parties, and they have no  
3 problems moving him to Tuesday of the second week, if  
4 that's okay with the Commission.

5 JUDGE VOSS: So no party has an objection  
6 to Mr. Gorman appearing on all issues on Tuesday,  
7 May 20th, as opposed to Friday, May 16th?

8 (No response.)

9 JUDGE VOSS: Hearing none. If he can't be  
10 here, he can't be here.

11 The second is Staff's motion to file  
12 additional testimony or motion to strike portions of  
13 Mr. Sager's surrebuttal testimony that was filed on  
14 May 9th. My first question is to Staff. From your  
15 pleading, it's my understanding that if  
16 Mr. Oligschlaeger's responsive testimony is admitted,  
17 Staff withdraws its objections to the portion of  
18 Mr. Sager's surrebuttal testimony in question; is that  
19 correct?

20 MR. REED: Correct, Judge.

21 JUDGE VOSS: I realize some of the parties  
22 may have not been made aware of this filing since it came  
23 in late Friday. If so, just let me know before you answer  
24 the next question. That question is whether any party  
25 objects to the admission of that responsive testimony into

1 the record?

2 MR. MILLS: Judge, from my perspective, of  
3 course, it's Staff's pleading and Staff's argument to  
4 make, but I find their alternative remedy more compelling,  
5 which is to strike Mr. Sager's improper surrebuttal  
6 testimony because it really is rebuttal testimony and it  
7 should have been filed in rebuttal testimony.

8 But if the Commission sees fit to allow  
9 Mr. Sager's testimony in, then I certainly believe that  
10 Mr. Oligschlaeger's responsive testimony ought to be  
11 allowed in as well.

12 JUDGE VOSS: Thank you.

13 MR. WOODSMALL: To echo slightly what  
14 Mr. Mills said, we believe that it's appropriate to strike  
15 this testimony, but if you go down the route of allowing  
16 Mr. Oligschlaeger's responsive testimony, if you go down  
17 the route of allowing the improperly filed rebuttal  
18 testimony to come in as surrebuttal testimony, I'd ask for  
19 leave a couple days certainly before the issue comes up to  
20 decide and file Gorman's responsive testimony to that  
21 improperly filed surrebuttal as well.

22 JUDGE VOSS: Does anyone else have a  
23 statement to make?

24 MR. MITTEN: Empire has no objection to the  
25 admission of Mr. Oligschlaeger's testimony.

1 JUDGE VOSS: This issue is not scheduled at  
2 this point until Thursday. Would Mr. Gorman need a  
3 significant amount of time?

4 MR. WOODSMALL: Mr. -- you're right. This  
5 issue is scheduled for Thursday. As we just discussed,  
6 Mr. Gorman won't be taking the stand 'til Tuesday. No, I  
7 don't think he would need a significant amount of time.  
8 He's looked at this testimony already. So a couple days,  
9 Wednesday or Thursday, to put together any responsive  
10 testimony, if any. And I can certainly let the Commission  
11 know prior to that if he's going to file some responsive  
12 testimony.

13 JUDGE VOSS: And I wouldn't expect Empire  
14 to at this point, without having seen it, to not offer  
15 objections to that. That will have to be taken up when  
16 Mr. Gorman takes the stand. Is that understandable?

17 MR. WOODSMALL: That's fine.

18 JUDGE VOSS: In that case, because it does  
19 appear from the pleading that this may truly be a  
20 misunderstanding by the parties that led to a new issue or  
21 subissue being raised, I'm going to go ahead and let the  
22 testimony in.

23 MR. WOODSMALL: Just to clarify, your  
24 Honor, it is not, as I understand it, a new issue. This  
25 issue was raised in Staff's direct. So to the extent your



1 ruling is dependent upon a belief that it's a new issue,  
2 that's incorrect.

3 JUDGE VOSS: Not a new issue, but a  
4 misunderstanding, I believe, of the other issue. It can  
5 be sorted out in the Report and Order. It's not a  
6 guarantee that anyone is going to win any position.  
7 Simply that the Commission is going to consider all the  
8 positions. And, of course, I will not formally be taking  
9 that into evidence until those witnesses take the stand,  
10 with the understanding that objections down this line to  
11 that testimony have been ruled on. Any new objections  
12 based on other grounds that are made would be reasonable.

13 All right. Two down. Next, Empire's  
14 motion to strike certain portions of Public Counsel  
15 witness Barbara Meisenheimer's prefiled direct testimony.  
16 The testimony in question is based in part upon  
17 Ms. Meisenheimer's belief, based upon the position of her  
18 legal counsel, that the Commission's Report and Order in  
19 Case ER-2006-315 may no longer be in effect.

20 Ms. Meisenheimer is not an attorney, and  
21 while it's appropriate that her testimony be based upon  
22 her understanding of current legal environment in which  
23 the company she's evaluating operates, the Commission  
24 recognizes that she's not offering a legal opinion. In  
25 reaching its decision in this case, the Commission will

1 evaluate the expert testimony in conjunction with the  
2 applicable law. So accordingly, the motion to strike that  
3 testimony is going to be denied.

4 Okay. Finally, we have -- at least finally  
5 that I know of, we have Empire's pending motion for  
6 reconsideration or clarification of the Commission's  
7 May 1st notice. I'm not sure that clarification of a  
8 notice is standard, but I may be able to offer some  
9 clarification.

10 The Commission is not seeking to relitigate  
11 anything that was litigated in a prior case. However, as  
12 the case now stands, by order of the Commission issued in  
13 Case No. ER-2006-315, Empire's IEC is not in place -- was  
14 not in place, sorry, at the time Empire filed the tariffs  
15 that resulted in the opening of this case.

16 In the absence of court action during the  
17 pendency of this case reversing a portion of that  
18 Commission decision, the issue of whether Empire should be  
19 allowed to adopt a fuel adjustment clause and all  
20 collateral issues related to how such fuel adjustment  
21 clause should be structured are appropriately before the  
22 Commission. We want to make sure that those issues are  
23 fully litigated.

24 So are there any other preliminary motions  
25 that need to be addressed?

1                   MR. WOODSMALL: Clarification on that  
2 point, your Honor. The original Order that you're  
3 attempting to clarify was an Order of the Commission, and  
4 I notice when you just gave the clarification that you  
5 said the Commission. Are you as a presiding officer  
6 clarifying or can you tell us the posture of that  
7 decision? Is it a Commission decision or yours?

8                   JUDGE VOSS: I think you can look to the  
9 General Counsel's pleading before the Supreme Court at  
10 this time for the Commission's position in that case. I  
11 was giving clarification as to the notice.

12                  MR. WOODSMALL: Based upon your  
13 understanding of the General Counsel Office's pleading?

14                  JUDGE VOSS: Yes. I think that looking to  
15 the pleadings filed in the Supreme Court reflects the  
16 General Counsel and the position that the General Counsel  
17 has taken on the Commission's behalf. Is that sufficient  
18 clarification of the clarification of the notice?

19                  MR. WOODSMALL: I hope so. I don't have  
20 any more questions. Thank you.

21                  JUDGE VOSS: Are there any other  
22 preliminary matters that we need to address?

23                  MR. MILLS: Just briefly as a scheduling  
24 matter, Judge. I notice that the scheduling order I think  
25 the parties submitted talked about resuming the hearings

1 tomorrow afternoon. The Supreme Court has moved the  
2 docket call a little bit earlier, but I believe that we're  
3 still No. 5 on the docket. So I can't say for certain  
4 that we'll be back here at noon. Are you planning to  
5 resume at noon, at one o'clock or whenever we're done at  
6 the Supreme Court?

7 JUDGE VOSS: I was presuming we would  
8 resume whenever they're done at the Supreme Court, which  
9 will hopefully be close to one o'clock. If not, we'll  
10 have to be flexible given that the counsel sitting in this  
11 room I believe is also supposed to be before the Supreme  
12 Court at the same time.

13 To that effect, the one thing I might  
14 suggest, in the event we get through the issues that are  
15 scheduled today before five, to take Staff and Public  
16 Counsel's witnesses on the next issue, if possible, if  
17 there's time, to move things along to leave less for  
18 Tuesday afternoon, and that would be on the off-system  
19 sales margins.

20 MR. MITTEN: Would you defer the company's  
21 witness on that issue until Tuesday?

22 JUDGE VOSS: Yes. It's my understanding  
23 that the company's witness won't be here until Tuesday,  
24 which is why I suggested --

25 MR. MITTEN: Our witness is here today, and

1 we would be prepared to go forward if you would prefer to  
2 do so.

3 JUDGE VOSS: Part of this depends on if --  
4 are people ready to cross-examine those witnesses. So  
5 maybe as the day progresses, if it looks like we're  
6 getting ahead, the parties can let me know if they're  
7 ready to take those witnesses. Does anybody have an  
8 objection at this point?

9 (No response.)

10 JUDGE VOSS: Hearing none. Are we ready to  
11 begin with opening statements? Beginning with the  
12 company.

13 MS. CARTER: Good morning. May it please  
14 the Commission, Judge Voss?

15 Empire initiated this rate case back in  
16 October of 2007 by filing proposed tariffs to implement an  
17 overall increase in the company's Missouri retail rates of  
18 approximately 34.7 million, which would represent about a  
19 10 percent increase in customer rates.

20 I attended the local public hearings in  
21 this case, and I believe Commissioner Clayton listened in  
22 on the majority of those hearings as well, and we heard  
23 customers talk about how a rate increase will impact them  
24 and how, given the economy, they cannot afford to pay more  
25 for electricity.

1                   While certainly sympathetic to the  
2     situation, Empire cannot as a matter of law be required to  
3     meet a higher or different standard in demonstrating what  
4     are just and reasonable rates simply because of the  
5     general economic circumstances. A regulated utility such  
6     as Empire cannot remain financially sound unless the  
7     return it is allowed to earn on the value of its property  
8     devoted to the public service is at least equal to the  
9     cost of capital.

10                  A fair return on equity, or ROE, an issue  
11     you will asked to be decide (sic) in this case, must be  
12     comparable to returns investors expect to return on other  
13     investments of similar risk sufficient to assure  
14     confidence in the company's financial integrity, and  
15     third, must be adequate to maintain and support the  
16     company's credit and to attract capital.

17                  Just like all other regulated utilities in  
18     Missouri, Empire must be allowed a reasonable opportunity  
19     both to recover all of its prudently incurred operating  
20     costs and then to earn a reasonable return on its  
21     investment.

22                  The evidence will show that the major  
23     factors driving Empire's rate increase which initiated  
24     this case are the capital additions made by the company to  
25     its electric system in 2007, specifically the Riverton 12

1 generating unit and the selective catalytic reduction, or  
2 SCR, at the company's Asbury plant, and also the financial  
3 impact, both capital and expense, related to the  
4 catastrophic ice storms that hit Empire's service area in  
5 the beginning and end of 2007.

6                   Additionally, Empire has been exposed to  
7 increased fuel cost risk because of the continued  
8 volatility of both fuel and purchased energy costs and the  
9 absence of an effective fuel adjustment mechanism. Empire  
10 has worked diligently to control the volatility associated  
11 with fuel costs through the use of a natural gas hedging  
12 program which has been in place since 2001, and Empire has  
13 been pursuing wind generation and continues to pursue  
14 that, but Empire remains exposed to increased fuel cost  
15 risk. Because of this, in this rate case proceeding  
16 Empire is requesting the authorization of a fuel  
17 adjustment clause, or FAC, pursuant to Missouri statute.

18                   The Company, the Commission Staff and  
19 Public Counsel entered into a Stipulation & Agreement  
20 regarding a number of issues in this case. No other  
21 parties objected, and that partial stipulation was  
22 approved by the Commission. It also looks likely that  
23 another at least nonunanimous stipulation will be  
24 presented for the Commission's consideration this week.

25                   Several significant issues, however, will

1 remain contested in this proceeding, and additional  
2 issue-specific opening statements will be given when each  
3 of those issues is presented.

4                   Simply to summarize, the company's  
5 testimony supports an increase in revenue requirement of  
6 approximately 35 million, and I believe the recent Staff  
7 reconciliation indicate Staff's opinion is that an  
8 increase of over 19 million is necessary.

9                   Now, quite to the contrary, the Industrial  
10 Intervenors assert that there should be a rate reduction  
11 of over 1 million, and Public Counsel argues for a rate  
12 reduction of almost \$4 million. The key issue resulting  
13 in these revenue requirement differences appears to  
14 concern a dispute over fuel and purchased power costs.  
15 On that note, it is irrelevant whether or not Empire may  
16 request an FAC while an IEC is in place. An IEC has not  
17 been in place for Empire through its filed tariffs at any  
18 time during this rate case.

19                   It appears that Public Counsel's and the  
20 Industrial Intervenors' primary objections to the current  
21 requested rate increase revolve around their unhappiness  
22 with the Report & Order issued by the Commission in  
23 Empire's last rate case.

24                   There are also significant revenue  
25 requirement differences associated with the issue of ROE



1 common in the rate cases to be presented to you as well as  
2 the issue of whether the Asbury SCR equipment should be  
3 included in rate base and its related expenses included in  
4 cost of service.

5 Empire urges the Commission to authorize an  
6 ROE which is commensurate with returns for light risk  
7 enterprises and which will be sufficient to assure  
8 confidence in the company's financial integrity and allow  
9 Empire to maintain and support its credit and to attract  
10 capital.

11 In this regard, Empire's expert witness  
12 recommends an ROE of 11.6 percent for Empire, which is  
13 consistent with his 11.7 recommendation in Empire's last  
14 case. Considering the substantial construction risk being  
15 faced by Empire and considering all other relevant factors  
16 for Empire as well as for comparable companies, this is a  
17 fair and reasonable ROE for Empire at this time.

18 Staff recommends a cost of equity range of  
19 9.7 to 10.8, with a midpoint of 10.28. The Industrial  
20 Intervenor have an ROE range, I believe, of 9.5 to 10.3  
21 with a 10 percent recommendation. This issue involves a  
22 revenue requirement difference of over \$9 million.

23 Now, additionally, the Asbury SCR equipment  
24 plant addition should be included in rate base, and its  
25 expenses should be included in Empire's cost of service.

1 This will be the first issue presented to the Commission  
2 today. This issue is worth approximately \$5 million in  
3 revenue requirement and turns on the fact that the SCR was  
4 not tested until after the close of the agreed-upon test  
5 year.

6                   Staff proposed in this case a test year  
7 ending June 30th, with a test year update period ending  
8 December 31 of 2007, and this test year with an update  
9 period instead of a true-up was approved by the  
10 Commission.

11                   Now, notwithstanding this fact, the Asbury  
12 SCR should be included in rate base for numerous reasons,  
13 including that the construction of the Asbury SCR was  
14 complete and the equipment useful by December 31, 2007,  
15 the end of the update period. It was only due to other  
16 issues that arose during the Asbury maintenance outage,  
17 wholly unrelated to the construction of the SCR, which  
18 caused the outage to be extended.

19                   But again, the SCR has now been tested and  
20 is fully operational and used for service. The SCR met  
21 all in-service criteria well before the cost for the  
22 equipment will be included in Empire's rate base, as  
23 contemplated and required by the stipulation agreed to by  
24 all parties in Empire's experimental regulatory plan case.

25                   Third, Empire is only requesting that those

1 Asbury SCR construction costs incurred as of the close --  
2 as of the date of the close of the agreed-upon test year  
3 and update period be included in its rate base.

4                   And from an equitable standpoint, the  
5 Commission should recognize that Empire was proactive  
6 during the planning phases of the SCR, deciding to install  
7 the Asbury SCR prior to a construction boom in the utility  
8 industry, allowing the Asbury SCR to be installed at lower  
9 capital cost relative to what other utilities will now be  
10 paying for the same equipment.

11                   Additionally, the Commission should  
12 consider the amount of so-called regulatory lag which  
13 would result if the SCR equipment is not included in rate  
14 base until Empire's next rate case. One of the  
15 fundamental goals of ratemaking is that the process be  
16 forward-looking and prospective in nature. This goal will  
17 not be met and the purpose of a test year will be  
18 subverted if the SCR equipment is not included in rate  
19 base at this time and in this rate case.

20                   As was noted in Empire's Prehearing Brief,  
21 if the Asbury SCR is not included in the revenue  
22 requirement calculation, not only will Empire not be  
23 allowed to earn a return on its investment in a timely  
24 manner, but Empire will also not be able to pass on the  
25 expenses associated with the SCR. That would be an absurd

1 and unjust result.

2                   Now, further, as I noted earlier, there is  
3 a significant disparity among recommendations regarding  
4 fuel cost recovery. Russ Mitten will address the  
5 Commission for Empire on this issue, but briefly, the  
6 Commission should authorize an FAC for Empire in this  
7 proceeding. Fuel and purchased power costs constitute the  
8 largest single element of Empire's cost of service,  
9 totaling approximately 38 percent of test year operating  
10 costs in this case.

11                   The evidence presented to you in this  
12 hearing will show that the FAC mechanism should be as  
13 proposed by Empire. There are various subissues within  
14 the FAC category, and Mr. Mitten and Empire's witnesses  
15 will address each of those issues for the Commission at a  
16 later time.

17                   Through the coming days, you will hear  
18 conflicting testimony on many significant issues. The  
19 Commission will need to judge credibility, take experience  
20 levels into account, and look at the motivation behind  
21 some testimony and arguments.

22                   Although the Commission is afforded with a  
23 large amount of discretion in the exercise of its powers,  
24 the courts have consistently held that every utility does  
25 have an undoubted constitutional right to such a fair and

1 reasonable return.

2 Empire will not be able to remain  
3 financially sound and will not be able to continue  
4 providing safe and adequate service to its customers in  
5 Missouri unless this Commission properly balances the  
6 interests of customers with the interests of shareholders,  
7 while keeping in mind that Empire must be allowed a  
8 reasonable opportunity to recover all of its prudently  
9 incurred operating costs and earn a reasonable return on  
10 its investment.

11 Thank you for your time.

12 CHAIRMAN DAVIS: Judge, I assume this is  
13 going to be the only opening statement we're going to get  
14 today?

15 JUDGE VOSS: That's what I was about to  
16 ask.

17 MS. CARTER: There will be an  
18 issue-specific opening statement for the SCR if you have  
19 additional questions on that.

20 JUDGE VOSS: That's what I was going to  
21 clarify. Are we going to do issue by issue summary  
22 openings so Kevin can get out his ROE chart?

23 MR. THOMPSON: You don't like my charts,  
24 Judge?

25 JUDGE VOSS: I do like your charts.

1                   MS. CARTER: It was certainly our intention  
2 to do a general brief overview and then also have specific  
3 opening statements.

4                   JUDGE VOSS: Thank you. That should be  
5 fine. Okay. Staff?

6                   MR. THOMPSON: May it please the  
7 Commission? I'm here representing Staff, and as you have  
8 just heard, there will be topical opening statements prior  
9 to the trial of each issue, and so I am going to keep my  
10 remarks brief, and I'm not going to get into a lot of  
11 details about the issues in this case.

12                   First, I want to address Staff's role.  
13 Staff's not a stakeholder in this case. Staff's job is to  
14 provide you with advice, hopefully useful advice that will  
15 help you reach a determination in this case. Staff  
16 participates as a party and gives you this advice in the  
17 form of filings and testimony similar to those provided by  
18 the other parties, but we do that for due process reasons,  
19 so that the advice we give you is transparent, everyone  
20 can see what it is, everyone gets a chance to respond to  
21 it.

22                   The Commission's duty in this rate case, as  
23 in every rate case, is to set a just and reasonable rate.  
24 A just and reasonable rate the Missouri Supreme Court said  
25 a few years ago is a fair rate, one that's fair to the

1 company and its shareholders on the one hand and fair to  
2 the company's customers on the other.

3           Empire is a traditional vertically  
4 integrated electric utility. It has a monopoly service  
5 area. Its customers are, therefore, at Empire's mercy for  
6 one of the necessities of life, electric power.  
7 Therefore, your rate setting job is vital. It's the only  
8 protection that those customers have. Otherwise, they  
9 are, as I said, at the mercy of the company.

10           In setting that rate, you need to give  
11 Empire ample money, money sufficient to cover its prudent  
12 operating and maintenance expenses and, in addition, money  
13 sufficient to provide a reasonable return to the investors  
14 on the value of their investment, but your award should  
15 not be even one penny more than that amount.

16           Your road map in this case is the  
17 reconciliation, or as they like to say in the Kansas City  
18 office, the reconcilment. That shows the monetary value  
19 of each issue in each party's case. You'll see that the  
20 reconcilment has four columns on the right-hand side of  
21 numbers. The first of those is the company's numbers, and  
22 that just has one number, the amount of the rate increase  
23 the company has requested, some \$35.8 million on an annual  
24 basis going forward.

25           The other three columns show additions or

1 actually more commonly subtractions from that number  
2 representing the positions of the other parties. Staff's  
3 is the next column that has the most numbers because Staff  
4 has a position on every issue. Staff suggests that Empire  
5 should receive a rate increase of just under \$20 million.  
6 You can see that from the bold number at the bottom of the  
7 column. That is all of Staff's positions as quantified  
8 here subtracted from the company's request, leaving  
9 \$19.6 million on the table.

10                   The big issues, well, the biggest one is  
11 the fuel adjustment clause. That issue is worth  
12 \$20 million by itself. You can see that by looking at the  
13 columns for the Public Counsel and the Industrial  
14 Intervenors opposite fuel and purchased power where you  
15 see a subtraction of \$19.6 million.

16                   Now, you've heard already from Empire that  
17 there's some controversy as to whether Empire can even ask  
18 for a fuel adjustment clause, and that's going to be  
19 decided somewhere else. As you know, there's an argument  
20 in the Supreme Court tomorrow morning. I don't know if  
21 that decision will settle that question. It may get us  
22 closer to an answer.

23                   But at any rate, Staff's position is that a  
24 fuel adjustment clause should be awarded. A fuel  
25 adjustment clause, as I'm sure you know, is a mechanism



1 that allows rates to fluctuate to reflect fuel cost  
2 volatility between rate cases. Almost every other  
3 jurisdiction in the country allows fuel adjustment  
4 clauses. Missouri in 2005 enacted Senate Bill 179 and  
5 joined the mainstream by allowing fuel adjustment clauses.  
6 Prior to that, they were illegal in Missouri pursuant to a  
7 Supreme Court decision in 1979.

8 Empire, as you perhaps know, has an unusual  
9 reliance on natural gas fired generation, and natural gas  
10 is the most volatile of the various fuels used in electric  
11 generation. Empire has a need for a fuel adjustment  
12 clause in order to remain solvent, and if Empire's  
13 customers are going to get lights when they click the  
14 switch, Empire has to remain financially healthy.

15 The next big issue is return on equity.  
16 You're going to hear from three experts on return on  
17 equity because in setting that rate of return, that fair  
18 return that the investors are entitled to on the value of  
19 their investment, one part of that, one component has to  
20 be estimated, and that's where the experts come in.

21 Let me say something about experts. You  
22 are the tribunal. Your job is to find the facts, and in  
23 doing that, you may accept all, some or none of any  
24 testimony you hear or read, including expert testimony.  
25 It is your job and your discretion, your power to choose

1    what you believe, what you are persuaded by.

2                   Dr. Vander Weide suggests 11.6.  When  
3    compared to recent return on equity awards in the nation,  
4    that's quite high.  It's at the top.  It may be the  
5    highest.  Matt Barnes for the Commission Staff suggests a  
6    midpoint of 10.26.  Mr. Gorman suggests 10.

7                   Now, how you form the midpoint, how you  
8    figure the average of recent awards has to do obviously  
9    with which awards you look at and over what time period.  
10   Dr. Vander Weide suggests, for example, that you don't  
11   look at the pipes and wires awards, the companies that are  
12   not traditional vertically integrated electric utilities  
13   like Empire.  I agree with that.  It's only fair to  
14   exclude awards made to companies that are different, that  
15   operate differently.

16                  Staff, unlike Dr. Vander Weide, suggests  
17   that you only look at companies that have at least  
18   70 percent electric revenues.  After all, we want  
19   companies and awards that are comparable to Empire.  In  
20   any event, that spread of points represents about 8 or  
21   \$9 million on an annual basis.

22                  Let me close by just reminding you,  
23   fairness.  Your guiding star in this case has got to be  
24   fairness, fair to the company.  Staff wants you to be fair  
25   to the company, but fair also to the ratepayers.  Thank

1     you very much.

2                     JUDGE VOSS:  Thank you.  Office of the  
3     Public Counsel?

4                     MR. MILLS:  Good morning.  May it please  
5     the Commission?  Like Mr. Thompson, I too will be brief.  
6     We will be doing opening statements on each issue, and  
7     I'll get into more details on the ones in which Public  
8     Counsel has taken an active role.  I'll briefly highlight  
9     some of the issues that are coming up and Public Counsel's  
10    position on those issues.

11                    As Mr. Thompson closed with, return on  
12    equity in this case, as in most cases, is certainly one of  
13    the biggest issues.  You are privileged and lucky I should  
14    say in this case to have the testimony of Michael Gorman  
15    on behalf of the Industrial Intervenors.  Public Counsel  
16    did not sponsor a witness on this issue in this case  
17    primarily for financial reasons.  We're getting near the  
18    end of the fiscal year, and we simply couldn't afford one.

19                    You have found Mr. Gorman in recent cases  
20    to be one of the most credible, if not the most credible  
21    and most convincing witnesses in the cases in which he's  
22    filed testimony.  In this case, his testimony supports a  
23    return on equity of 10 percent.  I think you'll find that  
24    Mr. Gorman's testimony is once again going to be the most  
25    credible and the most convincing of all the three

1 witnesses in this case on that issue.

2                   With respect to a fuel adjustment clause,  
3 there really are a couple of different aspects to this  
4 issue. One is the threshold question of whether Empire  
5 pursuant to the Stipulation & Agreement in ER-2004-0570 is  
6 even in a position to request a fuel adjustment clause.  
7 As Judge Voss indicated this morning, the Commission has  
8 already decided at least for the purposes of this case how  
9 it is going to rule on that particular issue. As  
10 Mr. Thompson alluded to, that question will perhaps lie  
11 before a different tribunal to decide the ultimate  
12 question.

13                   But with respect to if a fuel adjustment  
14 clause is authorized, how it should be structured, Public  
15 Counsel supports the testimony of Mr. Brubaker and the  
16 Staff witnesses that there should be, as the term has --  
17 the phrase has frequently been used over the last few  
18 years, some skin in the game for the Empire District  
19 Electric Company. There should be risk on Empire to  
20 achieve reasonable and prudent results from their fuel  
21 purchasing practices management.

22                   Mr. Kind, Public Counsel witness on this  
23 case, testified that Empire should be allowed to flow  
24 through no more than 60 percent of the fuel and purchased  
25 power costs through a surcharge, and that the remaining

1 portions should remain embedded in base rates.

2                   With respect to the off-system sales  
3 margins issue that the Commission will be hearing,  
4 Mr. Kind testified that the best estimate, the number that  
5 should be included in rates on a going-forward basis is  
6 calendar year 2007. There have been a number of changes  
7 in the recent past that affect Empire's ability to sell  
8 into the off-system sales margin, and the most recent  
9 period is the most representative of the likely amounts  
10 that Empire will receive going forward.

