

1 STATE OF MISSOURI  
2 PUBLIC SERVICE COMMISSION  
3  
4  
5

6 TRANSCRIPT OF PROCEEDINGS

7 Evidentiary Hearing

8 December 12, 2008  
9 Jefferson City, Missouri  
Volume 28  
10  
11

12 In the Matter of Union Electric )  
Company d/b/a AmerenUE's Tariffs )  
13 To Increase Its Annual Revenues ) Case No. ER-2008-0318  
For Electric Service )  
14

15 MORRIS L. WOODRUFF, Presiding,  
16 DEPUTY CHIEF REGULATORY LAW JUDGE.  
17

18 JEFF DAVIS, Chairman,  
CONNIE MURRAY,  
19 ROBERT M. CLAYTON III,  
TERRY JARRETT,  
20 COMMISSIONERS.  
21

22 REPORTED BY:

23 KELLENE K. FEDDERSEN, CSR, RPR, CCR  
24 MIDWEST LITIGATION SERVICES  
25

## 1 APPEARANCES:

2 THOMAS BYRNE, Attorney at Law  
3 WENDY K. TATRO, Attorney at Law

4 P.O. Box 66149  
5 1901 Chouteau Avenue  
6 St. Louis, MO 63103  
7 (314)554-2237

8 JAMES B. LOWERY, Attorney at Law  
9 Smith Lewis, LLP  
10 111 South 9th Street, Suite 200  
11 P.O. Box 918  
12 Columbia, MO 65205-0918  
13 (573)443-3141  
14 lowery@smithlewis.com

15 JAMES M. FISCHER, Attorney at Law  
16 Fischer & Dority  
17 101 Madison, Suite 400  
18 Jefferson City, MO 65101  
19 (573)636-6758  
20 jfischerpc@aol.com

21 FOR: Union Electric Company,  
22 d/b/a AmerenUE.

23 STUART CONRAD, Attorney at Law  
24 Finnegan, Conrad & Peterson  
25 3100 Broadway  
1209 Penntower Officer Center  
Kansas City, MO 64111  
(816)753-1122  
stucon@fcplaw.com

DAVID WOODSMALL, Attorney at Law  
Finnegan, Conrad & Peterson  
428 East Capitol, Suite 300  
Jefferson City, MO 65101  
(573) 635-2700

FOR: Noranda Aluminum, Inc.

MICHAEL C. PENDERGAST, Attorney at Law  
Laclede Gas Company  
720 Olive Street  
St. Louis, MO 63101  
(314)342-0532

1 SHELLEY WOODS, Assistant Attorney General  
P.O. Box 899  
2 Supreme Court Building  
Jefferson City, MO 65102  
3 (573)751-3321

4 FOR: Missouri Department of Natural  
Resources.

5  
H. TODD IVESON, Assistant Attorney General  
6 P.O. Box 899  
Supreme Court Building  
7 Jefferson City, MO 65102  
(573)751-3321

8  
9 FOR: State of Missouri.

HENRY B. ROBERTSON, Attorney at Law  
10 Great Rivers Environmental Law Center  
705 Olive Street, Suite 614  
11 St. Louis, MO 63101  
(314)231-4181  
12 hrobertson@greatriverslaw.org

13 FOR: Missouri Coalition for the  
Environment.  
14 Missourians for Safe Energy,

15 DIANA VUYLSTEKE, Attorney at Law  
Bryan Cave, LLP  
16 211 North Broadway, Suite 3600  
St. Louis, MO 63102  
17 (314)259-2543  
dmvuyksteke@bryancave.com

18  
19 FOR: Missouri Industrial Energy Consumers.

LISA C. LANGENECKERT, Attorney at Law  
20 Sandberg, Phoenix & von Gontard, P.C.  
One City Centre, 15th Floor  
21 St. Louis, MO 63101-1880  
(314)231-3332  
22 llangeneckert@spvg.com

23 FOR: Missouri Energy Group.

24

25

1 JOHN COFFMAN, Attorney at Law  
871 Tuxedo Boulevard  
2 St. Louis, MO 63119  
(573)424-6779  
3

FOR: AARP.  
4 Consumers Council of Missouri.

5 LEWIS R. MILLS, JR., Public Counsel  
P.O. Box 2230  
6 200 Madison Street, Suite 650  
Jefferson City, MO 65102-2230  
7 (573)751-4857

8 FOR: Office of the Public Counsel  
and the Public.  
9

KEVIN THOMPSON, General Counsel  
10 STEVEN DOTTHEIM, Chief Deputy General Counsel  
STEVE REED, Chief Litigation Attorney  
11 NATHAN WILLIAMS, Deputy General Counsel  
SARAH KLIETHERMES, Assistant General Counsel  
12 ERIC DEARMONT, Assistant General Counsel  
P.O. Box 360  
13 200 Madison Street  
Jefferson City, MO 65102  
14 (573)751-3234

15 FOR: Staff of the Missouri Public  
Service Commission.  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

2 JUDGE WOODRUFF: Good morning, everyone.  
3 Let's go ahead and get started. Welcome back for the last  
4 day of the AmerenUE rate hearing. Mr. Conrad? You're  
5 just crossing your fingers. All right. Where are we at  
6 this morning? Mr. Dottheim?

7 MR. DOTTHEIM: Mr. Lowery?

8 MR. LOWERY: Sure. Your Honor, we've  
9 circulated a draft of a rate design settlement on the fuel  
10 adjustment clause rate design issues. I think what I was  
11 anticipating that might make the most sense is to go ahead  
12 and take these last three witnesses that we had, which I  
13 don't think is going to probably take very long, and then  
14 perhaps, with leave of the Bench, we could break and try  
15 to sit down and see if we could work through that draft  
16 settlement document, and if we do, I think that would  
17 dispose of the rest of the case. We'd have maybe some  
18 preliminary -- or some cleanup items procedurally or  
19 something to come back on the record for, and obviously to  
20 deal with the off-system sales stipulation perhaps.

21 JUDGE WOODRUFF: Yes. I sent an e-mail to  
22 the Commissioners late last night indicating that we'd try  
23 to take that up about ten o'clock for the off-system sales  
24 stipulation. I haven't heard any negative comments to  
25 that.

1                   MR. LOWERY: One other thing on the  
2 off-system sales stipulation, I had -- it was my mistake,  
3 but when we were putting the stipulation together, I had  
4 removed a couple parties from the signature line who were  
5 not going to oppose but who were not signing on, Noranda  
6 and Missouri Energy Group. Mr. Conrad pointed out that I  
7 failed to remove them from the first page, the  
8 introductory paragraph.

9                   I made the same mistake as to MEG, but I  
10 did contact Ms. Langeneckert last night and have an e-mail  
11 from her that says, please let the Bench know tomorrow  
12 that MEG is in agreement with the stipulation. So just  
13 for the record, they are in agreement.

14                  JUDGE WOODRUFF: But they're not going to  
15 sign?

16                  MR. LOWERY: They're not going to sign. I  
17 guess I can't interpret that. They're certainly not  
18 objecting. And she also indicated if the Bench wanted  
19 something more formal filed next week, she'd be happy to  
20 do that. So --

21                  JUDGE WOODRUFF: Okay. Mr. Dottheim?

22                  MR. DOTTHEIM: Yes. As far as the  
23 convening at ten for the off-system sales Stipulation &  
24 Agreement, because of an unexpected matter, Ms. Mantle  
25 will be running late this morning, so I need to check on

1 timing on that matter as far as her schedule.

2 JUDGE WOODRUFF: As far as I know, the  
3 Commission is still flexible on that. It was just a  
4 suggestion I had given to them.

5 MR. DOTTHEIM: And Mr. Lowery, you said  
6 three witnesses. We've got Dr. Proctor, Mr. Kind and --

7 MR. LOWERY: I guess Mr. Watkins was on the  
8 list, although I -- we have no questions for Mr. Watkins.

9 MR. DOTTHEIM: And that was -- I compiled  
10 the list, and that was -- at least from the Staff's  
11 perspective, that was my error. He should have been just  
12 under fuel adjustment clause rate design. If anybody had  
13 any questions, we were to put him on the stand, but his  
14 testimony only addressed fuel adjustment clause rate  
15 design.

16 JUDGE WOODRUFF: Very good.

17 MR. DOTTHEIM: One other matter is, I don't  
18 know if anyone noticed -- probably, Judge, you did -- but  
19 I did file the Staff's response to AmerenUE's offers of  
20 admissions from the deposition of Staff witness Michael  
21 Proctor. I'm quite sure everyone noticed that I filed  
22 that pleading, but what I was referring to -- to noticing  
23 is I had filed a red lined version of the designations of  
24 what Mr. Lowery had filed, and what I had intended to be  
25 filed would be -- was just a track changes version, but

1    what appears to have been filed was a track changes with  
2    balloons.

3                   JUDGE WOODRUFF:   The balloons don't need to  
4    be there.

5                   MR. DOTTHEIM:   Balloons don't need to be  
6    there, and they, I think, in certain instances obliterate  
7    the changes.  I have copies with track changes and --  
8    color copies, so I think it's relatively easy to follow,  
9    which I could distribute, but before refiling that  
10   document, I thought I'd first check with you to see if you  
11   have some procedure that you might suggest or would want  
12   to direct the Staff to follow on that.

13                  JUDGE WOODRUFF:   I went through it last  
14   night, and I think I got the changes that Staff wanted to  
15   make.

16                  MR. LOWERY:   Your Honor, I was going to  
17   add, I understood the changes that were to be made, and  
18   the company has no objection to those counter  
19   designations.  So I would, I guess, renew my motion to  
20   admit those portions that we offered as our designations,  
21   and presumably Mr. Dottheim is moving to admit the counter  
22   designations as well.

23                  JUDGE WOODRUFF:   Is that correct,  
24   Mr. Dottheim?

25                  MR. DOTTHEIM:   Yes.



1 JUDGE WOODRUFF: Anyone else want to be  
2 heard on that point?

3 MR. CONRAD: Just in favor of balloons  
4 generally.

5 JUDGE WOODRUFF: We all like balloons.  
6 Okay. The designations and counter designations will be  
7 admitted for Dr. Proctor's deposition, which I believe  
8 brings us to Dr. Proctor. I think you testified earlier?

9 THE WITNESS: No, I did not. This is it.

10 JUDGE WOODRUFF: You've been here a lot of  
11 times.

12 THE WITNESS: Right.

13 (Witness sworn.)

14 MICHAEL PROCTOR testified as follows:

15 DIRECT EXAMINATION BY MR. DOTTHEIM:

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

18 A. My name is Michael S. Proctor.

19 Q. And would you please state your business  
20 address.

21 A. Let me look. I don't remember it too  
22 often. It's 9900 Page Avenue, Suite 103, Overland,  
23 Missouri.

24 Q. And would you please identify the nature of  
25 your employment with the Commission?

1           A.       I'm employed with the Missouri Public  
2 Service Commission as their chief regulatory economist.

3           Q.       And Dr. Proctor, did you cause to be filed  
4 two pieces of testimony, rebuttal testimony in this  
5 proceeding what's been designated as Exhibit No. 212 on  
6 fuel adjustment clause issue?

7           A.       Yes, I did.

8           Q.       Do you have at this time any corrections or  
9 changes to make --

10          A.       Yes. I have a few.

11          Q.       -- to that testimony?  
12                    Would you please identify those corrections  
13 or changes.

14          A.       Yes. On page 3 of the rebuttal testimony,  
15 line 24, I should have closed the quotation at the end of  
16 that sentence. So there needs to be quotation marks after  
17 fuel costs. On page 14, line 13, the phrase two  
18 iterations, and it should be trials, t-r-i-a-l-s, instead  
19 of trails.

20          Q.       Dr. Proctor, I think you may have said two  
21 iterations?

22          A.       250.

23          Q.       250 iterations?

24          A.       250 iterations. On page 30, line 4, the  
25 sentence currently reads, specifically in a test year

1   there is no forecast uncertainty and the only uncertainty,  
2   and I'd like to change that to there is limited forecast  
3   uncertainty and the overall uncertainty. So strike no and  
4   put in limited, and strike the word only and put in the  
5   word overall.

6           Q.     And Dr. Proctor, would you please identify  
7   the reason for that change in your testimony?

8           A.     Yes. During the deposition, Mr. Lowery  
9   asked me if there were any changes that I had to my  
10   rebuttal testimony given what I had seen as filed by  
11   Mr. Arora in his surrebuttal, and at the time I had not  
12   gone through, and I told him that I had not gone through  
13   my rebuttal testimony from that perspective, and  
14   subsequently, I have.

15                   In addition, I think the changes that I've  
16   made are more in line with the sentence that appears on  
17   lines 12 and 13 on that same page where I say, in essence,  
18   the test year should represent a case with changes in  
19   demand from weather variations but minimal changes in  
20   supply. So -- so the -- so the test year in the way I was  
21   talking about it does include some changes in supply, and  
22   I think the way the sentence read was -- it was a little  
23   too extreme in terms of describing how I actually viewed  
24   the test year.

25           Q.     Okay. Dr. Proctor, do you have any other

1 corrections or changes?

2 A. Yes. On page 31 at line 19, talking about  
3 the variability that should have been in the test year,  
4 and was talking about what AmerenUE ran being an order of  
5 magnitude of five times larger than what I would have  
6 expected, and I would like to change that to four times  
7 rather than five times.

8 Q. And could you please identify the reason  
9 for that change?

10 A. Yes. The five times is a relative measure  
11 of the uncertainty factors, and when we did the deposition  
12 of Mr. Arora, he pointed out that uncertainty factors  
13 depend on the denominator that are being used, and the  
14 four times is an actual comparison of the standard  
15 deviations rather than the uncertainty factors. In this  
16 particular case, it's a comparison of his uncertainty  
17 factor for the test year of 10.72 and the one that I had  
18 calculated at 2.77, and that ratio is 3.87, which is an  
19 order of magnitude of four, not five. Those are all the  
20 changes that I have.

21 Q. Okay. And Dr. Proctor, do you have any  
22 changes or corrections to make to Exhibit No. 213, your  
23 surrebuttal testimony on the issue of adjustment in net  
24 fuel expense for under-forecasting error?

25 A. No, I do not.

1           Q.       Dr. Proctor, if I were to ask you the  
2       questions that are contained in Exhibit 212, your rebuttal  
3       testimony, would your answers as corrected change today,  
4       be as they are to that document?

5           A.       Yes.

6           Q.       Is the information contained in Exhibit 212  
7       true and correct to the best of your knowledge and belief?

8           A.       It is.

9           Q.       If I were to ask you today the questions  
10      that are contained in Exhibit 213, would your answers be  
11      the same?

12          A.       Yes.

13          Q.       Is the information contained in Exhibit 213  
14      true and correct to the best of your knowledge and belief?

15          A.       Yes.

16                   MR. DOTTHEIM: I would offer Exhibits 212  
17      and 213 and tender Dr. Proctor for cross-examination.

18                   JUDGE WOODRUFF: All right. 212 and 213  
19      have been offered. Are there any objections to their  
20      receipt?

21                   (No response.)

22                   JUDGE WOODRUFF: Hearing none, they will be  
23      received.

24                   (EXHIBIT NOS. 212 AND 213 WERE MARKED FOR  
25      IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

1 JUDGE WOODRUFF: For cross-examination, we  
2 begin with Public Counsel.

3 MR. MILLS: Thank you, Judge. Before I  
4 begin, Judge, can I ask a clarifying question with respect  
5 to Exhibit 79, which was the EPRI technical brief?

6 JUDGE WOODRUFF: Yes.

7 MR. MILLS: I believe when it was -- when  
8 it was offered UE said it was only being offered for the  
9 definition of volatility and was it admitted under that  
10 same understanding or is the entire document part of the  
11 record and all of this Greek equations and stuff  
12 considered to be adequate foundation laid and --

13 JUDGE WOODRUFF: I believe it was for the  
14 limited purposes, was my intent. There was a highlighted  
15 portion.

16 MR. MILLS: Exactly. Okay.

17 CROSS-EXAMINATION BY MR. MILLS:

18 Q. Dr. Proctor, have you seen that document?

19 A. Yes, I have.

20 Q. Did you read the definition of volatility  
21 in Exhibit 79?

22 A. I have read that definition, yes.

23 Q. Is that a definition that you would apply  
24 in the sense that the Commission talks about volatility  
25 when they have discussed volatility with respect to a fuel

1 adjustment clause in the three Orders in which they've  
2 considered fuel adjustment clauses?

3 MR. LOWERY: Objection to the extent it  
4 calls for Dr. Proctor to opine about what the Commission  
5 means by volatility in the Commission's Orders.

6 BY MR. MILLS:

7 Q. All right. I will -- can you answer the  
8 question based on your understanding of what the  
9 Commission's Orders mean?

10 A. Right. That definition deals with the  
11 concept of volatility in forward market prices. Okay.  
12 And it's very specific. That whole document deals with  
13 volatility in forward market prices. And I don't  
14 believe -- I think the Commission is more concerned with  
15 actual volatility that occurs in fuel costs, volatility  
16 that occurs in prices that AmerenUE actually faces on a  
17 day-to-day basis when they sell electricity and not the  
18 volatility that occurs in forward markets.

19 And forward markets tend to be very  
20 volatile because -- particularly as you get close to the  
21 time of settlement, you have a lot of speculators in those  
22 forward markets. I'll use that word. They have to settle  
23 out. They're not taking delivery. So they have to --  
24 they have to balance their books at the end of the period.  
25 They can't get stuck with either having to deliver or

1 taking the delivery. So you tend to get a lot more  
2 volatility in those forward markets than you actually see  
3 in the spot markets.

4 Q. And, in fact, are the prices that UE, the  
5 costs that UE actually incurs for fuels as volatile as  
6 either the forward markets or the spot markets?

7 A. Well, for fuels. Okay.

8 Q. Let's talk about coal in particular.

9 A. In terms of coal, no, they're not, but the  
10 forward markets do -- obviously do play a role in terms of  
11 what they can hedge in -- there's been a lot of testimony  
12 on their hedging programs, but do you -- do you see that  
13 kind of volatility in the final cost that they contract  
14 for that you will see in the coal markets on a daily  
15 basis? And the answer is no.

16 Q. Now, is the process through which UE goes  
17 to buy coal the same as the process you would go through  
18 in buying a burger at McDonald's?

19 A. No.

20 Q. With UE buying coal, they've got some  
21 ability to negotiate?

22 A. Sure.

23 Q. More than one supplier?

24 A. Well, they -- yeah, they have more than one  
25 supplier, but they buy a large quantity of coal, and that



1 does give them to a certain extent some ability, some  
2 leverage in terms of buying power, I'll call it.

3 Q. And do you know just how, in terms of  
4 relative size, in terms of other coal purchasers, how big  
5 a purchaser UE is?

6 A. I haven't done that comparison to -- on a  
7 United States wide basis, but, you know, if you compare  
8 them to someone like Empire District Electric or Aquila,  
9 the smaller utilities, of course they're going to have  
10 significantly more quantities of coal that they purchase.

11 MR. MILLS: Judge, I think that's all I  
12 have. Thank you.

13 JUDGE WOODRUFF: Thank you. Cross for the  
14 State?

15 MR. IVESON: I have no questions, your  
16 Honor.

17 JUDGE WOODRUFF: DNR?

18 MS. WOODS: I have no questions, your  
19 Honor.

20 JUDGE WOODRUFF: For Noranda?

21 MR. CONRAD: Well, Judge, now that you've  
22 clarified the ruling on Exhibit 79, I believe to exclude  
23 the -- those complicated formulas, I was going to take  
24 Dr. Proctor through those, but in view of that, I think  
25 we'll just pass the witness. Thank you.

1 JUDGE WOODRUFF: For MIEC?

2 MS. VUYLSTEKE: No questions.

3 JUDGE WOODRUFF: Let's see. Down to  
4 AmerenUE then.

5 MR. LOWERY: Just a few, your Honor.

6 CROSS-EXAMINATION BY MR. LOWERY:

7 Q. Dr. Proctor, you've never negotiated a  
8 contract to buy coal or to sell power, have you?

9 A. No.

10 Q. You've never studied whether UE's level of  
11 coal purchases in the national or international coal  
12 markets, whether they -- that gives UE any influence on  
13 the prices it pays at all, have you?

14 A. I haven't done such a study, no.

15 Q. You don't have any idea whether UE's level  
16 of coal purchases in a year or in another period actually  
17 allows UE to influence what the market price of coal is  
18 that it can lock in coal prices, have you?

19 A. No specific studies, no.

20 Q. Dr. Proctor, you've never been involved in  
21 power trading at all, correct?

22 A. Correct.

23 Q. You've never had responsibility for risk  
24 management of a utility's generation portfolio, have you?

25 A. No.

1           Q.       Dr. Proctor, you've agreed that there's  
2   uncertainty in each of the components in net fuel costs;  
3   isn't that right?

4           A.       That's correct.

5           Q.       There's uncertainty in gas prices and  
6   volumes?

7           A.       Yes.

8           Q.       There's uncertainty in coal prices and  
9   volumes of coal to be burned?

10          A.       Yes.

11          Q.       There's uncertainty in power prices and  
12   off-system sales volumes?

13          A.       Yes.

14          Q.       You agree off-system sales revenues are  
15   difficult to forecast, correct?

16          A.       Yes.

17          Q.       I mean, sitting here today, you don't know,  
18   I don't know, Mr. Schukar doesn't know, Mr. Dauphinaia  
19   doesn't know, Mr. Arora doesn't know, none of us know what  
20   power prices are going to be in 2009, do we?

