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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
TRANSCRIPT OF PROCEEDINGS
Hearing
September 13, 2006
Jefferson City, Missouri
Volume 16

In the Matter of The Empire)
District Electric Company of)
Joplin, Missouri, for Authority to)
File Tariffs Increasing Rates for) Case No. ER-2006-0315
Electric Service Provided to)
Customers in the Missouri Service)
Area of the Company)

COLLEEN M. DALE, Presiding,
CHIEF REGULATORY LAW JUDGE.
JEFF DAVIS, Chairman,
CONNIE MURRAY,
LINWARD "LIN" APPLING,
COMMISSIONERS.

REPORTED BY:
KELLENE K. FEDDERSEN, CSR, RPR, CCR
MIDWEST LITIGATION SERVICES

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

2 JUDGE DALE: We are here in a continuation
3 of Empire rate case ER-2006-315. As we left yesterday,
4 Mr. Gipson was on the stand. And, Mr. Swearngen, if you
5 will please recall him, we'll continue.

6 MR. SWEARENGEN: Yes. Thank you, Judge. I
7 will do that. At this time I will recall Mr. Bill Gipson
8 to the witness stand.

9 JUDGE DALE: And I'll just remind you that
10 you're still under oath.

11 THE WITNESS: Yes.

12 JUDGE DALE: As I recall, we were
13 continuing with your cross.

14 MR. WOODSMALL: Yes, your Honor. As an
15 initial matter, to try and speed this up, and I think if
16 we can do this, I can be done in approximately five
17 minutes, I asked some questions of Mr. Gipson regarding
18 the --

19 JUDGE DALE: Is your mic on?

20 MR. WOODSMALL: Sorry.

21 -- regarding the first IEC and how it was
22 terminated. And I believe Mr. Gipson's answers were
23 somewhat different than what the Commission's orders would
24 say. And rather than take him through all the
25 Commission's orders and do that, I'd merely ask for

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1 administrative notice of a couple things, those being the
2 Commission order in Case No. ER-2002-1074, the Unanimous
3 Stipulation & Agreement in that case, and the Commission
4 order in ER-2002-424.

5 MS. CARTER: David, could you say the case
6 number again on your last one?

7 MR. WOODSMALL: ER-2002-424.

8 MR. SWEARENGEN: Let me just ask a
9 clarifying question of counsel. Those are all orders with
10 respect to the interim energy charge that came out of the
11 2001 electric rate case?

12 MR. WOODSMALL: That's correct.

13 MR. SWEARENGEN: Thank you.

14 JUDGE DALE: Administrative notice will be
15 taken of both of those. Thank you.

16 MR. WOODSMALL: Three of those, your Honor.
17 Two of them were Orders, and one was the Stipulation in
18 the ER-2002-1074 case.

19 MR. SWEARENGEN: Would you mind making
20 copies of those for me, please?

21 MR. WOODSMALL: Absolutely.

22 JUDGE DALE: Are those new enough to be in
23 EFIS?

24 MR. WOODSMALL: I don't know if the
25 Stipulation is. I know the Report and Orders are.

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1 JUDGE DALE: Okay. Seeing Mr. Conrad nod
2 and say that they're all in EFIS, we'll go from there.

3 MR. CONRAD: Your Honor, it's my
4 recollection that that's one of those triple X cases.
5 You're looking blankly at me, but it was the stuff that
6 was imported that you have to go the three digits XXX and
7 do it without the hyphens in it.

8 JUDGE DALE: And in some of those triple X
9 cases they've backfilled it and some of them they haven't
10 yet.

11 MR. CONRAD: I believe the 424 is
12 accessible. I do not know about anything before that.

13 JUDGE DALE: Okay.

14 MR. WOODSMALL: Thank you. Your Honor, I'd
15 like to discuss an exhibit that's already been marked,
16 Exhibit No. 108, and I'll provide the witness another copy
17 of that.

18 W.L. GIPSON testified as follows:

19 CROSS-EXAMINATION (RESUMED) BY MR. WOODSMALL:

20 Q. Yesterday we discussed some -- you
21 mentioned that one of your responsibilities is to talk to
22 various debt and equity analysts, and you recalled at that
23 time one of those companies was Fitch.

24 MR. SWEARENGEN: Judge, I note for the
25 record that this document is marked highly confidential.

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1 So if we're going to have any questions about that, I
2 think we probably need to go in-camera.

3 MR. WOODSMALL: If I could just get him to
4 identify it and offer it into evidence, then I won't ask
5 any questions about it.

6 JUDGE DALE: I thought you said it had
7 already been --

8 MR. WOODSMALL: It's been marked. It's
9 108. But I don't intend to ask any questions about the
10 document, if we want to just lay the foundation, get it
11 into evidence.

12 MR. SWEARENGEN: And I might point out that
13 according to the document and I think the testimony I
14 heard yesterday, this is something that was prepared by
15 another individual with the company, Mr. Greg Knapp.

16 JUDGE DALE: I think for the sake of
17 caution, we'll go in-camera and discuss this.

18 (REPORTER'S NOTE: At this point, an
19 in-camera session was held, which is contained in
20 Volume 17, pages 902 through 911 of the transcript.)

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1 CROSS-EXAMINATION BY MR. MILLS:

2 Q. On page 3, lines 13 through 16, you're
3 referring there, I believe, to the Stipulation & Agreement
4 in ER-2004-0570; is that correct?

5 A. Rates went into effect in March of '05. I
6 believe that's the same case.

7 Q. Yes, that's the case. The one that rates
8 went into effect in March of '05 is the same case as
9 ER-2004-0570.

10 A. Okay.

11 Q. And the question is, is the quotation that
12 you've got in there, the discussion at the beginning of
13 that answer, referring to the Stipulation & Agreement in
14 that case?

15 A. Yes, I believe it is.

16 Q. And what you have in there is a somewhat
17 edited to make the point you're trying to make piece of a
18 very long sentence; is that correct?