11                   With respect to Empire's proposal to  
12 include in rates an estimate of its costs to comply with  
13 recent Commission rules on vegetation management and  
14 infrastructure inspection, Public Counsel takes the  
15 traditional regulatory approach, as this Commission  
16 should, that estimates of future costs should not be  
17 allowed in current rates.

18                   We have no way of knowing how accurate  
19 Empire's estimates are, whether those estimates will  
20 actually come true, whether Empire will in the future end  
21 up spending the amounts that it now guesses it will spend  
22 on compliance with those two rules. Those costs are  
23 simply not known and measurable, should not be included in  
24 rates.

25                   And finally, just in closing, I will note

1     that Mr. Thompson in his opening statement said that the  
2     guiding principle that the Commission should bear in mind  
3     in this case is fairness to both the shareholders and to  
4     the ratepayers of Empire. And while I don't disagree with  
5     that, I will note that it should also be the Commission's  
6     guiding principle, as the courts have frequently said,  
7     that it is the protection of the customer that is the  
8     Commission's principal business. Protection given to the  
9     company is merely incidental.

10                     Thank you.

11                     JUDGE VOSS: Thank you. Industrials?

12                     MR. WOODSMALL: Good morning, and thank  
13     you. As you may know, my name is David Woodsmall, and I'm  
14     here today representing a group of large industrial  
15     commercial electric users of Empire District Electric.  
16     These customers are extremely concerned. They're  
17     concerned about the status of their electric rates in  
18     southwest Missouri.

19                     The evidence indicates that Empire's  
20     electric rates have risen dramatically in the last six to  
21     seven years. During a time in which inflation has been  
22     averaging just over 2.5 percent a year, electric rates  
23     have increased by almost 6 percent a year since 2001. If  
24     given the increase that they request here, Empire's rates  
25     will have increased by over 50 percent in seven years.

1                   Such an increase is worrisome for everyone,  
2   but for an entity like the Missouri Public Service  
3   Commission, an entity that is part of the Department of  
4   Economic Development, such figures have to make one  
5   question the long-term economic health and prospects of  
6   the southwest Missouri region.

7                   Now, what do we have to show for the  
8   50 percent increase over the last seven years? I submit  
9   to you that the answer to this question is nothing. We  
10   don't have a new power plant that is decreasing Empire's  
11   reliance on natural gas. If anything, Empire's reliance  
12   on natural gas is as great as it's ever been.

13                  We don't have any increased reliability of  
14   Empire's delivery of electricity. In fact, in the last  
15   year, Empire's experienced two significant outages  
16   associated with ice storm damages.

17                  The only people benefiting from this rapid  
18   run up in electric rates are Empire shareholders, and  
19   those individuals are the same people that stand to  
20   benefit from Empire's rate request in this case.

21                  I'm going to talk to you briefly about two  
22   issues that will be presented for the Commission's  
23   decision in this case. The first is the return on equity,  
24   and the second is the structure of a fuel adjustment  
25   clause.

1                   As you may know, the return on equity is  
2     the rate of profit that Empire shareholders receive for  
3     investing in the company. The evidence indicates that the  
4     average return on equity authorized for shareholders of  
5     electric utilities is 10.3 percent. That's the average  
6     amongst all electric utilities across the nation,  
7     10.3 percent.

8                   Despite this average authorization, Empire  
9     asserts that it should be permitted to pay its ratepayers  
10    (sic) a return of 11.6 percent. Think about that number  
11    for a moment, 11.6 percent. Think about your own  
12    investments. Think about your own retirement accounts and  
13    your own stock holdings. How many of those investments  
14    average 11.6 percent a year? I submit that the answer to  
15    that question is very few.

16                  Now, you may think that the difference  
17    between 10.0 percent and 11.6 percent is not a big deal,  
18    but in this case that translates to approximately  
19    \$9.3 million every year straight into the pockets of the  
20    Empire shareholders. Nevertheless, Empire's management  
21    believes that they are entitled to such inflated returns.

22                  Now, in its past decisions the Commission  
23    has noted that the determination of an appropriate return  
24    on equity is the most difficult part of a rate case. The  
25    Commission is typically confronted with dueling opinions



1 of hired rate of return analysts.

2 But the Commission's decision in this case  
3 is not so difficult. In the recent past the Commission  
4 has utilized various tools and made some findings that  
5 more easily allow it to determine the reasonableness of a  
6 return on equity in this case. These tools will show you  
7 that Empire's return on equity recommendation is  
8 inherently unreasonable and should be summarily rejected.

9 In support of its recommendation, Empire  
10 offers the testimony of James Vander Weide. Now, this is  
11 not the first time the Commission has seen Mr. Vander  
12 Weide and his inflated recommendations. In the AmerenUE  
13 case decided less than a year ago, Case ER-2007-0002, the  
14 Commission made several findings about Mr. Vander Weide.

15 First, the Commission stated that his  
16 recommendation was, quote, too high, unquote. In fact,  
17 the Commission said that his recommendation was so high  
18 that it, quote, calls into question the credibility of the  
19 witness, unquote.

20 Second, the Commission noted that  
21 Mr. Vander Weide's recommendation would result in a return  
22 on equity that was the highest in the nation. Such a  
23 criticism has not dissuaded Mr. Vander Weide, however. In  
24 this case Mr. Vander Weide recommends a return of  
25 11.6 percent, a return that once again would be the

1 highest in the nation.

2                   Besides the questionable credibility of  
3 Mr. Vander Weide, the Commission has also utilized a zone  
4 of reasonableness to evaluate the reasonableness of a  
5 recommendation. Defined as 100 points above or below the  
6 national average return on equity, the zone of  
7 reasonableness allows the Commission to summarily reject  
8 any recommendation that is outside this zone.

9                   Despite being fully aware of the  
10 Commission's strict application of the zone of  
11 reasonableness, Mr. Vander Weide offers a return on equity  
12 that is 130 points greater than the national average and,  
13 therefore, well outside the zone of reasonableness. Given  
14 the Commission's past use of the zone of reasonableness,  
15 his recommendation should be summarily rejected.

16                   In contrast to Mr. Vander Weide's  
17 questionable credibility and his recommendation that is,  
18 as defined by the Commission, inherently unreasonable, the  
19 industrial customers offer the testimony of Michael  
20 Gorman. In the same AmerenUE case that I referenced, the  
21 Commission relied upon the work of Mr. Gorman.

22                   The Commission noted that Mr. Gorman is,  
23 quote, credible, unquote, and, quote, does the best job of  
24 presenting the balanced analysis that the Commission  
25 seeks, unquote. In this case, Mr. Gorman's balanced

1 analysis indicates that Empire should be authorized a  
2 return of equity of 10.0 percent, a figure that is safely  
3 within the Commission's zone of reasonableness.

4 I would encourage you to ask Mr. Gorman any  
5 questions that you may have about ratemaking, his method  
6 for calculating a return on equity and how his  
7 recommendation compares to decisions in other  
8 jurisdictions. As we discussed earlier, he'll be  
9 available next Tuesday to take all those questions from  
10 you.

11 The second question that I want to discuss  
12 is the structure of a fuel adjustment clause. I'm going  
13 to put aside for a moment the legal question that we  
14 continue to raise of whether Empire can lawfully request a  
15 fuel adjustment clause in this case. I believe that we  
16 will get some direction from the Supreme Court in the near  
17 future that will help the Commission decide this question.

18 Assuming for a moment, however, that Empire  
19 can request a fuel adjustment clause, we have submitted  
20 the testimony of Maurice Brubaker on the proper structure  
21 of a fuel adjustment clause. Mr. Brubaker has over 38  
22 years of experience in utility regulation. Mr. Brubaker  
23 has testified in numerous cases involving Missouri  
24 utilities and is intimately familiar with the operations  
25 of Empire District Electric.

1                   Contrary to Empire's request that it should  
2     be permitted to flow 95 percent of any changes in fuel and  
3     purchased power through its fuel adjustment clause,  
4     Mr. Brubaker states that such a proposal would eliminate  
5     virtually any incentive that Empire would have to minimize  
6     its cost of fuel.

7                   While certain aspects of Empire's fuel  
8     costs are beyond its control, Mr. Brubaker notes that  
9     Empire faces daily decisions that can impact its fuel  
10    cost. Empire's management faces numerous short and  
11    long-term decisions that will affect its fuel and  
12    purchased power costs. Unless Empire's shareholders  
13    participate in the results of its selected management's  
14    decision-making, we have serious concerns about the  
15    inherent prudence of those management decisions.

16                  For this reason, Mr. Brubaker suggests that  
17    you implement a fuel adjustment clause that allows Empire  
18    shareholders to share in any increases and decreases in  
19    fuel cost. While he places a cap on the ultimate amount  
20    of increase or decrease that the shareholders can incur,  
21    he bases the amount of sharing on a grid that bounds the  
22    authorized return on equity.

23                  I ask you to consult Mr. Brubaker's rate  
24    design direct testimony for more details on this, and he  
25    will be here next Monday to answer any questions you may

1 have.

2                   In conclusion, I'd ask you to consider the  
3 mission of the Department of Economic Development, to  
4 promote the economy of the state and the economic  
5 development of the state. Now, as I said, you are a part  
6 of the Department of Economic Development. While no one  
7 wants to see a utility that is stripped of its ability to  
8 provide necessary services, anyone concerned with the  
9 economic development of the state should also not want to  
10 see a region of the state that has been saddled with rate  
11 increases approaching 50 percent in the last seven years.

12                  Similarly, anyone focused on the economic  
13 development of the state should not be influenced by a  
14 request for a return on -- to Empire's shareholders of  
15 11.6 percent.

16                  For these reasons, I ask you to carefully  
17 consider the positions of the industrial customers and  
18 stop the runaway train that has been Empire's recent rate  
19 increases. Thank you.

20                  CHAIRMAN DAVIS: Judge, I have a couple of  
21 questions. Mr. Woodsmall's what's Explorer Pipeline's  
22 return on equity?

23                  MR. WOODSMALL: I couldn't tell you, but I  
24 can tell you that Explorer Pipeline operates in a  
25 completely competitive industry with much more risk than a

1 utility company would have. Explorer Pipeline at any one  
2 time could make a profit, they could lose a profit. If  
3 they lose a profit, that comes completely out of the  
4 pockets of its shareholders.

5 CHAIRMAN DAVIS: Okay. So can you find out  
6 and ascertain what Explorer Pipeline's return on equity  
7 is?

8 MR. WOODSMALL: I don't know if Explorer  
9 Pipeline is publicly traded. I don't know if it's a  
10 subsidiary of a publicly traded company. I can indulge to  
11 find that information for you.

12 CHAIRMAN DAVIS: Okay. And can you also  
13 find out their rate information? For instance, is it --  
14 is it possible that Explorer Pipeline has raised their  
15 rates by approximately 60 percent in the last year or two?

16 MR. WOODSMALL: Anything is possible.  
17 Explorer Pipeline, as I said, operates within a  
18 competitive industry. To the extent they're able to raise  
19 rates or lower rates, it's all done within the confines  
20 and the pressures of a competitive industry. So at any  
21 one time --

22 CHAIRMAN DAVIS: They were FERC regulated,  
23 though, correct?

24 MR. WOODSMALL: I don't know. Explorer  
25 Pipeline is not a natural gas pipeline. It's a petroleum

1 pipeline. I don't know the extent, as a petroleum  
2 pipeline versus natural gas, the extent of their  
3 regulation, whether it's rate regulation, whether it's  
4 just tariff, informational, safety. I couldn't tell you.

5 CHAIRMAN DAVIS: Okay. Well, we could look  
6 at the FERC order out there on that if there is one,  
7 couldn't we?

8 MR. WOODSMALL: If they are regulated, I  
9 would think it would be a public document, yes.

10 CHAIRMAN DAVIS: Thank you, Mr. Woodsmall.

11 MR. WOODSMALL: Just so I'm clear of your  
12 request, you want information regarding Explorer  
13 Pipeline's profits and any rate increases in the last  
14 couple years?

15 CHAIRMAN DAVIS: ROE and rate increases in  
16 the last two years would suffice.

17 MR. WOODSMALL: I will endeavor to find  
18 that information for you. Thank you.

19 JUDGE VOSS: Department of Natural  
20 Resources?

21 MS. WOODS: Good morning. May it please  
22 the Commission?

23 The Department of Natural Resources is  
24 before you once again on the energy efficiency issues, and  
25 in this case the Department has offered some limited

1 testimony on the experimental low income or ELIP program  
2 as well. Because we are offering more detailed opening  
3 statements before the actual issue is brought before you,  
4 and I believe the energy efficiency and ELIP issues are  
5 scheduled for Wednesday, I'm going to be very brief.

6 Suffice it to say that this case has  
7 brought to the Department's attention the need for better  
8 and improved communication among the members of the  
9 Customer Program Collaborative -- I keep wanting to call  
10 it the Consumer Program Collaborative -- or CPC, that was  
11 approved by this Commission in a stipulation in a 2005  
12 Empire regulatory plan case.

13 And I think I will just let that be our  
14 opening statement, unless there are any questions from the  
15 Commissioners.

16 JUDGE VOSS: Thank you. Now I have a  
17 question. Since we're ready for our first issue, are you  
18 going to go through another round of opening statements  
19 right now on that issue? Is that the parties' intention?

20 MR. REED: You bet.

21 JUDGE VOSS: Before we begin the second  
22 round of opening statements, I did want to remind the  
23 attorneys to attempt to control your witnesses when we do  
24 call witnesses. Try to limit answers. Don't let them  
25 ramble on and then ask for testimony to be stricken as



1 nonresponsive.

2 MR. CONRAD: Judge, their witnesses are  
3 certainly difficult to control. Sometimes the lawyers are  
4 even more difficult to control.

5 Let me come back very briefly just to fill  
6 in on Chairman Davis' question. I think Explorer Pipeline  
7 is currently regulated by FERC. We'll verify that, Judge,  
8 but they are not regulated under the things that I think  
9 you're familiar with which would be Natural Gas Act and  
10 the Federal Power Act. So I think that the nature of that  
11 regulation is a little bit different, but we'll verify  
12 that and get that information for you.

13 JUDGE VOSS: Thank you. At this point  
14 round two of opening statements, beginning with Empire on  
15 the Asbury SCR issues.

16 MR. BOUDREAU: May it please the  
17 Commission? My name is Paul Boudreau. I'm here on behalf  
18 of the Empire District Electric Company and specifically  
19 on the issue this morning of the Asbury selective  
20 catalytic reduction project, which even though it is  
21 melodic and rolls off the tongue easily, I'm going to  
22 abbreviate to SCR for convenience.

23 I'll try to keep my comments relatively  
24 brief in light of the fact that my partner, Diana Carter,  
25 has already touched on this particular issue in her

1 opening statement, and hopefully you will grant me a  
2 little bit of leave here. I'll compensate for it because  
3 I don't think I have a whole lot of cross-examination for  
4 Staff's witness Mark Oligschlaeger. So in the end, I  
5 don't think a whole lot of time will be taken up.

6 I think that you will find, if you haven't  
7 already ascertained this on your own, is that the  
8 underlying facts concerning this particular issue are not  
9 really heavily in dispute. In fact, I think the  
10 underlying facts are more or less agreed to by all the  
11 parties, and I'll just touch on those.

12 In response to the EPA's Clean Air  
13 Interstate Rule in 2005 governing nitrous oxide and sulfur  
14 dioxide emissions from certain fossil fuel power plants,  
15 Empire acted quickly and began constructing the SCR at its  
16 Asbury power plant with the expectation that it would be  
17 in service in the fourth quarter of 2007.

18 The project was tied into a major outage at  
19 Asbury. This project had been anticipated and  
20 specifically addressed in the company's experimental  
21 regulatory plan that was approved by this Commission in  
22 Case No. EO-2005-0263, which contemplated the development  
23 of in-service criteria that must be met before those --  
24 before the cost for that equipment could be included in  
25 Empire's rate base. Those criteria were thereafter

1 established and are presented in Mr. Blake Mertens' direct  
2 testimony at pages 7 and 8.

3 Now, this case was commenced by the company  
4 in October of 2007. There was a subsequent agreement to a  
5 test year to be updated through December 31st of 2007.  
6 The SCR construction and tie in was completed in the  
7 November -- or excuse me -- in November of 2007 during  
8 Asbury's major outage.

9 And although Asbury's major outage was  
10 scheduled to be completed by November 18th of 2007, it was  
11 extended through February of 2008 to address an  
12 unanticipated rewinding of Asbury Unit 1 generator, an  
13 event that was entirely unrelated to the completion of the  
14 SCR project.

15 As a consequence, the performance testing  
16 of the SCR project, including a 120-hour continuous run,  
17 was not completed until February 29th of 2008. The  
18 parties agree or I think are in agreement that the Asbury  
19 SCR has met all in-service criteria as of that date.

20 Now, Staff has recommended that the cost of  
21 this project not be included in this case because the SCR  
22 was not in service as of December 31st of 2007. Empire is  
23 requesting that the Commission include in rate base the  
24 Asbury SCR equipment plant addition and also the  
25 associated expenses in cost of service.

1                   This is a significant issue to the company  
2     because if the Commission adopts the Staff's  
3     recommendation, Empire will not have an opportunity to  
4     earn a return on its investment in a timely manner. It  
5     will also not be able to recover expenses associated with  
6     operating the SCR.

7                   Now, there are a number of reasons why I  
8     would suggest to the Commission that it look upon the  
9     company's request favorably. First, unlike many rate  
10    cases, this issue isn't occurring in a complete vacuum.  
11    The Commission should take into account that the Asbury  
12    SCR equipment has met the experimental regulatory plan  
13    requirement that it meet the in-service criteria before  
14    costs for equipment be included in Empire's rate case --  
15    or rate base. Excuse me. Now, this is an independent  
16    basis that I think the Commission should take into  
17    account.

18                   Secondly, construction of the Asbury SCR  
19    was complete and the equipment was useful by December 31st  
20    of 2007. Only unrelated issues delayed testing beyond  
21    that date. Also, Empire's proposal is consistent with the  
22    test year update period in that it's only requesting  
23    construction costs incurred as of December 31st, 2007.

24                   Also, the Commission should take into  
25    account that Empire's decision to install the Asbury SCR

1 before the construction boom in the utility industry  
2 actually lowered its capital costs associated with this  
3 project and will save the customers money.

4                   Also, if this is not included in rate base,  
5 the bottom line is it results in an unfair outcome. In  
6 addition to what I previously mentioned about the company  
7 not being able to timely earn a return on its investment,  
8 you should take into account that Staff is recommending  
9 that the revenues from the sale of emissions allowances be  
10 flowed through the fuel adjustment clause in this case.

11                   Now, Empire agrees that this is the proper  
12 manner to handle this item, but it is the addition of the  
13 Asbury SCR that directly affects the amount of nitrous  
14 oxide allowances that would be bought or sold to meet  
15 Empire's allowance requirements in the future.

16                   And finally I would note that the company's  
17 request does not offend the regulatory policy behind the  
18 use of a historical test year. Because the purpose of a  
19 test year is to create a reasonably expected level of  
20 earnings, expenses and investment for the period of time  
21 during which the rates will be in effect, and this plant  
22 addition unquestionably is in service prior to the  
23 establishment of the rates that will be established in  
24 this case.

25                   Also, as a practical matter, I would note

1     that the environmental compliance work that the SCR  
2     project represents is not a revenue producing item in the  
3     sense that it doesn't generate additional power for Empire  
4     to sell to its customers.

5                     Now, in the end this is a policy question,  
6     I think, for the Commission to decide. Staff witness Mark  
7     Oligschlaeger states in his rebuttal testimony that what  
8     the Commission -- or what the company rather is requesting  
9     is not consistent with the policy of early resolution of  
10    test year and true-up determinations in rate proceedings.

11                    I urge you to keep in mind the purpose of a  
12    historical test year and keep in mind -- keep in mind what  
13    you consider the importance of a test year is in a rate  
14    case or the purpose of it. The test year is  
15    unquestionably an important tool in the ratemaking  
16    process, but it should not be the tail that wags the dog.  
17    What the company is requesting in this case is fully  
18    consistent with test year principles and more important is  
19    the right, reasonable and just outcome of the  
20    circumstances.

21                    Now, the company's witness on this issue  
22    today is Blake Mertens, and I would encourage you to  
23    inquire of Mr. Mertens about the project or any other  
24    aspects of the Asbury SCR that may be of interest to you.  
25    With that, I'll conclude my comments with respect to this

1 issue.

2 COMMISSIONER CLAYTON: Mr. Boudreau, I just  
3 have a couple of questions. Associated with the Asbury  
4 SCR issue, we've got the inclusion in rate base issue. We  
5 have a depreciation allowance.

6 MR. BOUDREAU: Yes.

7 COMMISSIONER CLAYTON: We have operation  
8 and maintenance expense associated with Asbury. We have  
9 the property tax issue.

10 MR. BOUDREAU: Yes.

11 COMMISSIONER CLAYTON: And then there's, I  
12 think, a tax impact associated with depreciation. Is that  
13 associated with Asbury? Is that a different issue?

14 MR. BOUDREAU: I don't believe that the tax  
15 issue is associated with Asbury.

16 COMMISSIONER CLAYTON: So there are no  
17 tax --

18 MR. BOUDREAU: You are correct about the O  
19 and M.

20 COMMISSIONER CLAYTON: Line 16 on the Staff  
21 reconciliation, that's not an Asbury issue, is it?

22 MR. REED: The property tax issue is --

23 COMMISSIONER CLAYTON: Line 16, not  
24 property tax. Line 16, depreciation issue, tax impact

25 130 -- I think it's public.

1                   MR. REED: I don't think so.

2                   COMMISSIONER CLAYTON: There's no income  
3 tax issue associated with this additional depreciation?

4                   MR. BOUDREAU: The only tax issue that I'm  
5 aware of is the property tax issue.

6                   COMMISSIONER CLAYTON: Well, I'll get Staff  
7 to clarify that. So I wanted to ask, from the company's  
8 perspective, when the Commission decides the Asbury SCR  
9 issue, all of these issues will go in one direction one  
10 way or the other. I mean, it's not like we can pick and  
11 choose among the issues. As one goes, through all five  
12 issues or four issues will go?

13                  MR. BOUDREAU: I think you're correct,  
14 because the testimony of Mr. Mertens is that one of the  
15 complications of the Commission's decision in this case is  
16 the inability to collect O and M expense and so forth. So  
17 I think your assessment is correct.

18                  COMMISSIONER CLAYTON: Okay. And I wanted  
19 to ask, Empire's objection to Staff's recommendation in  
20 light of its position on Asbury SCR issue, including I  
21 think there are SO2 allowances as part of the fuel  
22 adjustment mechanism, you find that inconsistent, I think.  
23 Is that what you said?

24                  MR. BOUDREAU: Oh, I see. I think that the  
25 point is that in viewing whether or not -- I think, yes,



1 fundamentally the company's saying this is something of an  
2 inconsistency, that you should take into account the  
3 staff's recommending that this be flowed -- these nitrous  
4 oxide emissions puts and takes ought to be flowed through  
5 the fuel adjustment clause, and that, of course, is  
6 impacted directly by the SCR, the fact that the SCR  
7 project is in place and in service.

8 COMMISSIONER CLAYTON: Just in light of  
9 that, the question that comes to mind is, I mean, I'm  
10 assuming fuel for Asbury would be included in any fuel  
11 adjustment mechanism that is set up. Is that true, or is  
12 Staff recommending that that fuel not be included in a  
13 fuel adjustment mechanism?

14 MR. BOUDREAU: I think that the fuel is --  
15 I mean, the fuel costs of the company are -- I mean, there  
16 will be a base fuel cost and then a fuel adjustment clause  
17 beyond that. I would think that the fuel associated with  
18 the fueling of Asbury would also be an item.

19 COMMISSIONER CLAYTON: Last question  
20 associated with Asbury and its in-service date.

21 MR. BOUDREAU: Yes.

22 COMMISSIONER CLAYTON: Somewhere in the  
23 testimony there's discussion about modification perhaps of  
24 the true-up period. Does Empire support or oppose  
25 changing the true-up period to include this date?

1                   MR. BOUDREAU: I don't think the company  
2 has a problem with the Staff's proposal as an alternative,  
3 but I think it's in Mr. Oligschlaeger's testimony that if  
4 the Commission takes Asbury into account, that there be a  
5 true-up, I don't think that the company would oppose that.

6                   COMMISSIONER CLAYTON: So there's no  
7 opposition to changing the true-up date. And this is the  
8 last question, I promise. In a literal reading of the  
9 agreement on this issue that Empire had with Staff on when  
10 this issue would be taken up, when the asset would be  
11 placed in rate base, a strict reading of the agreement  
12 that Empire had with Staff could lead one to conclude that  
13 Asbury did not fall into that category being included in  
14 this rate case. Do you agree with that?

15                  MR. BOUDREAU: Well, let me -- just a  
16 clarity on the agreement. Are you talking about the  
17 experimental regulatory plan or the agreement as to the  
18 updated test year?

19                  COMMISSIONER CLAYTON: I think I'm talking  
20 about the former.

21                  MR. BOUDREAU: The former, the experimental  
22 regulatory plan?

23                  COMMISSIONER CLAYTON: Right.

24                  MR. BOUDREAU: Well, the experimental  
25 regulatory plan just indicated that the plant should meet

1 the in-service criteria before it's included in rates, and  
2 the company's position on that is that it does meet the  
3 in-service criteria and is something that should be  
4 considered by the Commission in terms of whether or not  
5 the Asbury plant should be included in rates.

6 COMMISSIONER CLAYTON: You're saying --  
7 Empire's saying that it did meet those -- the in-service  
8 criteria as of the conclusion of the true-up period, and  
9 Staff's saying that it did not?

10 MR. BOUDREAU: Well, no, I'm not sure. In  
11 terms -- it did not meet the in-service criteria by  
12 December 31st of 2007. It was end of -- I think it was  
13 February 29 of 2008. And I don't think there's -- I don't  
14 think there's a disagreement as between Staff and the  
15 company as to when that date was.

16 So if you're asking whether it strictly met  
17 the updated test year of the cutoff of December 31st,  
18 2007, the answer is no, I mean, and I've explained why,  
19 you know, that there's some considerations that ought to  
20 be taken into account.

21 COMMISSIONER CLAYTON: But, I mean, a  
22 strict reading, a strict reading it did not meet the  
23 criteria as of December 31st?

24 MR. BOUDREAU: I agree with that.

25 COMMISSIONER CLAYTON: That's all I have.

1 Thank you.

2 MR. BOUDREAU: Thank you.

3 JUDGE VOSS: Staff?

4 MR. REED: Thank you and good morning.

5 Steve Reed for the Staff. I think the facts are  
6 essentially as Mr. Boudreau outlines them for us.  
7 However, with regard to Commissioner Clayton's inquiry  
8 about these four issues associated with Asbury, I think  
9 one issue, that regarding the property tax issue will go  
10 its own way whether the Asbury SCR is included in rate  
11 base or not.