21          A.       Sure don't.

22          Q.       And we don't know what the volumes of  
23   off-system sales are going to be next year either, do we?

24          A.       Not for certain. We have a pretty good  
25   idea of what they'll be, but we don't know for certain.

1           Q.       Dr. Proctor, do you know if Ameren Electric  
2 Power is as large or larger a coal buyer than AmerenUE is?

3           A.       I suspect AEP is a significantly larger  
4 buyer than AmerenUE.

5           Q.       What about Southern Companies?

6           A.       I would suspect they are larger, too.

7           Q.       What about Intergy?

8           A.       I'm not sure about Intergy.

9           Q.       Excel?

10          A.       Might be the same level. Haven't -- don't  
11 have a lot of familiarity with Excel.

12          Q.       Would you disagree with me if I told you  
13 that those companies and all of their electric utility  
14 subsidiaries have a fuel adjustment clause?

15          A.       I don't know.

16          Q.       Would you agree that all of those utilities  
17 are relatively heavy in coal-fired generation, the  
18 percentage of energy produced from coal?

19          A.       Most of them that you mentioned I'm aware  
20 of that, yes.

21          Q.       Give me just a moment, your Honor.

22                    You've agreed with me in the past,  
23 Dr. Proctor, that because a majority of Union Electric's  
24 off-system sales are not hedged, so the prices for those  
25 sales are obviously not fixed, so any variation in power

1 prices for those unhedged off-system sales are not going  
2 to be correlated with UE's fixed hedged coal prices,  
3 correct?

4 A. That's correct.

5 MR. LOWERY: I have no further questions,  
6 your Honor.

7 JUDGE WOODRUFF: Thank you. Then we'll  
8 come up to questions from the Bench. Commissioner Murray?

9 COMMISSIONER MURRAY: No questions. Thank  
10 you.

11 JUDGE WOODRUFF: Commissioner Jarrett?

12 QUESTIONS BY COMMISSIONER JARRETT:

13 Q. Good morning, Dr. Proctor

14 A. Good morning.

15 Q. How are you this morning?

16 A. I'm doing well.

17 Q. Good. Well, I don't have any questions, so  
18 have a good day.

19 JUDGE WOODRUFF: Chairman Davis?

20 QUESTIONS BY CHAIRMAN DAVIS:

21 Q. Good morning, Dr. Proctor.

22 A. Good morning.

23 Q. Okay. Are you familiar with the company  
24 that was formerly known as Aquila?

25 A. Yes.

1 Q. Okay. So you know who Rick Green is?

2 A. I know who he is, yes.

3 Q. Okay. I seem to recall a few years ago  
4 that Aquila had a coal contract, and basically -- and you  
5 can correct me if I'm wrong -- they had them a coal  
6 contract and whatever coal company said, hey, we've got a  
7 problem here, we can't deliver your coal unless you pay us  
8 more money than is required by the contract. Do you  
9 remember something happening to that effect?

10 A. No.

11 Q. No?

12 A. I really don't.

13 Q. Do you remember any instances involving  
14 arbitrage between Aquila and a coal company and their  
15 union?

16 A. That doesn't ring a bell. I'm sorry.

17 Q. Okay. So you wouldn't even remember if  
18 that issue came up in front of this Commission here in the  
19 last four years?

20 A. No, I'm sorry, I don't.

21 Q. Okay. Have you ever heard of such  
22 instances where the coal companies will go to electric  
23 utilities that burn coal and say, you know, boy, I don't  
24 know if we're ever going to be able to get you your coal  
25 or not, but if you pay us more money, I can spread some of

1 that around to the unions and that will make everything  
2 whole and we think we can get it delivered then for sure?

3 A. No, I -- honestly, I haven't heard of that.  
4 That's the first time I've heard of it.

5 Q. Okay. Anything else you wish to add,  
6 Dr. Proctor?

7 A. Not really. I mean, my testimony really  
8 focused on the amount of variation that was in Mr. Arora's  
9 study, the amount -- you use the word volatility, and  
10 that's really where I've -- where I've been focusing on  
11 this particular issue, because I had raised that in the  
12 previous case about the correlation between electric  
13 prices and coal prices and asked the company to do a  
14 volatility study, and they performed that and I did a  
15 review of that, and that's what I put into testimony here.

16 CHAIRMAN DAVIS: Judge, I don't think I  
17 have any further questions of Dr. Proctor.

18 JUDGE WOODRUFF: All right. Any recross  
19 based on those questions?

20 (No response.)

21 JUDGE WOODRUFF: Any redirect?

22 MR. DOTTHEIM: No redirect.

23 JUDGE WOODRUFF: Then, Dr. Proctor, you can  
24 step down.

25 And I believe the parties indicated

1 Mr. Watkins would not need to be called on this portion of  
2 the issue, which brings us to Mr. Kind.

3 MR. MILLS: Judge, can we address the  
4 question of deposition designations before we --

5 JUDGE WOODRUFF: Yes, I think that would be  
6 appropriate.

7 MR. MILLS: I'd like to have an exhibit  
8 marked.

9 JUDGE WOODRUFF: Okay. Next number is 440.  
10 This is about the designations?

11 MR. MILLS: It is. This is simply the  
12 Notice of Deposition by which Mr. Kind was produced.

13 (EXHIBIT NO. 440 WAS MARKED FOR  
14 IDENTIFICATION BY THE REPORTER.)

15 MR. MILLS: And then, Judge, I'll pass out  
16 just for the Bench's convenience a copy of Rule 5703  
17 particularly with reference to subparagraph (b) (4) that I  
18 mentioned on the record the other day. This doesn't need  
19 to be made an exhibit, but --

20 JUDGE WOODRUFF: Now, Mr. Mills, if I can  
21 interrupt, before we start getting into this whole issue  
22 of the admission of deposition for Mr. Kind, I have read  
23 the designations, and frankly, it looks to me like those  
24 designations -- designated portions could be covered in  
25 about five minutes of cross-examination rather than going



1 through this whole process of putting these deposition  
2 portions into the record.

3 I'll ask AmerenUE, is there any reason to  
4 put these depositions into the record?

5 MR. LOWERY: Well, your Honor, witnesses  
6 sometimes attempt to change their story later on, and they  
7 were in my view admissions, and from my perspective, I  
8 think it's appropriate. It's a limited number of  
9 designations. It's appropriate to put them in. I think I  
10 know the argument that Mr. Mills is going to make, and I'm  
11 prepared to address that argument.

12 JUDGE WOODRUFF: I'm sure you are, too.  
13 I'm just thinking we'll spend more time addressing the  
14 argument than we will if you just ask the questions. I'm  
15 not going to tell you you can't, but we'll hear the  
16 arguments if you want to.

17 MR. LOWERY: I think I'd like to go ahead  
18 and pursue the matter, your Honor.

19 JUDGE WOODRUFF: Very good. Mr. Mills, you  
20 can continue.

21 MR. MILLS: I'd like to hand out an excerpt  
22 from one of the cases that UE cited in its motion to admit  
23 designations. This is the United Services case. It has,  
24 I think, a helpful discussion of admissions against  
25 interest and declarations and things like that. Again,

1 this doesn't need to be made part of the record. It's  
2 simply for the convenience of the argument that we'll all  
3 have the same page here.

4 CHAIRMAN DAVIS: Mr. Mills, can we get some  
5 sort of designation? Okay. United Services of America  
6 vs. Empire Bank of Springfield.

7 MR. MILLS: Yeah. The citation is in bold  
8 at the back.

9 CHAIRMAN DAVIS: At the bottom. Okay.

10 JUDGE WOODRUFF: Go ahead.

11 MR. MILLS: Judge, Mr. Kind was produced  
12 pursuant to the Amended Notice of Deposition, Exhibit 440,  
13 which simply asked for Public Counsel to produce Ryan Kind  
14 for his deposition to be taken.

15 Pursuant to Supreme Court Rule 5703(4)(b),  
16 had UE wished to take the deposition of a government --  
17 governmental agency with persons to consent to testify on  
18 its behalf, it could have done so pursuant to 5703(b)(4),  
19 but it didn't do so. It simply asked to take the  
20 deposition of Mr. Kind, and we produced Mr. Kind, who is  
21 the expert witness testifying in this matter.

22 An expert witness, as Ms. Vuylsteke and I  
23 to a certain extent made the point the other day, is not  
24 necessarily authorized to speak on behalf of a party.  
25 There is a procedure in the rules by which a party can

1 produce someone to speak on its behalf. That's  
2 5703(b)(4), and that's not the process that UE followed.

3 Now, if you look at the United case,  
4 there's a helpful discussion about the distinction between  
5 admissions against interest and declarations against  
6 interest, and I think that's helpful because not only does  
7 it set out that only certain entities can make admissions  
8 against interest, and that would be done under 5703(b)(4),  
9 and this is primarily discussed in the very last paragraph  
10 of the excerpt that I produced here. Once that is done,  
11 it may be used by an adverse party for  
12 any -- for any purpose, including as admissions.

13 But in this case, the designation was not  
14 the deposition of a party, an officer, director or  
15 managing agent of a party, or a person designated in  
16 accordance with the rules. And so because UE did not  
17 follow the rules, they cannot use this portion -- these  
18 selected portions of Mr. Kind as admissions against  
19 interest of a party opponent.

20 And that's all I have on the question of  
21 whether or not they can use any portion of this deposition  
22 as admission of a party opponent, and I'm prepared to go  
23 through the particular designations to show why in any  
24 event, even if the court doesn't agree with that, that  
25 these are not admissions as admissions are defined.

1                   So I hate to put you on the spot, but if  
2     you would care to rule on the threshold question of  
3     whether they can be admissions at all, we can save the  
4     time of going through each particular designation and  
5     arguing over whether it, in fact, is an admission even if  
6     Mr. Kind could make admissions.

7                   MR. LOWERY: Your Honor, I'd like to be  
8     heard before you rule on any threshold issue.

9                   The problem with Mr. Mills' argument is  
10    Mr. Mills is relying on a Southern District case from 1987  
11    and ignoring the Supreme Court case in Bynote vs. National  
12    Supermarkets in 1995. The Bynote case did away with the  
13    manager or executive capacity rule that used to exist in  
14    terms of whether admissions could be made on behalf of a  
15    corporation or another organization, specifically held  
16    that if it's a vicarious -- if you have an agent,  
17    principal agent relationship, whether that be principal  
18    agent in the non-employee context or employer/employee  
19    relationship, that the statements of those parties are  
20    admissions that bind the principal. In that case it was a  
21    bagger and a checker, for example, and those admissions  
22    were held to be vicarious, and they bound National  
23    Supermarkets, the defendant in that case.

24                   The other problem with Mr. Mills' argument  
25    is he is relying on law that is out of date and was also

1    overruled in the Bynote versus National Supermarkets case,  
2    because he's claiming that in order to be an admission of  
3    a party opponent, it must be the same thing as a  
4    declaration against interest, and they're not the same  
5    thing.

6                   The Supreme Court in Bynote said, in order  
7    to qualify as a non-hearsay admission -- and that's  
8    another distinction you might recall from evidence a long  
9    time ago. Admissions of a party opponent are not hearsay.  
10   It's not an exception to the hearsay rule. They are not  
11   hearsay.

12                   And I quote, in order to qualify as a  
13   non-hearsay admission, the statement must be offered  
14   against the party and it must be the party's own  
15   statement. But the vicarious rule also applies, and so if  
16   it's a statement of an agent for the principal, then that  
17   also binds the principal.

18                   I continue, there is no logical reason to  
19   require that the admission be, quote, against interest,  
20   end quote, although admissions of an opposing party are  
21   often referred to as admissions against interest.

22                   I continue, because a statement would not  
23   be offered unless the offering party deemed it to be  
24   unfavorable to the party opponent, practically speaking,  
25   the only test for admissibility is relevancy.

1                   Now, Mr. Kind in this case in his direct  
2 testimony, he says -- he asked himself this question:  
3 Will OPC be taking a position on UE's proposal that the  
4 Commission approve a fuel adjustment clause?

5                   Answer: Yes. OPC opposes UE's request. A  
6 detailed description of OPC's position and support for it  
7 will be provided in testimony that will be filed later.

8                   Then Mr. Kind files testimony later. He  
9 states, quote, Public Counsel does not believe there's  
10 been a substantial change from the last rate case;  
11 therefore, they oppose. He continues, if the Commission  
12 decides to approve an FAC for UE despite OPC's  
13 recommendation to the contrary, and then he continues.

14                  Mr. Kind is an employee of the Office of  
15 Public Counsel, and he is advocating a position of that  
16 office, not giving an independent expert opinion about  
17 whether fuel adjustment clauses are good or bad or  
18 appropriate. He is advancing that position in his  
19 capacity as an employee of that office. He has -- those  
20 are vicarious admissions of the Office of the Public  
21 Counsel. The Bynote case rebuts what Mr. Mills said in  
22 reliance upon this 1987 case from the Southern District.

23                  And finally, Rule 5704(b)(3) says, this  
24 Rule 5703(b)(4) does not preclude taking a deposition by  
25 any other procedure. In the Empire Bank/United Services

1 case that Mr. Mills cites, the reason the admissions were  
2 admitted is because the counter-party in that case sent  
3 requests for admissions to the bank and asking if those  
4 bank personnel were officers or managing agents, because  
5 at that time you had to be in an executive capacity to  
6 make admissions, which as I said has now been overruled.  
7 It wasn't because it was a 5703(b)(4) deposition.

8                   The purpose of 5704(b)3(4) is if the party  
9 seeking to take the deposition doesn't know who has the  
10 information, then they can specify to the corporation or  
11 the government agency, I need to know about these things,  
12 give me somebody that can tell me about it.

13                   We know who took the position on behalf of  
14 OPC in this case. It's Mr. Kind, as it almost always is.  
15 So the rule doesn't apply in the way Mr. Mills indicates,  
16 and Mr. Mills' citation to case law is out of date and  
17 incorrect.

18                   JUDGE WOODRUFF: All right. Well, I'm  
19 going to make a ruling on this, and I think it will -- let  
20 me just say that I'm troubled by the use of the  
21 depositions in this case, the way they've been used. I  
22 think it's a poor substitution for effective  
23 cross-examination. And frankly, I'm not sure why AmerenUE  
24 really wants these, to use them in this way. I think it  
25 would have been much more effective to simply ask the

1 questions of Mr. Kind on the stand under  
2 cross-examination.

3                   Nevertheless, the motion is in front of me.  
4 I don't think it matters whether these are admissions  
5 against interest or admissions by a party. The Commission  
6 has the discretion to admit documents in front of it.  
7 These may be hearsay, in which case the ability of the  
8 Commission to rely upon them as an exclusive basis for its  
9 decision would be limited, but that does not preclude the  
10 Commission from admitting the documents.

11                   Therefore, I'm going to go ahead and admit  
12 the portions of the deposition that have been designated  
13 by AmerenUE.

14                   MR. MILLS: Judge, just so I'm clear,  
15 you're admitting them as hearsay; is that correct?

16                   JUDGE WOODRUFF: I'm not indicating whether  
17 they are hearsay or not hearsay. I'm just saying it  
18 doesn't really matter. They can be admitted before the  
19 Commission, and the parties can argue as to any reliance  
20 the Commission can put on them in their briefs.

21                   MR. MILLS: Because if they're admitted as  
22 hearsay over objection, that's sort of a different  
23 evidentiary value than if they are admitted as admissions.

24                   JUDGE WOODRUFF: That is correct. They are  
25 admitted as -- I guess they're admitted as hearsay, at



1 least for Mr. Kind's. I'm not going to make the same  
2 rulings on the other ones. That objection was not raised  
3 for the others.

4 MR. LOWERY: Just for the record, your  
5 Honor, we respect your ruling. Just for the record, I  
6 don't believe they are hearsay. I believe they are  
7 admissions of a party opponent. Therefore, they are not  
8 hearsay.

9 JUDGE WOODRUFF: That can be argued in  
10 briefs, then.

11 MS. VUYLSTEKE: Your Honor, I would  
12 respectfully request the opportunity to raise this same  
13 argument in our brief. Yesterday I don't believe the  
14 Court or the Bench had the opportunity to fully consider  
15 all of these issues and made a ruling very quickly in  
16 order to move the hearing along, but I think the same  
17 arguments and same reservations would apply with respect  
18 to the depositions of Mr. Brubaker and Mr. Dauphinaia.

19 I think all of the arguments raised by  
20 Mr. Mills also apply. So I will request that I can  
21 reserve the same right to question the evidentiary value  
22 of those with respect to witnesses Brubaker and  
23 Dauphinaia.

24 JUDGE WOODRUFF: That's fine. You can make  
25 any arguments you'd like to make in your brief. All

1 right.

2 CHAIRMAN DAVIS: Okay. So obviously that  
3 is a new issue that will have to be briefed. Are there  
4 any other, quote, new issues that have arisen that we need  
5 to be on notice for?

6 JUDGE WOODRUFF: I believe the Chairman's  
7 speaking in general, not on this limited issue.

8 CHAIRMAN DAVIS: Yes. Not -- in general.

9 MR. LOWERY: I'm not aware of other  
10 procedural issues, your Honor.

11 JUDGE WOODRUFF: We're not talking about  
12 procedural issues.

13 CHAIRMAN DAVIS: Any substantive,  
14 procedural, you name it. I want to make sure there  
15 aren't, you know, one sentence in someone's reply brief  
16 and then they -- you know, we get a motion on appeal that  
17 says, oh, you didn't address my issue.

18 MR. LOWERY: Well, your Honor, and I was  
19 going to address this at the very end of the hearing when  
20 we do some cleanup items. There is one issue, and that is  
21 there was evidence on a request that we made pursuant to  
22 the Midwest ISO's transmission owner agreement that the  
23 Commission determine that we are in compliance with the  
24 so-called FERC seven factor test.

25 And I believe there's no controversy about

1 that issue whatsoever. Staff filed very limited rebuttal  
2 on the issue. It wasn't rebuttal in the sense of adverse  
3 rebuttal. It was just commenting on the request. So  
4 that's a determination that we would be asking the  
5 Commission to make, but I don't think requires any  
6 argument or evidence in addition to what's in the record.

7 JUDGE WOODRUFF: Okay. Anybody else want  
8 to be heard on that at this point? Any other parties that  
9 have issues that might not have been identified?

10 MR. MILLS: I'm not aware of any.

11 MR. LOWERY: Nor am I, other than that one.

12 MS. VUYLSTEKE: I just want to make it  
13 clear on what the Chair is asking. I assume that --

14 JUDGE WOODRUFF: Come forward to the  
15 microphone so we can hear.

16 MS. VUYLSTEKE: I assume that it's  
17 permissible for the parties, upon review of the transcript  
18 further and review of the evidence as the record is  
19 complete from the hearing in this case, to raise  
20 additional arguments as they see fit based on the  
21 evidence. You're not asking us to say now whether we will  
22 raise any additional argument in briefs?

23 JUDGE WOODRUFF: We're not concerned about  
24 additional arguments as much as we are concerned about  
25 additional issues. This really goes back to the last

1 Ameren rate case where there was an issue raised in the  
2 briefs.

3 MR. DOTTHEIM: Really, I assume you're  
4 referring to in the last -- in the final reconciliation,  
5 the Taum Sauk regulatory capacity.

6 JUDGE WOODRUFF: That is what I'm talking  
7 about. As the Commission indicated in that case, we want  
8 to be able to deal with those issues promptly and  
9 directly.

10 All right. Let's bring Mr. Kind up. And  
11 Mr. Kind, I think you did testify several weeks ago now,  
12 isn't it?

13 THE WITNESS: Several times over the last  
14 few weeks.

15 JUDGE WOODRUFF: Okay. And you're still  
16 under oath.

17 MR. MILLS: And all Mr. Kind's testimony  
18 has already been admitted, so I'll simply tender him for  
19 cross-examination.

20 JUDGE WOODRUFF: For cross-examination,  
21 then, we begin with Staff.

22 MR. DOTTHEIM: No questions.

23 JUDGE WOODRUFF: For the State?

24 MR. IVESON: No questions, your Honor.

25 JUDGE WOODRUFF: For DNR?

1 MS. WOODS: No questions, your Honor.

2 JUDGE WOODRUFF: For Noranda?

3 MR. CONRAD: Just a couple things, Judge.

4 RYAN KIND testified as follows:

5 CROSS-EXAMINATION BY MR. CONRAD:

6 Q. Good morning, Mr. Kind.

7 A. Good morning.

8 Q. You were here through most of the time last  
9 week, I take it?

10 A. Yes, I was.

11 Q. And kind of in and out, but listening  
12 perhaps upstairs if you were here?

13 A. At times.

14 Q. There was a little confusion last week, I'm  
15 trying to remember which witness it was, it was not one of  
16 your folks, but there was some confusion about which  
17 customers the Office of Public Counsel represents. Can  
18 you offer any clarification on that?

19 A. It's my understanding that we represent the  
20 public.

21 Q. I understand that's not legal opinion,  
22 you're not a lawyer, but that's how you approach things?

23 A. That's the general approach, yes.

24 Q. Are matters of financial incentives and  
25 efficiency typically within the scope of issues addressed

1 by the field of economics?

2 A. Yes, they are.

3 Q. And you present yourself here today as an  
4 economist?

5 A. I have an educational background in that  
6 area, yes.

7 Q. Would you agree with me that it seems that  
8 AmerenUE appreciates the value of incentives when it comes  
9 to employee compensation?