19 A. Yes.

20 Q. Do you have a copy of the stipulation in
21 ER-2004-0570 with you?

22 A. I believe that was one of the exhibits from
23 yesterday, if somebody could help me with the number.

24 Q. I'll do better than that. I'll give you a
25 copy.

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1 A. Okay.

2 JUDGE DALE: It was 117 if other people
3 want to find it.

4 THE WITNESS: I have it.

5 MR. SWEARENGEN: And for the record, can I
6 inquire, was that made an exhibit or was simply official
7 notice taken of it?

8 JUDGE DALE: Official notice was taken, but
9 we continued to use the number for convenience of
10 referring to it.

11 MR. SWEARENGEN: Thank you.

12 BY MR. MILLS:

13 Q. And I believe the language in your
14 supplemental direct testimony at page 3 is an excerpt from
15 paragraph 4 on page 12 of the Stipulation & Agreement.

16 A. I think you're right.

17 Q. If I could, can I get you to read that
18 entire sentence, the one that you've copied excerpts of?

19 A. Beginning with in consideration?

20 Q. Yes, please.

21 A. In consideration of the implementation of
22 the IEC in this case and the agreement of the parties to
23 waive their respective rights to judicial review or to
24 otherwise challenge a Commission Order in this case
25 authorizing and approving the subject IEC, for the

1 duration of the IEC approved in this case Empire agrees to
2 forego any right it may have to request the use of or to
3 use any other procedure or remedy available under current
4 Missouri statute or subsequently enacted Missouri statute
5 in the form of a fuel adjustment clause, a natural gas
6 cost recovery mechanism or other energy-related adjustment
7 mechanism to which the company would otherwise be
8 entitled.

9 Q. Okay. Now, in your testimony, you've
10 excerpted from that to focus in on the fuel adjustment
11 clause; is that correct?

12 A. I don't believe so, Mr. Mills. I think
13 what I was trying to focus on was the request the use of
14 or to use during the time in which the IEC is effective.

15 Q. But in any event -- and I'm not trying to
16 quibble with the way you've edited it -- you're talking
17 about the fuel adjustment clause in your testimony?

18 A. No. Again, I'm trying to point to the
19 language to use or the use of a fuel adjustment at which
20 time the IEC is effective.

21 Q. Okay. And my point is, the Stipulation &
22 Agreement itself is much broader than simply a fuel
23 adjustment clause, is it not?

24 MR. SWEARENGEN: Well, your Honor, I think
25 I'm going to object to that. I think that really calls

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1 for a legal conclusion.

2 MR. MILLS: The witness is aware of the
3 language from which he has excerpted pieces, and I am
4 simply trying to walk him through the pieces that he left
5 out. I believe it's relevant to the coming questions that
6 I'm going to ask him. And if we can't agree that there is
7 a broader context than the line and a half that he put in
8 his testimony, then we're going to have some hard slogging
9 ahead of us.

10 MR. SWEARENGEN: I think you need to read
11 the entire agreement, but I think the agreement speaks for
12 itself, and what he's asking this witness to do is reach a
13 legal conclusion, which he cannot do, and I object on that
14 basis.

15 JUDGE DALE: If you could rephrase the
16 question to ask him to read the portion of the segment
17 that he read that you believe broadens it beyond.

18 BY MR. MILLS:

19 Q. Okay. Do you have in your non-legal
20 opinion any idea of what the phrase "any other procedure
21 or remedy" might mean? Does that strike you as broader
22 than simply a fuel adjustment clause?

23 A. Yes.

24 Q. Okay. And when it talks about a fuel
25 adjustment clause, it goes on to mention a natural gas

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1 cost recovery mechanism or other energy-related adjustment
2 mechanism to which the company might otherwise be
3 entitled. Does that strike you as broader than a fuel
4 adjustment clause?

5 A. Certainly in addition to a fuel adjustment
6 clause.

7 Q. So in your testimony you mention a fuel
8 adjustment clause, but the Stipulation & Agreement talks
9 about other things?

10 MR. SWEARENGEN: Well, your Honor, once
11 again I'm going to object on that basis. I think the
12 document speaks for itself. My view is that it's limited
13 to the fuel adjustment mechanisms, be they for electric or
14 gas, that's clearly the intent from our standpoint, and
15 that's a legal question.

16 MR. MILLS: I think the phrases that I read
17 to him are not obscure legal phrases. Any other procedure
18 or remedy I think is fairly easily understandable by a
19 layperson, and I'm trying to get his understanding of what
20 it is that he thought that agreement meant.

21 MR. SWEARENGEN: And it's modified by the
22 following phrase: In the form of a fuel adjustment
23 clause, a natural gas cost recovery mechanism or any other
24 energy-related adjustment mechanism. What he's trying to
25 get the witness to say is that he's prohibited from filing

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1 any kind of a rate case to seek recovery of fuel costs,
2 and that's not what this paragraph says.

3 JUDGE DALE: I think he has already said,
4 having read both of those additional sections and conceded
5 that they seem broader, so possibly we could move on.

6 BY MR. MILLS:

7 Q. Okay. Well, let's continue on with your
8 supplemental direct testimony. We've got -- on the same
9 page, page 3, we've just talked about that first
10 discussion, and then you go on to say, that is the thrust
11 of the agreement from the company's perspective was to
12 prevent the use, and you underline the word use, of both
13 an FAC as well as an IEC at the same time; is that
14 correct?

15 A. That is correct.

16 Q. Now, in this case, the fuel adjustment
17 clause that you sought to implement combined with the base
18 rate recovery would recover all of the fuel and purchased
19 power costs; is that correct?

20 A. The way that we originally filed the case?

21 Q. Yes.

22 A. The way that we originally filed the case
23 with an increase in base rates and requesting the
24 implementation of the fuel adjustment clause, we believe
25 would have allowed us to recover all of our prudently

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1 incurred fuel and purchased power costs.

2 Q. And when you say the way you originally
3 filed the case, is it your understanding that you have
4 made modifications to the way the case has been filed?