12 And that's because as you can -- you can  
13 ask Mr. Oligschlaeger and Paula Mapeka about this morning,  
14 because the -- Empire's investment in the Asbury SCR was  
15 included in the CWIP account, construction work in  
16 progress, as of January 1st, 2008, the property tax for  
17 2008 would be capitalized by Empire and added to -- added  
18 to the Asbury SCR plant account as I understand it.

19 In other words, whether Asbury SCR, whether  
20 you include that in rate base somehow through some true-up  
21 in this case or not, the property tax is not an expense  
22 that should be allowed in this particular rate case.

23 Now, by agreement with all the parties in  
24 this case, including Empire, the test year and the update  
25 period took us through December 31st, 2007, and so only

1 plant that is fully operational and used for service as of  
2 December 31st, 2007 can be included in Empire's rate base.

3 Empire filed this case on October 1st,  
4 2007, fully aware what the in-service criteria were for  
5 the SCR, fully aware of Section 393.135 which requires  
6 that you can't include plant in rate base unless it is  
7 fully operational and used for service.

8 So Empire filed the case. It undertook the  
9 risk, and it has to live with the consequences of its  
10 decision, because the in-service criteria that the parties  
11 agreed to that had to be met before the SCR goes into rate  
12 base included performance objectives. So not only did the  
13 SCR have to get built by December 31st, 2007, but it had  
14 to be tested as well to meet those in-service criteria  
15 which all the parties had agreed to, criteria which were  
16 clear and objective.

17 So Empire assumed the risk, and now it  
18 should live with the consequences of that decision. It  
19 could have filed this rate case December 1st, 2007,  
20 March 2008. Didn't have to do it October 1st, 2007.  
21 So Empire needs to live with the consequences of its  
22 decision in this particular case.

23 Thank you, Commissioners.

24 JUDGE VOSS: Commissioner Clayton?

25 COMMISSIONER CLAYTON: Mr. Reed, I want to

1 follow up on the questions just to give you a chance. So  
2 on line 16 of the Staff reconciliation, that depreciation  
3 issue tax impact is unrelated to Asbury?

4 MR. REED: I believe so, Commissioner.  
5 Correct.

6 COMMISSIONER CLAYTON: You believe that it  
7 is unrelated or you believe --

8 MR. REED: That it is unrelated, but I'll  
9 have to ask Mr. Oligschlaeger about that when he's on the  
10 stand.

11 COMMISSIONER CLAYTON: And you believe the  
12 property tax issue could potentially go a separate way  
13 than the other three Asbury issues?

14 MR. REED: I believe it should, yes.

15 COMMISSIONER CLAYTON: But the other three  
16 would probably go the same way, one way or the other?

17 MR. REED: That's correct.

18 COMMISSIONER CLAYTON: On this  
19 reconciliation, would Staff's recommended revenue  
20 requirement increase be greater in terms of regulatory  
21 amortizations if we were to deny inclusion of Asbury SCR  
22 in rate base?

23 MR. REED: That's my understanding, yes.

24 COMMISSIONER CLAYTON: So on the  
25 reconciliation, it has Staff's position, and this may

1 not -- may have changed, this is dated May 2nd, it's got  
2 about 19.686 million. What would be the addition in terms  
3 of regulatory amortizations so that the company meets its  
4 criteria under the credit metrics if Asbury's not  
5 included? Do you know that dollar amount?

6 MR. REED: I don't know that dollar amount,  
7 but I bet Mr. Oligschlaeger has an idea of what that would  
8 be.

9 COMMISSIONER CLAYTON: I'm sure that he  
10 would. Okay. I don't think I have anything else. Thank  
11 you.

12 JUDGE VOSS: Chairman?

13 CHAIRMAN DAVIS: All right. Mr. Reed,  
14 you -- I believe that Staff indicated in testimony or in  
15 Briefs that you would be okay with a truing everything up  
16 to February 29th; is that correct?

17 MR. REED: If the Commission wants to  
18 include this plant in rate base, then that would be the  
19 alternative that Staff recommends, yes, true-up.

20 CHAIRMAN DAVIS: And is that a fairly  
21 simple undertaking?

22 MR. REED: I don't think so. I don't think  
23 so. What we want to do, as opposed to -- the other  
24 alternative is just an adjustment of some kind. What we  
25 want to do is, if we do a true-up, we bring everything,

1 all the costs, all the expenses, everything,  
2 depreciation, up to and including that date that we choose  
3 for the true-up. There's quite a bit of work involved,  
4 but Staff if ordered will get it done.

5 CHAIRMAN DAVIS: And if the Commission is  
6 going to go that route, do you have a preference as to  
7 when that issue should be decided? Earlier?

8 MR. REED: Soon, yes. As soon as -- yes,  
9 as soon as we can.

10 CHAIRMAN DAVIS: Okay. Thank you,  
11 Mr. Reed.

12 JUDGE VOSS: Thank you. Office of the  
13 Public Counsel?

14 MR. MILLS: Judge, I don't have any  
15 additional opening statement to make on this issue  
16 specifically. Thank you.

17 JUDGE VOSS: Industrials?

18 MR. WOODSMALL: Nothing, your Honor. Thank  
19 you.

20 JUDGE VOSS: Department of Natural  
21 Resources?

22 MS. WOODS: Nothing, your Honor. Thank  
23 you.

24 JUDGE VOSS: In that case, Empire, call  
25 your first witness.



1                   COMMISSIONER CLAYTON: Can I ask a  
2 question, Judge? I'm sorry to interrupt you. I wanted to  
3 ask Mr. Mills, Public Counsel doesn't have any position on  
4 this issue?

5                   MR. MILLS: No. We haven't been able to  
6 evaluate the engineering criteria and the in-service  
7 criteria. I understand that Staff has, and I believe it's  
8 their testimony that they think that it met the in-service  
9 criteria at a later date rather than the true-up date. We  
10 haven't been able to --

11                  COMMISSIONER CLAYTON: Well, it's a six and  
12 a half million dollar issue and Public Counsel doesn't  
13 have a position on it?

14                  MR. MILLS: No.

15                  COMMISSIONER CLAYTON: You don't even  
16 endorse the position of Staff?

17                  MR. MILLS: No. We haven't been able to  
18 verify independently whether or not the Asbury SCR has  
19 actually met the in-service criteria. We just don't have  
20 the people to do it.

21                  COMMISSIONER CLAYTON: I understand. Thank  
22 you.

23                  MR. BOUDREAU: Call my first witness,  
24 Mr. Mertens, to the stand, please.

25                  JUDGE VOSS: Will you please state your

1 name for the record.

2 THE WITNESS: Blake Mertens.

3 (Witness sworn.)

4 JUDGE VOSS: Your witness.

5 MR. BOUDREAU: Thank you.

6 BLAKE MERTENS testified as follows:

7 DIRECT EXAMINATION BY MR. BOUDREAU:

8 Q. At the risk of being redundant, would you  
9 state your name, please.

10 A. Blake Mertens.

11 Q. By whom are you employed and in what  
12 capacity?

13 A. Empire District Electric as Manager of  
14 Strategic Projects.

15 Q. Are you the same Blake Mertens that has  
16 caused to be filed with the Commission both public and  
17 highly confidential versions of direct testimony and also  
18 rebuttal and surrebuttal testimony marked as Exhibits 5,  
19 5HC, 6 and 7?

20 A. Yes.

21 Q. Was that testimony prepared by you or under  
22 your direct supervision?

23 A. Yes, it was.

24 Q. Do you have any corrections that you need  
25 to make to any of those items of testimony at this time?

1           A.       No. I believe it's correct as stated.

2           Q.       If I would ask you the same questions as  
3 are contained in those documents, would your answers as  
4 contained therein be substantially the same today?

5           A.       Yes.

6           Q.       Are they correct and true to the best of  
7 your information, knowledge and belief?

8           A.       Yes.

9                   MR. BOUDREAU: With that, I would offer  
10 Exhibits 5HC, 5NP, 6 and 7 and tender the witness for  
11 cross-examination.

12                  JUDGE VOSS: Are there any objections to  
13 the admission of any of those exhibits?

14                  MR. WOODSMALL: Not an objection that I  
15 know of yet. Just a statement that I believe it's  
16 premature to offer this in that he has testimony on fuel  
17 adjustment clause and other project costs for which he's  
18 going to be taking the stand next week. So I just ask  
19 that we wait until that time to offer his testimony.

20                  MR. BOUDREAU: I don't think I have any  
21 problem with that.

22                  JUDGE VOSS: Fine. We'll take that back  
23 up, and I'll mark it as not admitted so we'll know to  
24 offer it again.

25                  MR. BOUDREAU: Very good.

1 JUDGE VOSS: I had one question. Since  
2 there were three orders of cross, I just want to confirm,  
3 this is under the general order of cross-examination  
4 version 1; is that correct?

5 MR. WOODSMALL: If it helps, your Honor, we  
6 don't have any questions on this issue.

7 JUDGE VOSS: During the course of the  
8 hearing, if I'm on the wrong cross-examination order list,  
9 let me know. I believe, then, that we begin with  
10 Department of Natural Resources.

11 MS. WOODS: I have no questions of this  
12 witness. Thank you.

13 JUDGE VOSS: The Commission Staff?

14 MR. REED: Thank you.

15 CROSS-EXAMINATION BY MR. REED:

16 Q. Mr. Mertens, I just have a few questions.  
17 You're the Manager of Strategic Projects, is that your  
18 title?

19 A. That's correct.

20 Q. What does the Manager of Strategic Projects  
21 do? What are you responsible for?

22 A. I help in the oversight of capital projects  
23 on the energy supply side of Empire District Electric.

24 Q. Capital projects like the Asbury SCR?

25 A. The Asbury SCR, Riverton Unit 12.

1           Q.     All right. So as the Manager of Strategic  
2 Projects, it's your job to make sure that the Asbury SCR  
3 gets into rate base, isn't it?

4           A.     It's my job to help assure that, yes.

5           Q.     Is the filing of a rate case a strategic  
6 project that you're responsible for?

7           A.     No.

8           Q.     Are you -- you're involved in the timing of  
9 filing of rate cases?

10          A.     No. That's not part of my decision.

11          Q.     So you have no responsibility with regard  
12 to when the case is filed?

13          A.     I have no direct responsibility.

14          Q.     Are you consulted?

15          A.     We have conversations about different  
16 projects that are going on, yes, and the timing of those  
17 as they affect the rate case.

18          Q.     Empire chose to file this rate case  
19 October 1st, 2007. You're aware of that date?

20          A.     Yes.

21          Q.     And at that time the Asbury SCR was not  
22 completed?

23          A.     No, it was not.

24          Q.     And you were aware, though, as the Manager  
25 of Strategic Projects that there were in-service criteria

1 that had to be met, correct?

2 A. Yes.

3 Q. And you were aware of that on October 1st,  
4 2007?

5 A. Yes.

6 Q. You're aware that the test year update  
7 period chosen for this case extended through  
8 December 31st, 2007?

9 A. Yes.

10 Q. So at some point during this case you  
11 became aware that the Asbury SCR not only had to be  
12 completed, it had to be tested and it had to perform  
13 adequately, correct?

14 A. That's correct.

15 Q. You were also aware of that, that there  
16 would -- when this case was filed, you were aware that  
17 there would become a date quickly when the Asbury SCR had  
18 to perform according to the in-service criteria, correct?

19 A. Yes.

20 Q. Was there some discussion about delaying  
21 the filing of the rate case?

22 A. Not to my knowledge.

23 Q. Are you familiar with the investment in the  
24 Asbury SCR made by Empire as of January 1st, 2008, in what  
25 account was that investment?

1           A.       To my understanding, it was still in  
2 construction work in progress.

3           Q.       Are you familiar with how the taxing  
4 authority would treat that account on January 1st, 2008?

5           A.       I am not an accountant, so no, I wouldn't  
6 understand.

7           Q.       Are you familiar with how -- are you  
8 familiar with how property -- with how property taxes for  
9 2008 would be handled since Empire's investment wasn't  
10 equipped on January 1st, 2008?

11          A.       Yes. Those were -- those would be  
12 capitalized as part of the project.

13          Q.       And how would -- how would those costs be  
14 recovered?

15          A.       Through our return on our investment.

16          Q.       So would you agree with me, Mr. Mertens,  
17 that with regard to the property tax issue in this case,  
18 whether the SCR is in rate base or not, the property taxes  
19 should not be included as an expense?

20          A.       As far as the property taxes for 2008, yes,  
21 I believe they're within the project.

22          Q.       All right. For 2008?

23          A.       Yes.

24          Q.       All right. Empire needs this Commission's  
25 authority before it can sell NOX allowances; isn't that

1 right?

2 A. To my knowledge, I'm not aware of a  
3 requirement for us to sell -- for a requirement to have  
4 permission from the Commission to sell NOX allowances, to  
5 my knowledge.

6 Q. Is the sale of these NOX allowances part of  
7 your responsibility as Manager of Strategic Projects?

8 A. No.

9 Q. Who would be in charge of that issue?

10 A. Would probably be our wholesale energy  
11 group.

12 Q. Do you have any projections for the amount  
13 of revenue that Empire would receive from the sale of NOX  
14 emission allowances in 2008?

15 A. I don't have any projections. At this time  
16 we do not plan to sell any in 2008.

17 MR. REED: That's all. Thank you.

18 JUDGE VOSS: Public Counsel?

19 MR. MILLS: No questions.

20 JUDGE VOSS: Industrials?

21 MR. WOODSMALL: Nothing, your Honor.

22 JUDGE VOSS: Questions from the Bench.

23 Commissioner Murray?

24 COMMISSIONER MURRAY: Thank you.

25 QUESTIONS BY COMMISSIONER MURRAY:



1 Q. Good morning.

2 A. Good morning.

3 Q. Can you tell me about the generator for  
4 Asbury Unit 1 that had to be rewound during the outage,  
5 was it possible to delay that rewinding until a later  
6 outage?

7 A. As part of the outage, we went through and  
8 inspected the generator, and when we inspected the  
9 generator we found some insulation that was suspect and  
10 worn. It was the same insulation, same generator that had  
11 been in service for 30 years or over 30 years, since 1970,  
12 and we found some worn insulation and felt that it was the  
13 prudent decision to move forward with that rewinding from  
14 both a safety and reliability perspective.

15 Q. And that delayed the completion of the  
16 outage to the point that the in-service criteria could not  
17 be met by December 31st; is that correct?

18 A. That's correct.

19 Q. And what were the other possible choices  
20 for Empire at the time? I mean, I assume you could have  
21 made a choice to delay the rewinding of that generator,  
22 but then would that have potentially created another  
23 unscheduled outage?

24 A. It would have created another unscheduled  
25 outage, along with the safety and reliability risk

1 associated with putting it back into service in its  
2 current condition.

3 Q. Do you know approximately, can you estimate  
4 at all what the potential costs would have been of  
5 delaying that generator rewinding?

6 A. Are you talking the cost of the rewinding  
7 itself or fuel and purchased power costs or --

8 Q. Well, I'm just talking about overall cost  
9 from the delay and creating another unscheduled outage.  
10 Is it even possible to estimate?

11 A. I probably couldn't estimate that here now.  
12 I mean, I could go back and figure something out.

13 Q. Unscheduled outages are pretty significant,  
14 aren't they?

15 A. Yes.

16 Q. Both in terms of cost and also reliability,  
17 I assume?

18 A. Yes. Reliability, construction cost, O&M  
19 costs, and also fuel and purchased power costs, all those  
20 would be considerable during -- to have an unscheduled  
21 outage.

22 Q. And when you determine the estimated time  
23 of an outage, are you making calculations about all of the  
24 equipment that is involved and the age of the equipment  
25 and the likelihood of finding things during the outage

1     that need to be repaired? Is that a pretty in-depth  
2     process to determine how long an outage will be?

3             A.       It's a pretty in-depth process. Along with  
4     that, we have to consider outages from our other units and  
5     coordinate those with the outage of any of our units. If  
6     we would have delayed this outage, it would have affected  
7     the outages for our other units as well, the timing of  
8     other outages for other units.

9             Q.       If you had delayed this outage, you mean --

10            A.       Delayed the generator rewind to a future  
11     date.

12            Q.       And in terms of having the outage prior to  
13     testing for the in-service criteria, would that have been  
14     a possibility that you could have waited until after the  
15     first of the year to schedule that outage?

16            A.       It would have been a possibility, but  
17     again, the safety and reliability risk would have been --  
18     have to be considered.

19            Q.       Okay. And tell me a little bit about what  
20     kind of safety risks you're talking about.

21            A.       Well, basically, the insulation that we  
22     found worn and damaged was in the generator, you know,  
23     could basically have caused a short within the generator,  
24     similar to an electrical cord or something that has some  
25     rubbing. Obviously if you touch the electrical cord where

1 wires are showing you get a shock, and we're talking a  
2 much greater magnitude here, obviously, with the Asbury  
3 generator from a safety perspective.

4 And if it would have failed, you know, from  
5 a reliability perspective we would have been without the  
6 generator for at least the same amount of time, 45 to 60  
7 days, and that is assuming that we could have got the  
8 personnel onsite right away to perform the generator  
9 rewind.

10 Q. So at the time the need for rewinding that  
11 generator was discovered during the outage, I guess Empire  
12 had to make the decision to either focus on safety and  
13 reliability or focus on the importance of meeting the  
14 in-service criteria for this rate case?

15 A. That's correct. From our perspective, the  
16 safety and reliability risk was of utmost concern versus  
17 the in-service criteria.

18 COMMISSIONER MURRAY: Thank you. I think  
19 that's all I have.

20 JUDGE VOSS: Commissioner Clayton?

21 COMMISSIONER CLAYTON: Yeah. I want to ask  
22 just a few general questions.

23 QUESTIONS BY COMMISSIONER CLAYTON:

24 Q. Mr. Mertens, you're Manager of Strategic  
25 Projects?

1           A.       Correct.

2           Q.       Is that the correct title?  And does that  
3   put you over all -- all upgrades to generation facilities  
4   or just certain projects?

5           A.       Just certain projects.

6           Q.       Okay.  Who is your -- in terms of chain of  
7   command, who is your -- I guess who do you report to?

8           A.       The vice president of energy supply, Harold  
9   Colgin.

10          Q.       All right.  I want to get some dates.  What  
11   was the original scheduled date for Asbury to be up and  
12   running had not the delay occurred?

13          A.       The outage was originally scheduled from  
14   September 22nd and to be completed as of November 18,  
15   2007.

16          Q.       So it was scheduled to be up and running on  
17   November 18, 2007?

18          A.       That was the original schedule, yes, sir.

19          Q.       And when were those dates set, the  
20   scheduling dates?

21          A.       They would have been set probably the --  
22   I'm trying to think here -- would have been the fall of  
23   2006 during our O&M schedule, scheduling cycle.

24          Q.       Okay.  So is it basically a two-month  
25   project; is that fair to say?  I mean, September to

1 November, it was a two-month project?

2 A. Roughly, yes.

3 Q. And then explain to me again what occurred  
4 that caused this delay in service, of completion.

5 A. As part of the major outage, unrelated to  
6 the SCR, as part of the major outage we went in and did an  
7 inspection of the generator. That's part of our regular  
8 maintenance when we have one of these outages. And in  
9 early October during that inspection we found this damaged  
10 insulation, as I've referred to previously.

11 And then in mid October, I don't know the  
12 exact dates off the top of my head, but in mid October we  
13 decided to move forward with the generator rewind. And at  
14 that time we knew that the outage was going to be extended  
15 at least two weeks, but due to circumstances it had to be  
16 extended even farther than that.

17 Q. Okay. The major outage, what were the  
18 dates of that? How quickly I forget. What were the dates  
19 of the outage?

20 A. September 22nd through November 18th was  
21 the original schedule. It ended up going all the way  
22 through February 10.

23 Q. So when this finding was made, this damaged  
24 insulation, did Empire or did you or your staff notify  
25 Staff, our Staff?

1           A.       Yes. I believe we -- we had several  
2       conversations with them, but yes, they were aware that we  
3       were going to move forward with the generator rewind.

4           Q.       And was Staff invited down to view the  
5       infrastructure or the equipment, or basically was that all  
6       verbal over the phone?

7           A.       It was verbal, but yes, we did invite them  
8       to site.

9           Q.       You did invite them down?

10          A.       Yes.

11          Q.       But no meeting ever occurred?

12          A.       Not to my recollection. I do not believe  
13       they came to site during the outage itself.

14          Q.       When that contact was made, did you give  
15       them a new date, a revised date of when you thought the  
16       facility would be up and running?

17          A.       As I alluded to earlier, we thought it was  
18       going to be back the first week of December, but the  
19       generator rewind, we encountered some issues with the  
20       rewind, had to reperform it, which basically pushed it out  
21       to February 10th.

22          Q.       I understand. Did you tell them that --

23          A.       Yes, we did.

24          Q.       -- when you had that conversation?

25          A.       Yes. We had several conversations with

1     them, updating them of the schedule the entire time the  
2     outage was going on.

3                   COMMISSIONER CLAYTON:  I don't think I have  
4     any other questions.

5                   JUDGE VOSS:  Commissioner Jarrett?

6                   COMMISSIONER JARRETT:  No questions.

7                   JUDGE VOSS:  Commissioner Gunn?

8                   COMMISSIONER GUNN:  No questions.

9                   JUDGE VOSS:  Chairman Davis?

10                  CHAIRMAN DAVIS:  Huh-uh.

11                  JUDGE VOSS:  Is there any recross based on  
12     questions from the Bench, Department of Natural Resources?

13                  MS. WOODS:  Nothing.

14                  JUDGE VOSS:  Staff?

15                  MR. REED:  No.

16                  JUDGE VOSS:  Public Counsel?

17                  MR. MILLS:  Just a few.  Thank you.

18     RE CROSS-EXAMINATION BY MR. MILLS:

19                  Q.     Mr. Mertens, has the Asbury unit ever been  
20     rewound since it was placed in service in the 1970s?

21                  A.     Not to my knowledge.

22                  Q.     So it's been running 30-plus years without  
23     a rewinding?

24                  A.     That's correct.

25                  Q.     And prior to this last outage that you were



1 just talking to Commissioner Clayton about, when was the  
2 last Asbury major outage?

3 A. Would have been roughly five years  
4 previous.

5 Q. Were the windings inspected then?

6 A. Yes.

7 Q. What was the result of that inspection?

8 A. No significant findings were found at that  
9 time.

10 Q. So for the -- since the 1970s, up until the  
11 last but one inspection, there was no deterioration of the  
12 windings?

13 A. In the late '90s there was an inspection  
14 occurred that we found that -- and I wasn't at Empire at  
15 the time, but there were some issues found in the late  
16 '90s during one of the major outages, but repairs were  
17 made in place. It didn't require a full rewind at the  
18 time. Repairs were made and put back into service.

19 Q. Now, I believe in response to a question  
20 from Commissioner Murray you said that if the plant had  
21 been placed back in service without doing the rewind, it  
22 would have created an unscheduled rewind. Was that your  
23 testimony?

24 A. Yes. It depends on if you would have  
25 called it an unscheduled or a rescheduled scheduled

1     outage. I mean, terminology there. But yes, it would  
2     have required another outage.

3             Q.       Why don't you clarify for me the  
4     terminology you were using when you said unscheduled  
5     outage?

6             A.       I probably should have corrected it at that  
7     time and said it would have been a new scheduled outage.

8             Q.       You don't know that the unit might have  
9     gone out as an unscheduled outage if you placed it back in  
10    service without rewinding?

11            A.       No, not with any certainty. I mean, I  
12    can't say one way or the other.

13            Q.       Now, I believe in response to a question  
14    from Commissioner Clayton you said that the outage -- this  
15    most recent outage began September 22nd, 2007?

16            A.       That's correct.

17            Q.       And when did you discover that there was a  
18    need to or there was potentially a need to address the  
19    windings?

20            A.       Again, I don't know the exact date, but  
21    early October.

22            Q.       And when was this case filed?

23            A.       October 1st, I believe we stated earlier.

24            Q.       So shortly after the case was filed, you  
25    recognized that the Asbury outage was going to be

1 extended; is that correct?

2 A. That's correct.

3 MR. MILLS: Those are all the questions I  
4 have. Thank you.

5 JUDGE VOSS: Industrials?

6 MR. WOODSMALL: Nothing, your Honor. Thank  
7 you.

8 JUDGE VOSS: Redirect?

9 MR. BOUDREAU: Yes, please.

10 REDIRECT EXAMINATION BY MR. BOUDREAU:

11 Q. Mr. Mertens, I believe counsel for Staff  
12 asked you whether it was your understanding based on the  
13 updated test year concept that the Asbury SCR needed to be  
14 completed and tested by December 31st, 2007. Do you  
15 recall that?

16 A. I didn't think he said tested, but I do  
17 remember that question.

18 Q. Well, what do you recall that you were  
19 asked?

20 A. I thought he said quickly. I didn't -- I  
21 don't think he said December 31st, 2007. Maybe I misheard  
22 him.

23 Q. Let me circle back around, then. All other  
24 things being -- taking aside any of the unanticipated  
25 issues that came up in the major outage, what was your

1 understanding about what would need to be accomplished by  
2 the updated test year of December 31st, 2007?

3 A. Can you restate that?

4 Q. Well, let me ask you this: Was it your  
5 understanding or -- that the December 31st, 2007 date  
6 anticipated that the work on the Asbury SCR would be  
7 completed?

8 A. Yes, the work would be completed.

9 Q. And tested?

10 A. Tested I'm not sure of, no.

11 Q. Let me ask you this: Was the work on the  
12 Asbury SCR completed by December 31st of 2007?

13 A. Yes.

14 Q. I believe in response to a question you  
15 received from Commissioner Murray you indicated that the  
16 necessity of doing the generator rewind on Asbury delayed  
17 the in-service testing?

18 A. That's correct.

19 Q. Did you believe -- or do you believe that  
20 the Asbury SCR which was completed prior to the end of the  
21 year 2007 would have met those testing requirements had  
22 the testing taken place?

23 A. Yes.

24 MR. REED: I object. It calls for  
25 speculation.

1 JUDGE VOSS: Could you repeat the question?

2 MR. BOUDREAU: My question to him is, does  
3 he believe that had the testing taken place before the end  
4 of the year, that the Asbury SCR would have met the  
5 in-service criteria.

6 JUDGE VOSS: Is that covered in his  
7 prefiled testimony? I recall that it is.

8 MR. BOUDREAU: I don't know. I'm trying to  
9 think if he expressly stated that. I think he said that  
10 the work was completed and that it was useful. My  
11 question to him is that, inasmuch as the testing wasn't  
12 able to be completed until after the first of the year,  
13 whether based on his familiarity with the project and the  
14 work that was done, whether he thought it would have met  
15 the testing criteria had it taken place at that time.

16 JUDGE VOSS: I'm going to allow the  
17 question.

18 MR. WOODSMALL: I would insert an objection  
19 here in addition to Mr. Reed's objection that it's  
20 speculative. I also believe that a foundation hasn't been  
21 laid for this witness to render an opinion as to whether  
22 it would have met such testing.