10 A. I have heard several statements from Union  
11 Electric Company witnesses in this hearing to that effect.

12 Q. And would you also agree with me that it's  
13 important to properly design an incentive in order to  
14 ensure the desired result?

15 A. It's very important, yes.

16 Q. Now, I seem to recall earlier this year  
17 that AmerenUE had announced a contract with Lockheed  
18 Martin to manage a major part of its DSM development. Do  
19 I recall that correctly?

20 A. Yes, you do. I am familiar with some of  
21 the particulars of that contract.

22 Q. If you know, did AmerenUE include an  
23 incentive structure in that contract?

24 A. I do know. I'm not sure whether or not the  
25 response to that question would be confidential

1 information or not.

2 MR. BYRNE: It is.

3 MR. LOWERY: It is.

4 MR. CONRAD: Since the witness, Judge, is  
5 indicating that he does know and the answer would be HC,  
6 would you briefly permit us to be in HC, in camera?

7 JUDGE WOODRUFF: Yes, we will go in camera.  
8 I don't think there's anybody in the room that needs to  
9 leave.

10 (REPORTER'S NOTE: At this point, an  
11 in-camera session was held, which is contained in  
12 Volume 29, pages 2729 through 2731 of the transcript.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 JUDGE WOODRUFF: And we're back in regular  
2 session.

3 BY MR. CONRAD:

4 Q. Mr. Kind, we just finished a discussion  
5 about some matter in camera. Do you recall a presentation  
6 that was made by AmerenUE on or about October 7th in this  
7 hearing room before the Commission concerning some of the  
8 DSM activities?

9 A. Yes, I do.

10 Q. And would I be correct that that was in the  
11 context of their then pending integrated resource plan or  
12 IRP proceeding docketed -- not docketed, but with Case No.  
13 EO-2007-0409?

14 A. That's correct.

15 Q. Were you there for most, if not all, of  
16 that presentation?

17 A. Yes, I believe I was there for all of it.

18 MR. CONRAD: Your Honor, I would ask that  
19 an exhibit be marked at this time.

20 JUDGE WOODRUFF: All right.

21 MR. CONRAD: Forgive me. I'm sorry about  
22 our numbers.

23 JUDGE WOODRUFF: 764.

24 (EXHIBIT NO. 764 WAS MARKED FOR

25 IDENTIFICATION BY THE REPORTER.)



1 BY MR. CONRAD:

2 Q. Mr. Kind, you've been presented -- you've  
3 been presented with a document that's been marked for  
4 identification at this point as 764. You probably have  
5 not seen that document before, but can you describe what  
6 it appears to be?

7 A. It appears to be a portion of the  
8 transcript from the on-the-record presentation in Case No.  
9 EO-2007-0409 that took place on October 7, 2008.

10 Q. Can you tell from the page at the upper  
11 left-hand corner that's denominated 14 who the presenting  
12 party is?

13 A. In terms of which individual?

14 Q. Yes, sir.

15 A. Yes. It's Mr. Kidwell, the Union Electric  
16 vice president of regulatory affairs.

17 Q. And does it appear on lines 6 and 7 of the  
18 page denominated as 14 that he was sworn?

19 A. Yes, it does.

20 Q. Now, look with me, if you would, on page  
21 that's on end that's denominated as page 21, and look down  
22 at line 17 through 21 where we have added some underlining  
23 simply to call your attention to it.

24 A. Yes, I see that.

25 Q. Okay. Is that consistent, as far as you

1 recall it, with your recollections of that presentation?

2 A. Yes, it is.

3 MR. CONRAD: Now, your Honor, we can  
4 approach that several ways. I guess one would be that the  
5 Commission can obviously take administrative notice of the  
6 fact of its own transcript in that proceeding, and we can  
7 offer it on that basis, or if the witness is able to  
8 provide adequate foundation, he may or may not, we can  
9 offer it as -- I see counsel shaking their heads --

10 MR. LOWERY: No.

11 MR. CONRAD: I think it is probably  
12 appropriate to take notice of the Commission's own  
13 transcript in the proceeding.

14 MR. LOWERY: In fact, you're not going to  
15 get an objection. I was going to move this along and say  
16 we don't have any objection to you either taking notice of  
17 it or marking it and admitting it, whichever you prefer.

18 JUDGE WOODRUFF: It's been marked. I  
19 assume if you want to offer it, sure.

20 MR. CONRAD: Well, if we're not going to  
21 get an objection, then let's offer it.

22 JUDGE WOODRUFF: 764 has been offered. Any  
23 objection to its receipt?

24 (No response.)

25 JUDGE WOODRUFF: Hearing none, it will be

1 received.

2 (EXHIBIT NO. 764 WAS RECEIVED INTO  
3 EVIDENCE.)

4 BY MR. CONRAD:

5 Q. Now, Mr. Kind, do I understand correctly  
6 that you oppose the adoption of an FAC in this proceeding  
7 by the Commission?

8 A. Yes, that's correct.

9 Q. So I take it you believe that it is true  
10 that you do not think that an FAC is in the best interests  
11 of the customers on whose behalf you are working?

12 A. That's right, and it's largely due to the  
13 shift in incentives in terms of, you know, having adverse  
14 consequences on the rates that customers are likely to pay  
15 in the future.

16 Q. Now, nevertheless, setting the position  
17 aside for just a moment, I take it that you have made some  
18 evaluation of the FAC that AmerenUE has proposed so that  
19 you would be able to provide an evaluation if the  
20 Commission decided to approve an FAC; is that true?

21 A. Yes, I have.

22 Q. And would you agree with me that an  
23 incentive structure is appropriate?

24 A. Yes.

25 Q. Now, we've had some discussion in this case

1 already about the levels of sharing an incentive. While I  
2 understand that you oppose the FAC, you did recommend a  
3 50/50 approach for tracking or sharing if the Commission  
4 chose to approve one; is that correct?

5 A. That's correct.

6 Q. Now, were you here for a portion of,  
7 actually Bench questions, I think, of Professor Morin?

8 A. I may have heard at least a portion of them  
9 either in the hearing room or upstairs. It -- if you can  
10 refresh my memory as to what the questions were, there  
11 have been quite a few witnesses here this week.

12 Q. Well, he had suggested --

13 MR. CONRAD: As a matter of fact, your  
14 Honor, I guess we could handle this by another exhibit.  
15 Might be a handy way to do it.

16 JUDGE WOODRUFF: All right. 765.

17 (EXHIBIT NO. 765 WAS MARKED FOR  
18 IDENTIFICATION BY THE REPORTER.)

19 BY MR. CONRAD:

20 Q. By way of refreshing your recollection,  
21 I've provided you with a copy of an extract, Mr. Kind,  
22 from the Commission's transcript on actually November 21  
23 in this very proceeding, have I not?

24 A. Yes, you have.

25 Q. And if you would look at the second page in

1 the packet, which is page 433 of volume 15, specifically  
2 lines 8 and 9, does it appear to you there that Chair  
3 Davis was starting to inquire of Dr. Morin?

4 A. Yes.

5 Q. And that continues on to page 437 where we  
6 have highlighted some material, and I wanted you to look  
7 at page 438 specifically to refresh your recollection.  
8 Line 3 and 4, question appears to be an okay, and the  
9 witness is talking about splitting hairs. Do you see  
10 that?

11 A. Yes, I do.

12 Q. Does that help you recall that testimony?

13 A. Yeah. I was listening upstairs to most of  
14 the ROE testimony, and I heard this particular passage.

15 Q. Well, my question to you, Mr. Kind, is,  
16 armed with that refreshed recollection through  
17 Exhibit 765, if, as Dr. Morin suggests there, the bond  
18 rating agencies are not likely to distinguish between 80,  
19 90, 95 or 100 percent pass through, in your sense would  
20 that place considerable discretion in the hands of the  
21 Commission as to what level of pass through to choose?

22 MR. LOWERY: Objection. It  
23 mischaracterizes what Dr. Morin testified to. What  
24 Dr. Morin said is it would be hard to quantify those 80 or  
25 90 or 95 or 100 in the basis points of ROE. Dr. Morin

1 gave no opinion about what the credit rating agencies, how  
2 they view that or how it would affect the company's credit  
3 ratings. So the question assumes facts not in evidence  
4 and mischaracterizes the testimony.

5 MR. CONRAD: Let's go ahead, then, and look  
6 at page 438, line 7, 8 and 9, and there it appears what  
7 the witness is saying is the bond rating agencies tend to  
8 think all or nothing basically.

9 MR. LOWERY: And if we look at lines 11 and  
10 12, he says they do favor sort of mainstream one on one or  
11 close to one on one pass throughs as well.

12 MR. CONRAD: I asked the witness what his  
13 recollection was.

14 JUDGE WOODRUFF: Mr. Conrad, let me make a  
15 ruling on this first here.

16 The transcript says what it says, subject  
17 to interpretation which the Commission can make. I'm  
18 going to allow Mr. Conrad to ask the question that he's  
19 asked. So the objection's overruled.

20 BY MR. CONRAD:

21 Q. I think the question pending, to collapse  
22 it, was whether with that understanding that you now have  
23 refreshed, does that seem to you to place a lot of  
24 discretion in the hands of this Commission as to what  
25 level of pass through they could choose?

1                   MR. LOWERY: Objection, improper  
2 foundation. There's been no foundation laid that this  
3 witness knows anything about what credit ratings agencies  
4 do or do not expect.

5                   JUDGE WOODRUFF: I'm going to overrule the  
6 objection. You can answer the question.

7                   THE WITNESS: Well, I -- I think I do know  
8 a fair amount about what credit rating agencies do and  
9 their basis for rating things. I've spoken with people  
10 from the rating agencies about what they look for in terms  
11 of regulatory climate in terms of incentives, and I know  
12 from those conversations that they tend not to look at any  
13 one factor, and they tend to look at the overall climate  
14 which can be, you know, a matter of -- can include things  
15 such as what sort of constructive engagement is taking  
16 place amongst regulators and stakeholders with a certain  
17 utility and how does that lead to, you know, outcomes in  
18 the regulatory process that -- that lead to, you know,  
19 good ability to be able to maintain certain financial  
20 ratios and to be able to maintain access to -- to capital  
21 markets.

22                   That said, I've also witnessed really the  
23 dismal performance of a lot of credit rating agencies and  
24 investment banks with respect to their views about the  
25 marketplace and their views of, you know, what -- what a

1     viable firm is and what a viable firm isn't, and their  
2     views of whether or not fundamentals exist for, you know,  
3     things like housing bubbles to persist forever, and I  
4     frankly don't take a whole lot of stock in what they say  
5     as a group.

6                     I think there's certain individuals that --  
7     at rating agencies and investment banks that would have  
8     some credibility with me, but as a group, I don't place a  
9     whole lot of stock in what they say. And I don't think  
10    that the Commission's exercise of its discretion in  
11    regulating utilities should rely a whole lot on the views  
12    of these types of entities.

13   BY MR. CONRAD:

14             Q.     Certainly your position is that if the  
15    Commission chose to approve an FAC, that a 50/50 sharing  
16    that you have proposed would be, at least in your view, an  
17    adequate incentive?

18             A.     It's not as good as the incentive that they  
19    have with no FAC at all, because with no FAC at all, then  
20    they tend to give equal attention to all aspects of their  
21    business. This really sort of dilutes the incentive to --  
22    we only pay half as much attention to this part of our  
23    business, but it's much more adequate than a 95/5 sharing  
24    type of arrangement.

25             Q.     And obviously as you move up and down that



1 scale, the incentives would change, the Commission would  
2 have discretion to that to balance as it sees fit the  
3 interests, correct?

4 A. Could you repeat that again, please?

5 Q. Well, my earlier question was about the  
6 discretion that would be laid in the hands of the  
7 Commission. Your recommendation is 50/50. You commented  
8 a moment ago about 95/5 as not being adequate.

9 A. Correct.

10 Q. As you move up and down the scale between  
11 that, the incentives would obviously vary and the  
12 Commission would have to make a balancing decision, would  
13 it not, between the concerns that you have about  
14 incentives and the concerns that the company has about  
15 recovery of its costs?

16 A. I think I would agree with that, yes.

17 MR. CONRAD: Your Honor, I don't --  
18 although I had asked that 765 be marked as an exhibit, it  
19 is part of the transcript in this proceeding, and I really  
20 don't think it's necessary to clutter this record further  
21 with redundant. I had offered it, frankly, for the  
22 purpose of helping the witness recall that portion of the  
23 testimony for the question and answer that ensued, so I'm  
24 not going to offer that, and although its number is  
25 reserved and assigned, I will not offer it because it's

1 already there. As your Honor correctly reflected, that is  
2 already part of the transcript. And that would conclude  
3 my questions for Mr. Kind. Thank you.

4 JUDGE WOODRUFF: Thank you. And for MIEC?

5 MS. VUYLSTEKE: No questions. Thank you.

6 JUDGE WOODRUFF: Then we're down to Ameren.

7 CROSS-EXAMINATION BY MR. LOWERY:

8 Q. Good morning, Mr. Kind.

9 A. Good morning, Mr. Lowery.

10 Q. OPC opposes the company's recovery  
11 incentive compensation in this case, does it not?

12 A. I'm really not involved in that issue, and  
13 I couldn't tell you what we've -- have in terms of our  
14 position statement on that issue.

15 Q. If Mr. Mills indicated opposition, you  
16 wouldn't disagree with that, correct?

17 A. I wouldn't disagree that that was the  
18 position of our office if that's what he's indicated.

19 Q. Mr. kind, do you recall in the company's  
20 last rate case, ER-2007-0002, that you proposed an  
21 off-system sales tracker that did not include any sharing  
22 between customers and the company?

23 A. I recall proposing a tracker. I don't  
24 recall the specifics of it.

25 Q. Isn't it true that it included no sharing

1    whatsoever, that the off-system sales would simply be  
2    tracked and 100 percent of those off-system sales would  
3    flow through to customers?

4           A.     I think I've already answered that  
5    question.

6           Q.     Is that yes or no to my question?

7           A.     It's the same as the answer to your  
8    previous question. I don't recall the specifics of the  
9    tracker that I proposed

10          Q.     So your answer is I don't know? Is that  
11   your answer to my question?

12                 MR. MILLS: Judge, I object to this as  
13   being argumentative. He asked the question. The witness  
14   says he doesn't know. We don't need him to say I don't  
15   know four times.

16                 JUDGE WOODRUFF: We don't need to hear him  
17   say it no four times. We -- he has a right to ask a  
18   clarifying question. So the objection is overruled.

19   BY MR. LOWERY:

20          Q.     Let me ask it this way. Do you know  
21   whether or not there was any sharing between the company  
22   and customers of the off-system sales in the proposed  
23   off-system sales tracker that you proposed in the last  
24   case? Do you know?

25          A.     I do not recall.

1 Q. Mr. Kind, you agreed with me in the past  
2 that you have no basis to disagree with the statement that  
3 nearly 90 percent of all electric utilities that have an  
4 FAC have no sharing within that FAC at all; isn't that  
5 right? You have no basis to disagree with that statement,  
6 correct?

7           A.       I don't know whether that statement's  
8   correct or not.

9 Q. That wasn't my question. You have no basis  
10 to disagree with that statement, correct?

11 A. I don't know if it's correct or not.

12 Q. Mr. Kind, do you have a copy of your  
13 deposition?

14                    A.        I think I do.

15 Q. Would you turn to page 163, please.

16                   A.       I'm there.

17           Q.       See line -- starting on line 25 on page  
18   163, continuing to line 8 on page 164? I'm going to ask  
19   you whether I asked you these questions and whether you  
20   gave the following answers:

21                               Question: Do you disagree that nearly 90  
22   percent of all electric utilities that have fuel  
23   adjustment clause have no sharing whatsoever?

24                      Answer: I just don't know.

25 Question: You don't agree or disagree?

1                   Answer: That's correct.

2                   You don't have any basis to disagree with  
3   that statement?

4                   Answer: No, I don't.

5                   Did I properly read those questions and  
6   answers?

7           A.       Yes, you did.

8           Q.       And Mr. Kind, you've done no quantitative  
9   analysis, you haven't plugged in any numbers with respect  
10   to your 50/50 sharing proposal, have you?

11          A.       No, I have not.

12          Q.       You haven't analyzed how the 50/50 sharing  
13   would affect UE's cash flows, have you?

14          A.       No quantitative analysis, no.

15          Q.       You've not analyzed how 50/50 sharing would  
16   affect UE's earnings, have you?

17          A.       No quantitative analysis in that area.

18          Q.       You don't know how much UE's fuel costs  
19   have increased in the last few years, do you?

20          A.       Yes, I do.

21          Q.       You didn't at the time of your deposition;  
22   is that correct?

23          A.       I don't think I did, no.

24          Q.       Which means you couldn't have known that at  
25   the time you wrote your testimony opposing the company's

1 FAC request; isn't that correct?

2 A. In terms of chronological order of those  
3 events, yes.

4 Q. So the amount by which UE's fuel costs have  
5 risen in the last few years wasn't relevant to your  
6 decision to oppose the company's fuel adjustment clause  
7 request because you weren't even aware of it when you  
8 decided to oppose it, correct?

9 A. It was not a key consideration, no.

10 Q. Wasn't any consideration, was it? You  
11 didn't know what the fuel cost increases had been, so it  
12 couldn't have been any consideration, could it?

13 A. I didn't know specifically. I would have  
14 had, of course, a general sense of that.

15 Q. You told me before that UE's credit ratings  
16 in your view had been pretty decent, were your words,  
17 without an FAC in the past, but other than that  
18 observation, your view that they had been pretty decent,  
19 you have not done any other analysis relating to having or  
20 not having a fuel adjustment clause and how that relates  
21 to UE's credit ratings, have you?

22 A. Are you speaking of a quantitative analysis  
23 there?

24 Q. Have you done some other kind of analysis?

25 A. I mean, in my mind, I analyze a lot of

1 things that I think are relevant to the positions that I  
2 take.

3 Q. Would you turn to page 166 of your  
4 deposition. Take a look at line 22. Did I ask you the  
5 following questions and answers:

6 Question: Other than an observation  
7 historically that in your view the credit ratings have  
8 been pretty decent --

9 Answer: Uh-huh.  
10 -- you haven't done any other analysis  
11 relating to having or not having a fuel adjustment clause?

12 Answer: That's correct.  
13 Did I ask you those questions and you give  
14 that answer?

15 A. Yeah, and I think --

16 Q. You've answered --

17 A. -- when I gave that answer --

18 Q. Mr. Kind, Mr. Kind, I asked you a yes or no  
19 question. If your attorney wants to ask you a question on  
20 redirect, he can do so.

21 And the same would be true of having or not  
22 having access to capital, your historical observation in  
23 your view is that UE's credit ratings have been, quote,  
24 pretty decent, but you have not done any analysis about  
25 how having or not having an FAC relates to UE's access to

1 capital; isn't that right?

2 A. No quantitative analysis.

3 Q. Or how it relates to UE's cost of debt?

4 A. Again, no quantitative analysis in that

5 area either.

6 Q. Let's look at page 167 of your deposition.

7 Line 14, you haven't done any analysis about how having or

8 not having a fuel --

9 A. I'm sorry. You've gotten ahead of me.

10 Where are you?

11 Q. I apologize. Page 167 of your deposition,

12 line 14.

13 A. Okay.

14 Q. Question: You haven't done any analysis

15 about having -- how having or not having a fuel adjustment

16 clause affects UE's cost of debt; is that true?

17 Answer: That's true.

18 Was that the answer you gave?

19 A. Yes, it is, but again --

20 Q. I did --

21 A. I think I was --

22 Q. Mr. Kind?

23 A. -- interpreting your question as --

24 Q. Mr. Kind?

25 JUDGE WOODRUFF: Mr. Kind, wait for the



1 questions.

2 BY MR. LOWERY:

3 Q. My questions I think are clearly yes or no  
4 questions. Do you not understand what a yes or no  
5 question is?

6 A. I might have a different understanding than  
7 you.

8 Q. Are you able to answer my questions yes or  
9 no?

10 A. Sometimes not without a qualification.

11 MR. LOWERY: Your Honor, I'd instruct --  
12 I'd ask you to instruct this witness if the question is  
13 yes or no and if it can be answered yes or no, that he  
14 answer it yes or no.

15 JUDGE WOODRUFF: So instructed.

16 CHAIRMAN DAVIS: For the record, he can  
17 answer I don't know, too.

18 MR. LOWERY: I agree. I stand corrected,  
19 your Honor.

20 BY MR. LOWERY:

21 Q. Mr. Kind, my question didn't ask you  
22 whether you'd done quantitative or qualitative analysis.  
23 It asked if you'd done any analysis; isn't that correct?

24 A. That's correct.

25 Q. And you haven't done any analysis as it

1 relates to UE's cost of equity in that respect either,  
2 have you?

3 A. In what respect, quantitative or  
4 qualitative?

5 Q. Mr. Kind, let's look at page 167 of your  
6 deposition again.

7 A. Okay.

8 Q. Line 14, you haven't done any analysis  
9 about how having or not having a fuel adjustment clause  
10 affects UE's cost of debt; is that true?

11 Answer: That's true.

12 Or how it affects cost of equity?

13 Answer: That's true.

14 Did I accurately read those questions and  
15 answers?

16 A. Yes, you did.

17 Q. We've already established that the Office  
18 of the Public Counsel opposes AmerenUE's fuel adjustment  
19 clause request in this case, correct?