5 A. As I say in my testimony, the Commission
6 has interpreted the language of the agreement differently
7 than how we argue, believe that -- what it meant. I
8 believe there was an Order that required us to strike
9 certain sections of our testimony, et cetera.

10 Q. Okay. And so when you use the phrase "the
11 way you originally filed the case," you're not -- you're
12 not suggesting by that that you have made subsequent
13 filings to modify that, or are you?

14 A. We filed a set of tariffs with your initial
15 filing. I don't believe we've filed any additional
16 tariffs to that. Certainly been stipulation with respect
17 to other issues that has been, I believe, agreed upon,
18 accepted by the Commission. So that would -- I mean, the
19 case, as you know, Mr. Mills, they evolve over time and
20 things get -- things get concluded.

21 Q. Now, if both the FAC that you requested and
22 the existing IEC were in effect at the same time, would
23 you over-recover fuel and purchased power costs?

24 A. Can you ask me that question again? I was
25 a bit distracted.

1 Q. If both the FAC that you requested in your
2 original filing in this case and the IEC that is
3 continuing at this time were in effect at the same time,
4 would you over-recover fuel and purchased power costs?

5 A. You know that's really difficult to say at
6 this juncture because it would -- first of all, that's not
7 what we filed to do. Secondly, I can't imagine that the
8 Commission's final Order would implement two surcharges on
9 a consumer's bill. That would be terribly confusing for
10 consumers to have the two surcharges on the bill, which
11 is, you know, to our point that we believe that the intent
12 of the agreement was to not have both operating at the
13 same time, particularly because of the confusion with
14 customers. So that's -- it's hard to -- I can't imagine
15 that we would have been in that kind of situation.

16 Q. Well, then, for the purpose of my question,
17 I'm going to ask you to try really hard to imagine that,
18 and assume for me that that is the case, that you had both
19 the fuel adjustment clause and the IEC at the same time.
20 If you make those assumptions, would you then be
21 over-recovering for fuel and purchased power cost?

22 A. You know, the fuel adjustment mechanism
23 that we utilize in our other jurisdictions and with our
24 FERC wholesale customers is --

25 MR. MILLS: Your Honor, I hate to do this,

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1 to interrupt, but I think that was a yes or no question.
2 You've been very diligent in pursuing yes or no answers to
3 yes or no questions.

4 JUDGE DALE: Yes.

5 MR. MILLS: Could I please have a yes or no
6 on that?

7 THE WITNESS: I'll have to have the
8 question again, Mr. Mills.

9 BY MR. MILLS:

10 Q. My question was, assume for me that that
11 eventuality did transpire and you did have both the fuel
12 adjustment clause and the IEC in effect at the same time.
13 Would you not be over-recovering fuel and purchased power
14 expense?

15 A. I do not believe so.

16 Q. Okay. Thank you. But you testified, I
17 believe, just before that answer that it was not your
18 intent to have them both in effect at the same time?

19 A. That is correct.

20 Q. So is it your testimony now that you would
21 need both in order to adequately recover fuel and
22 purchased power expense?

23 A. Ask me that question again, please.

24 Q. Well, you just said that you don't believe
25 that having both in effect at the same time would lead you

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1 to over-recover fuel and purchased power expense. So are
2 you saying that you do need both in order to adequately
3 recover fuel and purchased power expense?

4 A. I was prohibited from answering your
5 question in full about how I thought it would operate if
6 both were in place, and until I can answer that question
7 in full, I can't answer the question that you've just
8 asked me.

9 Q. So you have no -- no way of knowing whether
10 it's necessary to have both an IEC and a fuel adjustment
11 clause in order to be able to adequately recover fuel and
12 purchased power expense?

13 MR. SWEARENGEN: That wasn't his testimony.

14 MR. MILLS: Well, then he can say that
15 wasn't his testimony.

16 JUDGE DALE: Ask the question again.

17 Please answer it with a yes, no, I don't know.

18 BY MR. MILLS:

19 Q. The question was, so you have no way of
20 knowing whether you do need both a fuel adjustment clause
21 and an IEC in order to adequately recover fuel and
22 purchased power expense?

23 A. I don't know.

24 Q. As a general principle of ratemaking, is
25 Empire prohibited from over-recovering its -- or having

1 rates that are designed to over-recover certain expenses?

2 MR. SWEARENGEN: I'm going to make the
3 objection on the basis that that calls for a legal
4 conclusion. He may have a view of that, but he's not a
5 lawyer.

6 MR. MILLS: Well, a lot of people get
7 involved in the ratemaking process, and many of them are
8 not lawyers, and many of them would say it would be better
9 if most of them were not lawyers. I don't think that it
10 calls for a legal conclusion. I think the people that do
11 ratemaking are rate analysts, they're accountants, they're
12 auditors, they're engineers, they're economists. All of
13 them have opinions on how you should set rates, and I
14 don't believe this calls for a legal conclusion. I think
15 this witness' opinion would adequately answer my question.
16 If he doesn't know, he can certainly say so.

17 JUDGE DALE: He can answer as a layperson,
18 but all those people who have been offering legal opinions
19 for all these many years in these kind of rate cases I
20 hope will certainly stop doing that. So he may answer as
21 a layperson, but we understand that he is no expert.

22 THE WITNESS: What was the question?

23 BY MR. MILLS:

24 Q. The question was something along the lines
25 of, as a general principle of ratemaking, is Empire

1 prevented from double recovery of expenses?

2 A. Double? No.

3 Q. Okay. Now, let's talk -- let's go back to
4 your supplemental direct testimony and talk about on
5 page 4, lines 3 to 5 specifically, you indicate that
6 recovering fuel costs through base rates is a method
7 Empire proposed in its filing, and I believe there --

8 A. Where are you reading?

9 Q. I'm sorry. I'm on page 4, lines -- the
10 sentence and the answer that runs from line 3 to line 5.

11 A. Did you say supplemental direct?

12 Q. Supplemental direct testimony, page 4,
13 lines 3 through 5.

14 A. Okay.

15 Q. Have you had the opportunity to read that
16 sentence?

17 A. Yes.

18 Q. And is it correct for me to say that when
19 you talk about, the very end of the sentence, the phrase
20 proposed in its filing, you mean in your tariffs and
21 testimony that initiated this particular rate case; is
22 that correct?