23 JUDGE VOSS: Would you like to speak to the  
24 foundation?

25 MR. BOUDREAU: I can.

1 BY MR. BOUDREAU:

2 Q. Mr. Mertens, can you tell me what the  
3 nature of your responsibilities were with respect to the  
4 Asbury SCR project -- well, let me leave it at that --  
5 with respect to the Asbury SCR project?

6 A. I wasn't onsite on a daily basis, but on a  
7 weekly or even sometimes twice a week I'd go out, view the  
8 construction that was in process, and then was involved  
9 with the oversight and management of the contractors that  
10 were onsite.

11 Q. Did the contractors onsite report to you?

12 A. Not directly.

13 Q. Who did they report to?

14 A. They reported to the plant manager at the  
15 site.

16 Q. And did the plant -- who does the plant  
17 manager report to?

18 A. Harold Colgin, the vice president of energy  
19 supply.

20 Q. Were you involved in the -- strike that.

21 So what were the nature of your  
22 responsibilities with respect to the Asbury SCR?

23 A. As I stated earlier, just the management  
24 and, you know, assistance in the management of the  
25 contractors onsite. While they did not directly report to

1 me, I knew of what was going on and the work that was  
2 taking place.

3 Q. How often were you briefed on the work that  
4 was done, on the progress that was being made?

5 A. At least twice a week.

6 Q. Do you consider those -- do you consider  
7 yourself, based on those briefings that you received, to  
8 be knowledgeable about the status of the project at  
9 particular times during the time the project was being  
10 performed?

11 A. Yes.

12 MR. BOUDREAU: So with that -- well, with  
13 that, I would like to offer the question to him.

14 JUDGE VOSS: My question is the technical  
15 expertise of the witness to understand what the criteria  
16 of those studies or the procedures and tests were.

17 BY MR. BOUDREAU:

18 Q. Can you give the Commission an indication  
19 as to your background and training?

20 A. I am a chemical engineer from Kansas State  
21 University. I've been in charge of the construction of a  
22 combustion turbine, our Riverton Unit 12 project, and I  
23 was ultimately responsible for all construction and all  
24 contracts on that project.

25 MR. WOODSMALL: Your Honor, if I may voir

3 JUDGE VOSS: Go ahead, Mr. Woodsmall,  
4 quickly.

5 VOIR DIRE EXAMINATION BY MR. WOODSMALL:

9                   A.           Yes.   Energy Center 3 and 4 and Riverton  
10   Unit 12, I was in charge of the in-service, making sure  
11   the units met the in-service criteria on those units.

14                      A.                      No.

19 THE WITNESS: May I insert something here?

25 JUDGE VOSS: I'm going to allow limited



1 questioning on this because I think that if the plant is  
2 completely finished and functional, it's just whether he  
3 believes it was -- as an engineer, he knows if all the  
4 parts are in place. It's just speculative. It will be  
5 given the weight it's due.

6 MR. WOODSMALL: You answered his objection  
7 that it is speculative. Have you answered my objection  
8 regarding his credentials to offer an opinion?

9 JUDGE VOSS: I haven't answered your  
10 question. I've overruled your objection. Sorry if I  
11 wasn't clear. Thank you.

12 REDIRECT EXAMINATION (RESUMED) BY MR. BOUDREAU:

13 Q. Mr. Mertens, do you remember the question?

14 A. Could you repeat it, please?

15 Q. Based on -- you said that -- you testified  
16 that the work was completed prior to the end of the year  
17 2007; is that correct?

18 A. Yes.

19 Q. Do you have a view as to whether, based on  
20 your knowledge of the progress of that project and the  
21 status of it at the end of the year, had the testing taken  
22 place prior to the end of the year, do you have an opinion  
23 as to whether or not the Asbury SCR would have met the  
24 in-service criteria?

25 A. Yes. As stated, the construction on the

1 SCR itself was done by late November. The in-service  
2 criteria itself took two to three weeks to complete, and I  
3 do believe if we'd been able to test it, it would have  
4 been done by the end of the year.

5 Q. And, in fact, when the major outage work  
6 was completed and the in-service criteria testing took  
7 place, it did meet those in-service criteria, did it not?

8 MR. REED: Objection, leading.

9 MR. BOUDREAU: Let me rephrase the  
10 question.

11 BY MR. BOUDREAU:

12 Q. When the unit finally was tested in 2008,  
13 February of 2008, did it meet the in-service criteria?

14 A. Yes, it did.

15 Q. Thank you. I believe in response to some  
16 questions -- or I think Commissioner Murray asked you some  
17 questions about the decision to do the rewinding of the  
18 Asbury Unit 1 generator. Do you recall that?

19 A. Yes.

20 Q. Now, for the Commission's benefit, can you  
21 give us an idea of how the Asbury unit fits into Empire's  
22 energy portfolio? And by that I mean is it a peaking  
23 unit, an intermediate, base load, what is this?

24 A. Base load coal-fired unit, one of our  
25 cheaper units from a dollar per megawatt hour perspective

1 for fuel cost.

2 Q. You also talked about and I think there was  
3 some discussion about the terminology of using either the  
4 term unscheduled versus new scheduled outages. Do you  
5 recall that?

6 A. Yes.

7 Q. I guess my question to you is, in the event  
8 of an unscheduled outage, is it -- how disruptive is it  
9 for a base load unit to undergo an unscheduled outage?

10 A. Quite. This is a roughly 190 megawatt  
11 unit. As I stated, it was one of our cheaper from a  
12 dollars per megawatt hours fuel perspective, and that  
13 energy would have to be replaced through purchased power  
14 on the market or a less efficient -- one of our less  
15 efficient gas-fired units in most cases.

16 Q. I think you were also asked by Commissioner  
17 Clayton about -- or in response to a question to  
18 Commissioner Clayton you indicated that one of the steps  
19 or one of the items that's taken care of during a major  
20 outage is inspection of generators. Do you recall that?

21 A. Yes.

22 Q. How often do you do a major outage?

23 A. Once every five years.

24 MR. BOUDREAU: I believe that's all the  
25 questions that I have. Thank you.

1 JUDGE VOSS. The witness is excused until,  
2 what is it, Thursday or Friday?

3 MR. WOODSMALL: I believe his is Monday.

4 JUDGE VOSS: Is it Monday?

5 THE WITNESS: Thank you.

6 JUDGE VOSS: And it's 10:30. Let's take a  
7 10-minute break and come back at about 20 'til.

8 (A BREAK WAS TAKEN.)

9 JUDGE VOSS: Before we begin with Staff's  
10 first witness, I believe the Missouri Department of  
11 Natural Resources would like to make a request.

12 MS. WOODS: Yes, your Honor. Thank you.  
13 Since the Department is involved in so few of the issues  
14 that are before the Commission, I was going to ask for  
15 permission to excuse myself, if the Commission would  
16 excuse me from those issues except the ones where the  
17 Department has filed testimony.

18 JUDGE VOSS: Are there any objections?

19 (No response.)

20 JUDGE VOSS: Hearing none, you're excused,  
21 except for the issues that you are taking a position on.

22 MR. WOODSMALL: In fact, your Honor, there  
23 may be times during this hearing which myself and  
24 Mr. Conrad won't be present, and I'd ask that you'd excuse  
25 us. I'll certainly continue on --

1 CHAIRMAN DAVIS: Mr. Woodsmall, that's not  
2 your Jeep double parked out front, is it?

3 JUDGE VOSS: It's a pretty day. Okay.  
4 That is fine as well, with the understanding that if  
5 something is said, you've lost your opportunity to cross  
6 on it.

7 MS. WOODS: Okay.

8 JUDGE VOSS: With that, Staff, you can call  
9 your first witness.

10 MR. REED: Yes, Judge. Mark Oligschlaeger.

11 (Witness sworn.)

12 JUDGE VOSS: Thank you. Your witness.

13 MARK OLIGSCHLAEGER testified as follows:

14 DIRECT EXAMINATION BY MR. REED:

15 Q. You are Mark Oligschlaeger?

16 A. Yes, I am.

17 Q. Spell your last name for us.

18 A. Certainly. O-l-i-g-s-c-h-l-a-e-g-e-r.

19 Q. Mr. Oligschlaeger, I put in front of you,  
20 instead of copies of your testimony, I put in front of you  
21 an exhibit list that I had prepared, and it indicates the  
22 exhibit numbers I want to talk about, 200, 201, 202, 203  
23 and 204, you can see the title for each of those exhibits.  
24 Did you, in fact, prepare and file in this case direct,  
25 rebuttal, surrebuttal, as well as the accounting schedules

1 and also take -- prepare part of the Staff report, cost of  
2 service?

3 A. Yes, I did.

4 Q. In addition, Mr. Oligschlaeger, I have  
5 marked as Exhibit No. 221 a piece of testimony that's  
6 called Responsive Testimony of Mark L. Oligschlaeger. Can  
7 you describe for us what that piece of testimony is?

8 A. Yes. Exhibit 221 is the Staff's response  
9 to the surrebuttal testimony filed by Empire witness Sager  
10 on the subject of regulatory plan amortizations,  
11 about whether certain ice storm amortizations should be  
12 included in the RPA calculation.

13 Q. Mr. Oligschlaeger, have I missed any piece  
14 of testimony that you have prepared and filed?

15 A. I don't believe so.

16 Q. And if asked the same questions in all of  
17 this testimony today that appear in writing there, would  
18 your answers be the same?

19 A. Yes, they would.

20 Q. Are there any additions or corrections that  
21 you need to make?

22 A. Not that I'm aware of.

23 MR. REED: With that, I tender the witness,  
24 Judge.

25 JUDGE VOSS: Thank you. And I believe

1 Department of Natural Resources has left. So Industrials?

2 MR. WOODSMALL: Nothing, your Honor.

3 JUDGE VOSS: Public Counsel? Not here yet.

4 Empire?

5 MR. BOUDREAU: Yes, thank you.

6 CROSS-EXAMINATION BY MR. BOUDREAU:

7 Q. I promised the Commission I would keep this  
8 short, and I intend to live by that. Good morning,  
9 Mr. Oligschlaeger.

10 A. Good morning.

11 Q. Just a very few questions for you. I think  
12 you testified at page 13 of your surrebuttal testimony  
13 that the Asbury SCR has met all the agreed to in-service  
14 criteria as of February 29, 2008; is that correct? Down  
15 near the bottom, lines 20 through 23.

16 A. Yes, that is correct.

17 Q. Okay. And is the Asbury SCR currently in  
18 use in the provision of electric service to Empire's  
19 customers?

20 A. To my knowledge, it is.

21 Q. And do you know whether it is expected to  
22 be in use on the operation of law day in this case?

23 A. Again, my understanding is, yes, it's an  
24 ongoing -- it's a project that will have ongoing benefit  
25 or will be used on an ongoing basis by Empire.

1                   MR. BOUDREAU: That's really all the  
2 questions I have for this witness. Thank you, sir.

3                   JUDGE VOSS: Public Counsel have any?

4                   MR. MILLS: No questions.

5                   JUDGE VOSS: From the Bench?

6                   CHAIRMAN DAVIS: Is this where I can ask --  
7 is this the time to ask about property taxes related to  
8 Asbury? Yes. Okay.

9 QUESTIONS BY CHAIRMAN DAVIS:

10                  Q.       So Empire files their property tax  
11 statement on or about January 1st that says to -- I guess  
12 it's -- the county is drawing me blank. Is it Jasper?

13                  A.       I'm not sure what county Asbury is  
14 specifically located. Somewhere in that vicinity, though.

15                  Q.       All right. So they file -- correct me if  
16 I'm wrong. Your position is, okay, they didn't include it  
17 in their list of, you know, in-service property that they  
18 filed with the county, so that it -- so that it  
19 shouldn't -- so the property taxes are not a just and  
20 reasonable expense; is that correct?

21                  A.       Well, certainly if there are questions  
22 about specific amounts, Ms. Mapeka will be taking the  
23 stand. In general our position is that Empire's property  
24 was assessed as of January 1st, 2008. Since the  
25 investment related to the Asbury SCR project was in this



1 construction work in progress account --

2 Q. Right.

3 A. -- Empire should have and I believe they  
4 did capitalize any property taxes associated with that  
5 project. Because all of those will be capitalized, none  
6 will be charged to expense in the Staff's belief any  
7 earlier than January 1st, starting January 1st, 2009.

8 Q. Okay. And we know that they're going to  
9 come in for a rate case again in approximately when? 21  
10 months sticks out from the testimony, but I wasn't sure  
11 when that -- when they're actually going to file again.

12 A. Assuming the Iatan 2 construction project  
13 maintains its expected duration, I think it's reasonable  
14 to expect that in late 2009 Empire will be coming back in  
15 to include that investment in its rates. They're not  
16 precluded from coming in earlier than that.

17 Q. They're not precluded from coming in.  
18 Okay. So they would file probably extremely late '09 to  
19 try to capture their portion of Iatan 2 in rates in  
20 2000 -- calendar year 2010; is that correct?

21 A. That's my understanding of the regulatory  
22 plan stipulation.

23 Q. And they're not going to pay property taxes  
24 on the Asbury SCR additions until December 31st, '09,  
25 correct?

1           A.       Well, no. They will be paying property  
2 taxes associated with this addition at year end 2008, but  
3 Empire's accounting for those property taxes will be  
4 treated as part of the Asbury SCR plant investment, and  
5 that will be recovered in rates through ordinary  
6 depreciation of that investment once it is allowed in rate  
7 base.

8                   CHAIRMAN DAVIS: No further questions,  
9 Judge.

10                  JUDGE VOSS: Commissioner Murray?

11                  COMMISSIONER MURRAY: Thank you.

12 QUESTIONS BY COMMISSIONER MURRAY:

13           Q.       Good morning.

14           A.       Good morning.

15           Q.       Mr. Oligschlaeger, in regard to whether the  
16 in-service criteria have been met, I guess it's fair to  
17 say that technically the in-service criteria that were  
18 agreed to were not met by December 31st, correct?

19           A.       That's my understanding, yes.

20           Q.       And as I sit here and listen to this, and I  
21 think about the fact that they went ahead and put in  
22 the -- went ahead and did this, the SCR project without  
23 delay, testimony indicates that it was less expensive by  
24 going ahead, therefore ultimately the ratepayers will  
25 benefit from not -- from no delay in putting in that SCR

1 project, and I'm wondering, are we -- if we attempt to  
2 hold them strictly to the true-up period for meeting the  
3 in-service criteria even though the project was completed  
4 prior to the date, are we using form over substance here  
5 or is this -- is this actually being fair to both the  
6 ratepayers and to the company as Staff counsel argued that  
7 this morning that should be our major focus is fairness?

8 A. Well, I guess the question of form over  
9 substance, and that's a good question, in this case I  
10 think there was agreement by all the parties and  
11 ultimately the Commission ratified a recommendation that  
12 December 31st, 2007 would be the cutoff for known and  
13 measurable events, and there was no provision at that time  
14 for a true-up.

15 And there was also a statement, and I think  
16 it's a fairly new statement from the Commission in a  
17 suspension order about seeking early resolution of  
18 questions involving test year and true-up. Now, I mean,  
19 ultimately obviously it's up to you how -- what that early  
20 resolution means and how strictly it needs to be enforced.

21 Q. Can you point me to that language?

22 A. Sure. Hold on just a minute. It is at the  
23 very bottom of page 2 of the suspension order and notice  
24 filed October 3rd, 2007.

25 Q. All right. And just read it into the

1 record if you would, the statement regarding addressing  
2 changes quickly or whatever.

3 A. Sure. The Order reads, so that the test  
4 year and true-up questions can be quickly resolved, the  
5 Commission will require the other parties to promptly  
6 state their positions regarding Empire's true-up and test  
7 year proposals.

8 Q. And that was the initial proposals that  
9 were being referenced there?

10 A. By Empire, yes.

11 Q. And then it was determined that there would  
12 be the known and measurable through December 31st '07 with  
13 no true-up period, was that the outcome?

14 A. That was, yeah, the ultimate Staff  
15 recommendation which I believe was accepted by all the  
16 parties.

17 Q. And how frequently -- well, let me rephrase  
18 that question. Are true-up periods ever added during the  
19 pendency of a rate case?

20 A. Is your question how often are true-ups  
21 proposed and ordered or is your question how often are  
22 they ordered or proposed to be added later in the process  
23 as opposed to earlier?

24 Q. Later in the process.

25 A. Okay. Again, this language is a little bit

1 different than I think what we've seen in the past. I can  
2 tell you that in many cases in the past the Staff waited  
3 to make its ultimate true-up recommendation as to one --  
4 whether one should be had or not until the filing of its  
5 direct testimony. Given that this language seemed to  
6 suggest an earlier, we needed to weigh in earlier on that  
7 question, that's what we did in this case.

8 Q. And what was the date of the Staff's direct  
9 testimony in this case?

10 A. It was filed February 22nd, 2008.

11 Q. And if Staff had not weighed in earlier  
12 regarding the true-up period, would the true-up  
13 recommendation have been -- or would there have been a  
14 recommendation for a true-up through February?

15 A. Okay. I mean, obviously we're talking a  
16 little bit about a hypothetical situation there, so I  
17 can't really be definitive. Based on past experience of  
18 how we've handled some situations in the past, I think it  
19 is likely, with this specific set of circumstances that we  
20 faced, that it is likely we might have recommended a  
21 true-up proceeding in our direct testimony to allow a  
22 matched inclusion of the Asbury SCR investment in rates,  
23 assuming it would meet in-service criteria.

24 Q. And if we were to determine -- if the  
25 Commission were to determine that we would like to see a

1 true-up through February, time-wise what does that do to  
2 the case as it stands today?

3 A. Again, based on past history, such a  
4 true-up could be accomplished, I think, within the time  
5 frame remaining in this case, assuming an operation of law  
6 date I think in late August of this year.

7 Q. And that is assuming that you would know  
8 that by when?

9 A. I think as the Staff's attorney said  
10 earlier, as soon as possible, even I would say either at  
11 the conclusion perhaps of these hearings or shortly  
12 thereafter we would probably need to know that.

13 Q. And in terms of having all of the  
14 information and providing no potential advantage to any  
15 party by doing that, if we just did have a true-up through  
16 the month of February, that would provide -- present no  
17 problems in terms of fairness or include some issues  
18 without including others, would it?

19 A. If I understand your question, I think if  
20 the true-up audit, if one is ordered, encompasses the  
21 usual types of issues that are included in the true-up,  
22 which are the major components of all of Empire's revenue  
23 requirement calculations, in my opinion that would provide  
24 for a more or less fair and matched calculation of the  
25 revenue requirement as of the end of February.

1           Q.       Okay. On your position if we would just  
2 included the SCR through the end of December and costs  
3 through the end of December but -- rather than do a  
4 true-up, what is it that you are saying would be the  
5 unfair result of that?

6           A.       Are you asking about the company's proposal  
7 to limit its request in this case to dollars expended and  
8 booked as of December 31?

9           Q.       Yes.

10          A.       If the company wishes to limit its request  
11 for the Asbury SCR equipment in the event the Commission  
12 allows it, I think that's up to them or -- and ultimately  
13 up to the Commission as to whether that's reasonable. I  
14 don't know that we would have a problem with that  
15 limitation.

16                   My criticism of their position in their  
17 testimony that somehow they are meeting the ordered test  
18 year and update requirements by limiting their request to  
19 December 31st is, quite simply, that those dollars as of  
20 December 31st were in CWIP and in no way bear to a proper  
21 matching of actual plant in service, actual rate base  
22 revenues and expenses as of that date and time.

23          Q.       But if we were to grant the company's  
24 request to just include the dollars spent until  
25 December 31st, would that create any uncertainty as to

1 what would be included as of the next rate case?

2 A. Not necessarily. Presumably Empire would  
3 request the remainder of its investment in this project in  
4 rate base in its next rate proceeding.

5 Q. So the company's request, really, you're  
6 not saying that what the company has requested would be an  
7 unjust result?

8 A. Let me answer this this way. I think the  
9 company's position is somehow their position preserves an  
10 appropriate matching as of December 31st, 2007. Staff  
11 disagrees with that. If the Commission is to allow the  
12 Asbury SCR equipment in this case, then a fair and  
13 reasonable matching would mean you would have to take out  
14 or measure all of its major revenue requirement components  
15 no -- no earlier than February 29th. That would be the  
16 point in which the matching would need to occur.

17 COMMISSIONER MURRAY: Okay. Thank you.

18 JUDGE VOSS: Commissioner Clayton?

19 QUESTIONS BY COMMISSIONER CLAYTON:

20 Q. Mr. Oligschlaeger, do you agree with the  
21 discussion that was earlier with the attorneys that the  
22 Asbury rate base issue, the depreciation expense  
23 associated with Asbury and the O&M expense issue should  
24 all be decided either one way or the other together?

25 A. Yes, I do.



1 Q. You do. So among those three issues  
2 there's no separating or trying to go one way or the  
3 other?

4 A. Not in my mind, no.

5 Q. Basically, the problem that Staff has with  
6 these particular issues is that their in-service date  
7 falls outside of the test year that was agreed to by the  
8 parties; is that correct?

9 A. The test year and the update period.

10 Q. And what is the end of the test year?

11 A. That was June 30th, 2007.

12 Q. And then the true-up period goes to  
13 December 31, 2007?

14 A. Again, just trying to keep the terminology  
15 clear, the update period went through December 31, 2007.

16 Q. All right. Then tell me what the  
17 difference between update and true-up would be.

18 A. An update is a period beyond the test year  
19 which is normally audited and reviewed and included in the  
20 revenue requirement recommendation in parties' direct  
21 testimony filings.

22 Q. And when you say you update it, what does  
23 that mean? You take -- you start off with a 12-month  
24 period, do you not?

25 A. Yes.

1 Q. And then you're adding another six months.

2 So what is the purpose of that additional six months?

3 A. Just to have more up to date and --

4 information to incorporate in the final revenue

5 requirement recommendation for the important or the

6 material pieces of the company's revenue requirement.

7 Q. Okay. So -- and when I use the language

8 true-up, what do you mean by -- what do you take from that

9 language?

10 A. True-up to us is when you basically have to

11 do a limited reaudit of the entire company at a time

12 following the testimony filings by the party, and

13 sometimes even the evidentiary hearings to incorporate

14 some very late cost data, which is material to the company

15 and again should be presumably reflected in the ultimate

16 revenue requirement.

17 Q. That's helpful, and I'm understanding how

18 I'm not properly using terms. So at the beginning of an

19 evidentiary hearing like we are here, you can use

20 updated -- test year and updated information, but not

21 true-up information; is that correct?

22 A. That's generally correct.

23 Q. All right. And then there will be another

24 opportunity for true-up later on following the conclusion

25 of this evidentiary hearing?

1 A. If the Commission desires one, yes.

2 Q. Well, but don't we normally have a true-up  
3 hearing in every rate case?

4 A. No. In some cases for whatever parties --  
5 or for whatever reason the parties may either agree that  
6 there's no particular need for a true-up, in other words,  
7 the case itself is not based upon projected or very late  
8 data to occur just before the operation of law date.

9 Q. All right. So it's not really up to the  
10 Commission, it's up to the parties it sounds like?

11 A. Well, ultimately --

12 Q. Yeah. Yeah.

13 A. -- it's up to the Commission.

14 Q. Well, I know you say that, but the parties  
15 are kind of setting out before us what decisions need to  
16 be made, so the parties decide whether there's going to be  
17 a true-up hearing in its procedural schedule?

18 A. Correct. And in most cases in my  
19 experience there's not been a dispute among the parties.

20 Q. Now, is there a true-up hearing set in this  
21 case?

22 A. No, there is not.

23 Q. There is not. Was there a true-up hearing  
24 set in the last Empire case?

25 A. Yes, there was.

1 Q. And was there a true-up hearing held?

2 A. Yes, there was.

3 Q. There was. Okay. Now, what information is  
4 supposed to come up at a true-up hearing?

5 A. Ideally only information that was not  
6 available to be reviewed, audited and discussed during the  
7 normal direct, rebuttal and surrebuttal testimony phases  
8 of the hearing, as well as the initial set of evidentiary  
9 hearings.

10 Q. Does the true-up change the actual test  
11 year or test period in question?

12 A. No.

13 Q. So the true-up doesn't change anything  
14 associated with time; it has to do with information  
15 available at the time of the evidentiary hearing?

16 A. That you can possibly use to update your  
17 test year adjusted results, yes.

18 Q. So basically -- basically, the in-service  
19 date for the Asbury facility falls outside of the test  
20 year and it falls outside of the update period; is that  
21 correct?

22 A. Yes, that is correct.

23 Q. All right. And Staff's position is that  
24 because it falls out of that time period, it should not be  
25 included either as an expense or as a rate base issue,

1 correct?

2 A. That is correct.

3 Q. Can you tell me in your experience in  
4 working at the Commission, how often do you have issues  
5 that come up outside of either the test year, or I guess  
6 it has to be outside the test year and the update period  
7 where an expense or a rate base item that falls outside  
8 that period is included in an ongoing rate case or  
9 included as part of rates in the Commission's decision?

10 A. That has come up before. Sometimes the  
11 issue is framed as a kind of what we term isolated  
12 adjustment. Should this particular item or event be  
13 reflected in rates, even though it occurred outside of the  
14 ordered test year and update periods or perhaps even  
15 true-up period, then it's not matched necessarily with  
16 other elements of revenue requirement.

17 Q. So Staff has -- let me ask the question  
18 this way: Has Staff ever agreed to an isolated limited  
19 adjustment that falls outside of the update period?

20 A. Yes, but under very limited circumstances.

21 Q. All right. Give me some examples.

22 A. The examples?

23 Q. And you can characterize it as limited all  
24 you want, but tell me when you've done it in recent  
25 memory.

1           A.       Sure. In terms of type of items reflected,  
2 governmental mandates are considered the classic isolated  
3 adjustments, and this isn't necessarily a big cost item,  
4 but postage stamp increases, which I think one's supposed  
5 to occur today or in the near future.

6           Q.       But you have a change for the postage stamp  
7 increase, the penny that went up today?

8           A.       Not in this case, but --

9           Q.       Why not? How come?

10          A.       Well, probably because we weren't aware of  
11 it and the company hasn't asked for it. I just read the  
12 papers --

13          Q.       The company hasn't asked for it?

14          A.       -- over the weekend. And again, because  
15 that is a cost which we know the company will incur but it  
16 has absolutely no control over, and I think the Commission  
17 has said, yeah, we will go beyond the normal test year and  
18 update period of bounds to pick those kinds of items up.

19          Q.       Okay. So like on a governmental mandate,  
20 could that be taxes?

21          A.       A tax rate change, for example, could be  
22 another example.

23          Q.       Differentiate for me why Staff would take a  
24 position where certain governmental mandates like a tax  
25 rate change could possibly fit in as an isolated limited

1 exemption to the hard and fast update period rules versus  
2 this property tax expense which falls outside the test  
3 year but is certain to be in place in next year's rates,  
4 tell me the difference.