20 A. That's the Office of Public Counsel's  
21 position, yes.

22 Q. And OPC opposed AmerenUE's fuel adjustment  
23 clause request in its last rate case, too, correct?

24 A. That's correct.

25 Q. And you opposed Aquila's fuel adjustment

1 clause request in its case; isn't that right?

2 A. Yes.

3 Q. And others in the Aquila case proposed a  
4 50/50 sharing mechanism, correct?

5 A. I don't recall specifically.

6 Q. Do you recall that the Commission rejected  
7 a 50/50 sharing mechanism in the Aquila case?

8 A. No, I don't.

9 Q. Now, I'm not talking about the legal fight  
10 over the prior Stipulation & Agreement in the Empire case  
11 involving the interim energy charge. You're familiar with  
12 the Stipulation & Agreement involving Empire and the  
13 interim energy charge from a few years ago; is that  
14 correct?

15 A. I know that there was one. I'm not, you  
16 know, aware of the details of it. I haven't -- another  
17 witness from our office provided testimony on that in the  
18 last Empire case, I think.

19 Q. When I refer to the Stipulation & Agreement  
20 involving Empire's interim energy charge from, not its  
21 last rate case, from the one before, you know generally  
22 what I'm talking about, right?

23 A. I have some limited level of knowledge  
24 about it.

25 Q. You know that such a Stipulation &

1 Agreement existed, right?

2 A. That's correct.

3 Q. And you're aware in the last Empire case  
4 that there was a legal fight, legal arguments about  
5 whether Empire could request a fuel adjustment clause or  
6 not in that last Empire rate case given the terms of that  
7 Stipulation & Agreement? You know generally that that  
8 legal dispute existed, correct?

9 A. That's correct.

10 Q. So I'm not talking about that legal fight  
11 for purposes of this question. But aside from that issue,  
12 OPC opposed Empire's fuel adjustment clause request in  
13 Empire's last rate case that was decided this past summer  
14 on the merits; isn't that right?

15 A. Yes.

16 Q. OPC's opposed every fuel adjustment clause  
17 request made by every electric utility in the state since  
18 Senate Bill 179 was adopted; isn't that correct?

19 A. I think we have opposed all four requests;  
20 that is correct.

21 MR. LOWERY: May I approach the witness,  
22 you Honor?

23 JUDGE WOODRUFF: You certainly may.

24 MR. LOWERY: If you'll give me just a  
25 moment, your Honor.

1 JUDGE WOODRUFF: Sure.

2 MR. LOWERY: I'll show Mr. Mills what I'm  
3 talking about here.

4 BY MR. LOWERY:

5 Q. Mr. Kind, I'm showing you an electronic  
6 version of what I'll represent to you to be your rebuttal  
7 testimony from the company's last rate case, and I'll  
8 scroll up and let you verify that I'm not misrepresenting  
9 what I'm showing you.

10 A. That's what it appears to be, yes.

11 Q. Can you see your affidavit here, Mr. Kind?

12 A. Yes, I do.

13 Q. You don't have any reason to believe that  
14 this isn't an accurate copy of your testimony from the  
15 last case, do you?

16 A. I don't know. I haven't seen the whole  
17 document.

18 Q. Well, would you like to take a little bit  
19 more time and look at it? Because we're going to take the  
20 time if necessary for you to verify that it's accurate.  
21 So if you don't know, we'll take the time. If you can  
22 answer my question about whether or not that's an  
23 authentic copy, then I'll proceed with my questions.

24 A. Well, I can look through it and see if it  
25 looks familiar to me.

1 Q. Please do.

2 A. If you don't mind me using your computer.

3 Q. No. Please go ahead.

4 A. Okay. Yes, it does appear to be a copy of  
5 the testimony that you represented it to be.

6 Q. Mr. Kind, I am going to a page of that  
7 testimony. I'm going to ask you to read -- let's find  
8 what page we're on -- page 3. We're on page 3 of your  
9 rebuttal testimony in Case No. ER-2007-0002, and I would  
10 ask you to read the question and answer starting on line  
11 8, line 7 through line 17 if you would, please.

12 A. Okay. The question is, what did you  
13 recommend in your direct testimony for the treatment of  
14 off-system sales margins in this case?

15 The answer is, the Public Counsel  
16 recommendation for the treatment of off-system sales  
17 margins consisted of two elements and was described in my  
18 direct testimony as follows. Okay. UE's revenue  
19 requirement should include a baseline amount of off-system  
20 sales margins at a level that reflects the best estimate  
21 of the ongoing level of off-system sales margins, and a  
22 deferred accounting tracker mechanism should be used to  
23 accumulate variations from the baseline level between rate  
24 cases. The accumulated deferral amount should be  
25 reflected in the revenue requirement in UE's next case.

1                   That's the end of it.

2           Q.       Thank you. I'm sure you'll correct me if I  
3   don't paraphrase it correctly, Mr. Kind, but what that  
4   says is, is that the Commission makes the best estimate of  
5   what it thinks normalized off-system sales margin would  
6   have been in that case, I'll make up a number,  
7   \$200 million, just for illustrative purpose, right?

8           A.       Okay. I'm following you.

9           Q.       And \$200 million would then be reflected as  
10   an offset to the revenue requirement in base rates. The  
11   company's base rates would be lower by \$200 million,  
12   right, in that example?

13          A.       Yes.

14          Q.       I'm sorry. I didn't mean to speak over  
15   you. Was your answer yes?

16          A.       Yes.

17          Q.       And then if the company were to achieve  
18   \$250 million the next year and \$250 million the next year,  
19   then \$100 million would have built up in the tracker.  
20   Let's say that new rates went into effect from a  
21   subsequent rate case exactly two years later. Are you  
22   following me?

23          A.       Yes.

24          Q.       So if in that two-year period the company  
25   had exceeded that \$200 million baseline level by a total

1 of \$100 million, then there would be \$100 million sitting  
2 in the tracker when that next rate case came along, right?

3 A. That's correct.

4 Q. And ratepayers under your proposal would  
5 have gotten all \$100 million, right?

6 A. I have to look at the testimony again. I  
7 think there might have been something in there about with  
8 interest. I'm not sure.

9 Q. I'll be happy to let you look at it.

10 A. Okay.

11 Q. I'll ask you that question. Is there  
12 anything about interest in there?

13 A. The interest amount isn't specified in the  
14 proposal here, no. It just speaks to a deferred  
15 accounting tracker mechanism.

16 Q. Let me ask you this: Let's say there was  
17 interest. Let's say there was \$100 million in that  
18 tracker, then, and let's say there was interest, and I'll  
19 ignore compact. There was 5 percent interest. So we'd  
20 have \$5 million of interest, right?

21 A. On how much?

22 Q. On \$100 million.

23 A. Okay. You're just saying on a two-year  
24 period?

25 Q. Just simplify the assumptions.



1           A.     Right.  Okay.

2           Q.     So \$100 -- so in the company's next rate  
3     case, its rates would be lower by \$105 million, right,  
4     under your proposal?

5           A.     No.  No.  There would be the whole question  
6     of how you might want to amortize that amount.

7           Q.     Okay.  You have the amortization --

8           A.     You have to look at, you know, the  
9     anticipated time period between rate cases, maybe for  
10    amortization, and different people would have different  
11    proposals on how to do that, I think.

12          Q.     Fair enough.  But your proposal was not  
13    that the company, for example, get to keep 50 percent of  
14    the amount built up in the tracker, was it?

15          A.     No, that's not -- that's not the proposal  
16    that was stated there.

17          Q.     Or 10 percent, right?

18          A.     No, that's not the proposal.

19          Q.     No incentive for the company was built into  
20    that tracker, correct?

21          A.     That's correct.

22                   MR. LOWERY:  I have no further questions,  
23    your Honor.

24                   JUDGE WOODRUFF:  All right.  Then we'll  
25    come up for questions from the Bench.  Commissioner

1 Murray?

2 COMMISSIONER MURRAY: I have no questions.

3 Thank you.

4 JUDGE WOODRUFF: Commissioner Jarrett?

5 COMMISSIONER JARRETT: No questions, thank  
6 you, Mr. Kind.

7 JUDGE WOODRUFF: Chairman Davis?

8 QUESTIONS BY CHAIRMAN DAVIS:

9 Q. Mr. Kind, okay. I think in some  
10 questioning from Mr. Conrad, you were -- he was asking you  
11 about incentives, and I guess my recollection of your  
12 testimony is that you said, you know, the best incentive  
13 of all is for these electric utilities to have no fuel  
14 adjustment; is that correct?

15 A. Yes. I mean, again, you'd have to look at  
16 all the circumstances at a certain point in time, but as a  
17 general statement, that's what I believe.

18 Q. Okay. In terms of fuel procurement, is  
19 there anything that Ameren should be doing that they're  
20 not currently doing?

21 A. There's a lot of things, yes, that they  
22 could be doing and, in fact, that they are considering  
23 doing. There's a -- I have here a document that's over  
24 100 pages long entitled coal risks, and I can't talk about  
25 the specifics of it, but it was a presentation that was

1 made to the -- not the UE's management, but to Ameren's  
2 management, the Ameren executive leadership team, about  
3 the risks in all the various areas of getting coal  
4 delivered, everything from the commodity price, the  
5 transportation contracts, the diesel fuel risks, and it  
6 talks about all the many things that AmerenUE has done in  
7 the past, has explored to mitigate risk, and it talks  
8 about all their additional options that they could explore  
9 to mitigate risks in all these areas.

10 In fact, I really hadn't delved into the  
11 details of this document until the last week or two, but  
12 after looking at it, I don't see how really Commissioners  
13 could make a good decision about whether or not Ameren  
14 needs a fuel adjustment clause without reading this entire  
15 document.

16 JUDGE WOODRUFF: Mr. Kind, are you  
17 referring to a document that's been marked as evidence?

18 THE WITNESS: A portion of this document  
19 was marked as evidence during the cross-examination of  
20 Mr. Neff.

21 BY CHAIRMAN DAVIS:

22 Q. Let me ask you this, because Mr. Kind, I  
23 mean, we have to decide -- would you agree -- well, you're  
24 not a lawyer, and Mr. Mills, maybe he can get up and start  
25 objecting and then maybe -- maybe we can -- maybe I can

1 start asking him these questions, but you agree that we  
2 have to decide these cases based on the facts and the  
3 evidence, do you not?

4 A. Yes, I do.

5 Q. Okay. Is that -- a portion of that  
6 document is in evidence?

7 A. Yes. And your question had to do with just  
8 a broader question --

9 Q. Okay. I asked you --

10 A. -- a lot of pieces that aren't in evidence.

11 JUDGE WOODRUFF: Mr. Kind --

12 BY CHAIRMAN DAVIS:

13 Q. I asked you a specific question. A portion  
14 of that document is in evidence, but not the whole  
15 document, correct?

16 A. A small portion.

17 Q. Okay. A small portion. And now you are  
18 arguing -- or you just stated that you don't think this  
19 Commission can adequately decide this issue without having  
20 reviewed that whole document. Is that what you're  
21 arguing?

22 A. I just made that statement. I believe  
23 that, yes.

24 Q. And can you understand my concern? I guess  
25 can you understand my concern that it looks to me like the

1 Office of Public Counsel is now -- AmerenUE has the burden  
2 of proof in this case, agreed?

3 A. That's my understanding.

4 Q. All right. So would you agree that they  
5 have put on evidence on the fuel adjustment issue?

6 A. I would agree.

7 Q. Okay. Would you agree that OPC has put on  
8 evidence in opposition to that issue?

9 A. We've used our limited resources to try and  
10 do that, yes.

11 Q. Is this another instance where OPC is  
12 attempting to argue that the absence of a fact somehow  
13 constitutes a fact in and of itself that, you know, is,  
14 you know, somehow, you know, a presumption that, you know,  
15 we can't decide this issue now?

16 A. You know, I probably can't tell you what we  
17 have discussed as part of our litigation strategy, but I  
18 can tell you there has been no discussion of that as part  
19 of our litigation strategy.

20 Q. Okay. Now, you've also testified in recent  
21 rate cases involving Aquila and Empire, have you not?

22 A. Yes, I have.

23 Q. Okay. Would you agree with the statement  
24 that those two companies have under-recovered tens of  
25 millions of dollars in fuel costs in the last three, four

1    years?

2                   A.       I know that's a fair statement.  At least  
3    I've seen those quantifications with respect to Empire.  
4    I'm not as certain about the situation with Aquila.

5                   Q.       Okay.  So do you feel that that's the  
6    situation with Empire?

7                   A.       Well, under-recovered, I guess that could  
8    be explored a little further, you know, in terms of under-  
9    recovery.  Does it mean that with respect to this one  
10   particular area --

11                  Q.       Mr. Kind, we may be here all weekend if you  
12   can't answer a stinking question.

13                            Let's start again.  Has Empire Electric  
14   historically earned its allowed return in the last four  
15   years?

16                  A.       I can't say for each of those years, but I  
17   think I could generally say that for most of them they  
18   have not.

19                  Q.       Okay.  I think you're right.  I think it's  
20   possible they might have actually earned it one year.  
21   That's based on my recollection.

22                            Okay.  And it is -- is it also your  
23   recollection that Empire has on a fairly consistent basis  
24   not been able to recover its fuel and all of its fuel and  
25   purchased power costs?

1           A.       I think that's correct.

2           Q.       Okay. What could Empire Electric have done  
3 differently to somehow more prudently manage their  
4 business where they could recover their fuel and purchased  
5 power costs and earn their allowed return on equity, or  
6 had the opportunity to earn their allowed return on  
7 equity, I guess I should say?

8           A.       Well, there could have probably been a  
9 different adjustment mechanism, but I think I might  
10 surprise you to say that my views of whether or not a fuel  
11 adjustment clause for Aquila and Empire is appropriate  
12 have been evolving over time.

13          Q.       Okay. Once again, Mr. Kind, what could  
14 Empire have done differently to earn -- have an  
15 opportunity to earn their allowed return on equity?

16          A.       I don't think there's anything I'm aware of  
17 that would be responsive to your question.

18          Q.       Okay. Now, incentive regulation can be a  
19 good thing, can't it?

20          A.       Yes. And I would include just basic cost  
21 of service regulation with regulatory lag as one form of  
22 incentive regulation.

23          Q.       Okay. Have you heard the concept skin in  
24 the game?

25          A.       Yes, I have.

1           Q.       Okay. Now, let me ask you -- let me ask  
2     you this question: Do you think it would be good for the  
3     Public Service Commission Staff that puts on rate cases to  
4     have some skin in the game?

5           A.       I haven't thought about that. It's a tough  
6     question to me to just answer. I would be willing to give  
7     some consideration as that being a beneficial approach.

8           Q.       Okay. So let me ask you this: If we  
9     somehow put, I think the Ameren model is 35 percent of  
10    their compensation, quote, at risk, and let's say that  
11    they come up with a number that's say 50 percent off,  
12    think we should reduce their compensation by half of that  
13    amount, say cut the 35 percent in half and say, well,  
14    you're only going to get paid 82 and a half percent next  
15    year? Do you think -- would you think that would be  
16    incentive -- do you think paying them in that sort of  
17    fashion would be an adequate incentive to get them focused  
18    on getting a better number?

19          A.       Well, I'm a little confused by your  
20    question, or I shouldn't say confused. I'm just not sure  
21    I understand it. The 50 percent off, are you looking at  
22    sort of their -- the way they structure incentive  
23    compensation and they relate it to certain targets on  
24    whether it's ROE or key performance indicators and they  
25    only achieve 50 percent of that target? Is that the kind



1 of thing you're asking about?

2 Q. Let's say that they made a recommendation  
3 in a rate case that was, say -- let's say their final  
4 recommendation was the company should be paid \$50 million.

5 A. Additional revenue requirement?

6 Q. Additional revenue requirement.

7 A. Okay.

8 Q. And let's say that they were -- the  
9 Commission found otherwise, and that they were off by  
10 \$25 million. So they're off roughly 50 percent of that  
11 amount.

12 A. I'm following you.

13 Q. And let's say they have 35 percent of their  
14 pay is incentive compensation, and so since those  
15 employees are -- you know, obviously the rate case is one  
16 of the most important things we do here. If they're  
17 50 percent off, you know, should we reduce their incentive  
18 compensation by half?

19 A. I'm frankly not seeing the parallel between  
20 actual costs and the costs that AmerenUE seeks to recover  
21 in a rate case that would be sort of applicable to an  
22 incentive mechanism, and that has to do with sort of that  
23 there can often be some sort of gaming involved, you know,  
24 ROE way up here, someone else's way down here.

25 Q. Mr. Kind, it's fascinating that you -- do

1 you believe that there is gaming going on amongst the  
2 parties in rate cases?

3 A. I think that parties have an incentive to  
4 exaggerate their positions to some extent. You know, it  
5 depends on the party and their motivation, for instance,  
6 especially parties that -- where their compensation is  
7 tied to the outcomes of a rate case. For Public Counsel,  
8 our compensation is not tied to the outcome of a rate  
9 case.

10 Q. Should it be?

11 A. I know it doesn't need to be for me. I  
12 know I was here past midnight this week without any  
13 incentive compensation.

14 Q. Okay. Would you agree that there's a  
15 difference between working hard and working smart?

16 A. I agree there can be a difference.

17 Q. Okay. Mr. Kind, how does -- how does this  
18 Commission incent the parties in rate cases, including  
19 Staff and the utility, to give us what they perceive to be  
20 the right answer and not just posture?

21 A. The first thing that comes to mind is  
22 making sure that all the parties have a somewhat  
23 equivalent or comparable level of resources with which to  
24 prosecute their case, and this case is an example where  
25 there's nothing close to that. I think -- and I should

1 explain why that's important. I think that, first of all,  
2 one of the -- if there is a, you know, a weakness to cost  
3 of service regulation, it's often a problem of  
4 asymmetrical information.

5                   The company has -- they've got all the  
6 information about their operations. Other parties are  
7 seeking to get it. But when you have one party who has a  
8 huge advantage in terms of the information they have and  
9 the experts that they can hire to use that information,  
10 you're not going to get parties coming together at, okay,  
11 here's where the middle is. You're often going to get --  
12 you get -- you tend to get posturing, I think. And  
13 it's -- it's a huge issue. The larger the utility is, the  
14 larger the issue is, I believe.

15               Q.       And it's fair to say that your office has  
16 had several reductions in the past few years?

17               A.       Yes. But when it comes to being, you know,  
18 unequal resources, I'm speaking about the Commission Staff  
19 as well, but with respect to our office, certainly.

20               Q.       Now I'm curious, I mean, because obviously  
21 the OPC doesn't have auditors. I mean, there's only like  
22 nine -- nine of you; is that correct?

23               A.       There are four expert technical people in  
24 our office.

25               Q.       And there's three lawyers and two --

1           A.       Four attorneys and three, you know, people.

2           Q.       Administrative support?

3           A.       Administrative support, yes.

4           Q.       So there's 11?

5           A.       Yes.

6           Q.       So, obviously there are how many thousand  
7 people that work for Ameren?

8           A.       Well, yeah. I mean, and then on a contract  
9 basis, I mean, in rate cases it's -- I don't know if  
10 you've seen the numbers, but it's pretty staggering the  
11 amount of money they've spent on consultants in this case.

12          Q.       Hiring the Brattle Group doesn't come  
13 cheap, does it?

14          A.       We -- it would overwhelm the budget of our  
15 office in a single year, I think, probably, at least in  
16 terms of just the rough numbers.

17          Q.       And are you familiar with the audits  
18 conducted by public utility commissions in other states?

19          A.       Somewhat, and sometime even the public  
20 counsels in other states would have an auditing function,  
21 such as in the state of Iowa.

22          Q.       Indiana?

23          A.       Indiana, yes.

24          Q.       Have you ever seen a state, any other state  
25 or anyone else do a more thorough audit of a utility than

1 the Missouri Public Service Commission Staff?

2 A. I don't think I'd have knowledge to really  
3 answer that question in that I don't -- I haven't had the  
4 experience of actually participating in a case, reading  
5 all the testimony filed by both sides and that kind of  
6 thing.

7 Q. Have you ever -- have you ever discussed  
8 that issue with anyone else outside the state or inside  
9 the state?

10 A. Yeah, sure. It's a common point of  
11 discussion at our, you know, NASUCA conferences is how do  
12 we use our very, very limited resources to try and get  
13 some decent outcomes for consumers and just be able to,  
14 you know, have -- be able to do a respectable job in  
15 raising issues and presenting them to commissions, and  
16 most consumer advocate offices I know, just outguns is the  
17 word that comes up again and again.

18 Q. Have you ever been given the impression  
19 that the Missouri Public Service Commission auditors are  
20 not thorough?

21 A. Yes. There are areas that I audit that  
22 Missouri Staff really doesn't get engaged in auditing, and  
23 sometimes I audit in those areas because the Commission  
24 Staff does not.