23 A. Yes.

24 Q. Okay. In the tariff sheets that were filed
25 to implement the rate case, were there included tariff

1 sheets that would have recovered in base rates fuel and
2 purchased power costs?

3 A. Yes.

4 Q. And which tariff sheets were those?

5 A. They would be all tariffs that contained
6 any kind of charge to the customer based on volume.

7 Q. So those tariff sheets independently of the
8 IEC tariff sheets would have recovered fuel and purchased
9 power costs?

10 MR. SWEARENGEN: Your Honor, I'm going to
11 object to that because that mischaracterizes the filing.
12 The filing sought to eliminate the IEC, not to continue
13 it.

14 MR. MILLS: I'll rephrase the question.

15 JUDGE DALE: Thank you.

16 BY MR. MILLS:

17 Q. Did those tariff sheets without the IEC
18 recover adequately your fuel and purchased power costs?

19 A. They recovered our historical fuel and
20 purchased power costs adjusted for issues that are the
21 subject of this proceeding.

22 JUDGE DALE: I have to follow up with that
23 and ask if that was a yes or a no?

24 THE WITNESS: Well, I have to have the
25 question again, Judge. I'm sorry.

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1 JUDGE DALE: Could the court reporter read
2 it back, please.

3 THE REPORTER: "Question: Did those tariff
4 sheets without the IEC recover adequately your fuel and
5 purchased power costs?"

6 THE WITNESS: Yes.

7 JUDGE DALE: Thank you.

8 BY MR. MILLS:

9 Q. Now, let's turn back, if you will, to
10 Exhibit 117, which is the Stipulation & Agreement from the
11 2005 rate case, ER-2004-0570, and in particular I'd like
12 you to look at Exhibit A to that Stipulation & Agreement.
13 I'm sorry. Appendix A.

14 MR. SWEARENGEN: I'm not sure that was on
15 the copy that was furnished yesterday by counsel.

16 MR. WOODSMALL: I don't believe it is
17 either.

18 MR. MILLS: I've got a copy of that. May I
19 approach?

20 JUDGE DALE: Absolutely.

21 BY MR. MILLS:

22 Q. Now I'm going to focus specifically on
23 page -- the document I gave you had Appendix A, which
24 consists of two pages and Appendix B which consists of
25 one. I'm going to ask you questions about Appendix A at

1 page 2 of 2. Are you familiar with this document?

2 A. I've not -- I've not studied it. I recall
3 it from the last case.

4 Q. Okay. Now, the middle column on
5 Appendix A talks about the 135 million total company fuel
6 and purchased power; is that correct? It's the very first
7 number in the middle column on that page.

8 MR. SWEARENGEN: And your Honor, for the
9 record, I'm going to object to any questions about it. I
10 think the document speaks for itself. I think the
11 Commission has taken administrative notice of the
12 stipulation, and it speaks for itself.

13 JUDGE DALE: Is this foundation for
14 something that you're leading up to?

15 MR. MILLS: Yes, absolutely. And if
16 Mr. Gipson is -- if Mr. Gipson is not familiar with this
17 and not able, this is the cross-examination we talked
18 about yesterday that I can either do with Mr. Gipson or
19 Mr. Tarter, and I'm quite sure that Mr. Tarter is familiar
20 with this, but I think Mr. Gipson is probably familiar
21 enough with my -- the level of detail that I'm going to
22 get into that, I think he'll be able to answer.

23 JUDGE DALE: Then you may proceed with the
24 line of questioning.

25 BY MR. MILLS:

1 Q. Okay. Are you with me so far? I was
2 asking you if the \$135 million number in the -- the very
3 first number in the middle column on that page, if that
4 represents the fuel number from the IEC in the last case
5 on a total company basis?

6 A. I believe what it would represent is the
7 top of the collar for the IEC.

8 Q. And then going further down in that column,
9 there's a section that does some calculations that apply a
10 Missouri retail allocation factor, actually several
11 factors, to come up with the line roughly in the middle
12 there of total Missouri fuel and purchased power of
13 approximately 111 million?

14 A. I see that line.

15 Q. Okay. Is it your understanding that that
16 would represent on the basis of the 135 million top of the
17 collar, as you characterized it, the Missouri share of
18 that number, Missouri retail share?

19 A. Yes.

20 Q. Now, I believe you've been in the hearing
21 room for most if not all of the hearing the last couple of
22 weeks, week and a half; is that correct?

23 A. That is correct.

24 Q. Were you here when Empire's witness
25 Mr. Tarter testified?

1 A. For the bulk of it, yes.

2 MR. MILLS: May I approach again?

3 JUDGE DALE: Absolutely.

4 BY MR. MILLS:

5 Q. Now, Mr. Gipson, I've just handed you a
6 copy of Empire witness Tarter's rebuttal testimony, and as
7 one of the attachments to that he has a calculation
8 that -- and correct me if I'm wrong, but I believe that
9 the bottom line of that fuel and purchased power
10 production run is designed to show on a total company
11 basis Empire's fuel and purchased power revenue
12 requirement at the time that run was made; is that
13 correct?

14 A. I believe that's correct.

15 Q. And that's the 166 -- and as I just
16 mentioned to you, most of that page is highly
17 confidential, but the ultimate result of that model run is
18 not, and that result is \$166 million; is that correct?

19 A. That's what's on the -- that's what's on
20 the page.

21 Q. And when I talked to Mr. Tarter about that
22 yesterday or the day before, I don't recall which, we -- I
23 asked him to apply a Missouri jurisdictional allocation
24 factor, and the one I suggested was .8249, he did that and
25 came up with a figure of about 137 million. Do you recall

1 that?