5 A. Okay. And just to clarify, when you  
6 specifically mention property taxes, do you mean that?  
7 Because that's kind of a subset of the entire issue we're  
8 talking about.

9 Q. Feel free to differentiate as you need. I  
10 mean, property taxes, I mean, we can identify with some  
11 certainty what those dollars are I think today. So if you  
12 can tell me what the difference between a tax rate change  
13 and a known tax that falls outside of the test year, how  
14 Staff differentiates those issues in a rate case.

15 A. Well, the property tax issue in this case  
16 probably doesn't fit into the category we're talking about  
17 because there's a dispute over whether they will actually  
18 be charging to expense any property taxes associated with  
19 this equipment until 2009. Okay. Now, to answer your  
20 question more broadly --

21 Q. Is the dollar amount the same or is there a  
22 dispute as to the dollar amount in 2009?

23 A. At this point, it's premature to -- for  
24 anyone, I think, to estimate or guess how much property  
25 taxes will ultimately be paid by the company in 2009.

1 Q. So it is in dispute --

2 A. It is, yes.

3 Q. -- would be the answer to that question?

4 A. Yes.

5 Q. So if I look on line 12 of Staff's  
6 reconciliation, where it says property tax expense Asbury  
7 SCR 257,000, that figure is in dispute in terms of its  
8 accuracy, not just falling outside the test year?

9 A. I would -- yes, I would agree with that.

10 Q. Okay. Go ahead with your explanation.

11 A. Okay. Now, if your question's broader than  
12 that, why would we treat this rate base addition to maybe  
13 a different standard than a governmental mandate, well,  
14 the first and quick answer is the Commission itself in the  
15 past has suggested governmental mandates are kind of a  
16 special category.

17 Beyond that, I think in terms of this case,  
18 the company had full control over this project first in  
19 terms of when the project would actually be performed,  
20 when they hoped to bring the plant into service, and also  
21 crucially when to file this rate request and how to  
22 structure its test year and true-up recommendations to  
23 reasonably capture its expectations as to the timing of  
24 this addition.

25 Q. Okay. I understand -- so I guess Staff



1 looks at what the company has control or doesn't have  
2 control over certain issues in -- in terms of having an  
3 expense or a rate base item fall within the update period  
4 or the test year?

5 A. Yes. The company chose when to file this  
6 case, and they also chose basically what period in which  
7 to seek updates beyond test year information to include in  
8 this case.

9 Q. So in essence what Staff is saying is that  
10 because Empire had these delays and missed by two months  
11 their in-service date for the Asbury site, they should be  
12 penalized by these amounts because they were within their  
13 control and -- and they shouldn't be able to include those  
14 numbers regardless of what time -- they shouldn't be able  
15 to include these numbers because they fall outside the  
16 test year?

17 A. I'm not sure I'd agree with the word  
18 penalize, but beyond that, yes, but -- but because they  
19 had control of the terms or the timing by which these  
20 items would be incorporated into its revenue requirement,  
21 because they blew the timing so to speak, yes, we don't  
22 believe that these items should be reflected in this  
23 current revenue requirement.

24 Q. Okay. Help me understand Staff's position  
25 by taking the next step. Assume that the Commission

1 declines to include the SCR rate base addition and the  
2 depreciation expense and the O&M expense. Set aside the  
3 property tax thing. Does Staff propose an additional  
4 amount of money included in the revenue requirement as  
5 part of a regulatory amortization mechanism --

6 A. Well --

7 Q. -- to meet certain credit metrics that  
8 would go back into rates --

9 A. Okay.

10 Q. -- if we declined to add these numbers in?

11 A. To answer that question at least broadly at  
12 first, yes, whatever the Commission ultimately decides in  
13 terms of its traditional revenue requirement, that will be  
14 flowed through the regulatory plan amortization  
15 calculation and as a result of its Asbury SCR decision and  
16 other decisions, Empire's cash flow do not meet the  
17 necessary credit metrics, then yes, the regulatory plan  
18 amortization amount will be increased in order to meet  
19 those minimum metrics.

20 Q. Okay. Now, has Staff compiled a chart like  
21 we've seen in other cases that kind of sets out the amount  
22 of revenue requirement that -- certain scenarios where the  
23 Commission sets out those dollars to figure out how much  
24 in additional amortization will kick in so that Empire  
25 does meet those credit metrics?

1           A.       Well, we have a current calculation, based  
2 upon our rate reco -- revenue requirement recommendation  
3 of what that amount would be.

4           Q.       If we were to implement Staff's proposal,  
5 and I think Staff's recommended revenue requirement  
6 increases, what, 19.6 million, roughly?

7           A.       Actually, closer to 19.8 million.

8           Q.       Forgive me. Forgive me.

9           A.       You're in the ballpark. Yes. With that  
10 level of traditional revenue requirement, our calculations  
11 assume that Empire will need an approximate additional 2.3  
12 million in regulatory plan amortization.

13          Q.       So Staff's recommendation is that -- and  
14 I'm kind of asking you questions in the totality of the  
15 case. Are you the case manager?

16          A.       I'm co-case coordinator, is the official.

17          Q.       Thank you. So it's roughly 19.8 million,  
18 plus Staff would recommend an additional 2.3 million as  
19 regulatory amortizations?

20          A.       As of this point in time, yes.

21          Q.       And is that -- that's based on a 10.26  
22 return on equity?

23          A.       Yes, it is.

24          Q.       Now, let's say we remove Asbury. Let's say  
25 that we -- well, wait a minute. That already has Asbury

1 removed, doesn't it? Staff's case has the Asbury plant  
2 removed?

3 A. Correct.

4 Q. Now, if we were -- let's say we were to add  
5 Asbury in, the roughly \$7 million in rate base and expense  
6 items which would boost up the Staff recommendation up to  
7 about 26.8 million. Are you able to tell me what the  
8 regulatory amortizations would then be, if any, assuming a  
9 10.26 percent ROE?

10 A. I can tell you at this time it would reduce  
11 the amount of regulatory plan amortizations. I can't give  
12 you an exact number, but I would be happy to perform that  
13 calculation for you.

14 Q. Well, considering it would be an increase  
15 of \$7 million, which is three times the amount that Staff  
16 would be recommending for increases for regulatory  
17 amortizations, would it eliminate regulatory  
18 amortizations?

19 A. 7 million sounds too high. Let me look at  
20 the reconciliation.

21 Q. Sure. You accountants are so precise.

22 A. Looking at the most recent version of the  
23 case reconciliation, the valuation given for the rate base  
24 addition issue is approximately 3.7 million. I believe  
25 Empire's quantification of the depreciation impact is

1 around half a million, and there's an additional  
2 1.1 million associated with O&M expenses. So if I add  
3 that all together, we're probably between five and five  
4 and a half million dollars in revenue requirements.

5 Q. Okay. Now, that's helpful here, because I  
6 had -- I was including line 11, annualized depreciation  
7 expense. That's not Asbury, is it?

8 A. Not all of it is Asbury. There's also an  
9 actual issue involving depreciation rates in general.

10 Q. All right. That's where I was getting that  
11 7 million. All right. So you're talking a little over  
12 5 million. So it's still twice as much as Staff would be  
13 recommending in additional regulatory amortizations. Can  
14 we assume that that would eliminate the need for  
15 regulatory amortizations?

16 A. Tell you what, I'd be happy to at this  
17 point concede it. Certainly most of it I believe would go  
18 away just based on that one change, but I'd like to make  
19 the calculation before I would characterize it as entirely  
20 going away.

21 Q. Is that something you can do there or you  
22 have to go back and turn on your big computer and --

23 A. Yeah, I would have to rely on my machinery  
24 there.

25 Q. Yeah. That's what I thought. Okay. Now,

1 regulatory amortizations are -- they're basically  
2 accelerated depreciation, would you agree with that?

3 A. That's a fair characterization.

4 A. And they increase cash in the short term  
5 and then will offset the rate base in the future as plant  
6 goes -- is put into service?

7 A. That's correct, yes.

8 Q. So either way you're going to be increasing  
9 the cash flow of the company in the short term either by  
10 including Asbury in rate base or by doing regulatory  
11 amortizations. You're going to be increasing cash in the  
12 short term, and in the long term ratepayers are still  
13 getting credits for that through depreciation reserve.  
14 Would you agree with that statement?

15 A. Yes, with the caveat that there may be a  
16 different dollar amount being called for from current  
17 ratepayers under the two different scenarios, but yes, in  
18 either way cash flow will be enhanced.

19 Q. So the numbers may not be exactly right,  
20 but basically you're increasing cash flow in relatively  
21 comparable amounts now, and ratepayers will be given  
22 credit for all their advances over time in the next rate  
23 case and two rate cases from now, three rate cases with  
24 plants that are put in service. Do you agree with that?

25 A. Yes.

1           Q.       Now, tell me what the difference is between  
2 these two scenarios in terms of making policy for the  
3 Commission to make a decision between either increased  
4 regulatory amortizations or just going ahead and putting  
5 Asbury in rate base. They missed the deadline by two  
6 months. You're going to have comparable cash flow  
7 amounts. You're going to have potential recognition for  
8 ratepayer payments. Tell me what the difference is in the  
9 big picture.

10           A.       Well, the big picture isn't -- I'm sure the  
11 company would be very quick to tell you this. The part of  
12 this issue that's associated with the O&M expenses for  
13 Asbury, that is not recoverable or something that would be  
14 taken into account through the regulatory plan  
15 amortization. So like I said, there's -- for the rate  
16 base disallowance itself, if that's made, then some monies  
17 is probably going to go back through the regulatory plan  
18 amortization. That is not true for O&M expenses.

19           Q.       So when choosing between -- between the two  
20 scenarios potentially the company's expense level will be  
21 less \$1.1 million by choosing the regulatory amortization  
22 route; is that correct?

23           A.       If their estimates are correct, they would  
24 not be recovering that 1.1 million in current rates, even  
25 with the regulatory plan amortization.

1           Q.       In-service date falling outside of the test  
2 year and the update period, is it Staff's position that  
3 Empire has done anything improperly associated with Asbury  
4 either as part of the regulatory comprehensive energy plan  
5 or whatever we -- the special regulatory plan or any other  
6 deal, has Empire done something wrong in Staff's eyes?

7           A.       I -- in terms of how they've handled the  
8 outage and putting all of that, I don't believe so, but I  
9 will say you may want to ask Mr. Taylor that tomorrow  
10 morning because he handles more the engineering side.

11          Q.       I understand. I'll ask him the engineering  
12 questions. But in terms of policy, in terms of being the  
13 co-case manager and your knowledge of the comprehensive  
14 energy plan that Empire has, is there any breach that  
15 Empire has committed? And I say that not meaning legal  
16 significance, but does Staff feel that they have done  
17 something improper with this aspect of their energy plan  
18 and the Asbury facility?

19          A.       Not to my knowledge.

20          Q.       If the Commission were to extend  
21 the -- the update period to include February 29, 2008,  
22 which I think would take in the in-service date for  
23 Asbury -- first of all; is that correct?

24          A.       Yes.

25          Q.       Staff would then go back and review all



1 relevant factors up to February 29, 2008; is that correct?

2 A. That is correct.

3 Q. And does Staff have any idea whether those  
4 all relevant factors will be higher or lower at this  
5 point, or is it basically a roll of the dice, we're just  
6 not sure what it's going to be, it could be higher rates  
7 or it could be lower rates?

8 A. I would agree at this point, it's a roll of  
9 the dice. We really haven't looked at their -- any  
10 financial information for January or February 2008.

11 Q. In two months at the beginning of a  
12 calendar year, what issues would jump out in your mind as  
13 potentially being different or leading to a significant  
14 alteration of Staff's case?

15 A. Well, if you were to include the Asbury SCR  
16 investment, there are at least two potential significant  
17 offsets to that. One would be normal customer growth, and  
18 Empire, given its service territory, perhaps has higher  
19 customer growth than the other electric utilities in the  
20 state. It has been significant in the past.

21 The other factor that in particular would  
22 need to be looked at is depreciation accruals on its  
23 existing plant in service which would lower its rate base  
24 value. We've long taken the view you shouldn't be adding  
25 plant out beyond a matched revenue requirement point with

1 also taking into account the fact that the existing plant  
2 that was already there will be depreciating and will  
3 create a lower rate base over time.

4 Q. Right. Right. Regardless of what the  
5 Commission decides on inclusion of Asbury, it's Staff's  
6 position that the property tax expense as identified under  
7 line 12 of the Staff reconciliation should still be  
8 excluded from rates in this case; is that correct?

9 A. That's correct.

10 Q. And explain to me what the reasoning is  
11 behind that.

12 A. The reasoning is behind that, the way the  
13 property tax assessment and payment system works, they are  
14 only assessed on their equipment based upon its value as  
15 of January 1st of each year. As of January 1st, 2008, the  
16 Asbury SCR equipment was booked to construction work in  
17 progress, and normal accounting conventions hold that  
18 those property taxes are capitalized and included in the  
19 Asbury SCR work order to be depreciated once the project  
20 becomes in service.

21 There is no -- Staff believes there are no  
22 property taxes being charged to expense during 2008,  
23 during the period of time we're talking about at all  
24 associated with the Asbury SCR equipment. Therefore, none  
25 should be added to expense.

1           Q.       If any, they would occur in 2009, and  
2       there's still a dispute as to that amount that would occur  
3       in 2009?

4           A.       Right. That amount at this time is  
5       unknown.

6                   COMMISSIONER CLAYTON: I don't have any  
7       other questions. Thank you.

8                   JUDGE VOSS: Commissioner Jarrett?

9                   COMMISSIONER JARRETT: No questions. Thank  
10      you.

11                  JUDGE VOSS: Commissioner Gunn?

12                  COMMISSIONER GUNN: No questions.

13                  JUDGE VOSS: Recross based on questions  
14      from the Bench, beginning with Industrials?

15                  MR. WOODSMALL: Yes, one or two brief  
16      questions.

17      RE CROSS-EXAMINATION BY MR. WOODSMALL:

18           Q.       Good morning, sir. You were asked some  
19      questions and you talked about an isolated adjustment.  
20      You mentioned that a classic case is a postal increase.  
21      Do you recall those questions?

22           A.       Yes, I do.

23           Q.       Can you tell me, do isolated adjustments as  
24      they have typically been used, do they have an effect on  
25      other parts of the utility's cost of service?

1           A.       Typically, no direct impacts. I mean, a  
2   postal inc -- a postage stamp increase increases your cost  
3   to purchase a postage stamp. It doesn't necessarily  
4   affect other parts of your cost of service.

5           Q.       And would the inclusion of a rate base such  
6   as the Asbury SCR be isolated in that term or would it  
7   have an effect on other parts of the utility's cost of  
8   service?

9           A.       Well, I mean, as the company's case itself  
10   holds, yes, it would impact their level of O&M expenses  
11   and depreciation expenses as well as its rate base.

12          Q.       So would you agree, then, that the Asbury  
13   SCR would not fit the classic definition of an isolated  
14   adjustment?

15          A.       It goes very much beyond the kind of  
16   governmental mandates this Commission has considered in  
17   the past.

18                   MR. WOODSMALL: Thank you. That's all.

19                   JUDGE VOSS: Public counsel?

20                   MR. MILLS: Just a few. Thank you.

21   RE CROSS-EXAMINATION BY MR. MILLS:

22          Q.       Mr. Oligschlaeger, I think in response to a  
23   question from Commissioner Murray, there was a question as  
24   to whether or not Empire was saving money by going forward  
25   with an SCR now as opposed to at some later date. Do you

1 recall a question concerning that?

2 A. Yes, I do.

3 Q. Do you have any information as to whether  
4 or not Empire is saving money by going forward with the  
5 Empire SCR when it did as opposed to a later date?

6 A. All I've looked at is what is asserted in  
7 it testimony. I haven't seen any independent evidence to  
8 corroborate that, no.

9 Q. You haven't verified that claim in any way?

10 A. No.

11 Q. Have you, through your investigation of the  
12 Asbury SCR, discovered any information that would lead you  
13 to conclude that the Asbury SCR would have passed the  
14 in-service testing had the in-service testing been done at  
15 some other date?

16 MR. BOUDREAU: I guess -- I guess I'm going  
17 to object at this point on the grounds that no  
18 foundation's been laid for this witness' testimony.

19 JUDGE VOSS: Would you repeat the question?

20 MR. MILLS: The question was whether  
21 Mr. Oligschlaeger has seen any information that would lead  
22 him to believe that the Asbury SCR would have passed the  
23 in-service testing had the in-service testing been done at  
24 some other date. So it's really -- it's not a question of  
25 whether he has an opinion about that. It's a question of

1     what information he has.

2                     JUDGE VOSS:  Overrule the objection.

3                     THE WITNESS:  I've not seen any such  
4     information.  You may also want to inquire of Staff  
5     witness Taylor tomorrow morning as well on that point,  
6     though.

7                     MR. MILLS:  Thank you.  Those are all the  
8     questions I have.

9                     JUDGE VOSS:  Empire?

10                    MR. BOUDREAU:  Yes.  Thank you.  Just a  
11     few.

12     RE CROSS-EXAMINATION BY MR. BOUDREAU:

13                    Q.     Mr. Oligschlaeger, you've got some -- I  
14     think some question or series of questions from  
15     Commissioner Clayton dealing with the types of -- and I  
16     think this goes back to a question you got from  
17     Mr. Woodsmall, isolated adjustments in response to some  
18     sort of governmental action.  Do you recall that?

19                    A.     Yes, I do.

20                    Q.     Would you agree with me that Empire  
21     undertook the Asbury SCR program in response to the EPA  
22     Clean Air Interstate Rule of 2005?

23                    A.     That is what it states in its testimony.  I  
24     have no reason to dispute that.

25                    Q.     Okay.  I also want to ask you about some --

1   you received a number of questions, I think, also from  
2   Commissioner Clayton about the interplay of the  
3   experimental regulatory plan and particularly the  
4   regulatory plan amortizations and the possibility of  
5   putting Asbury SCR in rate base. Do you recall that?

6           A.       Yes, I do.

7           Q.       And you -- you, I think, explored a little  
8   bit with him about the purpose of the regulatory plan  
9   amortizations. Do you recall that?

10          A.       Yes.

11          Q.       And I guess -- I guess what I want to ask  
12   you, is that -- I think you said in response -- or during  
13   the course of that interplay -- or interaction with  
14   Commissioner Clayton that a regulatory amortization  
15   amounts to an accelerated depreciation; is that correct?

16          A.       That's one of the ways in which it's  
17   commonly thought, yes.

18          Q.       And the idea I guess is to -- is to -- is  
19   to assist with cash flow requirements during that period  
20   of time?

21          A.       Yes.

22          Q.       Let me ask you this: When you increase  
23   depreciation on plant, do you also reduce -- I mean,  
24   doesn't that have the effect of reducing the amount in the  
25   plant account, you know, associated with that

1 depreciation? A. You charge depreciation expense  
2 on a plant item to depreciation reserve, the plant amount  
3 stays the same. I think I understand what you're saying.

4 Q. But the -- when you -- when you -- the  
5 effect of that, as you -- as you depreciate plant, the net  
6 value of the plant for purposes of ratemaking decreases;  
7 isn't that correct?

8 A. Yes.

9 Q. And is it also fair to say from that that  
10 as you do that in a subsequent ratemaking case, if the net  
11 present -- or the net value of the plant, net book value  
12 is reduced, then the amount that's available for the  
13 company to earn a return on is less, there's less plant  
14 value for the company to earn a return; is that correct?

15 A. All other things being equal, yes.

16 Q. You got a question from Mr. Mills about  
17 whether or not you had verified the company's statement  
18 that the timing of the company's undertaking of the SCR  
19 project avoided some costs attributable to the runup of  
20 construction costs in the utility industry. Do you recall  
21 that?

22 A. Yes, I do.

23 Q. And I believe that your testimony was that  
24 you hadn't seen anything that -- that -- to verify that,  
25 is that correct?



1           A.       Yes.

2           Q.       Let me ask you this. Based on -- based on  
3 your knowledge about the utility industry, do you have a  
4 view about whether construction costs are increasing for  
5 projects of this sort?

6                   MR. MILLS: Judge, I'm going to object  
7 here. This round of cross examination is supposed to be  
8 based on questions from the Bench. Mr. Boudreau clearly  
9 led into this by saying it was in response to questions  
10 that I posed, and so it's beyond the scope of the  
11 questions from the Bench almost by definition.

12                   JUDGE VOSS: Weren't your questions based  
13 on questions from the Bench?

14                   MR. MILLS: Mine were, but he's going  
15 considerably beyond what I asked and what the Bench asked,  
16 and then he premised that as if though -- almost as though  
17 he's asking redirect based on my cross-examination, and  
18 that's beyond the scope of cross-examination based on  
19 questions from the Bench.

20                   MR. BOUDREAU: Well, I think it's an  
21 appropriate line of questioning, particularly if his -- if  
22 his questions are premised on questions from the Bench, I  
23 think I should be allowed to explore some of these topics.

24                   JUDGE VOSS: Can you trace how it's  
25 relevant for me because I had kind of lost track of where

1     that came from as well?

2                   MR. BOUDREAU:   Well, Mr. Mills had asked  
3     the witness whether he had looked at any information that  
4     would lead him to conclude that the company's -- on the  
5     timing of the project saved some money in terms of doing  
6     it sooner than later, and I'm asking him based on his  
7     knowledge about the industry, whether he's aware that  
8     construction costs were being driven upwards -- in an  
9     upward direction.

10                  MR. MILLS:   And Judge, I'll just -- in  
11     furtherance of my objection, you asked him to tie it to  
12     the questions from the Bench   and he did not.   He's tying  
13     it to my questions.   So I think it's beyond the scope of  
14     questions from the Bench.

15                  MR. BOUDREAU:   Well, if his question was  
16     based on question from the Bench, it seems to me that the  
17     tie is certainly indirect.   I mean, if he can -- if he can  
18     bring up this topic based on questions from the Bench, I  
19     ought to be able to explore it.

20                  JUDGE VOSS:   He brought it up in a very  
21     minimal way.   The one question you posed I will allow, but  
22     I wouldn't go much beyond because you're rapidly  
23     progressing away.

24                  MR. BOUDREAU:   It's the only question I  
25     have for the witness.   If he knows, he knows.   If he

1 doesn't, he doesn't.

2 MR. WOODSMALL: Your Honor, I would  
3 interject an objection, and it basically concurs in what  
4 the objection of Mr. Boudreau asked -- or stated earlier  
5 in that there's no foundation for this witness to answer  
6 that, for him to offer an opinion on the state of  
7 construction costs, especially the construction costs for  
8 an SCR. So I believe it's an inappropriate question.

9 MR. BOUDREAU: I'm just asking based on his  
10 knowledge. If he has no knowledge, he can say I have no  
11 knowledge, and if he does, he should be able --

12 JUDGE VOSS: I'm going to overrule the  
13 objection. He was already asked a question along this  
14 line, just to the ability that he knows to answer the  
15 question or has a basis. Should be a quick question.

16 MR. BOUDREAU: The only question.

17 BY MR. BOUDREAU:

18 Q. Would you like me to restate it?

19 A. Please.

20 Q. I gave you the context for asking the  
21 question. My question to you is, based on your knowledge  
22 about the utility industry, do you have a view about  
23 whether or not these -- the construction cost associated  
24 with these major projects is increasing and whether  
25 they -- and I'll leave it at that?

1           A.       From what I read in the newspapers, I  
2     gather that there is a general -- there's a perceived  
3     general increase in construction costs for major utility  
4     projects. I have no specific knowledge as to how that  
5     trend may affect SCR projects such as Empire entered into.

6           MR. BOUDREAU: Fair enough. That's all the  
7     questions I have. Thank you.

8           JUDGE VOSS: Redirect?

9           MR. REED: No, thank you.

10          JUDGE VOSS: Then you're excused for now,  
11     Mr. Oligschlaeger. And I did have a question. You  
12     mentioned that Mr. Taylor was going to testify tomorrow,  
13     and is he not available today? I had him down as today.

14          MR. REED: I did, too, and I'd forgotten  
15     about that, Judge. His testimony is quite brief, I think  
16     it will be, given that we've -- it has to do with the  
17     Asbury SCR as well, sort of an incidental issue to the  
18     issue we're trying here. So he can't be here today, but  
19     he can be here first thing tomorrow afternoon, and I think  
20     it would be very brief.

21          JUDGE VOSS: That makes it all the more  
22     important to try to get through a little bit of the other  
23     testimony that we originally scheduled for tomorrow today.  
24     At this point, since we are moving rapidly, do any of the  
25     parties object to having Mr. Keith testify today regarding

1 off-system sales margins?

2 MR. MILLS: I don't object to that. If we  
3 can put that off 'til after lunch, that would be great.

4 JUDGE VOSS: Definitely it would be after  
5 lunch. Actually, there's another witness on this issue  
6 from Staff. I just wanted to get that out of the way now.

7 CHAIRMAN DAVIS: Judge, can I inquire of  
8 the attorneys? If the Commission were to go down the road  
9 of ordering a February 29th true-up, does that have a  
10 material effect on any of the other issues that we are  
11 hearing this week? Is there any -- is there any unfair  
12 prejudice or anything?

13 MR. WOODSMALL: The only effect that I  
14 could see off the top of my head would be just the  
15 quantification of the issues, but not in the substance of  
16 the issues.

17 JUDGE VOSS: Actually, I was going to ask  
18 this before we went to lunch, but I know there's a  
19 timeline and at least a round or two of testimony that  
20 would need to be filed regarding -- would it be one round?

21 MR. MILLS: For true-up testimony?

22 JUDGE VOSS: Yeah.

23 MR. MILLS: Typically there's at least  
24 direct and rebuttal.

25 MR. WOODSMALL: With that said, just so

1     you're aware, it's not an extended period. Typically one  
2     is filed and then the next week the rebuttal is filed, so  
3     it's done in a rapid fire succession.

4                     JUDGE VOSS: Just looking at the hearings  
5     calendar, in case this is something the Commission opts to  
6     do, I want to be prepared and give the parties a chance,  
7     so after lunch think about what timelines the parties  
8     would need for that so that we can at least have those  
9     dates that would be workable in the event that's something  
10    the Commission decides to do so that issue can be decided  
11    just as quickly as possible.

12                    And I guess Staff, did you want to call  
13    your other witness on this issue, please?

14                    MR. REED: Paula Mapeka.

15                    (Witness sworn.)

16                    JUDGE VOSS: Please proceed.

17    PAULA MAPEKA testified as follows:

18    DIRECT EXAMINATION BY MR. REED:

19                    Q. State your name for us.

20                    A. Paula Mapeka, and the last name is spelled  
21    M-a-p-e-k-a.

22                    Q. Ms. Mapeka, earlier we had marked the Staff  
23    report cost of service as Exhibit No. 204. Did you take  
24    part in preparing that cost of service report?