25 Q. And what are those areas?

1           A.       When I say they don't audit, I don't want  
2     to mean they don't look at it at all. But one example  
3     would be the -- in the power marketing area of UE's  
4     operations, and in the particular example would be their  
5     capacity sales, you might look at this case and you'd see  
6     the Commission Staff just agreed with the analysis by the  
7     company, and while -- I haven't talked with the Staff and  
8     said, why did you just agree? I -- it's very -- it's sort  
9     of --

10          Q.       Dr. Proctor's sitting right there. We can  
11     call him back up and we can ask him.

12          A.       He doesn't look at that area. I think if  
13     you had people like -- I think the Commission Staff needs  
14     people like Dr. Proctor with his level of expertise to  
15     analyze the things like the power marketing operations of  
16     UE because there is -- you know, there is a lot going on  
17     there. I don't know if you're aware, but they claim part  
18     of those operations are nonregulated, and I've raised the  
19     question --

20                 MR. LOWERY: Your Honor, I'm going to  
21     object at this point. Mr. Kind is starting to talk about  
22     capacity sales issues. I think he's about ready to talk  
23     about non-asset-based trading issues, and we've settled  
24     those issues in this case, including his office has  
25     settled those issues. And there's an agreement in that

1 stipulation that the parties will support that settlement.  
2 And so I don't think it's time to relitigate issues that  
3 have been settled in this case, and what I'm hearing is an  
4 attempt to litigate those issues even though they're not  
5 ripe for litigation any longer.

6 MR. MILLS: And Judge, I will certainly  
7 stipulate that we are not trying to litigate that issue, I  
8 think Mr. Kind was simply trying to identify particular  
9 areas in which he looked at and that the Staff didn't, and  
10 I don't know that we really need to get into any great  
11 detail about those areas unless the Bench is asking  
12 specific questions about them.

13 JUDGE WOODRUFF: I'll sustain the objection  
14 unless the Chairman wishes to ask specific questions about  
15 that.

16 BY CHAIRMAN DAVIS:

17 Q. I'm not going to ask -- I'm not going to  
18 ask specific questions about that area, but I am curious.  
19 So -- okay. So if we had auditors specifically assigned  
20 to look at power marketing operations?

21 A. People with background in that area  
22 preferably.

23 Q. Are those -- are those people easy to come  
24 by?

25 A. They're not cheap.

1           Q.       And what other suggestions do you have,  
2   Mr. Kind?  It's nearly Christmas.  You've got less than  
3   two weeks.

4                   MR. MILLS:  Is this where we get our  
5   \$3 million and we get to outline how we want to spend it?

6                   MR. LOWERY:  I was thinking the same thing.

7                   THE WITNESS:  I think there's just lots of  
8   area.  I think that the Commission Staff has a lot of  
9   really hard-working individuals, and that given the  
10  resources that are available to attract staff, I think  
11  there's a good staff there.

12                   But there are -- and I think there are  
13  efforts being made to try and address some of the areas  
14  where there isn't a lot of strength.  For instance, in the  
15  area of actually implementing fuel adjustment clauses,  
16  there's -- you know, the staff is just being developed in  
17  the area of IRP.  The Staff is -- there's constant efforts  
18  to develop that staff.  I do a lot of work in IRP, and it  
19  distracts me from a lot of other work, because I don't --  
20  I believe a lot of the work that I do isn't going to be  
21  done by anyone else.

22           Q.       Between -- my impression is that the  
23  parties in this case that are opposing Ameren on these  
24  issues have -- different parties focus on different  
25  issues, but certainly between the Staff, who has -- would



1 you agree that they have recommended a number of  
2 disallowances?

3 A. Yes, they have.

4 Q. And in this case they're the only one  
5 that's really done a complete cost of service analysis  
6 other than Ameren; is that correct?

7 A. They're generally the only staff that's  
8 available that can do that.

9 Q. Okay. And obviously, though, OPC has  
10 raised issues. Noranda has raised issues. MIEC has  
11 raised issues. Missouri Energy Group has raised issues.  
12 Did I say the State Attorney General?

13 A. I don't think so.

14 Q. The Attorney General is here litigating  
15 issues, and you -- and it's still your contention that,  
16 you know, all the other parties in this state are not  
17 being adequately represented against Ameren?

18 A. I don't really want to characterize it that  
19 way because I feel like that's an unfair criticism of a  
20 really for the most part dedicated and hard-working  
21 Commission Staff. I just feel like that's often the  
22 nature of regulation. You'll see, you know, Scott  
23 Hempling at NRRI. He speaks to this issue quite a bit.  
24 He's obviously been around a long time. He's seen how  
25 things work.

1                   And I -- you know, I mean, look today.  
2     There are -- how many attorneys are sitting in this room  
3     for the company and how many are here -- you might say,  
4     well, collectively there's all these attorneys for the  
5     other parties, but if you have a team of four attorneys  
6     for one entity, you can't expect -- it's not like the  
7     other attorneys are all working as one joint team. I can  
8     assure you there's nothing like that taking place.

9                   Q.       Okay. So, in essence, there's four of  
10    them. There's Mr. Lowery, Mr. Byrne, Ms. Tatro. There  
11    was Mr. Fischer, and you're saying that they just single  
12    you -- single each party out one by one and pick you off.  
13    Is that what they do?

14                  A.       I wouldn't even begin to suggest that the  
15    attorneys in this room for Ameren are the extent of their  
16    legal resources that are used in this case.

17                  Q.       Is it --

18                             MR. LOWERY: For the record, they are.

19    BY CHAIRMAN DAVIS:

20                  Q.       Okay. Well, is it the extent -- I mean,  
21    certainly between the Office of Public Counsel, the  
22    Attorney General, I mean, you'd agree that every party in  
23    here has other resources besides those that are in this  
24    room, wouldn't you?

25                  A.       For example, Public Counsel does, but we

1 haven't had any other attorneys really engaged working on  
2 this case. I guess it's just -- you know, it is just to  
3 me a somewhat -- it's somewhat remarkable that, again,  
4 getting back to just the difference in information, that  
5 there can be a document like this that, you know, some  
6 people would say this is admissions against interest in  
7 terms of things that are in Ameren testimony, but I don't  
8 think the Staff has ever seen this document. I don't  
9 think they have.

10 And, you know, it's -- and again, it's not  
11 that they're not doing a good job, but I don't know how  
12 you could -- how you can really address the fuel  
13 adjustment clause issue and risk mitigation without it.

14 Q. Is this like an Ed Martin Sunshine request  
15 issue? I mean, are they not given it? Are you not asking  
16 the right questions? Are we not asking the right  
17 questions?

18 A. That's definitely part of it, I mean, just  
19 knowing how to ask the right questions, you know.

20 Q. Do you know -- I mean, do you know how  
21 many -- how many Data Requests were sent to Ameren in this  
22 case?

23 A. Roughly I do, yes.

24 Q. And how many was that?

25 A. Well, I know that the Commission Staff sent

1 roughly 350, and I sent roughly 250.

2 Q. 350?

3 A. That's correct.

4 Q. And you sent 250?

5 A. Yes. And that doesn't mean we got  
6 responses to anything close to 250, but that's how many we  
7 sent.

8 Q. Let the record reflect that there is some  
9 noise in the background here. I mean, do you ask  
10 open-ended data questions? Do you ever say just send us  
11 any and everything you've got on this issue?

12 A. That could occur occasionally, and there  
13 could be efforts to try and narrow down the scope of a  
14 request. But I mean, for instance, I asked the question  
15 give me information on your DOE loan applications for the  
16 nuclear plant. Well, they were objected to. But then we  
17 had the company trying to introduce, in fact, information  
18 on their DOE loan application from the nuclear plant as an  
19 exhibit.

20 MR. LOWERY: Your Honor, I'm going to move  
21 to strike that last response. This is another example of  
22 the Office of the Public Counsel asking a Data Request,  
23 the company exercising its legal right to object, to make  
24 a proper objection, and then the Office of the Public  
25 Counsel trying to create an adverse inference against the

1 company for making a proper objection that was not taken  
2 up under the channels that the Commission has available  
3 for taking up those objections. I'm going to ask that  
4 that response be stricken.

5 MR. MILLS: I don't think there's any  
6 grounds for striking that that Mr. Lowery has enunciated  
7 for striking the answer. I mean, Mr. Kind said what he  
8 said. Mr. Lowery may have a different interpretation of  
9 other things that Public Counsel could have done.  
10 Mr. Lowery may not even think it's true, but it certainly  
11 is not a basis for striking sworn testimony.

12 JUDGE WOODRUFF: It was responsive to the  
13 question from the Chairman, and you can certainly ask on  
14 recross clarifying questions. I'll deny the motion or the  
15 request.

16 BY CHAIRMAN DAVIS:

17 Q. Certainly if they deny a request, you have  
18 the ability to appeal that to the Commission?

19 A. If we have the resources to do so, that's  
20 correct. I -- I mean, I don't want to go down that road  
21 anymore, frankly, in terms of our lack of resources. I  
22 probably sound like I'm whining. But it causes -- again,  
23 it's back to that why can't people meet in the middle,  
24 sort of why is there this wide divergence of views?

25 Q. Why is there?

1           A.       I think a lot of it has to do with  
2 everyone, you know, has equal resources, you can -- you  
3 tend to figure out, well, we can't -- there's no sense  
4 arguing this issue, here's what the fact are. Everybody  
5 knows the same facts. They lead to the same conclusions,  
6 or at least the range of conclusions is narrowed  
7 substantially.

8           Q.       Mr. Kind, is it -- you know, obviously  
9 you've testified that the company controls the data, and  
10 they have a tremendous advantage in terms of knowledge?

11          A.       Yes.

12          Q.       Okay. And it's -- is it also fair to say  
13 that the vast majority of people that are opposing Ameren  
14 in this case have never worked for a utility or never been  
15 involved in a utility's operations?

16          A.       With the exception of a few Staff members,  
17 I think.

18          Q.       Exception of a few Staff members. Do you  
19 think the State of Missouri could do a better job of  
20 building power plants and providing electricity to people?

21          A.       I think it's done a pretty good job for the  
22 most part up to this point. I've got some questions about  
23 the future, but up to this point.

24          Q.       Wait. Let me go back there. What power  
25 plants does the State of Missouri own and operate? What

1 systems do they own and operate?

2 A. I guess I -- I'm sorry. I misinterpreted  
3 your question. I thought you were speaking to the  
4 regulatory oversight aspect of that. I'm not suggesting  
5 we create a power agency like the State of Illinois.

6 Q. Okay. So you're not going to -- you're not  
7 going to suggest that?

8 A. No.

9 Q. Did you hear Mr. Cohen's testimony  
10 yesterday?

11 A. Yes, I did.

12 Q. He's really optimistic.

13 A. About that power agency? Yes. I've spoken  
14 with him personally about it. He has a lot more optimism  
15 than I have, I believe.

16 CHAIRMAN DAVIS: Mr. Kind, I don't have any  
17 further questions. Thank you. It's been enlightening.

18 THE WITNESS: Thank you, Chairman.

19 JUDGE WOODRUFF: Anyone wish to recross  
20 based on some of those questions from the Bench?

21 MR. LOWERY: I do.

22 JUDGE WOODRUFF: Noranda.

23 MR. LOWERY: I thought you had passed. I'm  
24 sorry.

25 JUDGE WOODRUFF: For Noranda, then.

1     RE CROSS-EXAMINATION BY MR. CONRAD:

2             Q.       Just at least one thing to just clarify.

3     Mr. Kind, you held up a document that you indicated  
4     portions of which had been admitted. Were you referring  
5     to Exhibit 439HC?

6             A.       That's correct. And we may have admitted  
7     portions of this document twice. I know we did that with  
8     one document. I'm not sure if it was this one or not.

9             Q.       And just flipping through what was there, I  
10    do note that there are some gaps in pages. So at least on  
11    that one, if the Chairman was interested in that, he  
12    certainly could ask that the whole document be admitted.  
13    I take it you-all have the whole document?

14            A.       We have it in electronic format, yes.

15            Q.       Obviously UE does. But that's the exhibit  
16    you were referring to as is 439?

17            A.       That's correct.

18            Q.       Now, Chairman Davis asked you about -- a  
19    couple questions about Staff having skin in the game. Do  
20    you remember that exchange?

21            A.       Yes, I do.

22            Q.       And I think he was questioning about the  
23    about incentives, and looking back to the exchange that  
24    you and I had a few minutes ago, we were talking about  
25    incentives that needed to be properly designed to achieve



1 the objective. Do you remember that discussion?

2 A. Yes.

3 Q. Would your responses be the same or really  
4 in consideration depending on the game to which the  
5 Chairman is referring? If you define the game one way to  
6 include performance and productive use of what might  
7 otherwise be billable time, you might decide to design  
8 incentives one way. If your view of the game was, well,  
9 how much did they recover or how much did they get on  
10 their recommendation, did their recommendation succeed or  
11 not, you'd design incentives another way; would you agree?

12 A. Well, I think so. I interpreted his  
13 question as related to skin in the game related to  
14 outcomes.

15 Q. Would it be possible to design incentives  
16 that focused on things such as productive hours and time  
17 clocks and those type of things? Not that I'm advocating  
18 that, but you could do that, couldn't you?

19 A. You can, you know, make incentive  
20 arrangements with almost an infinite number of designs,  
21 yes.

22 Q. I think his question was, if we did  
23 something like that, would we get better numbers? Is that  
24 part of the objective or is it really to explore the facts  
25 and get the facts out?

1           A.       Could you repeat that?

2           Q.       Well, the question I guess is, the role of  
3   the Staff is really to get -- and your office, too, is to  
4   get the facts out and get them before the Commission and  
5   make a presentation connecting up -- connecting the dots,  
6   as it were?

7           A.       Right. Making sure both the -- I think  
8   both the appropriate evidence is available and then also  
9   making appropriate policy recommendations, often based  
10  upon evidence.

11          Q.       Now, I think Chairman Davis also used the  
12  term the right answer. Is there always such a thing as a  
13  right answer?

14          A.       If you're saying is there -- is there some  
15  ultimate truth about everything, I mean, that's getting to  
16  be a pretty broad question, but I would say that's not the  
17  way I see things, no.

18          Q.       So I think the point he was making is you  
19  always have to look at the facts in a particular case to  
20  come to a conclusion about them, right?

21          A.       Yeah, with the particular circumstances.

22          Q.       And indeed, even when we present to the  
23  Commission a settlement package that represents an  
24  amalgamation, if you will, of a number of diverse  
25  interests, that settlement package often isn't presented

1 as, quote, the right answer; it instead is something that  
2 represents compromise, agreed?

3 A. Yes.

4 Q. Now, I don't want to reopen the topic of  
5 gaming and data access. I think that's been explored and  
6 probably will be -- will be further. But there was a  
7 discussion you had with the Chairman about the  
8 thoroughness of audits, and I take it your point was that  
9 many of the Staff folks do excellent and conscientious  
10 work, but they may be limited as to the data that they're  
11 having to work with; is that fair?

12 A. That's fair. And, you know, to some extent  
13 there can be a mismatch in terms of, you know -- in  
14 certain situations in terms of just the skill sets that  
15 people bring to the job. If one job is paying 200,000 a  
16 year, another paying 50,000 a year, you can attract people  
17 with different skill sets.

18 Q. Now, in that context, is there potential  
19 for gaming of the system?

20 A. I'm not sure really what gaming means in  
21 that context.

22 Q. Well, think of it in the sense of access to  
23 data, which is what I was talking about as opposed to --  
24 excuse me. Your response was skill sets, but I was  
25 thinking in terms of access to data.

1           A.       In terms of, you know, magnitude of  
2 resources to explore discovery issues, I think I'd  
3 probably agree with you.

4           Q.       Now, would you agree with me that if you  
5 were to put people on productive hours and time clocks,  
6 that my friend and colleague that we know and love as  
7 Mr. Steve Dottheim would rank pretty high there?

8           A.       No question about that.

9           MR. CONRAD: Very good. Thank you, Judge.  
10 That's all I have.

11           JUDGE WOODRUFF: Then to Ameren.

12           MR. LOWERY: Mr. Kind, Commission --

13           CHAIRMAN DAVIS: Can I inquire?

14           JUDGE WOODRUFF: Go ahead.

15           CHAIRMAN DAVIS: Was that Exhibit No. 473?

16           JUDGE WOODRUFF: 439.

17           CHAIRMAN DAVIS: 439.

18           MR. CONRAD: The one that I had, Judge, was  
19 439.

20           THE WITNESS: That's correct.

21           MR. MILLS: And for reference, that was  
22 introduced during cross-examination of Mr. Neff yesterday,  
23 I believe.

24           CHAIRMAN DAVIS: But that was just a  
25 portion, right?

1                   MR. MILLS: Yeah. It's a 90-page or more  
2 presentation. We reproduced somewhere less than a third  
3 of it for the specific questions having to do with  
4 Mr. Neff yesterday.

5                   CHAIRMAN DAVIS: Does anyone have any  
6 objection if we -- can we get that admitted into -- the  
7 entire document admitted into evidence? I assume it's HC,  
8 Mr. Lowery?

9                   MR. LOWERY: It is HC, and we don't have an  
10 objection, your Honor.

11                  JUDGE WOODRUFF: Let's go ahead and mark it  
12 as a new exhibit. Someone needs to supply it.

13                  MR. MILLS: I will supply a copy. I think  
14 the only copy we have in the hearing room right now is  
15 Mr. Kind's copy with notes all over it.

16                  CHAIRMAN DAVIS: Maybe everyone can look  
17 over it and make sure that -- thank you.

18                  JUDGE WOODRUFF: We'll mark it as  
19 Exhibit 1001, as requested by Chairman Davis.

20                  MR. MILLS: And it will be HC.

21                  JUDGE WOODRUFF: Yes. And if you just  
22 provide that whenever you get a chance. All right. For  
23 Ameren.

24 RECROSS-EXAMINATION BY MR. LOWERY:

25                  Q. Mr. Kind, the Chairman asked you a number

1 of questions about how parties might get to the middle,  
2 more reasonable, less posturing, those kinds of things.  
3 You, I'm sure, recall that rather lengthy discussion, do  
4 you not?

5 A. Yes, I do.

6 Q. Am I correct that the parties in this case  
7 are OPC, the State of Missouri, Noranda, MIEC, MEG, the --  
8 I'll call them the environmental groups, AARP, the Staff  
9 and the unions and the company and the Department of  
10 Natural Resources? Sorry.

11 A. I think -- did you mention Laclede?

12 Q. Oh, and Laclede Gas. So 10 or 11 parties?

13 A. I'd have to look at the list.

14 Q. Does that sound about right?

15 A. I know all the -- all the parties that you  
16 mentioned are parties.

17 Q. So at least all of those are parties.  
18 There might be some that I overlooked, but at least all of  
19 those are parties, correct?

20 A. That's correct.

21 Q. And OPC has one lawyer working on the case  
22 primarily, right?

23 A. I wouldn't say this is his primary efforts.

24 Q. I don't think that was my question, was it?  
25 My question was, OPC has one lawyer working on the case,

1 right?

2 A. That's -- to that question, I'd say right.

3 Q. And the State has Mr. Iveson, and  
4 Mr. Carlson was assisting Mr. Iveson with respect to some  
5 of these capacity issues. Are you aware of that?

6 A. I'm not sure what Mr. Carlson was doing  
7 here, but I know he was working on the case.

8 Q. All right. And Mr. Conrad's here for  
9 Noranda, correct?

10 A. Yes, he is.

11 Q. We have four. And the Staff has had  
12 Mr. Dottheim, Mr. Reed, Ms. Kliethermes, Mr. Thompson,  
13 Mr. Williams and Mr. Dearmont work on the case in the  
14 hearing room in this case in the last three weeks,  
15 correct?

16 A. I'm familiar with most of those attorneys.

17 Q. And Ms. Vuylsteke's here from MIEC, is she  
18 not?

19 A. Yes, she is.

20 Q. Works for one of the largest law firms in  
21 the United States. Were you aware of that?

22 A. I'm aware they've gotten larger recently,  
23 but I don't know where they rank.

24 Q. They're a big law firm, are they not?

25 A. Yes, certainly.

1 Q. And Ms. Langeneckert represents MEG, right?

2 A. Yes. I don't see her here today, but yes,  
3 she's their representative.

4 Q. And the unions have two lawyers that  
5 entered appearance in this case. Were you aware of that?

6 A. I'm not.

7 Q. You know they have at least one, right?

8 A. Correct.

9 Q. Mr. Robertson was here for the  
10 environmental groups, was he not?

11 A. Yes, he was.

12 Q. AARP has a lawyer, Mr. Coffman, your former  
13 boss, right?

14 A. That's right.

15 Q. Who knows something about regulatory law;  
16 would you agree?

17 A. Knows something.

18 Q. That's quite -- that's quite a fairly large  
19 number of lawyers working on this case for parties who in  
20 general have opposed a number of the company's positions;  
21 isn't that a fair statement?

22 A. It's a pretty large number, yes.

23 Q. And the employees for the company who  
24 testify in this case, people like Mr. Neff, people like  
25 Mr. Schukar, do they have -- do they have other duties



1 besides testifying and assisting with the handling of rate  
2 cases at Ameren?

3 A. Do you mean the rate cases with Ameren or  
4 with Union Electric Company?

5 Q. My apologies. With Union Electric Company.  
6 Do they have other duties?

7 A. Yeah. I think a lot of them work for, you  
8 know, rate cases for all of Ameren probably.

9 Q. Is Mr. Neff in charge of buying coal and  
10 arranging coal transportation for the company's coal-fired  
11 plants?