2 A. Yes.

3 Q. So if I were to compare that \$137 million
4 with the \$111 million that we just went through from
5 attachment Appendix A to the Stipulation & Agreement in
6 the last rate case, I'm not going to ask you to do the
7 math up there, but does that strike you that it's roughly
8 25 or \$26 million?

9 MR. SWEARENGEN: Your Honor, I'm going to
10 object at this point. I've been pretty patient with
11 Mr. Mills asking these questions about fuel costs and fuel
12 amounts. This may or may not be the best witness for
13 that, but that's not the issue that's before the
14 Commission now. The amount of fuel recovery has been
15 litigated, as I understand it, and all we're here today to
16 discuss and yesterday afternoon is the method of
17 recovering and not the amount, so I would object on that
18 basis. He should have asked these questions of Mr. Tarter
19 yesterday.

20 MR. MILLS: Well, this -- this is the last
21 quantification on numbers, and from this number that's the
22 difference between the amount in the last case and the
23 amount that's that's requested in this case, my answers
24 are going to lead to the method of recovery. I think you
25 have to know what you're trying to recovering before it

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1 makes much sense to talk about the method of recovery. So
2 these questions do lead directly to questions about the
3 method of recovery.

4 MR. SWEARENGEN: And the amounts that we're
5 seeking to recover are the amounts that we've already
6 litigated in this proceeding, not something that we may or
7 may not have recovered under prior rates.

8 JUDGE DALE: Does the amount that you're
9 asking about, is that relevant to recovery in this case if
10 rates are set on a forward-looking basis?

11 MR. MILLS: Yes, it has a lot to do with
12 whether or not rates are -- whether or not fuel and
13 purchased power costs are recovered through the IEC or not
14 through the IEC and how they're recovered in this case.
15 Yes. I'm not simply going over history because I have
16 nothing else to do this morning.

17 MR. SWEARENGEN: But that has no relevance
18 because we're not seeking an interim energy charge in this
19 case. We're seeking to eliminate it.

20 MR. MILLS: I understand that the company
21 is seeking to eliminate it, but that is and has been, as
22 the Commission is well aware, a very open issue in this
23 case. So far as we sit here today, we don't know whether
24 or not the IEC will be eliminated or will continue in this
25 case.

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1 JUDGE DALE: Last quantification question
2 and then let's begin talking about continuation or not.

3 BY MR. MILLS:

4 Q. Okay. So the question I had, and I will
5 tell you the numbers I've calculated, it's 25,699,000, and
6 that's the difference between the approximately
7 137 million and 111 million.

8 MR. SWEARENGEN: I'm going to object if
9 he's asking him to accept that subject to check.

10 BY MR. MILLS:

11 Q. Okay. Do you have a calculator?

12 A. I do not.

13 Q. Okay. I don't want to take the time to do
14 this, but could you please calculate for me the difference
15 between -- you'll probably have to write this down.

16 A. You're going to make me do math, aren't
17 you?

18 Q. No, sir, I am not. Your counsel is. I was
19 perfectly happy to put these in and the record would speak
20 for itself. But 136,943,299 -- let's just do the
21 approximations. 136 minus 111.

22 A. 25.

23 Q. Okay. That's good enough for me, and the
24 record will allow anyone who wants to to actually
25 calculate those numbers.

1 Now, we were talking earlier about the
2 tariff sheets that you filed to implement this case, and
3 I -- and let me ask you this. I think we sort of touched
4 on this, but I'm not sure that I ever got a yes or no
5 answer. Has Empire -- and I'm not being critical. I
6 don't think I asked you a yes or no question. Has Empire
7 filed, subsequent to its initial rate case filing, other
8 tariff sheets in this case?

9 MR. SWEARENGEN: Objection, asked and
10 answered.

11 MR. MILLS: It may have been, your Honor,
12 but I beg the Court's indulgence because I don't remember
13 if it was asked or answered. It's a yes or no question.
14 If he could just allow me to ask this one question so I
15 could see what the answer was because I don't recall, then
16 I think we can move forward.

17 JUDGE DALE: Please answer the question.
18 It was have you filed subsequent tariff sheets in this
19 case after you filed your original rate case?

20 THE WITNESS: No.

21 BY MR. MILLS:

22 Q. And the original tariff sheets that you
23 filed in this case were designed to recover approximately
24 an additional \$19 million in fuel and purchased power
25 costs; is that correct?

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1 A. I don't know.

2 MR. MILLS: That's all I have. Thank you.

3 JUDGE DALE: Thank you. Staff?

4 MR. FREY: No questions, your Honor.

5 JUDGE DALE: Are there questions from the
6 Bench?

7 COMMISSIONER APPLING: Let me try
8 Mr. Gipson with a couple questions.

9 QUESTIONS BY COMMISSIONER APPLING:

10 Q. Good morning, sir. How you doing?

11 A. I'm doing well. Thank you.

12 Q. I had a couple questions for Mr. Tarter
13 yesterday, but I think I missed my opportunity. So
14 Empire's asked this Commission to terminate the IEC,
15 correct?

16 A. Yes, we have.

17 Q. I am sure that I read it, and I apologize
18 for asking you to tell me again, why you're asking that to
19 be done.

20 A. Commissioner, we're at a point in time with
21 this particular instrument that we're not recovering our
22 fuel and purchased power costs. I'll tell you, we not
23 only -- I'll not say we. I'll say I labored much over
24 filing this case. I didn't -- I think I told you last
25 week, I didn't intend to be here right now. We intended

1 to be here with our next case that coincided with the
2 commercial operation date of our combustion turbine that's
3 under construction.

4 But as events changed over time, it became
5 clear to us that we weren't going -- that we were not
6 recovering our costs and that we were not going to be able
7 to recover our costs. We had a number of analyses ran
8 before we filed the case to see if at some point in time
9 over that three years that there would be an opportunity
10 for us to get back into the collar or very close to the
11 top of the collar. I still have those analysis run from
12 time to time. Today we set, I think it's been disclosed
13 in our SEC filings, some 18, \$19 million over the top.
14 I'll tell you, it's higher than that now.