25                    A. Yes, I did.

1           Q.     And in addition to that, did you also  
2 prepare to be filed surrebuttal?

3           A.     Yes, sir.

4           Q.     Did you prepare, I guess there was an HC  
5 and an NP version correct?

6           A.     Yes, sir.

7           Q.     Was there rebuttal? Did you do rebuttal?

8           A.     No.

9           Q.     All right. Thank you. I have marked your  
10 HC surrebuttal as Exhibit No. 207, and I've marked your NP  
11 surrebuttal as Exhibit No. 208. If I were to ask you the  
12 same questions as are contained in that testimony, that is  
13 Exhibits 204, 207 and 208, would your answers today be the  
14 same?

15          A.     They would.

16          Q.     Are there any changes or corrections that  
17 you need to make to that testimony?

18          A.     Yes. On page 13, line 9, I would like to  
19 change the approximated number to 222,000.

20                 JUDGE VOSS: Which piece of testimony was  
21 that? I'm sorry.

22                 THE WITNESS: Sorry. Surrebuttal.

23                 JUDGE VOSS: And could you repeat what  
24 area?

25                 THE WITNESS: On page 13, line 9.

1 JUDGE VOSS: Thank you.

2 THE WITNESS: As well as line 15. To  
3 change the amount from 220,000 to 222,000.

4 BY MR. REED:

5 Q. Any other changes?

6 A. That will be all.

7 Q. That would be it. All right. So with that  
8 change, is that testimony, your surrebuttal, a fair and  
9 accurate representation of your opinions in this case?

10 A. Yes, sir.

11 MR. REED: All right. I'll tender the  
12 witness

13 JUDGE VOSS: Department of Natural  
14 Resources is not here. Industrials?

15 MR. WOODSMALL: Nothing, Your Honor.

16 JUDGE VOSS: Public Counsel?

17 MR. MILLS: No questions.

18 JUDGE VOSS: Empire?

19 MR. BOUDREAU: Just so I know what is going  
20 on, we're dealing with the Asbury SCR issue?

21 JUDGE VOSS: Yes.

22 MR. BOUDREAU: Well, with that  
23 clarification, I have no questions for this witness.

24 Thank you.

25 JUDGE VOSS: Are there any questions from



1 the Bench? Commissioner Murray?

2 COMMISSIONER MURRAY: No, thank you.

3 JUDGE VOSS: And I do not know whether  
4 Commissioner Clayton has any questions for you. He had  
5 some for Mr. Taylor. So will you be around after lunch in  
6 case he wants to call you back up for a couple questions?

7 THE WITNESS: Yes, ma'am.

8 JUDGE VOSS: With that said, I can't see  
9 any need for any redirect. No recross at this point. So  
10 for now you're excused, subject to recall on this issue,  
11 and of course you're testifying, is it Thursday, on  
12 depreciation?

13 THE WITNESS: No. That would be Rosella  
14 Schad.

15 JUDGE VOSS: Are you -- what are you --

16 MR. BOUDREAU: I believe this witness also  
17 has incentive compensation.

18 THE WITNESS: Incentive compensation.

19 JUDGE VOSS: Thank you. For now, you may  
20 step down, and I guess go ahead and break for lunch until  
21 ten to one. Does that sound okay? Is that all right with  
22 everybody?

23 MR. WOODSMALL: Your Honor, just for some  
24 clarification, after lunch it's your intent to cover  
25 off-system sales or just one witness of that or --

1 JUDGE VOSS: I would assume as far as we  
2 can go with off-system sales assuming all the witnesses  
3 are here and the parties are ready with their  
4 cross-examination questions. Is everybody all right with  
5 that?

6 MR. REED: Yes.

7 MS. CARTER: Can we make that an even one,  
8 just so we have time to get --

9 JUDGE VOSS: And since you asked that, I  
10 also would like -- okay. I'd also like the parties to be  
11 ready to tell me if there was a true-up, how much time  
12 they'd need, because I'm assuming there would also need to  
13 be a round of proposals -- or proposed items to true up.  
14 I don't know if everyone's agreeable generally to that  
15 issue. Thank you. We're off the record.

16 (A BREAK WAS TAKEN.)

17 JUDGE VOSS: We're going to go back on the  
18 record. Before we recessed for lunch, we discussed the  
19 parties proposing timelines in the event a true-up was  
20 ordered by the Commission, and does anyone want to speak  
21 to that issue? Mr. Reed?

22 MR. REED: Well, I think previously we  
23 had -- there may have been some discussion about a  
24 true-up. There were a couple dates that may have been  
25 held out, June 9 and June 10 for true-up hearing at some

1 point in time, and those dates may still be available on  
2 the Commission's calender. However, that's a very -- even  
3 if we filed testimony, the week before, you know, like the  
4 Friday before, the week of the true-up hearing, that's a  
5 very tight time frame for us now.

6                   And so with -- since we're looking at the  
7 end of August for an operation of law date, I think,  
8 although the Commission wants to get out an Order with  
9 ample time for reconsideration or hearing, Staff would, I  
10 guess, appreciate consideration of a date later in June  
11 when I think we could get the testimony filed by then.

12                   JUDGE VOSS: When I looked at the calendar,  
13 I did note that the 19th and 20th of June were available  
14 at least in Room 305. I wasn't certain if that would be  
15 sufficient time either. I do anticipate ordering briefing  
16 on all issues aside from the true-up. I don't want to  
17 wait until after the true-up for Briefs to come in.  
18 Raises my blood pressure to think about.

19                   So would a true-up hearing of the 19th and  
20 20th give the parties sufficient time, probably?

21                   MR. REED: I think so.

22                   MR. MILLS: I would assume so, although I  
23 don't know if my calendar is open those days, but I would  
24 assume that's probably marginally sufficient time to get a  
25 true-up done.

1 JUDGE VOSS: We may even be able to have  
2 310. The 19th and 20th are completely blank at this time  
3 on the Commission's official calendar. I don't know about  
4 vacation calendars in June.

5 All right, I think we're ready to proceed  
6 with off-system sales margins. Empire, would you like to  
7 call their first witness?

8 MR. MITTEN: Could I please make an opening  
9 statement?

10 JUDGE VOSS: Oh, I forgot about the opening  
11 statement. Please proceed.

12 MR. MITTEN: If it please the Commission?  
13 When the Commission considered the issue of off-system  
14 sales in Empire's last rate case, it decided that the best  
15 and most reliable way to project off-system sales for the  
16 future would be to use a five-year average of the  
17 company's historical off-system sales, and you reached  
18 that conclusion because you recognized that off-system  
19 sales margins fluctuate significantly from year to year,  
20 and because of that significant fluctuation, an average  
21 would allow you to, as you said, smooth out the peaks and  
22 valleys.

23 In this case, Empire is the only party that  
24 has used a five-year average to project off-system sales  
25 margins. The Staff has used a six-month period from

1 January through June of 2007. Public Counsel, even though  
2 it supported a five-year average in Empire's last case, is  
3 proposing to use the actual off-system sales margins that  
4 were booked during calendar year 2007.

5 Empire's evidence in this case will show  
6 that that's a very opportunistic projection because 2007  
7 off-system sales margins were extraordinarily high. It's  
8 also opportunistic because it fails to take into  
9 consideration the facts supported by uncontroverted  
10 evidence by Empire's witness in this case that almost  
11 25 percent of the margins that the company booked in 2007  
12 were attributable to a single power agreement which will  
13 expire within a couple of months after rates set in this  
14 case go into effect.

15 So even if the Commission were of a mind to  
16 use 2007 as a projection for the future, it would have to  
17 make an adjustment based upon that known and measurable  
18 change.

19 Empire's off-system sales margins continue  
20 to fluctuate significantly from year to year. Mr. Keith's  
21 evidence in this case will show that within the last five  
22 years you had a year where off-system sales were five and  
23 a half million dollars, two years later, they were less  
24 than two million dollars, and then the very next year,  
25 they were more than three and a half million dollars.

1

2                   Given that significant fluctuation, Empire  
3 still believes that a five-year average is what the  
4 Commission should use in this case. But we have also  
5 filed testimony that we believe the number that Staff is  
6 supporting in this case, which coincidentally happens to  
7 be very close to the five-year average that Empire has  
8 calculated, would be acceptable as well.

9                   Thank you.

10                  JUDGE VOSS: Thank you. Commission Staff?

11                  MR. REED: On this issue the Commission has  
12 to decide this number, the off-system sales margins that  
13 should be used to offset Empire's revenue requirement in  
14 this case. Because Empire's generation capacity is paid  
15 for by its ratepayers, at times that capacity can be used  
16 to sell power off-system and make a profit, so that  
17 Empire's ratepayers should enjoy some benefit from the  
18 sale of power that they made possible.

19                  In this case, Empire suggests the five-year  
20 average, and I think that number is 3.4 million. Office  
21 of the Public Counsel suggests the number that Mr. Mitten  
22 indicated was for calendar year 2007. That is  
23 5.9 million.

24                  The problem with Empire's five-year average  
25 is that the 3.4 million doesn't reflect -- really reflect

1 Empire's current market for off-system sales opportunity  
2 because in February of 2007 Empire became part of the  
3 Southwest Power Pool's energy imbalance service market  
4 wherein additional opportunity is available for Empire.

5                   With the advent of that market in 2007,  
6 Empire -- Empire's margins in off-system sales were  
7 5.9 million. That's the highest number that Staff is  
8 aware of for at least the last nine years for Empire in  
9 off-system sales.

10                   Instead, what Staff did in this case, in  
11 order to accurately reflect the current market in which  
12 Empire operates, and also to consider at least part of a  
13 contract that Empire has with the Kansas City Board of  
14 Public Utilities that actually ends after this summer,  
15 2008, I think after September, what Staff did was it took  
16 the first six months of off-system sales margins generated  
17 in 2007, January through June, and then the Staff  
18 annualized that number, basically doubled it, to come up  
19 with about 4.4 million, and that's the number that should  
20 be used for off-system sales margins to reduce Empire's  
21 revenue requirement.

22                   It's a significant amount, yet it's  
23 conservative enough to accurately reflect the current  
24 market. And I think in this case what you'll hear from  
25 the witnesses is that the parties agree that a base amount

1 of off-system sales margin should be established as a  
2 component of the fuel adjustment clause, and then there  
3 should also be passed through that fuel adjustment clause,  
4 if the Commission orders the FAC, any changes above or  
5 below that base amount should pass through to the  
6 ratepayers. Thank you.

7 JUDGE VOSS: Thank you. Public Counsel?

8 MR. MILLS: Thank you. Just very briefly.  
9 As both Mr. Mitten and Mr. Reed alluded to, Public Counsel  
10 supports the use of the calendar year 2007 off-system  
11 sales margin figure of approximately \$5.9 million. There  
12 are a number of reasons why that's the most appropriate  
13 figure.

14 One is, as Mr. Reed recognized, is the  
15 opening of the SPP EIS market in February of 2007. A  
16 second is the bilateral contract between Empire and BPU  
17 that runs through this summer. And the third is the  
18 addition of the Riverton 12 unit, which adds another 150  
19 megawatts of capacity to the Empire system, which will be  
20 available either to serve native load or to sell into the  
21 off-system sales market.

22 None of these three factors are reflected  
23 in the earlier -- or captured in the earlier part of the  
24 five-year average that Mr. Keith proposes. So it's only  
25 the most recent numbers that accurately reflect the



1 current situation that Empire is -- the current markets  
2 that Empire is selling off-system sales into and that it  
3 will likely continue to sell off-system sales into during  
4 the period of time in which rates in this case are in  
5 effect. Thank you.

6 JUDGE VOSS: Thank you. Industrials?

7 MR. WOODSMALL: Nothing, your Honor. We  
8 did a written Brief. Thank you.

9 JUDGE VOSS: Now, would Empire like to call  
10 its first witness?

11 MR. MITTEN: Call Scott Keith, please.

12 (Witness sworn.)

13 JUDGE VOSS: Please proceed.

14 SCOTT KEITH testified as follows:

15 DIRECT EXAMINATION BY MR. MITTEN:

16 Q. Would you please state your name and  
17 business address for the record.

18 A. My name is Scott Keith, and my business  
19 address is 602 Joplin Street, Joplin, Missouri.

20 Q. Where are you employed and what is your  
21 current business title?

22 A. I'm employed by Empire District Electric  
23 Company, and I am the director of planning and regulatory.

24 Q. Mr. Keith, your prefiled testimony in this  
25 case previously has been marked as Exhibit 2HC and NP,

1 Exhibit 3 and Exhibit 4HC and NP. Do you have that  
2 testimony in front of you?

3 A. Yes, I do.

4 Q. Was that testimony prepared by you?

5 A. Yes, it was.

6 Q. Are there any changes or corrections you  
7 need to make in any of those exhibits today?

8 A. None that I'm aware of.

9 Q. If I asked you the questions that are  
10 contained in those exhibits today, would your answers be  
11 the same as are reflected there?

12 A. Yes, they would.

13 Q. And are those answers true and correct to  
14 the best of your knowledge and belief?

15 A. Yes, they are.

16 MR. MITTEN: I have no further questions  
17 for Mr. Keith. It's my understanding we're going to defer  
18 offering his testimony until later because he's also  
19 testifying on some other issues.

20 JUDGE VOSS: Correct. Let's see. And this  
21 I believe is cross-exam schedule three. Okay. Department  
22 of Natural Resources is not here, so that brings us to  
23 Staff.

24 CROSS-EXAMINATION BY MR. REED:

25 Q. Mr. Keith, does Empire still propose he

1 five-year average of 3.4 million or in your surrebuttal do  
2 you agree with Staff's number of 4.4 million?

3 A. We agree with the Staff's number of  
4 4.4 million from a total company standpoint.

5 Q. From the total company. Okay. Yeah, we  
6 should be clear about that. Does Empire concur that this  
7 should be the base level of off-system sales that would be  
8 a component of a fuel adjustment clause if that is  
9 granted?

10 A. Yes, we do.

11 Q. And then is it your understanding, then,  
12 that actual off-system sales margins would flow through  
13 the fuel adjustment clause so rates would vary up or down  
14 based upon the amount of the margin, correct?

15 A. That's correct. If it's included, the  
16 sales levels would automatically be reflected in the  
17 clause, and if they declined, that would be reflected. If  
18 they increased, that would also be reflected.

19 MR. REED: All right. Thank you.

20 JUDGE VOSS: Public Counsel?

21 MR. MILLS: Judge, I do have a few  
22 questions. As a matter of protocol, is it okay to do  
23 cross from the tables or do you want us at the podium?

24 JUDGE VOSS: It's fine with me either way.

25 CROSS-EXAMINATION BY MR. MILLS:

1           Q.       Mr. Keith, and this kind of goes to what  
2 Mr. Reed was just asking you about. If the Commission  
3 authorizes Empire to use a fuel adjustment clause, would  
4 Empire object to using the 5.9 million total company  
5 dollar amount for off-system sales margin that Mr. Kind  
6 recommends?

7           A.       Well, not necessarily, as long as the  
8 increases and decreases were reflected down the road. If  
9 it turned out that the ongoing level was 4.4 million and  
10 that was reflected through the fuel adjustment clause, it  
11 would just be a matter of timing from a revenue recovery  
12 standpoint.

13          Q.       And even if the Commission does establish a  
14 fuel adjustment clause or does allow a fuel adjustment  
15 clause for Empire, do you believe that it's important that  
16 the Commission get the base level of off-system sales  
17 right? I'll ask another couple questions about what you  
18 think right is, but do you think it's important to get it  
19 right?

20          A.       I think there probably should be some level  
21 of sales reflected in base rates so that you're not  
22 starting at zero.

23          Q.       And do you believe that that level should  
24 be as close in approximation as the record evidence shows  
25 to what's likely to occur in the next year or so?

1           A.       It doesn't really matter because whatever  
2 actually occurs end up -- the customers end up getting  
3 that flowed through to them. So to the extent it was set  
4 at 4.4 million and the 5.9 million level turned out to be  
5 the real sales down the road, the extra one and a half  
6 million dollars would flow through the clause.

7           Q.       Is there any reason to -- for the  
8 Commission to deliberately set it at a level different  
9 than what's anticipated to be actually achieved?

10          A.       No, but there is a component in the fuel  
11 adjustment clause that would have some carrying cost  
12 associated with it. To the extent that it was well off,  
13 there would be more interest up or down, depending on  
14 which way the sales levels actually turned out.

15          Q.       Now, with respect to the five-year average,  
16 do you know of any cases since Empire's last rate case in  
17 which the Commission has used a five-year average for  
18 off-system sales margins for an electric utility in  
19 Missouri?

20          A.       No, I'm not aware of any.

21          Q.       Do you know of any cases in which they've  
22 used a different calculation of off-system sales margins?

23          A.       No. I'm not aware of how they've handled  
24 it.

25          Q.       Now, with respect to the Southwest Power

1 Pool energy imbalance markets, was that a functioning  
2 market five years ago?

3 A. No, it wasn't.

4 Q. Was it a functioning market at any time  
5 before February of 2007?

6 A. No.

7 Q. Has that market enabled Empire to more  
8 easily sell its excess energy into Southwest Power Pool?

9 A. Since the inception of the market, Empire  
10 has been able to sell into that market. I'm not sure that  
11 that's going to be the case every year. It just depends  
12 on the pricing every year. But they have been to date  
13 able to sell some energy into that market.

14 Q. But regardless of how Empire fits into that  
15 market, that's a market that didn't exist a few years ago?

16 A. That's correct.

17 Q. And do you have any reason to believe that  
18 that market will go away any time in the near future?

19 A. No.

20 Q. Now, with respect to the BPU contract, I  
21 believe in your surrebuttal testimony you stated that  
22 Empire has no plans to renew that contract; is that  
23 correct?

24 A. No. It expires the end of September of  
25 this year, and there's no discussion to renew it or seek

1 to sell capacity again.

2 Q. Has Empire made an affirmative decision not  
3 to -- not to seek to renew it?

4 A. No. I don't think -- we have no options  
5 under the current contract. I believe it just expires.  
6 To the extent BPU's in the market again, I did hear the  
7 other day they sent out an RFP, which they'll get  
8 responses to. So they're competitively bidding anything  
9 they need for say the summer of 2009-'10.

10 Q. And to the extent that that contract or any  
11 particular contract is not renewed or not entered into, is  
12 it because Empire intends to use the energy it produces to  
13 sell to its native load?

14 A. That's the plan. The unit was built to  
15 serve native load, and to the extent our load growth  
16 continues, that will ultimately use that capacity.

17 Q. And is Empire's -- is Empire's customer  
18 count growing?

19 A. Yes.

20 Q. Is Empire's load per customer growing?

21 A. I don't know that number. I don't know for  
22 sure.

23 Q. The way regulation is conducted in  
24 Missouri, in between rate cases does Empire -- is there  
25 any way to adjust for increases in customer numbers in

1 rates?

2 A. No. Rates remain the same.

3 Q. So to the extent that you take in more  
4 revenue from more customers, that's something that enures  
5 to Empire's bottom line, correct?

6 A. As long as we cover the costs associated  
7 with doing that, yes.

8 MR. MILLS: I have no further questions.

9 JUDGE VOSS: Industrials?

10 MR. WOODSMALL: No questions. Thank you.

11 JUDGE VOSS: Are there questions from the  
12 bench, Commissioner Murray?

13 COMMISSIONER MURRAY: Yes.

14 QUESTIONS BY COMMISSIONER MURRAY:

15 Q. The five-year average that was used in the  
16 last rate case, how did -- how did that compare to the  
17 actual during the period of time that the rates were in  
18 effect?

19 A. It was -- since the rate order?

20 Q. Yes.

21 A. I believe it's -- the average was lower  
22 than what we've actually been able to do.

23 Q. And was that because of the things that  
24 happened in 2007, would you say?

25 A. Yes. It's primarily the result of the SPP



1 energy imbalance market and the fact that we were able to  
2 do a bilateral capacity arrangement with the Board of  
3 Public Utilities.

4 Q. Okay. Now, using a five-year average in  
5 this case, that would not -- five-year historical average,  
6 that would include the year 2007, would it not?

7 A. If it were updated to reflect December.  
8 The number we came in with only went through June of '07,  
9 so it only picked up six months of the '07 activity. The  
10 Staff number, it's probably closer because they simply  
11 doubled the six months, the first six months and sort of  
12 projected it on for the rest of the year. They're kind of  
13 in between the high level that the OPC is and our lower  
14 straight five-year average.

15 Q. And if we took OPC's just -- just the year  
16 2007, that would assume that it would be normal going  
17 forward to continue to have the highest recorded year; is  
18 that correct?

19 A. That's correct. And the biggest problem I  
20 view -- in my view of that is the fact that this BPU  
21 contract expires approximately one month after rates --  
22 after the operation of law date.

23 The other factor that could take care of  
24 this is the fuel adjustment. If the margins, whatever  
25 they are, flow through the fuel adjustment in the future,

1 we don't really need to set out really a hard and fast  
2 level for base rates.

3 Q. But you would like to set them as close as  
4 possible, wouldn't you?

5 A. Yes, because it would minimize -- could  
6 minimize any interest charges that might come about  
7 through the fuel adjustment for over and under-recovery.

8 Q. And I assume by being willing to accept  
9 Staff's number, you're considering the Staff's number is  
10 likely to be more realistic than either the numbers that  
11 you have proposed or that the OPC has proposed?

12 A. Yes. For example, we -- really absent the  
13 BPU sale in the OPC's number, they're going to be  
14 right -- very close to the Staff number if you were just  
15 to adjust it for that one factor.

16 COMMISSIONER MURRAY: Thank you.

17 JUDGE VOSS: Thank you. Commissioner  
18 Jarrett?

19 COMMISSIONER JARRETT: No questions.

20 JUDGE VOSS: Chairman?

21 CHAIRMAN DAVIS: Real quick.

22 QUESTIONS BY CHAIRMAN DAVIS:

23 Q. Empire Electric's load is growing, correct?

24 A. Yes.

25 Q. Is it also fair to say that Empire

1 Electric's off-system sales margins have increased, the  
2 margins have increased since it began participating in the  
3 SPP energy imbalance market?

4 A. Yes, that's true. The biggest single  
5 factor of the increase, though, is this capacity sale,  
6 which has nothing to do with the EIS market.

7 Q. Now, with this, quote, capacity sale, are  
8 you actually selling kilowatts of electricity?

9 A. Very few. It's my understanding it's --  
10 it's an agreement they had -- BPU had to enter into to  
11 meet their load requirements. They needed the capacity.  
12 They don't call on the energy very much.

13 Q. Okay. So what's -- do you know what  
14 intervening, you know, factors are going to change, why  
15 BPU won't need this load in the future?

16 A. No. As a matter of fact, I think they do  
17 probably need some additional capacity. I think they're  
18 getting ready to go to the market and issue an RFP to get  
19 a response on pricing.

20 Q. Do you anticipate that Empire Electric will  
21 be -- will be bidding on that RFP?

22 A. I haven't heard one way or the other. I  
23 don't know.

24 Q. Okay. Are you familiar with RTOs?

25 A. Generally.

1 Q. Okay. Do some RTOs have capacity markets?

2 A. It's my understanding, I believe MISO does,  
3 but the SPP does not. Now, they may be talking and moving  
4 towards that, but they're not there yet. So the SP --

5 Q. It is entirely possible, though, that  
6 Empire Electric could sell capacity into the market in the  
7 future?

8 A. If it's avail -- if it's not needed for  
9 native load, yes.

10 Q. Okay.

11 CHAIRMAN DAVIS: Judge, no further  
12 questions at this time. He will be back, correct?

13 JUDGE VOSS: I believe so. I'm not exactly  
14 certain which day.

15 MR. REED: Thursday.

16 MR. WOODSMALL: He's up Wednesday on  
17 depreciation.

18 JUDGE VOSS: Do we have any redirect based  
19 on questions from the bench?

20 MR. MITTEN: No redirect.

21 MR. MILLS: I have further cross based on  
22 questions from the Bench.

23 JUDGE VOSS: Sorry. I meant recross. Go  
24 ahead. Staff?

25 MR. REED: No, thank you.

1 JUDGE VOSS: Public Counsel?

2 RECROSS-EXAMINATION BY MR. MILLS:

3 Q. Mr. Keith, do you have a copy of Ryan  
4 Kind's rebuttal testimony there with you?

5 A. I think I do. Yes, I do.

6 Q. Can you turn to page 3, please?

7 A. I've got it.

8 Q. In response to a question from the Bench, I  
9 believe you said that the single biggest factor that drove  
10 the increase in 2007 was the BPU contract. Was that your  
11 testimony?

12 A. It's the biggest single factor in the  
13 margin increase.

14 Q. Could you look at Mr. Kind's testimony,  
15 page 3, lines 11 through 13. Isn't it true that your 2007  
16 annual report said that the revenues less expenses  
17 increased during 2007 as compared to 2006 primarily due to  
18 sales facilitated by the SPP energy imbalance services,  
19 EIS market that began on February 1st of 2007?

20 A. Is that the single spaced --

21 Q. Yes. That's correct.

22 A. -- stuff?

23 Q. The first sentence in that quote from your  
24 annual report.

25 A. Could you repeat the question?

1           Q.       My first question was, did I read that  
2 statement accurately from your annual report?

3           A.       Could you reread it?

4           Q.       Revenue less expenses increased during 2007  
5 as compared to 2006 primarily due to sales facilitated by  
6 the SPP energy imbalances services, parents EIS close  
7 parents, market that began on February 1st, 2007.

8           A.       That's what it says, yes.

9           Q.       Do you disagree with that?

10          A.       No, I don't.

11                   MR. MILLS: No further questions.

12                   JUDGE VOSS: Industrials?

13                   MR. WOODSMALL: Just real briefly.

14 RE-CROSS-EXAMINATION BY MR. WOODSMALL:

15           Q.       Continuing on there, you see on pages 13  
16 through 15, you see sales from this market contributed  
17 8.8 million to our off-system electric revenues during  
18 2007 with 6.2 million of related expense? Do you see  
19 that?

20          A.       You're on the same page?

21          Q.       Yes.

22          A.       Yes, I see it.

23          Q.       Can you tell me then, if revenues were  
24 8.8 million and expenses were 6.2, what was your margin  
25 there?

1           A.       2.6 million.

2           Q.       And you see on page 16 -- or line 16, it

3       says the margin -- the sales on the BPU contributed

4       1.8 million; is that correct?

5           A.       That's correct.

6           Q.       2.6 is greater than 1.8; is that correct?

7           A.       Yes, it is.

8                   MR. WOODSMALL: Thank you. No further

9       questions.

10                   JUDGE VOSS: Redirect?

11                   MR. MITTEN: No redirect.

12                   JUDGE VOSS: Very well. Mr. Taylor, it

13       looks like you're excused for this afternoon. See you

14       Thursday.

15                   MR. WOODSMALL: Wednesday.

16                   JUDGE VOSS: Wednesday. I love the way

17       witnesses are popping up availability-wise today. We'll

18       see you at some future point. Staff, would you like to

19       call your witness?

20                   MR. REED: Yes, Dana Eaves.

21                   (Witness sworn.)