12 A. That's my understanding.

13 Q. Is that a pretty big job, pretty important  
14 job?

15 A. Yes. He and his staff do a very important  
16 job.

17 Q. Do you think that takes a lot of his time?

18 A. Quite a bit, I would think, yes.

19 Q. Are the Staff auditors that work on the  
20 case, are they full-time regulators?

21 A. Meaning work 40 hours a week?

22 Q. Is their role and the role of the  
23 Commission on a full-time basis, whether 40 hours a week  
24 or 50? Whatever their normal work week is, is their basic  
25 role to regulate the utilities that are within the

1 Commission's jurisdiction? Is that basically their  
2 full-time role?

3 A. I think that's -- yeah, that's the primary  
4 role of the Commission, I think, yes.

5 Q. Do you think Anheuser Busch has a lot of  
6 resources?

7 A. Well, I know they have a lot fewer  
8 employees in St. Louis, or they're going to in the near  
9 future, than they did. They are a very large company.

10 Q. In fact, they're part of an even larger  
11 company now than they were before the merger with InBev,  
12 aren't they?

13 A. Certainly are.

14 Q. Do you think Monsanto has a lot of  
15 resources?

16 A. They are a large company.

17 Q. It's not your testimony that Monsanto and  
18 Anheuser Busch and the industrials that Ms. Langeneckert  
19 represents are comparatively small in relation to the size  
20 of Union Electric Company or even Ameren, is it?

21 A. I haven't testified to that effect, no.

22 Q. And that's not your position, is it?

23 A. No, it's not.

24 Q. Now, you cited a number of Data Requests  
25 that you were aware of in the case, and I think that

1     totaled around 600 or a little bit more between the Staff  
2     and Office of the Public Counsel, correct?

3             A.       That's correct.

4             Q.       You didn't mention the fact that many of  
5     those Data Requests have several, sometimes dozens of  
6     subparts, did you?

7             A.       I received so much flack about that from  
8     Ameren in the past that I try to make a habit of not doing  
9     that anymore, and I'm not -- I'm not sure really what the  
10    Staff's practice is.

11            Q.       You didn't notice the fact that there were  
12    dozens of subparts to some of Staff's Data Requests?

13            A.       Dozens? No, I couldn't testify to that.

14            Q.       Some of Mr. Ensrud's, for example?

15            A.       I have not reviewed his Data Requests.

16            Q.       The Data Requests that you complained about  
17    regarding the DOE loan guarantees, did the Office of the  
18    Public Counsel file a motion to compel related to that?

19            A.       I was discussing it. I'm not sure if I'd  
20    characterize it as a complaint.

21            Q.       Mr. Kind, it's not your testimony that the  
22    company does not have a legal right to interpose  
23    objections to Data Requests, is it? Is that your  
24    position?

25            A.       Objections on what basis?

1           Q.       On lawful bases. Is it your position that  
2 the company does not have the right to assert objections  
3 to Data Requests that the company believes are  
4 appropriate?

5                   MR. MILLS: I'm going to have to object in  
6 that it calls for a legal conclusion.

7                   MR. LOWERY: It does not call for a legal  
8 conclusion. It asks whether his position is that the  
9 company should not have that right.

10                  JUDGE WOODRUFF: It asks for his opinion  
11 rather than a legal conclusion. I'll overrule the  
12 objection.

13                  THE WITNESS: I think the company has a  
14 legal right to object on certain bases.

15 BY MR. LOWERY:

16           Q.       In response to some of Commissioner --  
17 Chairman Davis' questions, you indicated that you thought  
18 there might be an incentive to exaggerate positions. Do  
19 you remember that?

20           A.       Yes, I do.

21           Q.       Is your 50/50 sharing proposal an  
22 exaggerated position?

23           A.       No. It's going from feeling like zero and  
24 100 is the most appropriate to another alternative that we  
25 thought the Commission should consider.

1           Q.       Chairman Davis asked you a number of  
2 questions about skin in the game. Do you remember that?

3           A.       Yes.

4           Q.       And he was talking about incentive and  
5 various incentive structures you might have with the Staff  
6 and various percentages. Do you remember those questions?

7           A.       You mean like about the Staff, should they  
8 have skin in the game?

9           Q.       That's right.

10          A.       I remember him asking about that.

11          Q.       And he was positing some percentages. Do  
12 you recall that, percentage of compensation that might be  
13 at risk if Staff doesn't get within some range of their  
14 final recommendation, might be within some range or some  
15 comparison to the ultimate result in a rate case heard by  
16 the Commission. Do you remember that?

17          A.       I don't recall it specifically as you're  
18 describing it, no.

19          Q.       Well, he gave you an example where the  
20 Staff came in with a final recommendation of 50 million  
21 and the Commission decided that the rate increase should  
22 be 100 million.

23          A.       That's not the example I recall.

24          Q.       I stand corrected. I think the example was  
25 the final recommendation was -- or the final decision was

1 75 million from the Commission, and the Staff's final  
2 recommendation had been 50 million. Is that the one you  
3 remember?

4 A. No. I've got some notes about that, and  
5 they're not consistent with that.

6 Q. Well, what do your notes reflect, then?  
7 You tell me what you remember the example to be.

8 A. I thought that the -- that Chairman Davis  
9 was speaking with respect not to Staff incentives but  
10 company incentives and incentive compensation for the  
11 company in that particular example.

12 Q. You don't recall the Chairman asking  
13 whether or not perhaps Staff should have a percentage of  
14 their compensation at risk in relation to how accurate  
15 their final recommendation was in relation to the  
16 Commission's final order? I could have misunderstood the  
17 question.

18 A. I could have misunderstood him as well, but  
19 I wasn't getting the same understanding that you have  
20 apparently.

21 Q. Did you understand that the Chairman's  
22 questions relating to what -- I'll assume for a moment  
23 it's company incentive compensation. Do you understand  
24 that those questions were in relation to the issue of  
25 what -- of whether there should be sharing within a fuel

1 adjustment clause and what the appropriate percentages  
2 should be, that that was the context in which the  
3 questions were asked?

4 A. I'm not certain of that.

5 Q. Mr. Kind, I had a couple more questions  
6 about the Chairman's questions to you about meeting in the  
7 middle or how we get folks to have, I think, more  
8 reasonable positions, which was the general theme of a  
9 number of those questions. Is that your understanding?

10 A. At least one or two questions, yes.

11 Q. With respect to return on equity, wouldn't  
12 a mainstream return on equity be more of a position of  
13 meeting in the middle as opposed to a return on equity  
14 recommendation that's far below the national average?

15 A. Well, I guess it would be meeting somewhere  
16 between the extremes. I don't know that I would  
17 characterize it with respect to that particular issue as  
18 being in the middle, though, if you're getting at  
19 strictly, you know, in the middle between somebody having  
20 this recommended ROE and this one, in the middle in that  
21 sense.

22 Q. Isn't the mainstream by definition meeting  
23 in the middle, because there's always going to be extremes  
24 that are outside the mainstream?

25 A. Not in my mind. Mainstream is just sort of

1 more like, you know, what's everybody doing.

2 Q. And if something becomes mainstream, isn't  
3 there usually a reason it's become mainstream?

4 A. There's always a reason why everything  
5 happens, I think.

6 Q. Like fuel adjustment clauses and the  
7 percent sharing or the lack of sharing of fuel adjustment  
8 clauses, if that is a mainstream mechanism that's been  
9 decided by almost every other regulatory jurisdiction, do  
10 you not think that those regulatory jurisdictions had a  
11 good reason for arriving at those positions?

12 A. I would think they had reasons. I'd have  
13 to look at each case to see if they were good reasons.

14 MR. LOWERY: I don't have any further  
15 questions. Thank you.

16 JUDGE WOODRUFF: Redirect.

17 MR. MILLS: Thank you. I do have some.

18 REDIRECT EXAMINATION BY MR. MILLS:

19 Q. Mr. Kind, just sort of working backwards a  
20 little bit, Mr. Lowery just asked you about what's  
21 mainstream. In your opinion, is it mainstream for an  
22 electric utility to have no rate increases for 20 years  
23 and several decreases during that time?

24 A. No. That's a pretty unusual circumstance.

25 Q. Now, you were asked some questions about



1 Dr. Morin and rating agencies. Are you aware that rating  
2 agencies --

3 MR. LOWERY: Objection. I don't believe  
4 the Chairman asked any questions -- I'm sorry. It's  
5 redirect. I'm sorry. Never mind.

6 MR. MILLS: Mr. Conrad did.

7 MR. LOWERY: I'm sorry, Mr. Mills. I'm  
8 still in cross mode.

9 BY MR. MILLS:

10 Q. Okay. Mr. Conrad asked you some questions  
11 about Dr. Morin and rating agencies. Are you aware of  
12 whether rating agencies have been criticized lately for  
13 doing a poor job?

14 A. They've been criticized for the last  
15 several years, ever since they failed to predict the  
16 demise of Enron, was where I started seeing a lot of  
17 criticism.

18 Q. And have some of the criticisms been that  
19 the rating agencies are getting too cozy with the  
20 companies they rate?

21 A. That's certainly one of the criticisms. I  
22 think there have been some Congressional hearings on that  
23 subject.

24 Q. And are you aware that for Moody's at least  
25 in particular that the long-time model of being paid by

1 investors has changed to where they are now being paid by  
2 the companies they rate?

3 A. I have heard that, yes.

4 Q. Now, Mr. Lowery asked you some questions,  
5 and they reflected back, I believe, a little bit to your  
6 deposition, about whether or not you're aware that -- or  
7 whether or not 90 percent of fuel adjustment clauses  
8 around the country have no sharing. Do you recall that  
9 question?

10 A. Yes, I do.

11 Q. Have you made an investigation to find out  
12 whether or not that's an accurate number?

13 A. No, I haven't, and just -- I think to just  
14 look at a fuel adjustment clause in terms of here's the  
15 sharing percentage and that describes the whole situation,  
16 there's so many other pieces of a fuel adjustment clause  
17 that really get at what are the incentives involved that I  
18 don't -- I wouldn't think that's even a meaningful  
19 comparison.

20 Q. Now, do you have a copy of your deposition  
21 there?

22 A. Yes, I do.

23 Q. And if you look at page 165, this is the  
24 beginning of the whole series of questions that Mr. Lowery  
25 asked you about. The first question he asked you, what

1 analysis -- what analysis have you done respecting your  
2 50/50 sharing proposal, if any? What was your answer to  
3 that question?

4 A. I said, in terms of plugging in numbers,  
5 no, I haven't done any analysis.

6 Q. Okay. And then if you look at your very  
7 last answer on that page at line 25 of page 165, what was  
8 your answer there?

9 A. The answer is, haven't -- no quantitative  
10 analysis, no.

11 Q. And was it -- the questions that you  
12 answered later, were your answers in terms of a  
13 quantitative analysis, in keeping with those earlier  
14 answers in that line of questioning?

15 A. That's generally the way I interpret a  
16 question when someone asks me if I've done some analysis.  
17 Unless I specify otherwise, I would guess they're asking  
18 have I plugged some numbers into a spreadsheet basically.

19 Q. Now, with respect to the off-system sales  
20 sharing proposal that Mr. Lowery referred you to in the --  
21 in UE's last rate case, do you recall struggling to get  
22 numbers for off-system sales margins in that case?

23 MR. LOWERY: I'm going to object. All of  
24 these questions are leading, and particularly that  
25 question. He fed him the -- what he was struggling for as

1 a premise for the question and asked him if he recalled  
2 struggling for it.

3 MR. MILLS: I can rephrase the question.

4 JUDGE WOODRUFF: I'll sustain the  
5 objection. Rephrase.

6 BY MR. MILLS:

7 Q. Tell me about some of the struggles you had  
8 getting data in the last UE rate case.

9 A. Well, with -- you know, it's generally a  
10 struggle in any rate case with Ameren compared to most  
11 other utilities, but with respect to that issue in  
12 particular, it was difficult. I think it was later in the  
13 case when I actually felt like I was able to obtain some  
14 reasonable numbers that represented their -- both their  
15 ongoing level of off-system sales margins and their  
16 budgeted level of off-system sales margins.

17 Q. Do you recall when in the proceeding the  
18 budget numbers became available?

19 MR. LOWERY: Your Honor, I'm going to  
20 object again. The question's leading, and ask that  
21 Mr. Mills be asked to not lead his witness on redirect.

22 MR. MILLS: That's not a leading question.

23 JUDGE WOODRUFF: I don't believe that was a  
24 leading question. I do question the relevance. How is  
25 this all relevant?

1                   MR. MILLS: It's relevant to the question  
2 of why -- Mr. Lowery raised the question of an off-system  
3 sales tracking proposal that Mr. Kind made in that case,  
4 and it's relevant to putting in context of what the  
5 different options for treating off-system sales margins  
6 were in that case and why that proposal was made.

7                   JUDGE WOODRUFF: I'll allow the question.

8 BY MR. MILLS:

9                   Q.       Do you recall when the budget numbers  
10 became available?

11                  A.       My recollection is it was either right  
12 before the hearing or during the hearing.

13                  Q.       And with respect to -- you were asked a  
14 number of questions by a number of people about extreme  
15 positions and meeting in the middle and things like that.  
16 Do you have any recollection of the positions that the  
17 company took with respect to return on equity in the last  
18 rate case?

19                  MR. LOWERY: Objection, relevance. We're  
20 here to try this rate case.

21                  JUDGE WOODRUFF: I'll sustain that  
22 objection.

23 BY MR. MILLS:

24                  Q.       Do you know what position the company took  
25 with respect to return on equity in this case?

1           A.       I -- I know it's, of course, the highest  
2     number from any party, and I think it's highest by quite a  
3     large amount. I know it's higher than Mr. Gorman's  
4     figure, but I don't recall the exact figure.

5           Q.       Now, you were asked some questions by  
6     Chairman Davis about -- and some of the questions had to  
7     do with both and some just had to do with one, but they  
8     were generally Empire, Aquila and recovery of their fuel  
9     and purchased power costs. Do you recall that?

10          A.       Yes, I do.

11          Q.       Within the last several years, five or ten,  
12     do you know of any years in which Empire or Aquila failed  
13     to recover all of their prudently incurred costs?

14          A.       Well, there's different ways of looking at  
15     that question. You can look at it in terms of, you know,  
16     if -- if their -- their rates are assumed to be just and  
17     reasonable until they change, and I mean, you can assume  
18     that they're at a level that are recovering their costs if  
19     they're just and reasonable.

20          Q.       Do you know of any period of time within --  
21     that you can remember when Empire operated for an entire  
22     year at a loss?

23          A.       You mean in the sense that they lost money  
24     every month?

25          Q.       No. That they lost money over the course

1 of a year.

2 MR. LOWERY: I'm going to object on  
3 relevance grounds. Chairman Davis asked about  
4 under-recovery of fuel costs tied to this fuel adjustment  
5 clause issue. I don't know what the relevance of over the  
6 last five or ten years what Empire's earnings have been,  
7 whether there have been losses.

8 MR. MILLS: I'm not talking about earnings.  
9 There may, in fact, be limited relevance of that. The  
10 Chairman asked a number of questions about recovering  
11 costs. I'm simply exploring the question of whether or  
12 not they actually recovered their costs overall. If you  
13 single out one particular cost, perhaps they did, perhaps  
14 they didn't. But if you look at all costs, maybe they  
15 didn't, maybe they didn't. I'm trying to get this  
16 witness --

17 JUDGE WOODRUFF: I'll allow you a little  
18 leeway. Let's move it along.

19 THE WITNESS: I just don't have those  
20 figures in front of me here, and so in terms of their --  
21 their overall recovery of costs, I can't make a statement  
22 one way or another.

23 BY MR. MILLS:

24 Q. Now, Mr. -- let me take that back. I  
25 believe this was Chairman Davis asked you whether you

1     could name particular ways in which Empire, I don't  
2     remember the exact question, but basically could have done  
3     better in terms of cost recovery. Do you recall that?

4             A.       Yes, I do.

5             Q.       Are you familiar with all aspects of  
6     Empire's business?

7             A.       No, certainly not. I've got a fair amount  
8     of knowledge in the resource planning area, and I  
9     considered having a discussion with Chairman Davis about  
10    that area as -- in response to that question, but I don't  
11    have, you know, knowledge about all areas of their  
12    operations.

13            Q.       And similar question for Aquila?

14            A.       It would be the same answer. You know, for  
15    instance, if they could be achieving some efficiencies in  
16    the area of customer service, I -- I would not be aware of  
17    that. I haven't looked at that area.

18            Q.       Now, with respect to incentive  
19    compensation, there were a number of questions about that.  
20    Would you be willing to move to a system where you had the  
21    opportunity to earn a market salary and one-third was at  
22    risk for performance if the key performance indicators  
23    were appropriately designed?

24            A.       Do you mean would I be willing personally  
25    to move to a system like that as an employee of Office of



1 Public Counsel?

2 Q. Yes.

3 A. Would I have the opportunity to actually  
4 earn even more than I'm earning today as part of that?

5 Q. I said a market salary.

6 A. Oh, a market salary. That's a no-brainer.  
7 I would go for that in a second, yes.

8 Q. Now, I believe you were asked some  
9 questions by Chairman Davis having to do with the relative  
10 level of expenditures for this case, and was your  
11 testimony that your understanding is that UE spent more on  
12 one consultant for this case than OPC's entire budget for  
13 a year?

14 A. Speaking in rough numbers. If I were to  
15 get into specifics, we'd probably have to go in camera.

16 Q. But just in terms of order of magnitude,  
17 you believe that that one consultant is greater than our  
18 budget?

19 A. Well, in terms of their budget for that  
20 consultant. I haven't actually tracked the expenditures.

21 Q. Now, you were also asked some questions  
22 about -- by Mr. Lowery about objections to DRs. In your  
23 opinion, what is a valid basis for UE to object to DRs?

24 MR. LOWERY: Objection. That calls for a  
25 legal conclusion.

1                   MR. MILLS: Judge, I'm asking about his  
2 opinion. This is simply following up on a question that  
3 Mr. Lowery asked.

4                   JUDGE WOODRUFF: With the understanding  
5 that you're not an attorney, I'm going to allow you to  
6 answer the question,

7                   MR. LOWERY: I object on relevance grounds  
8 as well. I asked him if he thought the company should  
9 give up its right to make valid objections, but not his  
10 opinion -- not anything about his opinion about what valid  
11 objections would be.

12                  JUDGE WOODRUFF: I'm going to sustain it on  
13 the relevance grounds. I don't think it's relevant what  
14 his opinion what Ameren's valid base for objection might  
15 be.

16                  MR. MILLS: Judge, you asked Mr. Lowery to  
17 have this witness answer over my objection the question of  
18 whether or not UE can object to Data Requests. I'm simply  
19 asking a follow-up question to see on what basis he  
20 believes they can. He was required to answer about what  
21 his opinion on yes or no, and I'm not going to be allowed  
22 to have him answer why?

23                  JUDGE WOODRUFF: That was my ruling.

24                  MR. MILLS: Okay. That's all the questions  
25 I have.

1 JUDGE WOODRUFF: Then, Mr. Kind, you can  
2 step down. We'll take a break now. We'll come back at  
3 11 o'clock for questions from the Commissioners about the  
4 Stipulation & Agreement on off-system sales.

5 (A BREAK WAS TAKEN.)

6 JUDGE WOODRUFF: Let's come back from  
7 break. We're back on the record. I realize that  
8 apparently we had a time slip during my break. The clock  
9 on the wall in front of me that I was looking at says  
10 11:03. It, in fact, is 11:25. So we have a bit of  
11 confusion here. I assume that the clock has just lost  
12 some time during the morning, which is frequently my  
13 feeling around here, but we need to get started.

14 All right. What I propose to do at this  
15 point is take up Commissioner questions based on the  
16 Stipulation & Agreement that was filed yesterday on the  
17 off-system sales, and I know Commissioner Clayton has  
18 questions, so I'll hand it to him.

19 COMMISSIONER CLAYTON: Thank you, Judge. I  
20 just have some general questions about these issues  
21 depending if the Commission enters an order that  
22 authorizes a fuel adjustment clause, and the questions I'm  
23 not sure -- considering that these are all relatively new  
24 topics in Missouri, I just want to be able to walk through  
25 the implications of each of the different factors that

1 would go into a fuel adjustment clause.

2 So I guess I'm going to direct questions to  
3 Staff, and then if any parties can -- have a problem with  
4 the questions or want to chime in, let me know. I don't  
5 know if it ought to be Mr. Dottheim or to -- did he just  
6 shake his head?

7 MR. DOTTHEIM: Yes.

8 COMMISSIONER CLAYTON: Who should the  
9 questions go to, then?

10 MR. DOTTHEIM: Probably Ms. Mantle. It is  
11 addressed in -- I assume you're referring to under  
12 paragraph 2 on page -- on page 32B; is that correct,  
13 Commissioner?

14 COMMISSIONER CLAYTON: What's that?

15 MR. DOTTHEIM: I assume what your questions  
16 are are referring to the part of the Stipulation &  
17 Agreement since you were referring to, I thought, the fuel  
18 adjustment clause?

19 COMMISSIONER CLAYTON: Yes.

20 MR. DOTTHEIM: Which is addressed --

21 COMMISSIONER CLAYTON: I don't know what  
22 paragraph. These are general questions. I don't have  
23 specific questions. Let me just ask the questions and  
24 then you-all decide who's best to answer. How about that?

25 In a traditional ratemaking model where you

1 have in, say, even in American's last case, you set an  
2 amount of base fuel costs that is built into rates, and  
3 you also set an amount that is imputed in terms of  
4 off-system sales. So you have -- you have a fuel cost  
5 that's built into rates and then you also have the deduct  
6 for anticipated revenues.

7                   Now, when you do that, you have an  
8 incentive, I think, or I think the company has an  
9 incentive to keep its fuel costs down as low as possible  
10 while also trying to maximize its off-system sales, and  
11 then, of course, any cost that's incurred above that the  
12 company has to eat. Any sales above that the company gets  
13 to keep. So there are these little incentives that are  
14 built in there.