15 I asked our folks to take a look at what
16 does it take to get us back there, what has to happen to
17 commodity fuel prices in order for us to get back there.
18 I had that analysis run just last week, and it's a high
19 hurdle. We've got to find somebody that will, if you
20 will, sell us 4 million units of gas but they pay us \$7 a
21 unit to take it. That's not something that we're going to
22 be able to get done.

23 I've asked them also to take a look at, you
24 know, we're -- I said \$19 million, 18, \$19 million over
25 the top. So how about just staying where we're at, no

1 further degradation. In other words, that money's been
2 flushed. Let's just look forward. I've got to find
3 somebody that will sell us that gas and pay us a dollar
4 per unit to take it. That's just not going to happen.

5 We're at a point where we cannot work our
6 way out of this thing. I think I just -- through some of
7 the cross-examination with Mr. Woodsmall yesterday, we
8 reviewed, although they were highly confidential because
9 it was a presentation at our board of directors, but
10 nonetheless, a number of things that we've undertaken to
11 try to manage our fuel situation such that we could avoid
12 coming back here, but it's just become an untenable
13 situation.

14 Q. Since you signed the stipulation, I think
15 it was back in February 2005, I believe, when you signed
16 the stip, has Empire had an opportunity fix the prices of
17 purchased power at a level implied by the IEC? Have you
18 had that opportunity?

19 A. To fix purchased power?

20 Q. Uh-huh.

21 A. There's not a good market for purchased
22 power, in other words, not a liquid market. It's more of
23 a day-to-day kind of market for purchased power. So we've
24 been unable to do that.

25 Q. Had you had that opportunity, do you think

1 it would have been prudent for you to have done that?

2 A. You know, I believe those decisions are
3 only prudent with perfect 20/20 hindsight. I've often
4 asked myself, why didn't we go ahead and hedge our natural
5 gas position more fully beginning in March of 2005.
6 That's not -- our program is one that seeks to mitigate
7 volatility, not one to match expenses with rates, if you
8 will. It's one to try to maintain the lowest cost
9 possible at the same time we're mitigating the volatility,
10 and we've been pretty successful with that.

11 We've had that program in place for about
12 four -- or about five years, and we've averaged, you know,
13 compared to the cash gas market, we have -- we've saved
14 some 10 to \$15 million per year because of our hedging
15 program. So I think it's a successful program. And
16 there's been previous testimony in previous cases from
17 other witnesses besides company witnesses that have told
18 the Commission that it's a good program.

19 There's another element that factors into
20 that, and that is the risk of the counter-parties to which
21 we take our positions, with which we take our positions.
22 Those are -- we don't have as many counter-parties today
23 to buy gas from as we used to. Companies like Enron and
24 Aquila and Dynegy don't provide trading opportunities
25 anymore.

1 And there was a point in time during the
2 third, maybe even early fourth quarter when we had -- we
3 had roughly \$55 million of exposure to our credit parties.
4 What that means is if those credit parties aren't able to
5 fulfill their obligation, then we have to buy gas on the
6 market. Cost us an extra \$55 million. That is -- that's
7 again another untenable situation.

8 All of those factors were what were in our
9 minds at the time and the reasons that we chose to stay
10 the course with what we were doing with respect to our
11 hedging program.

12 COMMISSIONER APPLING: Thank you very much,
13 sir.

14 JUDGE DALE: Is there recross based on
15 questions from the Bench?

16 MR. WOODSMALL: Yes, your Honor.

17 RECROSS-EXAMINATION BY MR. WOODSMALL:

18 Q. Very briefly. You mentioned the V84. Can
19 you tell me if Empire anticipates having at some point to
20 file a rate case in order to put the V84 into rate base?

21 A. We will.

22 Q. And when do you believe that that rate case
23 will be initiated?

24 A. I believe that the regulatory plan now
25 calls for a case sometime in 2009, and we will probably,

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1 depending on the outcome of this case, quite frankly, will
2 have to weigh whether or not we try a case specific to the
3 V84 or wait until the 2009 case.

4 Q. You haven't -- you haven't made up your
5 mind yet whether to file a case between the end of this
6 case and the 2009 case?

7 A. Not at this point in time.

8 Q. When your documents discuss -- your
9 documents that you provide to analysts discuss a 2008 fuel
10 adjustment clause, how do you go about intending to
11 implement that?

12 A. Well, our documents don't discuss a fuel
13 adjustment in 2008, our most recent documents don't.

14 Q. The documents that you provided to analysts
15 that have been marked as exhibits and accepted into this
16 case that indicate a 2008 fuel adjustment clause?

17 A. Those were April 2005 documents.

18 Q. Latest documents don't indicate a 2008 fuel
19 adjustment clause?

20 A. Our latest document that I'm aware of --

21 THE WITNESS: We probably need to go
22 in-camera, Judge.

23 MR. WOODSMALL: Never mind. I can move on.

24 BY MR. WOODSMALL:

25 Q. You were talking about the amount of

1 under-recovery of fuel and purchased power expense with
2 Commissioner Appling. You gave some numbers. I don't
3 recall what they were. Has the under-recovery of fuel and
4 purchased power expense in any way threatened Empire's
5 ability to provide safe and adequate service?

6 A. No, it has not.

7 Q. And would you agree that the existence of
8 the amortization plan would help ensure that Empire is
9 able to continue to provide safe and adequate service?

10 MR. SWEARENGEN: Objection, your Honor.
11 That's not relevant to the issue of method of recovery.

12 JUDGE DALE: Moreover, it seems to be
13 beyond the scope of what Commissioner Appling asked.

14 MR. WOODSMALL: This witness was talking
15 about under-recovery, how much they'd under-recovered fuel
16 and purchased power expense, and I wanted to -- as we laid
17 out in our Prehearing Brief as the issues to be presented
18 today and as Public Counsel agreed, one of the issues is
19 what should the standard be, and that standard as we set
20 out in our Prehearing Brief and Public Counsel agreed to
21 was the Commission should utilize an emergency standard
22 which focuses on safe and adequate service.