22                   JUDGE VOSS: Please proceed.

23       DANA EAVES testified as follows:

24       DIRECT EXAMINATION BY MR. REED:

25           Q.       State your name for us.

1           A.     My name's Dana Eaves.

2           Q.     Spell your last name.

3           A.     E-a-v-e-s.

4           Q.     What's your position?

5           A.     I'm a utility regulatory auditor.

6           Q.     With whom?

7           A.     With the Missouri Public Service

8 Commission.

9           Q.     Mr. Eaves, did you -- did you contribute to

10 the Staff report cost of service marked as Exhibit 204?

11          A.     I did.

12          Q.     And did you also prepare and cause to be

13 filed surrebuttal testimony in this case?

14          A.     Yes, I did.

15          Q.     I marked your surrebuttal testimony as

16 Exhibit No. 209. Was there any other testimony?

17          A.     No.

18          Q.     That was it. All right. Do you have any

19 corrections to the surrebuttal testimony?

20          A.     No.

21          Q.     What about the cost of service report?

22          A.     No.

23          Q.     All right. So if I asked the questions

24 that are contained in your surrebuttal testimony, would

25 your answers be the same today?



1           A.       Yes.

2                   MR. REED:  Tender the witness, Judge.

3                   JUDGE VOSS:  Industrials?

4                   MR. WOODSMALL:  Nothing, your Honor.

5                   JUDGE VOSS:  Public counsel?

6                   MR. MILLS:  Just a few.  Thank you.

7  CROSS-EXAMINATION BY MR. MILLS:

8           Q.       Mr. Eaves, it's your proposal that the  
9  Commission include two times the level of the first six  
10 months of 2007 off-system sales margins; is that correct?

11          A.       That's correct.

12          Q.       Can you point me to any other Commission  
13 case in which the Staff has recommended using a doubled  
14 amount of a half a year's expenses or revenues for  
15 ratemaking purposes?

16          A.       Exclusively for off-system sales, you're  
17 speaking of?

18          Q.       For any issue.

19          A.       I don't know that particular methodology,  
20 but there are a wide variety of methodologies that we use  
21 to annualize various things.

22          Q.       Well, I'm talking about specifically.  Can  
23 you point me to any other case in which the Commission has  
24 accepted doubling up half a year's worth of expenses or  
25 revenues?

1           A.       I have probably used that methodology in  
2 other expense categories or I would think probably an  
3 expense category, but I can't think of anything that the  
4 Commission would have adopted in off-system sales this  
5 way.

6           Q.       Has the Commission adopted that in any  
7 expense category?

8           A.       I know I've used that. I don't know if  
9 they've adopted it or not. I think in the context of  
10 other rate cases.

11          Q.       And what issues have you used that method  
12 on?

13          A.       Possibly some expense item, but I just --

14          Q.       Can you be more specific?

15          A.       I can't.

16                   MR. MILLS: That's all the questions I  
17 have. Thank you.

18                   JUDGE VOSS: Empire?

19                   MR. MITTEN: No questions.

20                   JUDGE VOSS: Okay. From the Bench,  
21 Commissioner Murray?

22 QUESTIONS BY COMMISSIONER MURRAY:

23          Q.       Good afternoon.

24          A.       Good afternoon.

25          Q.       Mr. Eaves, how did you determine that you

1     were going to double the first half of the year 2007  
2     instead of using the entire calendar year?

3             A.       Well, when I first looked at the issue, I  
4     didn't have a full calendar year to use. I would have  
5     used the test year, which was June 30th of 2007. When I  
6     looked at the company's proposed adjustment, looked at  
7     some other factors, I didn't feel that that -- those  
8     particular dollars would have been a good representative  
9     of an ongoing level.

10            Q.       Which particular dollars?

11            A.       The dollars in the test year.

12            Q.       In the entire test year?

13            A.       Yes, and that would be June 30th of 2007.

14            Q.       All right. But you felt that the first  
15     half of -- the first half of 2007 times two would be more  
16     realistic?

17            A.       Once I did the numbers, once I evaluated  
18     the numbers, because we tried to look at an annualization  
19     method that will be a good reflection of an ongoing level.  
20     That may require a five-year average, a three-year  
21     average, a seven year average, different methodologies,  
22     different tools that we have to use in order to pick a  
23     good -- what we feel is a good ongoing level.

24            Q.       And in determining that in this case, did  
25     you think that the entire actual year of 2007 was not

1 likely to be sustained going forward?

2 A. Really what I drew my conclusion on is that  
3 it was the highest level. If you use the calendar year  
4 ending, it had been the highest level -- I looked back  
5 nine years, 1999, and that would have been the highest  
6 level. So I didn't feel that that would be a good  
7 predictor, even with the changes that occurred during the  
8 test year and the update period, that would be a good  
9 reflective ongoing level.

10 Q. And you felt that doing the five-year  
11 historical average would not represent the true changes  
12 that had occurred that would still factor in going  
13 forward; is that right?

14 A. That's correct.

15 COMMISSIONER MURRAY: Thank you.

16 JUDGE VOSS: Commissioner Jarrett?

17 COMMISSIONER JARRETT: No questions.

18 JUDGE VOSS: Chairman Davis?

19 QUESTIONS BY CHAIRMAN DAVIS:

20 Q. Mr. Eaves, is it your position that Empire  
21 Electric participating in the SPP energy imbalance market  
22 is sort of an intervening event that makes the, you know,  
23 history prior to that participation less relevant?

24 A. Yes, that's -- that's one of the factors,  
25 if not possibly the overriding factor was that change in

1     how they market their energy.

2             Q.       Okay.  And would you agree that Empire  
3     Electric will be able to realize higher off-system sales  
4     margins through participation in SPP than if they were  
5     just entering into bilateral contracts on their own?

6             A.       It appears they're going to have some  
7     change upwardly.

8             Q.       Some change upwardly?

9             A.       From prior years.

10            Q.       If we were to adopt OPC's recommended  
11     amount for off-system sales, do you see any potential  
12     harm, and if so, what would it be?

13            A.       The harm would be if the -- the margin is  
14     not a good predictor of what occurs, if that 5.9 million  
15     is too high, then would -- is this in context with an FAC,  
16     if an FAC was ordered?

17            Q.       Can be whatever context.  You just -- if  
18     you would -- you can define the parameters that you want  
19     to answer, however you want to answer the question.  So  
20     yes, just assume that there's an FAC.

21            A.       I think having an FAC mitigates the risk on  
22     both parties if the margins are too high, are set too high  
23     or set too low.

24            Q.       Okay.

25            A.       So really within the context of an FAC is

1 the ratepayer or the company going to be harmed by picking  
2 an inappropriate level? I don't know that I can measure  
3 that, what impact that would have on the company or on the  
4 ratepayers, but I think it's important to pick a  
5 conservative, well thought out number for the base, and I  
6 think my approach that I've recommended does that.

7 Q. Can you state again why a conservative,  
8 well thought out number would be most appropriate?

9 A. I think a conservative well thought out  
10 number is always more appropriate.

11 CHAIRMAN DAVIS: Okay. No further  
12 questions.

13 JUDGE VOSS: Commissioner Clayton?

14 COMMISSIONER CLAYTON: I just have a couple  
15 of basic things.

16 QUESTIONS BY COMMISSIONER CLAYTON:

17 Q. First of all, do you -- are you the witness  
18 who is talking about both the off-system sales as an  
19 independent issue as well as the issue of inclusion of  
20 off-system sales in a fuel adjustment clause?

21 A. I don't sponsor any testimony on the FAC  
22 itself.

23 Q. Who is handling that?

24 A. I believe that's Mark Oligschlaeger.

25 Q. So basically you're sponsoring testimony

1 supporting inclusion of a dollar amount and the reasons  
2 behind that; is that correct?

3 A. Yes.

4 Q. Now, in looking at these numbers, I think  
5 Staff's testimony in terms of total company is that for  
6 the first six months in calendar year 2007, Empire  
7 realized off-system sales, and I think these are all  
8 public numbers -- are these public? They're in the Brief,  
9 so I think they're public, yeah. 2.2 million for the six  
10 first months of calendar year 2007?

11 A. Yes.

12 Q. And then you-all doubled that to get to the  
13 4.4 and change million dollars that would support Staff's  
14 position --

15 A. I did.

16 Q. -- is that correct?

17 It wasn't a trick question. I thought it  
18 was a pretty easy question; is that right?

19 A. Yes, that's correct.

20 Q. Good. Now Public Counsel's testimony has  
21 supported off-system sales margins at the level of  
22 \$5.9 million because that's what Empire realized for the  
23 entire calendar year 2007. Do you agree with that?

24 A. Yes.

25 Q. Then that would logically follow that the

1 six months at the second half of 2007, they had roughly  
2 \$3.7 million in off-system sales?

3 A. Yes.

4 Q. Now, I don't know if this question's been  
5 answered, and if this is repetitive I apologize for that.  
6 What caused that increase, that difference between the two  
7 six months periods?

8 A. Various factors. I don't know that I  
9 looked at each individual transaction that transpired  
10 during that period. So it would be difficult for me to  
11 say any one transaction accounted for that. It was just a  
12 sum of transactions.

13 Q. I mean, is there any particular reason why  
14 they -- why their sales were higher during that second six  
15 months period?

16 A. I would assume that it was from the EIS  
17 market.

18 Q. But the EIS-- so the EIS market increased  
19 their off-system sales?

20 A. That's my -- that's my assumption.

21 Q. All right. Now, they participated in the  
22 EIS margin for at least four months in the first six  
23 months out of the year, correct?

24 A. Yes.

25 Q. And then for all six months from July



1 through December of 2007?

2 A. Yes.

3 Q. All right. Now, in 2008 and going forward,  
4 are they still participating in that EIS market?

5 A. To the best of my knowledge, yes.

6 Q. So wouldn't that suggest that their  
7 off-system sales would be more indicative of the second  
8 six months period rather than January through June of 2007  
9 when for at least two months they weren't in that market?

10 A. Yes. I looked at that, and I annualized it  
11 that way. I took the last six months and annualized it,  
12 and it gave even -- rendered even a higher level.

13 Q. You mean by taking the months where they're  
14 in the EIS market and then making it a 12-month year?

15 A. Yes, doing the same thing for the last six  
16 months I did for the first six months --

17 Q. Okay.

18 A. -- and it rendered a much higher level, and  
19 I didn't think that was indicative of a good ongoing  
20 level.

21 Q. Okay. I don't -- explain to me why you  
22 don't think that was indicative considering that Empire is  
23 now in this EIS market. Going forward they're going to be  
24 in this EIS market. That registers higher sales. So why  
25 is that not indicative of what they're going to be seeing

1 in the future?

2 A. Well, I think it -- we still have to -- at  
3 least I still have to look on that in a historical  
4 perspective because it's just not the EIS market.

5 Q. Okay.

6 A. There's other factors. There's operational  
7 issues that occur. They can have outages.

8 Q. Can you give me some examples? Each of  
9 these things, give me just some examples so I know what  
10 you're talking about.

11 A. They could have maintenance issues. They  
12 could have outages. They could have extended outages,  
13 therefore not having as much power available to trade on  
14 the market.

15 Q. Okay.

16 A. I know growth has been talked about some.  
17 If they -- if they're --

18 Q. Native load growth you mean?

19 A. Native load growth, then they possibly  
20 won't have as much power to sell on the market. It's  
21 difficult. It's hard to isolate one particular factor  
22 without a lot of history behind that to make a  
23 determination of what the ongoing level is going to be.

24 Q. Okay. Let's talk about some of these  
25 factors. You're talking about operational issues such as

1 an outage, and an outage would cause Empire to have less  
2 power to sell on the open market, correct?

3 A. I think with everything else being equal,  
4 yes.

5 Q. Now, during the second six months of this  
6 period here, they did have some outages in place, did they  
7 not?

8 A. Probably. I don't -- I don't know. I  
9 didn't look at particular outages.

10 Q. Maybe I'm misunderstanding. Asbury was out  
11 during this period, correct?

12 A. For some period I think they would have  
13 been, yes.

14 Q. So that would have an impact on what power  
15 they would have available for the off-system market, yes  
16 or no?

17 A. Yes.

18 Q. Okay. And did you consider that in looking  
19 at what Empire's annualized off-system sales would be --

20 A. No.

21 Q. -- the fact that Asbury was out of service?

22 A. No.

23 Q. You don't think that's relevant or you just  
24 forgot or didn't know or just --

25 A. No, I think looking at the period that I

1 looked at would have encompassed some of those same  
2 factors whether it would have been Asbury or a different  
3 plant, there's --

4 Q. Okay. During the first six months of  
5 calendar year 2007, which plants were out?

6 A. I don't know.

7 Q. Okay. Well, in trying to figure out the  
8 reasons why you chose the first six months, you said that  
9 there were some things that would offset the fact that  
10 Asbury was out of service late in 2007. So what would  
11 have -- give me some specific examples of what would have  
12 offset that to make January through June more indicative  
13 of what Empire's off-system sales were going to be.

14 A. Well, I think they have a certain level of  
15 maintenance, whether it's scheduled maintenance, possibly  
16 have some --

17 Q. Can you give me some specific examples?

18 A. I cannot. I don't have a list of their  
19 maintenance outages or --

20 Q. Well, do you know, do you know if they had  
21 any outages in the first six months of 2007?

22 A. Without being able to give you a specific  
23 plant or a specific generating unit, no, and I'm not able  
24 to do that.

25 Q. I'm not trying to put you on the spot for

1    what you know today, but in compiling your testimony, did  
2    you evaluate that? I mean, do you know if any plants were  
3    out of service in those first six months or not?

4           A.     I did not evaluate that.

5           Q.     You did not evaluate that?

6           A.     No.

7           Q.     So if you didn't look at that, if you have  
8    no idea whether plants were in service or out of service  
9    for that first six-month period, then explain to me how  
10   you can justify that first six months being truly  
11   indicative when we know there was at least one outage in  
12   the second six-month period.

13          A.     Well, I think -- in context, if you look at  
14   using the methodology that I used, I just -- we have to  
15   make a certain determination of really what do we feel, do  
16   we feel that what we've done is a representative sample,  
17   and I understand what you're saying, did you look at all  
18   these various factors. No, I didn't look at every factor  
19   probably that -- that's out there, that you could look at.

20          Q.     Maybe I'm looking at this the wrong way.  
21   Maybe I'm looking at it the wrong way, so correct me if  
22   I'm wrong. It almost seems that what Staff's position is,  
23   is that it looked at those first six months as being more  
24   reflective of what history had shown Empire's off-system  
25   sales to be rather than looking at specific physical

1 circumstances involving off-system sales with Empire's  
2 fleet, its generation fleet. Is that accurate?

3 A. Most certainly.

4 Q. So you-all were looking at more outcome  
5 based rather than the specific circumstances that led to  
6 that outcome?

7 A. I would -- yes, definitely. I think if you  
8 used the methodology that you're looking at and tried to  
9 pinpoint the generation from each unit and how that  
10 impacted the overall level of energy that they had to  
11 trade, it would be very difficult.

12 Q. Okay. So if -- if Staff is looking at  
13 outcome and is comparing with historical records, and that  
14 how -- that's how it comes to its 4.4 million in  
15 off-system sales, don't you think there is a pretty strong  
16 argument that that is not an accurate reflection  
17 considering we've got new market participation and -- and  
18 the second six months out of the year had an increased  
19 amount even with the one Asbury facility being out of  
20 service? Wouldn't that second six-month period be more  
21 indicative of the future?

22 A. Really looking in context of all the  
23 different averages that I've done and taking in those  
24 major factors, the EIS market, Asbury outages, you know,  
25 anything that occurred during the -- I think if you look

1 at the number, it's just -- it's a very good reflective  
2 number. If you look at --

3 Q. Based on history, not on the -- what the  
4 circumstances --

5 A. Some history. Some history. That's why I  
6 wasn't able to use just a straight five-year average or  
7 three-year average. I can say, well, let's throw --

8 Q. But in terms of -- if one is going to go  
9 outside the calendar year, go outside what the test year  
10 period is, and you go to a running three-year average or  
11 five-year average, looking backward is not going to  
12 reflect what the future is because of the existence of the  
13 SPP EIS market, correct?

14 A. With that last statement, with a change in  
15 the test year, then that's correct.

16 Q. I mean, if we're -- the test year, the  
17 amount would be OPC's number, correct, if we just used a  
18 straight historical test year?

19 A. No, it would not.

20 Q. It would not be? What would the number be  
21 in the test year? Correct me here.

22 A. It would be the --

23 Q. I've got so many dates that I'm messing  
24 them up.

25 A. Not to confuse -- not to confuse you or

1 other parties, the test year ended June 30th, 2007. So  
2 the level of off-system sales margins June 30th would have  
3 been the test year level. That was 3 million --  
4 3,566,000. So 3.5 million.

5 Q. That's the test year amount?

6 A. That's the test year amount.

7 Q. Okay.

8 A. I'm sorry. It's 3.9 million.

9 Q. 3.9. 3.9 million. And that 3.9 million  
10 would include I believe only three or four months of  
11 participation in the SPP EIS market?

12 A. They entered sometime in February. Whether  
13 it was the middle of February, first of February, end of  
14 February, I can't recall.

15 Q. So the test year's 3.9. Staff has come in  
16 at a figure of 4.4 that they feel would be appropriate; is  
17 that correct?

18 A. Yes.

19 Q. And what was Empire's original position on  
20 this issue, do you remember? What was their position and  
21 what is their position, is your understanding?

22 A. I believe their filed number was the  
23 3.9 million, and my understanding is that they're  
24 accepting my number, which is 4.4 million.

25 Q. Accepting 4.4. And OPC is 5 --



1 A. 5.9.

2 Q. 5.9 million. Based on calendar year 2007?

3 A. Which is also the update period.

4 Q. Which is also the update period?

5 A. Update period.

6 Q. It'd be the same -- yeah, it is the update  
7 period. Thank you.

8 Okay. I don't have any other questions,  
9 but I'd like to ask you to compile one more number, then  
10 I'll leave you alone. Can you compile a number that --  
11 and I'm sure Staff will do this if the Commission looks at  
12 this, makes this decision. Do you know what the number  
13 would be if the update period were to end February 29th?  
14 Do you have any idea what that would make it?

15 A. I haven't looked at January and February in  
16 '08, but I can certainly do that.

17 Q. Well, obviously you want to wait. It's not  
18 relevant until you get some direction from at least more  
19 than one Commissioner.

20 Last general questions. Is the SPP EIS  
21 market, is it -- is it still intact --

22 A. Best of my knowledge, yes.

23 Q. -- right now? And Empire's still  
24 participating in that?

25 A. Best of my knowledge, yes.

1           Q.       Is it your understanding that Empire will  
2 remain operating in that market for the foreseeable  
3 future?

4           A.       That's my understanding, yes.

5                   COMMISSIONER CLAYTON: Okay. Thank you  
6 very much.

7                   JUDGE VOSS: Any other questions from the  
8 Bench?

9 QUESTIONS BY JUDGE VOSS:

10           Q.       I have a question. There's one thing I'm a  
11 little confused about, make sure I understand. I'm just  
12 not familiar with the trading market. Are the kilowatt --  
13 or is the price per kilowatt comparable on an ongoing  
14 basis or is it significantly higher at certain periods of  
15 time on the resale market?

16           A.       It's openly traded, so it goes up and down.

17           Q.       So since you're talking an electric energy  
18 commodity, would you expect it to be higher, then, in the  
19 summer? I'm just wondering how this might have factored  
20 into the periods that were used.

21           A.       I think it really varies on the  
22 availability of power. And does weather impact that? I  
23 think so, yes. So if you had warmer than normal or colder  
24 than normal, that could have an impact as well.

25                   JUDGE VOSS: Thank you. Let's see.

1 Redirect based on questions -- should be recross based on  
2 questions from the Bench, Industrials?

3 MR. WOODSMALL: No.

4 JUDGE VOSS: Public Counsel?

5 MR. MILLS: Just a few. Thank you.

6 RECROSS-EXAMINATION BY MR. MILLS:

7 Q. In response to a question from Commissioner  
8 Murray, I believe you testified that if the Commission  
9 were to adopt Public Counsel's proposed number for  
10 off-system sales margins, that would be the highest level;  
11 is that correct? Is that your testimony?

12 A. From the analysis period I had, and I think  
13 that was through 1999.

14 Q. Okay. And did you hear Mr. Keith testify  
15 that Empire's level of customers is growing steadily?

16 A. I heard that, yes.

17 Q. Assuming that Staff -- assuming that  
18 Mr. Keith is correct, if Staff used calendar year 2007  
19 customer numbers, would that be the highest level of  
20 customer numbers ever?

21 A. Yes, I believe that would follow.

22 Q. Is there anything inherently wrong with  
23 using the highest number in the analysis period if you  
24 believe it's representative of the going-forward number?

25 A. I think if it's -- if it's trending and I

1 think that's what you have to look at when you're looking  
2 at that period, not just that it's the highest level for  
3 that year, but there's a trending and you can reasonably  
4 predict that the number is going to be at a higher level  
5 in the future.

6 Q. So there's nothing inherently wrong with  
7 using the highest number?

8 A. No, I think if you -- if you -- just  
9 because it's a higher number doesn't mean it's -- it  
10 shouldn't be used. There could be -- there's factors  
11 leading up to why that number is higher, and if those  
12 factors are going to remain the same or constant, then the  
13 higher number is not necessarily a bad number.

14 Q. Now, similarly, in response to a question  
15 from Commissioner Davis, you characterized the Staff's  
16 proposed number as conservative and well thought out. Do  
17 you recall that?

18 A. Yes, I do.

19 Q. Can you define for me in the context of a  
20 revenue item that's an offset to the company's operating  
21 expenses what you mean by the term conservative?

22 A. Again, going back, looking at all the  
23 numbers available, trying to predict an ongoing level, do  
24 I take test year, do I take calendar year update period or  
25 do I do something else to give me that representative

1 ongoing level, and that's what I mean by conservative. Is  
2 it the lowest number that I can find or is it the highest  
3 number I can find?

4 I think looking at the facts and  
5 circumstances will render you whether you're conservative  
6 or whether you're at one end or the other of the spectrum.

7 Q. So by conservative in this context you  
8 essentially mean most representative?

9 A. Yes, on a going forward basis.

10 Q. Now, in terms of Staff's overall case, and  
11 this goes to some questions you had with Commission  
12 Clayton about using the update period or the test year  
13 period, is Staff's case generally based on a 12-month  
14 period ending December 31, 2007?

15 A. It's generally some 12-month-ending period,  
16 whether it ends December 31st or not. I don't know that I  
17 have any way to quantify how many cases that's happened  
18 in.

19 Q. No. I mean in this case, is the revenue  
20 requirement calculation that Staff came up with in this  
21 case, is it primarily based on calendar year 2007, on the  
22 update period?

23 A. Yes.

24 Q. Is there any other expense item or revenue  
25 item for which Staff has used the first half of 2007

1 doubled in this case?

2 A. I believe I used that also in transmission  
3 revenue.

4 Q. Correct.

5 A. The same methodology.

6 Q. Okay. You say you used the same one for  
7 transmission revenue and off-system sales margins?

8 A. Yes.

9 Q. Other than those two, is there any other  
10 one?

11 A. Not that I'm aware of, no.

12 MR. MILLS: That's all the questions I  
13 have. Thank you.

14 JUDGE VOSS: Empire?

15 MR. MITTEN: Just a few questions.

16 RE-CROSS-EXAMINATION BY MR. MITTEN:

17 Q. Mr. Eaves, could you turn to page 3 of your  
18 surrebuttal testimony, please.

19 A. I'm there.

20 Q. Okay. Commissioner Clayton asked you some  
21 questions about the ability to predict the future based  
22 upon the first six months of 2007 versus the second six  
23 months of 2007. Do you recall those questions?

24 Q. Yes.

25 Q. Now, if I understand the data that are on

1 page 3, you have nine years worth of actual off-system  
2 revenues that are margins that were booked by Empire; is  
3 that correct?

4 A. That's correct.

5 Q. Let me direct your attention to 2001 and  
6 2002. Now, there was a significant increase between 2001  
7 and 2002, correct?

8 A. Yes.

9 Q. And I assume that was attributable to  
10 something?

11 A. Something, yes.

12 Q. If you had used either the actual revenues  
13 that were booked in 2002 or double the first six months or  
14 the second six months of those revenues and used that to  
15 predict what would be booked in 2003, you'd have been off  
16 by as much as 40 percent; is that right?

17 A. At least.

18 Q. And in fact, in no year since 2002 has  
19 Empire come anywhere near the \$5.116 million in off-system  
20 sales margins that were booked in 2002?

21 A. Doesn't appear they have.

22 Q. Given that history, can you say with any  
23 degree of certainty that it's likely that Empire is going  
24 to duplicate the \$5.9 million in off-system sales margins  
25 that it booked in 2007 in the future?

1                   MR. MILLS: I object. There's no  
2 foundation been laid that this witness has any expertise  
3 in predicting that.

4                   MR. MITTEN: I asked him based upon the  
5 history in his testimony.

6                   JUDGE VOSS: I'll overrule.

7                   THE WITNESS: Could you ask the question  
8 again?

9 BY MR. MITTEN:

10                Q.       Based upon the data that are shown in your  
11 testimony and the fluctuations, are there -- is there  
12 reason for you to believe that the \$5.9 million in  
13 off-system sales margins that Empire booked in 2007 are  
14 going to be duplicated in 2008 or 2009?

15                MR. MILLS: And just so the record's clear  
16 I have the same objection. This witness' -- there's  
17 nothing in this witness' testimony that qualifies him as  
18 an expert in predicting the level of off-system sales  
19 margins.

20                MR. MITTEN: That's what his whole  
21 testimony is about, predicting off-system sales margins.  
22 It's a little late in the game to argue about his  
23 expertise.

24                JUDGE VOSS: That was my impression.

25                MR. MILLS: I don't believe so. I'm



1 objecting to this question on the basis that's there's  
2 nothing in his testimony to qualify him as an expert.

3 JUDGE VOSS: Staff, are you representing  
4 this witness is an expert in spot market pricing?

5 MR. REED: I'm sorry?

6 JUDGE VOSS: Are you representing this  
7 witness is an expert in spot market pricing?

8 MR. REED: Spot market pricing?

9 MR. MITTEN: Excuse me. My question didn't  
10 have anything to do with spot market pricing.

11 JUDGE VOSS: Maybe you need to repeat the  
12 question.

13 MR. MITTEN: I'm just asking, based upon  
14 the data that's in his prefiled testimony which shows  
15 fluctuations from year to year, is there any basis for you  
16 to believe that the \$5.9 million in off-system sales  
17 margins that the company booked in 2007 is likely to be  
18 repeated in 2008 or 2009?

19 MR. MILLS: Same objection.

20 JUDGE VOSS: I have to sustain the  
21 objection, because information in his testimony is based  
22 on the past, and the witness also has already stated that  
23 you can't look at individual things in the future that  
24 haven't happened. So --

25 MR. MITTEN: No further questions.

1 JUDGE VOSS: Redirect?

2 REDIRECT EXAMINATION BY MR. REED:

3 Q. I just -- I want to clear something up for  
4 the record that we'll need later. In response to  
5 Commissioner Clayton's questions, you had talked about the  
6 2.2 million that was generated in off-system sales for the  
7 first six months of 2007, do you recall?