15                   If you have a fuel adjustment clause where  
16 you have a rider, and let's assume a 100 percent pass  
17 through, if you have a fuel adjustment clause that allows  
18 for fuel costs to be adjusted, how are off-system sales  
19 addressed considering that fuel costs will go up and down  
20 depending on off-system sales opportunities, and how are  
21 those costs addressed in an adjustable rider?

22                   Basically, that is my question, and I don't  
23 know who the best person to answer that is. So I don't  
24 have specific questions about the exact terms of the  
25 stipulation, but if we do this fuel adjustment clause, and

1 I brought this up in a prior case, and I never had the  
2 chance, so if I don't ask the questions here, I'll  
3 probably lose the chance to ask them again.

4 MS. MANTLE: In this case, the revenues  
5 from the off-system sales would be used to offset the net  
6 fuel cost in the accumulation period. I'm trying to get  
7 my terminology correct for you.

8 You were correct about the incentive. If  
9 there isn't it an FAC, there's incentive to keep the fuel  
10 costs down and sell as much in off-system sales as  
11 possible because they get to keep whatever's above what's  
12 in base rates.

13 COMMISSIONER CLAYTON: So if we had -- if  
14 100 percent -- let's just assume 100 percent of fuel costs  
15 are built into an adjustable rider as a fuel adjustment  
16 clause. So what you're saying is that 100 percent of  
17 off-system sales will then be used to offset that fuel  
18 cost?

19 MS. MANTLE: Yes.

20 MR. LOWERY: Yes.

21 COMMISSIONER CLAYTON: So basically, if we  
22 were to do this, then the company doesn't get to keep the  
23 gravy, so to speak, over and above what the base  
24 off-system sales amount would be in a normal rate setting  
25 environment, correct?

1 MS. MANTLE: That's correct, if it was  
2 100 percent pass through.

3 COMMISSIONER CLAYTON: If you need me to  
4 define gravy, I can define it.

5 MR. LOWERY: The company's proposal is the  
6 company would get to keep, I think, if I understand your  
7 use of the term gravy, 5 percent. Others have said the  
8 company should keep only 50 percent or 80 percent with a  
9 cap or varying levels. But in your hypothetical, the  
10 100 percent pass through, then there would be no gravy  
11 that the company keeps.

12 COMMISSIONER CLAYTON: Okay.

13 MS. MANTLE: And in this case, UE has  
14 talked about, and I didn't hear anything about it until it  
15 was on the stand the other day, that there's certain  
16 classifications, and I forget what they were called, of  
17 off-system sales that will not flow --

18 MR. LOWERY: The company has -- and there  
19 was testimony about this in the last rate case,  
20 Commissioner. The company has a speculative book,  
21 non-asset-based trading book. It's very small. In fact,  
22 for the 12 months ending with the true-up, we lost  
23 \$813,000. But the reason the company does that, the  
24 testimony, from the company's perspective is it gives the  
25 company more transactions in the market than if it just

1   traded its assets, gives it more exposure to counter  
2   parties and helps the company make additional asset-based  
3   sales, all of which are included. But, I mean, it's a  
4   tiny, tiny little piece of the off-system sales, and it's  
5   always been handled below the line up to now.

6                   COMMISSIONER CLAYTON: So then I kind of  
7   threw out the built-in incentives in the traditional model  
8   versus this. So you may have just answered this in part,  
9   but why -- why would Ameren want to go out and maximize  
10   its off-system sales if -- in the circumstance you have  
11   100 percent pass through, why would you even have an  
12   off-system sales department if they're always going to be  
13   reducing your fuel costs by 100 percent?

14                  MR. LOWERY: Well, if we don't do a good  
15   job of maximizing our off-system sales, we're going to  
16   face prudence disallowances in the reviews that the  
17   Staff's going to do of the fuel adjustment clause, is one  
18   very stark reason that we would like to maximize our  
19   off-system sales. And also --

20                  COMMISSIONER CLAYTON: But your fuel costs  
21   would be lower. I mean, you wouldn't have as much fuel  
22   cost presumably.

23                  MR. LOWERY: Well, your net fuel costs are  
24   lower by every dollar of off-system sales, that's right.  
25   But we also, of course, have to come back and we have



1 to -- we have to reup the fuel adjustment clause, have to  
2 file another rate case. We have to come back even if we  
3 didn't otherwise need a rate case. And if we're not doing  
4 a good job of making off-system sales, I mean, we've read  
5 what the Commission said in the Empire Order, having a  
6 fuel adjustment clause is a privilege, not a right. Then  
7 we would -- we might not expect to get to continue that  
8 fuel adjustment clause.

9                   So, you know, that's one of the --  
10 certainly -- certainly others, you know, could speak to  
11 that, but -- and there's a dispute in the case about  
12 whether or not incentives are included or not, but that's  
13 really a fuel adjustment clause issue, not an off-system  
14 sales issue. What we've agreed to in this settlement is,  
15 here's the right number, not -- nobody's agreed whether  
16 there should be a fuel adjustment clause or what the right  
17 sharing should be.

18                   COMMISSIONER CLAYTON: I understand that,  
19 and the reason why I'm just raising this, because I -- and  
20 I understood it correctly, and I think there would be  
21 plenty of arguments on incentives and all that.

22                   Does anyone else want to chime in on this  
23 set of questions, agree, disagree?

24                   MR. MILLS: Well, just as a clarifying  
25 point, this is essentially a black box settlement on

1 off-system sales numbers, and I don't think UE has  
2 conceded anything, and we certainly haven't conceded  
3 anything with respect to the speculative book.

4 COMMISSIONER CLAYTON: Yeah. I understand  
5 that. I understand that. But the mechanism if there is a  
6 fuel adjustment clause, you agree with the concepts  
7 Mrs. Lowery said, that 100 percent of off-system sales  
8 would offset the fuel costs. And I guess what I'm trying  
9 to get your feedback on is the implied incentive that the  
10 company would have to maximize its off-system sales, is  
11 there sufficient incentive there, regardless of what the  
12 amount is in the stipulation?

13 MR. MILLS: Well, the stipulation works two  
14 ways. There is an amount that, just as you described at  
15 the beginning, if rates -- if there's no fuel adjustment  
16 clause, that's the amount in rates. Anything above it  
17 they keep. Then if the Commission over our opposition  
18 implements a fuel adjustment clause, that's built into  
19 part of the base rates.

20 And with respect to what the incentives are  
21 under those two regimes, I think you're -- I certainly  
22 believe that they're extremely different, that they're  
23 much more limited under a fuel adjustment clause regime.  
24 Mechanically what you're saying, I agree with what you're  
25 saying, what Mr. Lowery is saying.

1                   MR. BYRNE: Your Honor, if I might just  
2 address it briefly? We do have -- the incentives we think  
3 we have are, of course, as Mr. Lowery said, keeping the  
4 fuel adjustment clause and the sharing percentage that is  
5 in there. But I think there's also an incentive that we  
6 have just in general to keep our rates low.

7                   You know, we do -- in the PGA situation,  
8 there's a 100 percent pass through, but we do believe it's  
9 in our interests to try to keep gas costs as low as we can  
10 for our customers, and our gas department, Scott Glaeser,  
11 who's been down here any number of times, works really  
12 hard to do that. I think we'd have the same kind of  
13 incentive on the electric side to keep rates low, avoid  
14 the bad publicity and just benefit our customers.

15                  COMMISSIONER CLAYTON: I understand. I  
16 don't want to get into the -- I mean, that's the core  
17 argument, I guess, on fuel adjustment clause are the  
18 incentives that are in there. What I was trying --

19                  MR. DOTTHEIM: Yeah, but --

20                  COMMISSIONER CLAYTON: Go ahead.

21                  MR. DOTTHEIM: The fuel adjustment clause,  
22 whatever the decision is, doesn't affect off-system sales  
23 as far as the ratemaking treatment.

24                  COMMISSIONER CLAYTON: Say that again.

25                  MR. DOTTHEIM: The fuel adjustment --

1 ultimately, the Commission's decision on the fuel  
2 adjustment clause doesn't affect the ratemaking treatment  
3 of off-system sales. It's treated the same. I mean,  
4 mechanically there is a difference, but it's still an  
5 offset to the company's costs --

6 COMMISSIONER CLAYTON: I understand.

7 MR. DOTTHEIM: -- under either regime.

8 COMMISSIONER CLAYTON: But I guess I would  
9 disagree that -- I think with you, and correct me if I'm  
10 wrong, that in a traditional model, yes, there is that  
11 imputed offset of off-system sales, but certainly anything  
12 above that that they sell they get to keep, while in a  
13 fuel adjustment clause situation anything -- when they go  
14 over that base amount of off-system sales, they don't get  
15 to keep, correct?

16 MR. LOWERY: That's true, but I think  
17 perhaps what Mr. Dottheim is suggesting and what I think I  
18 was trying to say a moment ago as well, that issue does  
19 not affect the level of fuel cost, off-system sales  
20 revenues that everybody for purpose of settlement only has  
21 agreed are the appropriate normalized level.

22 COMMISSIONER CLAYTON: I understand. I  
23 said when we started this that I wanted to ask this  
24 question. It involves -- I didn't get it asked earlier.  
25 I understand that. And I don't have a problem with the

1 stipulation. So thank you for answering my questions.

2 JUDGE WOODRUFF: Commissioner Murray, did  
3 you have any questions?

4 COMMISSIONER MURRAY: I don't.

5 JUDGE WOODRUFF: Commissioner Jarrett?

6 COMMISSIONER JARRETT: No questions.

7 JUDGE WOODRUFF: Chairman Davis?

8 CHAIRMAN DAVIS: No questions.

9 JUDGE WOODRUFF: Well, that takes care of  
10 the Stipulation & Agreement, then. It's my understanding  
11 that the parties -- any parties out there that might  
12 object have seven days to do so. I don't think the  
13 Commission can actually approve it until then. Anybody  
14 disagree with that?

15 MR. LOWERY: Not unless they were to  
16 indicate no opposition before them. I can represent, I  
17 think, that any party who has been active at all on this  
18 issue, they've all either signed on or indicated no  
19 objection, I believe, either on the record or to me.  
20 There might be a party or two here that could do that now.  
21 But I would not anticipate any objections showing up in  
22 the next seven days.

23 MR. IVESON: I'm not sure whether I did  
24 this on the record or not, but the State does not object.

25 MS. WOODS: And the Missouri Department of

1 Natural Resources will not be objecting.

2 MR. MILLS: And Judge, I don't disagree  
3 with any of that. I think you could shorten the time  
4 somewhat as long as you still allow reasonable time if you  
5 wanted to.

6 JUDGE WOODRUFF: I know that's been a  
7 question in other cases as well.

8 Well, let's move on, then. The only  
9 remaining group of issues are the FAC rate design, and I  
10 understand the parties wanted more time to finalize a  
11 Stip & Agreement on that.

12 MR. LOWERY: Yes, your Honor.

13 JUDGE WOODRUFF: Do you want to elaborate,  
14 Mr. Lowery?

15 MR. LOWERY: Well, we could -- I don't know  
16 if we could go off the record for just a moment or two. I  
17 guess I would hope that with an extended lunch hour,  
18 perhaps a couple of hours, that perhaps we can -- I don't  
19 know. Does anybody else have an opinion about that, a  
20 couple of hours to sit down and try and hammer it out?

21 MR. DOTTHEIM: Yeah.

22 JUDGE WOODRUFF: Take a lunch break until  
23 1:30.

24 MR. DOTTHEIM: Two o'clock?

25 MR. BYRNE: And, Judge, that clock is

1 wrong.

2 JUDGE WOODRUFF: I know that. It's 11:39  
3 by my clock.

4 MR. LOWERY: Do I hear two o'clock?

5 JUDGE WOODRUFF: Two o'clock.

6 Mr. Dottheim.

7 MR. DOTTHEIM: Judge, assuming we have a  
8 rate design Stipulation & Agreement and file it, would it  
9 be the Commission's disposition to try to have an  
10 on-the-record on that still this afternoon if possible?

11 JUDGE WOODRUFF: We'll -- are you  
12 anticipating that you'll actually get something filed by  
13 two o'clock?

14 MR. DOTTHEIM: I don't know if by two  
15 o'clock, but I wouldn't think too much after that.

16 MR. LOWERY: I would agree with that. I  
17 would at least hope to be able to say at two o'clock that  
18 all we have to do is the word processing, for example, if  
19 there's any word processing left to do.

20 JUDGE WOODRUFF: Let's see where we are at  
21 at two o'clock, and then I'll discuss it with the  
22 Commissioners and see if there's likely to be a need for  
23 questions. We won't know until we receive the agreement.  
24 It's my understanding you're talking about a final  
25 agreement on the entire issue, that we would not need any

1 further testimony; is that correct?

2 MR. DOTTHEIM: That would be correct.

3 There would be no need for final testimony, and there  
4 would be no need for the Commission to render a decision  
5 other than whether to approve or accept the Stipulation &  
6 Agreement on FAC rate design, assuming the Commission  
7 adopted a fuel adjustment clause.

8 JUDGE WOODRUFF: Mr. Conrad?

9 MR. CONRAD: It has been my understanding  
10 that sometimes the Commission finds it appropriate to have  
11 at least one witness get up and say that this -- whatever  
12 it is is a reasonable approach to it and results in a just  
13 and reasonable result, recommends it to the Commission,  
14 and that's the Commission's call, but that would give you  
15 some evidentiary basis to support the settlement since  
16 it's kind of an amalgamation, as we talked in another  
17 context before. That's beyond my kin, but --

18 JUDGE WOODRUFF: We can decide that again  
19 when we come back at two o'clock. All right. Go forth  
20 and do good and we'll come back at two o'clock.

21 (A BREAK WAS TAKEN.)

22 JUDGE WOODRUFF: Welcome back from our  
23 break. Who wants to give me a report on what happened?  
24 Mr. Dottheim or whoever? It looked like you were about to  
25 say something.



1                   MR. DOTTHEIM: Okay. Well, I think for the  
2 most part we believe that we have an agreement in  
3 principle, and we're working on language right now in  
4 another iteration, which we're hoping to have a copy of in  
5 maybe 20 minutes for the parties to review. So we're  
6 hopeful, I would think within the next hour, to get  
7 something filed.

8                   MR. BYRNE: I think that's fair. And, you  
9 know, Mr. Dottheim says agreement in principle, but I  
10 think it's a -- it's a pretty good agreement in principle.  
11 We sat in a room and hammered out word by word the  
12 language. Everybody's got to review it, but I'm very  
13 optimistic that we're going to have an agreement.

14                  JUDGE WOODRUFF: And this would be a  
15 complete agreement?

16                  MR. BYRNE: Yes.

17                  JUDGE WOODRUFF: There wouldn't be any need  
18 for any further evidence?

19                  MR. DOTTHEIM: Yes. It would be a complete  
20 agreement on rate design, which would resolve all the rate  
21 design issues from the perspective of there would be no  
22 rate design issues to be decided in the case. There may  
23 be some issues that are left unresolved for another day to  
24 be addressed, but they wouldn't be left unresolved to be  
25 addressed in the presently pending case.

1 JUDGE WOODRUFF: Okay.

2 MR. DOTTHEIM: So we're hopeful that we  
3 will get something filed again maybe in the next -- in the  
4 next hour and that the parties will still be here, and if  
5 the Commissioners and you, Judge, would like to reconvene  
6 after having reviewed the document, and it will have an  
7 exemplar tariff sheets, if there's a desire then to go on  
8 the record to ask questions, the parties will still be  
9 available with witnesses.

10 JUDGE WOODRUFF: Let's shoot for 2:45,  
11 then.

12 MR. BYRNE: You know, one thing Ms. Tatro  
13 suggested is there are some sort of cleanup things that  
14 maybe need to be done, that maybe we could use this time  
15 to try to move different exhibits into -- you know, the  
16 testimony of witnesses that didn't take the stand and  
17 things of that nature.

18 JUDGE WOODRUFF: That's fine. That's a  
19 good idea so we don't have to do as much later.

20 MR. MILLS: Judge, along the lines of  
21 cleanup, the exhibit that you reserved 1001HC for this  
22 morning, I think we are up to about six or eight copies of  
23 that so far, and the entire sixth floor smells like hot  
24 toner. I can bring that many down and just distribute  
25 them to the parties as we get the rest or wait until

1 they're all ready and do it all at one. Are you planning  
2 to go back on the record at 2:45?

3 JUDGE WOODRUFF: That will be the plan,  
4 yes.

5 MR. MILLS: Okay. I know I'll have all the  
6 copies by then. I'll just plan to do it then.

7 JUDGE WOODRUFF: That will be fine.

8 MR. BYRNE: I know one thing we can do now,  
9 if you'd like, to clean something up, is we reserved an  
10 exhibit for Mr. Zdellar's revised numbers. I've got that.  
11 We can move that into the record --

12 JUDGE WOODRUFF: Let's do that.

13 MR. BYRNE: -- if that will work.

14 JUDGE WOODRUFF: And I believe we said that  
15 was 76.

16 MR. BYRNE: Yes. That's correct. And it's  
17 a slight adjustment to the numbers that were in his  
18 testimony.

19 MS. TATRO: In case it's not evident, the  
20 bolded numbers are the ones that changed.

21 JUDGE WOODRUFF: Exhibit 76 has been  
22 offered. Are there any objections to its receipt?

23 (No response.)

24 JUDGE WOODRUFF: Hearing none, it will be  
25 received.

1                   (EXHIBIT NO. 76 WAS MARKED FOR  
2 IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

3                   MS. TATRO: We also have testimony of  
4 witnesses where the issues were resolved and so it didn't  
5 need to be taken to hearing, but we'd like to go ahead and  
6 move those into the record.

7                   We have Exhibit 51, which is the direct  
8 testimony of Michael J. Adams; Exhibit 52, rebuttal  
9 testimony of Michael J. Adams; 53, direct testimony of  
10 Edward Pfeiffer; 54, direct testimony of James Pozzo. 55  
11 is the supplemental direct testimony of James Pozzo. 56  
12 is the direct testimony of Steven M. Wills. 57 is the  
13 supplemental direct testimony of Steven M. Wills, and 58  
14 is the rebuttal testimony of Steven M. Wills.

15                  JUDGE WOODRUFF: Okay. Exhibits 51 through  
16 58 have been offered. Are there any objection to their  
17 receipt?

18                  (No response.)

19                  JUDGE WOODRUFF: Hearing none, they will  
20 all be received.

21                  (EXHIBIT NOS. 51 THROUGH 58 WERE MARKED FOR  
22 IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

23                  MR. BYRNE: Judge, just as a double check,  
24 does that match -- does it look to you like all the  
25 prefiled testimony has been received into evidence based

1 on your keeping track of?

2 JUDGE WOODRUFF: I will go through it here.

3 All right. I had one question about the stipulation.

4 There was -- there was a note that Mr. Schukar's  
5 supplemental testimony, I think it was called, would not  
6 be admitted. Was that ever numbered?

7 MR. BYRNE: I don't believe it ever was.

8 JUDGE WOODRUFF: Exhibit 28 is Schukar  
9 supplemental direct, but that would be something earlier,  
10 I believe.

11 MS. TATRO: That is earlier, yeah.

12 JUDGE WOODRUFF: And that is coming in.

13 MR. BYRNE: That was from the beginning of  
14 the case where we substituted actual fourth quarter test  
15 year data for budgeted.

16 JUDGE WOODRUFF: That's what I thought.  
17 Exhibit 37, Warwick rebuttal. Oh, the amended rebuttal  
18 admitted, so 37 was not admitted.

19 MR. BYRNE: That's correct.

20 JUDGE WOODRUFF: Okay. Looks like  
21 everything that was offered for Ameren is in.

22 For Staff, Maloney rebuttal, that would be  
23 part of the stipulation also, I believe, is it not?

24 MR. BYRNE: Yeah. We do have -- I think we  
25 do have some pieces of testimony that are related to the

1 stipulation that was filed that were -- as part of the  
2 stipulation were to be admitted. Should we give those to  
3 the court reporter now, too?

4 JUDGE WOODRUFF: Yes, if you would, please.  
5 For Staff, was the Maloney rebuttal part of the  
6 stipulation?

7 MR. DOTTHEIM: Yes.

8 MS. TATRO: Do you want me to state  
9 specifically which ones I have?

10 JUDGE WOODRUFF: Yes. Go ahead.

11 MS. TATRO: I think these were admitted as  
12 part of the -- or would be admitted upon approval of the  
13 OSS settlement. 27HC, which is the direct testimony of  
14 Shawn Schukar, and I guess there's an NP as well, and a P;  
15 28, which is the supplemental direct testimony of Shawn;  
16 29HC, which is the rebuttal testimony and 29NP; 30, which  
17 is surrebuttal; 31, different witness, direct testimony of  
18 Timothy D. Finnell; 32, supplemental direct testimony of  
19 Mr. Finnell; and 33, rebuttal testimony of Mr. Finnell.

20 JUDGE WOODRUFF: And those were to be  
21 offered as part of the stip, so we won't need to see if we  
22 have any objections.

23 (EXHIBIT NOS. 27 THROUGH 33 WERE MARKED FOR  
24 IDENTIFICATION BY THE REPORTER.)

25 JUDGE WOODRUFF: And Staff, I believe you

1 also had some coming in by the stip.