23 Now, I understand Empire hasn't agreed to
24 that denomination of issues, but that is the issue that we
25 set forth and that is being tried here today.

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1 JUDGE DALE: Lovely long speech. Didn't
2 answer my question. How did it relate to what
3 Commissioner Appling asked?

4 MR. WOODSMALL: Commissioner Appling asked
5 him about what put them basically in this situation, why
6 are they here, and he talked about the amount they're
7 under-recovering fuel and purchased power expense. And I
8 just want to clarify that that under-recovery is in no way
9 threatening their safe and adequate service.

10 JUDGE DALE: And that has been asked and
11 answered.

12 MR. WOODSMALL: No. He said to date it
13 hasn't threatened safe and adequate service. I want to
14 ask whether it will going forward.

15 JUDGE DALE: Well, ask that in that simple
16 fashion.

17 BY MR. WOODSMALL:

18 Q. Would the existence of the amortization
19 plan on a going-forward basis help to ensure that Empire
20 will be able to provide safe and adequate service?

21 A. No.

22 Q. And why is that?

23 A. The amortization plan is, as we've -- as
24 I've testified, not a substitute for prudently incurred
25 costs, whether they be cost of capital, fuel and purchased

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1 power costs, the cost of paper clips. If we're not
2 allowed to recover our costs, we're not allowed the
3 appropriate return on our investment and the appropriate
4 returns to our shareholders, the continuation of our
5 capital spending plan to build infrastructure to serve our
6 customers is going to be more expensive and may very well
7 be very difficult to acquire.

8 Q. Okay. Just to cut to the chase then, the
9 amortization plan will allow you sufficient cash flow to
10 meet the credit metrics for your current credit rating?

11 A. Cash flow is not earnings.

12 MR. WOODSMALL: No further questions, your
13 Honor.

14 JUDGE DALE: Public Counsel?

15 MR. MILLS: I have no questions based on
16 questions from the Bench, thank you.

17 JUDGE DALE: Staff?

18 MR. FREY: No questions, thank you.

19 JUDGE DALE: Redirect?

20 MR. SWEARENGEN: Yes, your Honor. I have a
21 few questions for Mr. Gipson on redirect. Maybe just as a
22 housekeeping matter, I've got -- I know that Mr. Woodsmall
23 offered or was going to offer Exhibit 117 yesterday, and I
24 think he indicated that there were some notes on his copy
25 and so he just asked the Commission to take administrative

1 notice of it.

2 If that's all the Commission wants to do,
3 that's fine, but Mr. Mills has indicated quite correctly
4 that there are some attachments to that. I'm wondering if
5 for the record we might simply be better off if we agree
6 that that can be filed late as Exhibit 117 so we have it
7 in its entirety, but that's up to the Commission. I do
8 have some questions about it.

9 MR. MILLS: Your Honor, if I may, I have
10 here today a clean copy and a copy of the two appendices
11 that I discussed. If you want me to give that to the
12 court reporter, we can use that as Exhibit 117.

13 MR. SWEARENGEN: That's kind of what I was
14 getting at.

15 JUDGE DALE: That will be fine, and still
16 only administrative notice because it is in EFIS.

17 MR. SWEARENGEN: Okay. That's fine.

18 REDIRECT EXAMINATION BY MR. SWEARENGEN:

19 Q. Mr. Gipson, yesterday -- and we're going to
20 talk a little bit about the Nonunanimous Stipulation &
21 Agreement regarding fuel and purchased power expense that
22 was entered into in the last rate case ER-2004-0570. In
23 response to a question yesterday from Mr. Woodsmall, you
24 testified that in your view, I believe the word you used
25 as in your view a material provision of that agreement was

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1 the company's ability to terminate the IEC tariff before
2 the end of three years. Do you recall that?

3 A. I do.

4 Q. And do you have a copy of Exhibit 117 in
5 front of you?

6 A. I do.

7 Q. If you could turn to page 4, please, and
8 there paragraph No. 1, small c is set out; is that
9 correct? Do you see that?

10 A. I'm going back. Yes, it's 1c. Yes.

11 Q. Could you read into the record, please, the
12 last --

13 MR. WOODSMALL: Your Honor, I believe if
14 counsel's going to ask him to show us where the provision
15 is for early termination, he can find that. I would
16 object if counsel's point is to direct him to the exact
17 provision. That would be a leading question. If he wants
18 to find it himself, I believe he can do that.

19 MR. SWEARENGEN: Well, my question was
20 going to be to ask him to read that last sentence into the
21 record, and I don't think that's leading.

22 MR. WOODSMALL: I'll withdraw my objection.

23 JUDGE DALE: Thank you. Proceed.

24 BY MR. SWEARENGEN:

25 Q. Would you read that last sentence of

1 paragraph 1c into the record, please, Mr. Gipson.

2 A. The IEC tariff or rate schedule will expire
3 no later than 12:01 a.m. on the date that is three years
4 after the original effective date of the revised tariff
5 sheets authorized by the Commission in this case, Case
6 No. ER-2004-0570, unless earlier terminated by order of
7 the Commission.

8 Q. Now, is that sentence -- does that sentence
9 a part of the -- form a part of the basis of your belief
10 that the agreement provides you the ability to terminate
11 the IEC in less than three years?

12 A. It gives us the authority in my view or the
13 latitude in my view to request the termination, to seek to
14 terminate. I believe the Commission has the authority to
15 terminate.

16 Q. And with respect to the agreement in its
17 entirety, is there anything else about it that forms the
18 basis of your belief that the IEC can be terminated in
19 less than three years? Looking at the agreement as a
20 whole, is there anything else in it that forms the basis
21 of your belief that the interim energy charge can be
22 terminated in less than three years?