8 A. Yes.

9 Q. The second six months in 2007 there was  
10 3.7 million, remember? That totals 5.9 million for  
11 calendar year 2007?

12 A. Yes.

13 Q. What was absent from the discussion that I  
14 wanted to ask you about was the Kansas City Board of  
15 Public Utility contract, and can you tell us from what  
16 period of time that contract ran in 2007?

17 A. My understanding of the contract, it was  
18 for the summer months of 2007.

19 Q. June, July, August, September, correct?

20 A. Yes.

21 Q. And how much per month did the contract  
22 call for, if you recall?

23 A. I know the total amount. I don't know if I  
24 know the monthly amount.

25 Q. All right. Give me that total.

1 A. I believe it's 1.8 million.

2 Q. 1.8 million. Okay. If that were divided  
3 by four months, you would have 400 -- over 400,000 per  
4 month, correct?

5 A. Yes.

6 Q. Okay. So if we back that out, if there are  
7 three months -- three months of that contract that are  
8 included in the second half of the 2007 numbers, 400,000  
9 times the three months is 1.2 million, correct?

10 A. Yes.

11 Q. So if you reduce the 3.7 million by  
12 1.2 million, you come up with 2.5?

13 A. 2.5.

14 Q. 2.5, okay. And in the same way, in the  
15 first six months there was 2.2 million generated from  
16 the -- in off-system sales, but about 400,000 of that was  
17 from the BPU contract?

18 A. Yes.

19 Q. So that would take you down to 1.8,  
20 correct?

21 A. Yes.

22 MR. REED: Thank you.

23 JUDGE VOSS: Commissioner Clayton?

24 FURTHER QUESTIONS BY COMMISSIONER CLAYTON:

25 Q. I hate to do this. If that's the case, why

1 -- I mean, do you think the BPU contract ought to be  
2 excluded from projecting off-system sales in the future?

3 A. No, and my annualization doesn't do that.  
4 My annualization includes those transactions that occurred  
5 during that period that I annualized. My first six months  
6 of '07, there's some level of those BPU sales in my  
7 number. I haven't attempted to exclude that contract on a  
8 going forward basis.

9 COMMISSIONER CLAYTON: Okay.

10 JUDGE VOSS: Any more questions from the  
11 Bench? Is there any party that has additional recross?  
12 Any additional redirect?

13 MR. REED: No.

14 JUDGE VOSS: All right. I think that will  
15 be it for Mr. Eaves. Public Counsel, are you ready to  
16 call your witness?

17 MR. MILLS: Yes. Public Counsel calls Ryan  
18 Kind, please.

19 (Witness sworn.)

20 JUDGE VOSS: Please proceed.

21 RYAN KIND testified as follows:

22 DIRECT EXAMINATION BY MR. MILLS:

23 Q. Mr. Kind, I'll represent to you that your  
24 testimony has been marked as Exhibit 303. Could you state  
25 your name for the record, please.

1           A.       My name is Ryan Kind.

2           Q.       And by whom are you employed and in what  
3 capacity?

4           A.       I'm employed by the Missouri Office of the  
5 Public Counsel as the chief energy economist.

6           Q.       And did you cause to be filed in this case  
7 rebuttal testimony that addresses, in addition to other  
8 issues, the off-system sales margin issue?

9           A.       Yes, I did.

10          Q.       And do you have any corrections to make to  
11 that testimony?

12          A.       Yes. I have just one correction, and  
13 that's on page 5, in line 16, the fifth word in that line  
14 is an abbreviation -- should be an abbreviation for the  
15 Southwest Power Pool, and it's SSP, and that abbreviation  
16 should be SPP.

17          Q.       With that correction, are the answers in  
18 your rebuttal testimony true and correct to the best of  
19 your knowledge and belief?

20          A.       Yes, they are.

21          Q.       And if I were to ask you the same questions  
22 here today, would your answers be the same?

23          A.       Yes.

24                   MR. MILLS: Judge, Mr. Kind will be  
25 testifying later on the fuel adjustment clause, so I won't

1 offer his testimony now, but I will tender him for  
2 cross-examination.

3 JUDGE VOSS: Thank you. Industrial?

4 MR. WOODSMALL: No, thank you.

5 JUDGE VOSS: Staff?

6 MR. REED: Yes.

7 CROSS-EXAMINATION BY MR. REED:

8 Q. Just a few questions because I think we've  
9 explored this issue pretty extensively, but Mr. Kind a few  
10 questions. In the last rate case that Empire had, did the  
11 Office of Public Counsel recommend a five-year average for  
12 off-system sales?

13 A. That's correct.

14 Q. The number -- the number of 5.9 million  
15 that you've sponsored in your testimony for this case, is  
16 that -- is that Missouri only or is that across --

17 A. No. That's the total company off-system  
18 sales margin figure.

19 Q. Do you know, is that the largest off-system  
20 sales margin that Empire has ever had?

21 A. It's the highest that I'm aware of, yes.

22 Q. According to the testimony we've heard so  
23 far, the Kansas City Board of Public Utility contract will  
24 expire after September of 2008. Are you aware of that?

25 A. Yes, I am.

1           Q.       Now, it is possible, I guess, that Empire  
2       could bid for that and obtain that contract again in the  
3       future, but if -- if we remove those amounts from the  
4       off-system sales margin for -- for Empire for the calendar  
5       year 2007, wouldn't that -- wouldn't that reduce your  
6       recommended 5.9 million down to about four and a half  
7       million?

8           A.       It would, but I wouldn't recommend doing  
9       that because I believe the company will have availability  
10      to make future capacity sales in -- on into 2009.

11          Q.       But at present they don't have a contract  
12      for 2009, at least with the Kansas City Board of Public  
13      Utilities?

14          A.       No, but at present there is a good capacity  
15      market for selling capacity in the SPP region, and the  
16      prices at which that capacity is sold in future years have  
17      been rising.

18                   MR. REED:   Thank you.   I'm finished.

19                   JUDGE VOSS:   Empire?

20                   MR. MITTEN:   No questions.

21                   JUDGE VOSS:   Questions from the Bench,  
22      Commissioner Murray?

23                   COMMISSIONER MURRAY:   No questions.   Thank  
24      you.

25                   JUDGE VOSS:   Commissioner Clayton?

1                   COMMISSIONER CLAYTON: I'll let somebody  
2 else go if they have questions.

3                   JUDGE VOSS: Commissioner Jarrett?

4                   COMMISSIONER JARRETT: I don't have any  
5 questions.

6                   JUDGE VOSS: Chairman Davis?

7 QUESTIONS BY CHAIRMAN DAVIS:

8               Q.       So in essence your position is that either  
9 through BPU or through potential capacity market in SPP,  
10 you know, Empire Electric will have the opportunity to  
11 have future capacity sales in the future and that there  
12 should be some accounting in rates for that?

13              A.       That's correct.

14                   CHAIRMAN DAVIS: Thank you.

15                   JUDGE VOSS: Any other questions from the  
16 Bench, Commissioner Clayton?

17 QUESTIONS BY COMMISSIONER CLAYTON:

18              Q.       Mr. Kind, did you look at any other details  
19 associated with the 12-month period that you chose that  
20 suggests that it is more indicative? Is it just simply  
21 the SPP market or are there other factors?

22              A.       No, there are other factors as well. One  
23 of the other key factors is the fact that the Riverton  
24 unit was just added during the -- prior to the peak period  
25 in the summer of 2007, a 150 megawatt peaking unit.



1 Q. And when was it added?

2 A. It was in service prior to June 2007.

3 Q. So like May 2007 or June 2007?

4 A. I can't tell you the exact date.

5 Q. How about I'll just put May slash June,  
6 2007.

7 A. And that's 150 megawatt unit, which is well  
8 more than the amount of capacity that they would grow into  
9 through load growth in just a couple of years.

10 Q. What other factors?

11 A. Specifically with regard to the calendar  
12 year and why I think it's reasonable?

13 Q. Yeah, why you think it's more indicative of  
14 an accurate number, aside from the SPP market? I asked  
15 Mr. Eaves these questions and he -- he didn't really have  
16 any specific responses. He just talked about the  
17 historical perspective and how you set these numbers. I'm  
18 wondering if you looked at any other figures. It doesn't  
19 appear that you looked at history of off-system sales of  
20 Empire's work here.

21 A. Well, I didn't figure -- I didn't feel that  
22 history was particularly relevant because of the opening  
23 up of the SPP --

24 Q. I understand. I just -- you have a  
25 different analysis than what Mr. Eaves had. So what other

1 factors did you look at aside from Riverton and the SPP  
2 market?

3 A. Well, the other main factors would have  
4 just been my general background, knowledge of energy and  
5 capacity markets in the SPP region, and that general  
6 knowledge leads me to believe that there is an upward  
7 trend in capacity prices in the SPP region just as there  
8 is in the MISO region.

9 Q. Do you know why there is an upward trend in  
10 prices?

11 A. Yes. It's really pretty clear. SPP is one  
12 of the NERC reliability regions that currently has the  
13 greatest amount of excess capacity, and that amount of  
14 excess capacity is slowly going away as in general  
15 additional units aren't added in the region that would  
16 keep up with the load growth in the region. And so just  
17 the -- essentially the tightening of supply will lead to  
18 an increase in the market price of capacity.

19 Q. And then is it -- is it your understanding  
20 that that market will continue to tighten in terms of  
21 capacity in the years to come?

22 A. Well, at least in the near term over, say,  
23 the next three or four years. At some point it will  
24 tighten enough where people will start building additional  
25 capacity.

1           Q.       Okay. Did you assess the outage associated  
2 with the Asbury unit in your analysis?

3           A.       I'm aware that there was an outage. It  
4 wasn't to me one of the chief factors for -- you know, in  
5 support of my recommendation, but I would say it would be  
6 a secondary factor.

7           Q.       Did you look at it? Were you aware of it  
8 and include that information in your analysis?

9           A.       It was part of my general knowledge of the  
10 utility that I took into account.

11          Q.       Would the presence or the operation of  
12 Asbury have caused a greater amount of off-system sales in  
13 that second six months period of 2007?

14          A.       It's likely that there would have been some  
15 additional energy sales if that unit were in service  
16 throughout the year.

17          Q.       You said that energy. What about -- are we  
18 talking capacity or are we talking energy?

19          A.       We're talking energy there, yes. Capacity  
20 primarily has value in the summer months, the months  
21 during which it was -- this BPU contract was for from June  
22 through September.

23          Q.       How did you address the BPU contract in  
24 evaluating Public Counsel's position?

25          A.       Well, I saw no need to, you know, make an

1 adjustment to eliminate it. It seemed like it was -- it's  
2 just reflective of -- of the amount of -- it's part of my  
3 determination that they're going to be able to make a  
4 level of capacity and energy sales in the future that  
5 would be at a level at least comparable to the sales level  
6 during calendar 2007.

7 Q. You think they'll have a contract that will  
8 replace that or you just think in the market they'll be  
9 able to find -- they'll be able to enhance their sales  
10 just because of the availability?

11 A. I don't think it would be solely through  
12 the market. I think it's likely that they will have some  
13 additional capacity sales contract in 2009.

14 Q. Can you describe for me the trends on a  
15 calendar year basis in terms of off-system sales from  
16 January to December? Are particular months going to be  
17 more beneficial to Empire where they're -- where they're  
18 going to be able to sell more power? What months are  
19 those generally, if any?

20 A. It's generally the summer months and the  
21 winter months when the largest volumes of sales are made,  
22 but there can be specific things, you know, circumstances  
23 of a certain year that can alter that. For instance, if  
24 there's a big outage of a major nuclear unit in a shoulder  
25 month, that's going to mean they'll have increased ability

1     probably to sell energy in shoulder months, shoulder  
2     months being essentially the fall and the spring months.

3                     But the greatest volumes of sales are  
4     generally made in summer and winter, and even though the  
5     greatest sales are made then, it's not necessarily  
6     equating with the highest level of margins because you'll  
7     have -- during the summer you'll have higher revenues per  
8     kilowatt hours sold, but you'll also have a higher cost  
9     per kilowatt hours sold.

10                    COMMISSIONER CLAYTON: Thank you.

11                    JUDGE VOSS: Any additional questions from  
12     the Bench? Okay. Recross, Industrial? Staff? Empire?

13                    MR. MITTEN: No.

14                    JUDGE VOSS: Redirect?

15                    MR. MILLS: Just briefly.

16     REDIRECT EXAMINATION BY MR. MILLS:

17                    Q.     Mr. Kind, in response to questions from  
18     Commissioner Davis, and I think Commissioner Clayton  
19     touched on this as well, you talked about a capacity  
20     market in SPP. Is there an organized market for capacity  
21     in SPP the same way there is for energy?

22                    A.     No, there's not.

23                    Q.     Is Empire nonetheless able to sell capacity  
24     to other counterparties within the SPP?

25                    A.     Yes, they are.

1 Q. Can you elaborate on that?

2 A. Well, it's somewhat similar really to the  
3 situation at MISO right now, which doesn't have a formal  
4 capacity market, meaning there's no capacity market that's  
5 run by the RTO. However, the existence of an RTO can  
6 facilitate a capacity market's development, and that's  
7 because it just allows other members of the RTO to really  
8 say, you know, I'm providing their capacity that they need  
9 to meet their reserve requirements, and once that's  
10 accomplished then someone can buy and sell energy in the  
11 energy market that is run by the RTO.

12 But the -- there is a little bit of a  
13 difference right now even between the informal capacity  
14 markets in MISO and SPP. However, SPP appears to be  
15 quickly catching up with MISO in terms of the amount of  
16 capacity transactions that I hear about taking place.

17 Q. Is the BPU contract that we've talked about  
18 here today an example of a bilateral contract between  
19 members of the SPP?

20 A. Yes, it is.

21 Q. And is there anything that would limit or  
22 hinder Empire's ability to enter into similar contracts in  
23 the future?

24 A. No, there is not anything.

25 MR. MILLS: No further questions.

1 JUDGE VOSS: Thank you, Mr. Kind. Now,  
2 it's only 2:30. Are there any other issues that we would  
3 be ready to address today? Any witnesses that would be  
4 ready for today? Because we could take a break and come  
5 back if we need a short -- I know you guys are getting  
6 ready for oral arguments tomorrow, but -- especially since  
7 we're going to take Taylor Wednesday morning, is there  
8 anything from Wednesday that we could --

9 MR. REED: Well, we could -- we could see  
10 about getting into the ELIP witnesses. That seems --  
11 that's possible.

12 MS. CARTER: Empire isn't available, and  
13 the Empire counsel who plans on doing that matter wasn't  
14 planning on it being taken.

15 MR. MILLS: And I don't even know if my  
16 witness on ELIP is here today.

17 JUDGE VOSS: With DNR's counsel absent  
18 because we didn't expect to take this issue up until  
19 Wednesday, it really wouldn't be fair to go forward with  
20 it.

21 MR. REED: Obviously Mr. Oligschlaeger is  
22 here for policy. I don't think Mr. Watkins is here today,  
23 though.

24 MS. CARTER: Judge, I promise we'll be  
25 productive and talk about the second stipulation.

1 JUDGE VOSS: Well, we have made good  
2 progress today, and we'll take Taylor up Wednesday. So we  
3 won't have any issues tomorrow. It will be really nice to  
4 have a stipulation filed.

5 All right. Are there any other issues we  
6 need to take up before we go off the record today?

7 MR. REED: I do have one item. Mr. Eaves  
8 will not be returning for later issues, and so at this  
9 time I'd move for admission of his surrebuttal testimony.

10 MR. WOODSMALL: His issue on pension and  
11 OPEBS, is that settled yet?

12 MR. REED: It's in the second stip. I take  
13 that back. I'll wait. Thank you.

14 JUDGE VOSS: Well, thank you. If there are  
15 no other issues, we will adjourn until 8:30 Wednesday  
16 morning.

17 WHEREUPON, the hearing of this case was  
18 recessed until May 14, 2008.

19

20

21

22

23

24

25



1	I N D E X	
2	Opening Statement by Ms. Carter	28
	Opening Statement by Mr. Thompson	37
3	Opening Statement by Mr. Mills	42
	Opening Statement by Mr. Woodsmall	45
4	Opening Statement by Ms. Woods	54
5		
6	ASBURY SCR	
7	Opening Statement by Mr. Boudreau	56
	Opening Statement by Mr. Reed	67
8		
	EMPIRE'S EVIDENCE:	
9		
	BLAKE MERTENS	
10	Direct Examination by Mr. Boudreau	73
	Cross-Examination by Mr. Reed	75
11	Questions by Commissioner Murray	79
	Questions by Commissioner Clayton	83
12	Recross-Examination by Mr. Mills	87
	Redirect Examination by Mr. Boudreau	90
13	Voir Dire Examination by Mr. Woodsmall	95
	Redirect Examination (Resumed) by Mr. Boudreau	96
14		
	STAFF'S EVIDENCE:	
15		
	MARK OLIGSCHLAEGER	
16	Direct Examination by Mr. Reed	100
	Cross-Examination by Mr. Boudreau	102
17	Questions by Chairman Davis	103
	Questions by Commissioner Murray	105
18	Questions by Commissioner Clayton	111
	Recross-Examination by Mr. Woodsmall	130
19	Recross-Examination by Mr. Mills	131
	Recross-Examination by Mr. Boudreau	133
20		
	PAULA MAPEKA	
21	Direct Examination by Mr. Reed	141
22		
23		
24		
25		

1	OFF-SYSTEM SALES	
2	EMPIRE'S EVIDENCE:	
3	SCOTT KEITH	
	Direct Examination by Mr. Mitten	152
4	Cross-Examination by Mr. Reed	153
	Cross-Examination by Mr. Mills	154
5	Questions by Commissioner Murray	159
	Questions by Chairman Davis	161
6	Recross-Examination by Mr. Mills	164
	Recross-Examination by Mr. Woodsmall	165
7		
	STAFF'S EVIDENCE:	
8		
	DANA EAVES	
9	Direct Examination by Mr. Reed	166
	Cross-Examination by Mr. Mills	168
10	Questions by Commissioner Murray	169
	Questions by Chairman Davis	171
11	Questions by Commissioner Clayton	173
	Questions by Judge Voss	185
12	Recross-Examination by Mr. Mills	186
	Recross-Examination by Mr. Mitten	189
13	Redirect Examination by Mr. Reed	193
	Further Questions by Commissioner Clayton	194
14		
	OPC'S EVIDENCE:	
15		
	RYAN KIND	
16	Direct Examination by Mr. Mills	195
	Cross-Examination by Mr. Reed	197
17	Questions by Chairman Davis	199
	Questions by Commissioner Clayton	199
18	Redirect Examination by Mr. Mills	204
19		
20		
21		
22		
23		
24		
25		

1	EXHIBITS INDEX		
2		MARKED	RECEIVED
3	EXHIBIT NO. 1		
4	Direct Testimony of W.L. Gipson	19	
5	EXHIBIT NO. 2NP/HC		
6	Direct Testimony of W. Scott Keith	19	
7	EXHIBIT NO. 3		
8	Rebuttal Testimony of W. Scott Keith	19	
9	EXHIBIT NO. 4NP/HC		
10	Surrebuttal Testimony of W. Scott Keith	19	
11	EXHIBIT NO. 5NP/HC		
12	Direct Testimony of Blake A. Mertens	19	
13	EXHIBIT NO. 6		
14	Rebuttal Testimony of Blake A. Mertens	19	
15	EXHIBIT NO. 7		
16	Surrebuttal Testimony of Blake A. Mertens	19	
17	EXHIBIT NO. 8		
18	Direct Testimony of H. Edwin Overcast	19	
19	EXHIBIT NO. 9NP/HC		
20	Schedules	19	
21	EXHIBIT NO. 10		
22	Rebuttal Testimony of H. Edwin Overcast	19	
23	EXHIBIT NO. 11		
24	Surrebuttal Testimony of H. Edwin Overcast	19	
25	EXHIBIT NO. 12NP/HC		
	Direct Testimony of Jayna R. Long	19	
	EXHIBIT NO. 13		
	Direct Testimony of Michael E. Palmer	19	
	EXHIBIT NO. 14		
	Direct Testimony of Laurie A. Delano	19	
	EXHIBIT NO. 15NP/HC		
	Direct Testimony of Todd W. Tarter	19	

1	EXHIBIT NO. 16	
2	Direct Testimony of Mark Quan	19
3	EXHIBIT NO. 17	
4	Rebuttal Testimony of Dale W. Harrigan	19
5	EXHIBIT NO. 18	
6	Rebuttal Testimony of C. Kenneth Vogl	19
7	EXHIBIT NO. 19	
8	Direct Testimony of Sherrill L. McCormack	19
9	EXHIBIT NO. 20	
10	Rebuttal Testimony of Sherrill L. McCormack	19
11	EXHIBIT NO. 21	
12	Surrebuttal Testimony of Sherrill L. McCormack	19
13	EXHIBIT NO. 22	
14	Direct Testimony of Robert W. Sager	19
15	EXHIBIT NO. 22HC	
16	Schedule RWS-1	19
17	EXHIBIT NO. 23	
18	Rebuttal Testimony of Robert W. Sager	19
19	EXHIBIT NO. 24	
20	Surrebuttal Testimony of Robert W. Sager	19
21	EXHIBIT NO. 25	
22	Direct Testimony of Donald S. Roff	19
23	EXHIBIT NO. 26	
24	Rebuttal Testimony of Donald S. Roff	19
25	EXHIBIT NO. 27	
	Surrebuttal Testimony of Donald S. Roff	19
	EXHIBIT NO. 28NP/HC	
	Direct Testimony of James H. Vander Weide	19
	EXHIBIT NO. 29	
	Rebuttal Testimony of James H.	

1	EXHIBIT NO. 30	
2	Surrebuttal Testimony of James H.	
3	Vander Weide	19
4	EXHIBIT NO. 200	
5	Direct Testimony of Mark L.	
6	Oligschlaeger	19
7	EXHIBIT NO. 201	
8	Rebuttal Testimony of Mark L.	
9	Oligschlaeger	19
10	EXHIBIT NO. 202	
11	Surrebuttal Testimony of Mark L.	
12	Oligschlaeger	19
13	EXHIBIT NO. 203	
14	Staff Accounting Schedules	19
15	EXHIBIT NO. 204	
16	Staff Report Cost of Service	19
17	EXHIBIT NO. 205	
18	Rebuttal Testimony of Michael E. Taylor	19
19	EXHIBIT NO. 206	
20	Surrebuttal Testimony of Michael E.	
21	Taylor	19
22	EXHIBIT NO. 207HC	
23	Surrebuttal Testimony of Paula Mapeka,	
24	Highly Confidential	19
25	EXHIBIT NO. 208	
26	Surrebuttal Testimony of Paula Mapeka	19
27	EXHIBIT NO. 209	
28	Surrebuttal Testimony of Dana E. Eaves	19
29	EXHIBIT NO. 210	
30	Direct Testimony of James C. Watkins	19
31	EXHIBIT NO. 211	
32	Staff Class Cost of Service and Rate	
33	Design Report	19
34	EXHIBIT NO. 212	
35	Rebuttal Testimony of James C. Watkins	19

1	EXHIBIT NO. 213	
2	Surrebuttal Testimony of James C. Watkins	19
3	EXHIBIT NO. 214	
4	Rebuttal Testimony of Lena M. Mantle	19
5	EXHIBIT NO. 215	
6	Surrebuttal Testimony of Lena M. Mantle	19
7	EXHIBIT NO. 216	
8	Surrebuttal Testimony of Amanda C. McMellen	19
9	EXHIBIT NO. 217	
10	Rebuttal Testimony of Rosella L. Schad	19
11	EXHIBIT NO. 218	
12	Rebuttal Testimony of Matthew J. Barnes	19
13	EXHIBIT NO. 219	
14	Surrebuttal Testimony of Matthew J. Barnes	19
15	EXHIBIT NO. 220	
16	Surrebuttal Testimony of Curt Wells	19
17	EXHIBIT NO. 221	
18	Responsive Testimony of Mark L. Oligschlaeger	19
19	EXHIBIT NO. 300	
20	Direct Testimony and Schedules of William W. Dunkel	19
21	EXHIBIT NO. 301	
22	Rebuttal Testimony and Schedules of William W. Dunkel	19
23	EXHIBIT NO. 302	
24	Surrebuttal Testimony and Schedules of William W. Dunkel	19
25	EXHIBIT NO. 303	
	Rebuttal Testimony of Ryan Kind	19
	EXHIBIT NO. 304	
	Direct Testimony of Barbara A. Meisenheimer Revenue Requirement	19

1	EXHIBIT NO. 305	
2	Direct Testimony of Barbara A.	
	Meisenheimer Rate Design	19
3	EXHIBIT NO. 306	
4	Surrebuttal Testimony of Barbara A.	
	Meisenheimer	19
5	EXHIBIT NO. 307	
6	Direct Testimony of Ted Robertson	19
	EXHIBIT NO. 308	
7	Rebuttal Testimony of Ted Robertson	19
8	EXHIBIT NO. 309	
9	Surrebuttal Testimony of Ted Robertson	19
	EXHIBIT NO. 400	
10	Direct Testimony of Brenda Wilbers	19
11	EXHIBIT NO. 401	
12	Surrebuttal Testimony of Brenda Wilbers	19
	EXHIBIT NO. 500	
13	Direct Testimony of Maurice Brubaker on	
	Fuel Adjustment Clause/Revenue	
14	Requirement	19
15	EXHIBIT NO. 501NP/HC	
16	Direct Testimony and Schedules of	
	Michael Gorman	19
17	EXHIBIT NO. 502	
18	Direct Testimony and Schedules of	
	Maurice Brubaker on Fuel Adjustment	
19	Clause/Rate Design	19
	EXHIBIT NO. 503	
20	Rebuttal Testimony of Maurice Brubaker	
21	on Revenue Requirement/Rate Design	19
	EXHIBIT NO. 504	
22	Rebuttal Testimony and Schedules of	
23	Michael Gorman	19
	EXHIBIT NO. 505	
24	Surrebuttal Testimony and Schedule of	
25	Maurice Brubaker on Fuel Adjustment	
	Clause	19





## 1 C E R T I F I C A T E

2 STATE OF MISSOURI )  
3 COUNTY OF COLE ) ss.

4 I, Kellene K. Feddersen, Certified  
5 Shorthand Reporter with the firm of Midwest Litigation  
6 Services, and Notary Public within and for the State of  
7 Missouri, do hereby certify that I was personally present  
8 at the proceedings had in the above-entitled cause at the  
9 time and place set forth in the caption sheet thereof;  
10 that I then and there took down in Stenotype the  
11 proceedings had; and that the foregoing is a full, true  
12 and correct transcript of such Stenotype notes so made at  
13 such time and place.

14 Given at my office in the City of  
15 Jefferson, County of Cole, State of Missouri.

16

17 Kellene K. Feddersen, RPR, CSR, CCR  
18 Notary Public (County of Cole)  
My commission expires March 28, 2009.

19

20

21

22

23

24

25