2 MR. DOTTHEIM: Yes. As far as the  
3 off-system sales Stipulation & Agreement, there's Exhibit  
4 No. 211, Maloney, which I'd like to offer at this time  
5 into evidence.

6 JUDGE WOODRUFF: And there was also Maloney  
7 surrebuttal. I've got it as 223.

8 MR. DOTTHEIM: Yes. Yes. It's not  
9 sequentially numbered, but yes, it's correct, 223, Maloney  
10 surrebuttal, which I'd like to offer at this time.

11 JUDGE WOODRUFF: Again, that's part of the  
12 stipulation?

13 MR. DOTTHEIM: Yes.

14 (EXHIBIT NOS. 211 AND 223 WERE MARKED FOR  
15 IDENTIFICATION BY THE REPORTER.)

16 JUDGE WOODRUFF: All right. I also see the  
17 Taylor rebuttal and Grissum surrebuttal.

18 MR. DOTTHEIM: Yes. Taylor rebuttal is  
19 Exhibit No. 216HC and NP, and Grissum, there's Exhibit  
20 No. 221 surrebuttal, which I'd like to offer at this time.

21 JUDGE WOODRUFF: And those are not part of  
22 the stipulation? Those are just issues that were  
23 resolved?

24 MR. DOTTHEIM: That's correct. Taylor is  
25 heat rate and efficiency testing with the fuel adjustment

1 clause issue, which was resolved. There are no issues.  
2 And the Grissum testimony, there were no ultimately  
3 contested issues.

4 JUDGE WOODRUFF: 216 and 221 have been  
5 offered. Are there any objections to their receipt?

6 (No response.)

7 JUDGE WOODRUFF: Hearing none, they will be  
8 received.

9 (EXHIBIT NOS. 216 AND 221 WERE MARKED FOR  
10 IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

11 JUDGE WOODRUFF: I think that's everything  
12 for Staff.

13 MR. DOTTHEIM: Judge, are you showing --

14 JUDGE WOODRUFF: Staff Accounting  
15 Schedules, 227, have not been offered.

16 MR. DOTTHEIM: At this time I'd like to  
17 offer, then, the Staff Accounting Schedules.

18 JUDGE WOODRUFF: All right. 227, the Staff  
19 Accounting Schedules, have been offered. Any objection to  
20 its receipt?

21 (No response.)

22 JUDGE WOODRUFF: Hearing none, it will be  
23 received.

24 (EXHIBIT NO. 227 WAS MARKED FOR  
25 IDENTIFICATION AND RECEIVED INTO EVIDENCE.)



1                   MR. DOTTHEIM: Judge, then are you showing  
2 Exhibit No. 200 through 227 as having been offered and  
3 received?

4                   MR. DOTTHEIM: Yes, other than the Maloney  
5 rebuttal and surrebuttal which is part of the stipulation  
6 and will be admitted assuming the stipulation is accepted.

7                   MR. DOTTHEIM: And you're showing then the  
8 Exhibit No. 200, which is the Staff cost of service report  
9 HC and NP, as having been offered and received?

10                  JUDGE WOODRUFF: Yes. It came in  
11 piecemeal, and then yesterday we did accept the entire  
12 thing.

13                  MR. DOTTHEIM: And then I assume the  
14 Staff's class cost of service rate design report?

15                  JUDGE WOODRUFF: Yes. Same situation, it  
16 is in, 206.

17                  MR. DOTTHEIM: Okay.

18                  JUDGE WOODRUFF: And I believe all of  
19 Public Counsel's are in. All of the State's are in.  
20 DNR's two items are in. For MIEC, the Dauphinaia  
21 testimony was going to come in by the stipulation.

22                  MS. VUYLSTEKE: Correct.

23                  JUDGE WOODRUFF: For some reason I don't  
24 show Gorman's surrebuttal as having been offered.

25                  MS. VUYLSTEKE: Okay. Let me check my

1 exhibit list and see which number that is.

2 JUDGE WOODRUFF: That's 615.

3 MS. VUYLSTEKE: Okay. I would like to  
4 offer that.

5 JUDGE WOODRUFF: 615 has been offered. Any  
6 objection to its receipt?

7 (No response.)

8 JUDGE WOODRUFF: Hearing none, it will be  
9 received.

10 (EXHIBIT NO. 615 WAS RECEIVED INTO  
11 EVIDENCE.)

12 JUDGE WOODRUFF: All of MEG's, looks like  
13 it's in, and all of the Commercial Group's, everything for  
14 Noranda.

15 MR. CONRAD: Yeah. I believe I have 750  
16 through 764, and then we had marked but not offered 765.

17 JUDGE WOODRUFF: That's correct.

18 MR. CONRAD: And all of those other than  
19 the very last one I mentioned will be in.

20 JUDGE WOODRUFF: Yes. Everything's in for  
21 AARP and for the unions. And then we had 1000 and 1001  
22 which were commissioner exhibits that were marked. I  
23 believe that's all of it.

24 There's one other matter for MIEC, and that  
25 was the counter designations.

1 MS. VUYLSTEKE: Correct. Your Honor, we  
2 filed a motion to admit several counter designations, the  
3 purpose of which is to put in context a few designations  
4 that AmerenUE made for Mr. Brubaker's testimony, basically  
5 putting several entire pages of the deposition, I think a  
6 total of six pages in, as opposed to just bits and pieces.  
7 And I would at this point request that our motion be  
8 granted and that we can put that deposition testimony in.

9 JUDGE WOODRUFF: Any objection?

10 MR. BYRNE: Your Honor, that's Mr. Lowery's  
11 issue, and he's not here. He's finalizing the  
12 stipulation. I would hope he could -- I don't know  
13 whether he has an objection to it or not.

14 JUDGE WOODRUFF: We'll take it up again  
15 later when Mr. Lowery is here. Anything else anyone wants  
16 to bring up?

17 (No response.)

18 JUDGE WOODRUFF: All right. Then let's  
19 come back at 2:45 and hopefully put to this bed.

20 CHAIRMAN DAVIS: Judge, before we go off  
21 the record, can I just express my gratitude to the parties  
22 for doing everything they can to work out as many of  
23 these, I guess you could say, onerously detailed issues  
24 that are extremely complicated? And I do appreciate each  
25 and every one of you trying your best to help us and to

1 help the Judge, because, you know, if not, that would be  
2 another 40 or 50 pages on the Order. So that does not go  
3 unnoticed, and we do appreciate your efforts.

4 MR. CONRAD: We appreciate being  
5 appreciated, Mr. Chairman.

6 JUDGE WOODRUFF: And we appreciate your  
7 appreciation. All right. With that, then, we are --  
8 we'll come back for -- have an intermission and come back  
9 at 2:45.

10 (A BREAK WAS TAKEN.)

11 (EXHIBIT NO. 1001 WAS MARKED FOR  
12 IDENTIFICATION BY THE REPORTER.)

13 JUDGE WOODRUFF: Mr. Byrne, do you want to  
14 go ahead and fill us in on what the situation is?

15 MR. BYRNE: Sure. Your Honor, we've  
16 been -- we've circulated a red-lined version of the  
17 Stipulation to the parties. I see Mr. Lowery and  
18 Mr. Conrad are discussing some potential minor tweaks to  
19 the draft. But I think we've captured the essence of what  
20 the parties have agreed to, and, you know, haven't heard  
21 back from everybody, but I think we are prepared -- we're  
22 pretty close to getting something filed, but it hasn't  
23 been filed yet.

24 JUDGE WOODRUFF: Does anybody have anything  
25 else they want to add?

1                   MR. BYRNE: I know Mr. Conrad's talking  
2 about a tweak. Has anybody else got a problem with  
3 anything in the Stipulation?

4                   MR. MILLS: We just got it. We may have  
5 some other tweaks, too, but I don't see anything that's  
6 insurmountable.

7                   MR. CONRAD: Nor do we, Judge.

8                   JUDGE WOODRUFF: Well, let's go ahead and  
9 take care of a couple other things. I don't think we need  
10 to stay on the record until this is all filed. I'm  
11 confident the Commissioners aren't going to have any  
12 questions about it. If they do, it won't be until they've  
13 had a chance to look at it. There won't be any reason to  
14 stick around here today.

15                  MR. IVESON: Your Honor, if I may, I would  
16 like to make it clear on the record, the State of Missouri  
17 does not intend to object or request a hearing on this  
18 Stipulation. We are not a party to it. But we do want it  
19 clear on the record that our failure to object to this  
20 Stipulation does not in any way and should not in any way  
21 be taken to be a waiver of our opposition to the fuel  
22 adjustment clause.

23                  JUDGE WOODRUFF: Certainly. That's  
24 certainly understandable.

25                         There are a couple things we need to take

1 care of while we're all still here. One is the counter  
2 designations that MIEC filed.

3 MR. LOWERY: No objection.

4 JUDGE WOODRUFF: All right. Those  
5 documents will be received into evidence, then, or the  
6 counter designations will be.

7 Mr. Mills while we were off the record  
8 provided me with copies of Exhibit 1001.

9 MR. MILLS: Yes. And I'd like to offer  
10 that at this time.

11 JUDGE WOODRUFF: Actually, that was -- I  
12 showed that, I believe, as offered by the Commissioner.

13 MR. MILLS: Okay.

14 JUDGE WOODRUFF: By the Chairman. It's  
15 already been received.

16 MR. MILLS: That's good enough for me.

17 JUDGE WOODRUFF: All right. Anything else  
18 we need to bring up? Mr. Dottheim?

19 MR. DOTTHEIM: Yes, Judge. Considering I  
20 don't know if we're going to be going off the record,  
21 there's possibly a chance we may not go back on the record  
22 depending upon whether the Commissioners have questions or  
23 not.

24 JUDGE WOODRUFF: It would be my intention  
25 that we will not go back on the record today, unless

1     somebody tells me a reason we need to.

2                     MR. DOTTHEIM:   And as a consequence, if the  
3     Commissioners don't have questions regarding the  
4     Stipulation & Agreement on rate design, then there's an  
5     open question whether we might go back on the record at  
6     all other than for purposes of the true-up.

7                     JUDGE WOODRUFF:   Yes.   I did want to ask  
8     the parties about the true-up.   Do we know yet if we're  
9     going to need a true-up hearing?

10                    MR. BYRNE:   If I had to guess, I would say  
11     no.

12                    MR. LOWERY:   I think it's doubtful that  
13     we're going to.

14                    MR. DOTTHEIM:   But I don't believe anything  
15     definitive can be said at this time.

16                    JUDGE WOODRUFF:   How soon will we know for  
17     sure?

18                    MR. DOTTHEIM:   I literally don't know,  
19     and --

20                    MR. BYRNE:   You know, your Honor, I did  
21     talk to Mr. Rackers and Mr. Weiss, who are the two -- the  
22     Staff and the company accountant, and they said they  
23     were -- they didn't see a substantive disagreement over  
24     the true-up.   So that would suggest to me dotting the Is  
25     and crossing the Ts won't take that long.

1 JUDGE WOODRUFF: Will someone file  
2 something to let us know for sure?

3 MR. DOTTHEIM: Oh, yes, definitely. That  
4 certainly will occur. But, of course, I think the Staff  
5 would not seek to speak on behalf of any of the other  
6 parties.

7 JUDGE WOODRUFF: Sure. Mr. Lowery?

8 MR. LOWERY: Your Honor, momentarily, maybe  
9 simultaneously as we're speaking, we are filing one --  
10 slightly over one page piece of supplemental testimony  
11 from Mr. Lyons. There were some minor question and answer  
12 just in support of the Stipulation that we're also getting  
13 ready to file and just a little bit on the FAC rate design  
14 issues. I believe essentially this testimony was agreed  
15 upon, and so we typed it up and have put it in the form of  
16 testimony. I think we should mark it and offer it so it  
17 could actually be made part of the record. But we are  
18 filing it momentarily.

19 JUDGE WOODRUFF: Your next number is  
20 No. 80.

21 MR. LOWERY: And I'd offer Exhibit 80.

22 JUDGE WOODRUFF: Any objections to the  
23 receipt of Exhibit 80?

24 (No response.)

25 JUDGE WOODRUFF: Hearing none, it will be



1 received.

2 (EXHIBIT NO. 80 WAS MARKED FOR  
3 IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

4 MR. CONRAD: And then my question, Judge,  
5 was with respect to briefing schedule, and I just couldn't  
6 remember if that had already been set.

7 JUDGE WOODRUFF: It has been set. Does  
8 anyone remember the exact date? I know it's early  
9 January.

10 MR. LOWERY: January 6th, I believe.

11 MS. WOODS: I think it's more like the 8th.

12 JUDGE WOODRUFF: It was in my mind it was  
13 the 9th. We better go back and check.

14 MR. MILLS: Can I be the 10th?

15 MS. TATRO: It is the 8th.

16 MR. LOWERY: Your memory's better than  
17 mine. And the transcripts are being expedited? We've  
18 been getting them throughout the hearing, so we'll have  
19 the final very soon, I'm assuming?

20 JUDGE WOODRUFF: Yes. They've all been on  
21 a four-day schedule, so we should have the final  
22 transcripts middle of next week. Anything else?

23 MR. DOTTHEIM: Yes. Judge, the  
24 Stipulation & Agreement that was filed yesterday on  
25 off-system sales, the fuel adjustment clause rate design

1 Stipulation & Agreement is likely to have a one-sentence  
2 paragraph that's missing from the off-system sales  
3 Stipulation & Agreement that's a sentence that on occasion  
4 is forgotten to be placed in Stipulations & Agreements,  
5 and I think that was basically the situation that happened  
6 yesterday, and I just would make note of it.

7 I don't think I'm going counter to the  
8 off-system sales Stipulation & Agreement, the provision  
9 that the signatories will defend the Stipulation &  
10 Agreement, and that is the -- the sentence that generally  
11 finds its way into Stipulations & Agreements, that the  
12 Stipulation & Agreement does not constitute a contract  
13 with the Commission.

14 And just one other note I had hoped to  
15 raise yesterday just in passing, and I would at this  
16 point. If the Commission is going to have a rulemaking on  
17 the use of depositions in Commission proceedings and just  
18 in general addresses evidence, the Commission -- I think  
19 it's in the Commission's rules. Of course, it's in --  
20 it's in statute, the reference to the Commission not being  
21 bound by the technical rules of evidence.

22 It's -- it's unfortunately often lost sight  
23 of that there are also the fundamental rules of evidence,  
24 and the fundamental rules of evidence do apply.

25 JUDGE WOODRUFF: Talking about due process?

1                   MR. DOTTHEIM: Hearsay, for example,  
2     technical rules of evidence, leading questions, rule on  
3     leading questions. That's a technical rule of evidence,  
4     not a fundamental rule, but hearsay is a fundamental rule  
5     of evidence. So if the Commission is going to engage in a  
6     rulemaking, I would suggest that the -- that the  
7     Commission consider addressing the distinction between  
8     technical rules and fundamental rules of evidence.

9                   JUDGE WOODRUFF: That's a good point,  
10    Mr. Dottheim. I don't know that the Commission is going  
11    to do that. It's something I think would be a good idea,  
12    but I don't have a vote.

13                  MR. DOTTHEIM: Certainly. I just thought  
14    I'd mention that in passing because it's -- that statutory  
15    section in 386 is often cited to the Commission. I think  
16    it's often cited incorrectly. Thank you.

17                  JUDGE WOODRUFF: Anything else that we need  
18    to bring up? Just to recap, it's my understanding that  
19    the Stipulation & Agreement on the remaining issues will  
20    be filed shortly.

21                  MR. LOWERY: I hope in the next 30 minutes  
22    or so, Judge.

23                  MS. WOODS: And Judge, I just want to go on  
24    the record for the Department of Natural Resources that it  
25    will not have an objection to the almost-filed

1 Stipulation.

2 JUDGE WOODRUFF: Okay. And if the  
3 Commissioners do have questions about the almost-filed  
4 Stipulation, we may bring you back for an on-the-record  
5 presentation if that's necessary. And thereafter, I'll  
6 bring those Stipulations & Agreements to the Commission in  
7 agenda and they'll rule upon them at that time.

8 Anything else?

9 MR. LOWERY: Thank you, Judge.

10 MR. DOTTHEIM: Thank you, Judge.

11 JUDGE WOODRUFF: We're adjourned. Thank  
12 you.

13 WHEREUPON, the hearing of this case was  
14 concluded.

15

16

17

18

19

20

21

22

23

24

25

I N D E X

STAFF'S EVIDENCE:

MICHAEL PROCTOR

Direct Examination by Mr. Dottheim	2698
Cross-Examination by Mr. Mills	2703
Cross-Examination by Mr. Lowery	2707
Questions by Commissioner Jarrett	2710
Questions by Chairman Davis	2710

OPC'S EVIDENCE:

RYAN KIND

Cross-Examination by Mr. Conrad (In-Camera Session - See Index Below)	2726
Cross-Examination by Mr. Lowery	2742
Questions by Chairman Davis	2758
Recross-Examination by Mr. Conrad	2780
Recross-Examination by Mr. Lowery	2785
Redirect Examination by Mr. Mills	2796

RYAN KIND (In-Camera Testimony - Volume 29)

Cross-Examination by Mr. Conrad	2730
---------------------------------	------

1	EXHIBITS INDEX		
2		MARKED	RECEIVED
3	EXHIBIT 27NP/P/NP		
4	Direct Testimony of Shawn E. Schukar	2826	*
5	EXHIBIT NO. 28		
6	Supplemental Direct Testimony of		
7	Shawn E. Schukar	2826	*
8	EXHIBIT NO. 29NP/HC		
9	Rebuttal Testimony of Shawn E. Schukar	2826	*
10	EXHIBIT NO. 30		
11	Surrebuttal Testimony of Shawn E.		
12	Schukar	2826	*
13	EXHIBIT NO. 31		
14	Direct Testimony of Timothy D. Finnell	2826	*
15	EXHIBIT NO. 32		
16	Supplemental Direct Testimony of		
17	Timothy D. Finnell	2826	*
18	EXHIBIT NO. 33		
19	Rebuttal Testimony of Timothy D.		
20	Finnell	2826	*
21	EXHIBIT NO. 51		
22	Direct Testimony of Michael J. Adams	2824	2824
23	EXHIBIT NO. 52		
24	Rebuttal Testimony of Michael J. Adams	2824	2824
25	EXHIBIT NO. 53		
26	Direct Testimony of Edward C. Pfeiffer	2824	2824
27	EXHIBIT NO. 54		
28	Direct Testimony James R. Pozzo	2824	2824
29	EXHIBIT NO. 55		
30	Supplemental Direct Testimony of		
31	James R. Pozzo	2824	2824
32	EXHIBIT NO. 56		
33	Direct Testimony of Steven M. Wills	2824	2824

1	EXHIBIT NO. 57		
2	Supplemental Direct Testimony of		
	Steven M. Wills	2824	2824
3	EXHIBIT NO. 58		
4	Rebuttal Testimony of Steven M. Mills	2824	2824
5	EXHIBIT NO. 76		
6	Excerpt and Schedule from Surrebuttal		
	Testimony of Ronald C. Zdellar	2824	2824
7	EXHIBIT NO. 80		
8	Supplemental Testimony of Martin J.		
	Lyons, Jr.	2837	2837
9	EXHIBIT NO. 211		
10	Rebuttal Testimony of Erin L. Maloney	2827	*
11	EXHIBIT NO. 212		
12	Rebuttal Testimony of Michael S.		
	Proctor	2702	2702
13	EXHIBIT NO. 213		
14	Surrebuttal Testimony of Michael S.		
	Proctor	2702	2702
15	EXHIBIT NO. 216NP/HC		
16	Rebuttal Testimony of Michael E. Taylor	2828	2828
17	EXHIBIT NO. 221		
18	Surrebuttal Testimony of Roberta A.		
	Grissum	2828	2828
19	EXHIBIT NO. 223		
20	Surrebuttal Testimony of Erin L.		
	Maloney	2827	*
21	EXHIBIT NO. 227		
22	Staff Accounting Schedules	2828	2828
23	EXHIBIT NO. 440		
24	Amended Notice of Deposition of Ryan		
	Kind	2713	
25	EXHIBIT NO. 615		
	Surrebuttal Testimony of Michael		
	Gorman		2830
	EXHIBIT NO. 764		
	Excerpt from October 7, 2008 Hearing		

1 EXHIBIT NO. 765

2 Excerpt of Transcript from November 21,  
3 2008 Hearing in ER-2008-0318 2736

4

5 EXHIBIT NO. 1001HC

6 Response to OPC Data Request 2214  
7 (Complete Document) 2832

8

9 \*Receipt pending Commission acceptance of Stipulation &  
10 Agreement.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



## 1 C E R T I F I C A T E

2

3 STATE OF MISSOURI )

4 ) ss.

5 COUNTY OF COLE )

6

7 I, Kellene K. Feddersen, Certified

8 Shorthand Reporter with the firm of Midwest Litigation

9 Services, and Notary Public within and for the State of

10 Missouri, do hereby certify that I was personally present

11 at the proceedings had in the above-entitled cause at the

12 time and place set forth in the caption sheet thereof;

13 that I then and there took down in Stenotype the

14 proceedings had; and that the foregoing is a full, true

15 and correct transcript of such Stenotype notes so made at

16 such time and place.

17 Given at my office in the City of

18 Jefferson, County of Cole, State of Missouri.

19

20

21

22

23 Kellene K. Feddersen, RPR, CSR, CCR

24 Notary Public (County of Cole)

25 My commission expires March 28, 2009.