23 A. It would be -- I suppose it would be the
24 absence of language prohibiting that.

25 Q. Are you familiar in other proceedings with

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1 language that would prohibit the filing of a rate case?

2 A. Quite familiar.

3 Q. And how is that language generally
4 characterized, do you know?

5 A. As a moratorium.

6 Q. And what is your understanding of a
7 moratorium generally?

8 A. That the company, unless, I mean, generally
9 set out certain qualifies to this, like acts of God and
10 riot and things of that nature, but the company is
11 prohibited from seeking a rate increase, and other parties
12 are prohibited from filing complaint cases.

13 Q. Now, you were here, I think, in the hearing
14 room last week, and at that point during the proceeding
15 the Commission took administrative notice of a Report and
16 Order and a Stipulation involving Empire's acquisition of
17 Aquila's gas properties, Missouri gas properties. Do you
18 recall that?

19 A. I think I was watching that on the Internet
20 at the time, Mr. Swarengen.

21 Q. Do you have a copy of that Order and
22 Stipulation with you today?

23 A. I do.

24 Q. Do you have it in front you?

25 A. I do.

1 Q. If you could turn to page 16 of the
2 Stipulation, please.

3 MR. MILLS: Your Honor, there isn't a
4 question pending, but I don't believe that any of the
5 parties asked questions about the gas acquisition with
6 relation to this topic, so I believe this is outside the
7 scope of cross and thus is improper redirect.

8 MR. SWEARENGEN: I haven't asked my
9 question yet.

10 MR. MILLS: I was assuming that it was
11 going to flow from the document that he was referring the
12 witness to, and before we got a question out there and
13 answered before I had a chance to object, I wanted to
14 lodge my objection. I will be perfectly happy to state it
15 again, once there is a question pending.

16 JUDGE DALE: Mr. Gipson, please pause to
17 allow Mr. Mills to state an objection if he has one before
18 you answer the question.

19 THE WITNESS: Yes, Judge.

20 BY MR. SWEARENGEN:

21 Q. Now, Mr. Gipson, do you have that document
22 in front of you? I'm talking about the Order approving
23 your acquisition of the gas properties and the
24 Stipulation.

25 A. Yes, I do.

1 Q. Could you turn to page 16. Do you have
2 that in front of you?

3 A. Yes, I do.

4 Q. And do you see the paragraph Roman numeral
5 IX titled rate moratorium?

6 MR. MILLS: Here's where I'm going to
7 object because I think this is outside the scope of
8 cross-examination.

9 MR. SWEARENGEN: It's not outside the scope
10 of cross-examination. The witness was asked by
11 Mr. Woodsmall on what basis he believed that the agreement
12 allowed the company to seek the elimination of the
13 existing interim energy charge, and he has testified as to
14 specific provisions that do exist in that agreement, plus
15 provisions that don't exist in that agreement, and this is
16 further amplification of that point.

17 MR. WOODSMALL: I believe, your Honor, this
18 witness has answered the question of where in that
19 Stipulation he believes the provision for early
20 termination is contained. That was the extent of the
21 question. I agree with Mr. Mills, this is clearly outside
22 the scope of my cross.

23 MR. SWEARENGEN: That wasn't the extent of
24 the question.

25 JUDGE DALE: In light of the fact that

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1 yesterday I took great exception to Mr. Woodsmall trying
2 to prove a negative, I will so limit you. So I will
3 sustain the objection as being outside the scope of the
4 cross inasmuch as it discusses a rate moratorium.

5 MR. SWEARENGEN: And I do understand that
6 the Commission hasn't taken administrative notice of this
7 decision plus the moratorium language, right?

8 JUDGE DALE: Absolutely.

9 BY MR. SWEARENGEN:

10 Q. Mr. Gipson, I think you've testified
11 previously without objection that the agreement involving
12 the recovery of fuel and purchased power in the last case
13 does not contain a moratorium; is that right?

14 A. Yes.

15 Q. Yesterday Mr. Woodsmall asked you some
16 questions about, I believe, Empire's 2001 electric rate
17 case. Do you recall that? Do you recall those questions?

18 A. I think so.

19 Q. Specifically he had a discussion with you
20 about the interim energy charge that was authorized in
21 that proceeding. Do you recall?

22 A. A number of questions about that.

23 Q. And let me ask you, with respect to that
24 2001 rate case, after the interim energy charge was
25 authorized and went into effect, what happened to Empire's

1 fuel costs?

2 A. The cost for fuel declined.

3 Q. And what was the primary cause of that, do
4 you recall?

5 A. Softening in the natural gas market,
6 significant softening.

7 Q. And I think Mr. Woodsmall asked you and you
8 indicated, and perhaps also in response to some questions
9 today, some orders were entered in connection with that
10 case. Am I correct in understanding that as a result of
11 what happened with fuel prices, that the IEC that was
12 authorized in that case was first modified and then
13 ultimately terminated?

14 A. The modification was to reduce it, and then
15 it was terminated, that's correct.

16 Q. And initially I think it was to have a
17 five-year term; is that true?

18 A. No. I believe it was to have a two-year
19 term, and we have -- we had proposed a five-year term. I
20 believe we had proposed a five-year term.

21 Q. In any event, was it terminated before its
22 term?

23 A. My memory is it was terminated at about 14
24 months.

25 Q. Thank you. Now, do you have in front of

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1 you Exhibit 118, which was offered into evidence
2 yesterday, a cover letter dated March 17, 2005 with an
3 attached tariff sheet?

4 A. Yes, I do.

5 Q. And are you familiar with that document?

6 A. I am today.

7 Q. Is the third page of that document, the
8 tariff sheet entitled interim energy charge rider, rider
9 IEC, a tariff that is currently in effect, to the best of
10 your knowledge?

11 A. Yes.

12 Q. And would I be correct if I said that this
13 was the IEC or the interim energy surcharge tariff?

14 A. Yes.

15 Q. And if you would look under the heading
16 conditions, which is in the middle of the tariff sheet, do
17 you see that?

18 A. I do.

19 Q. And what does it say the effective term is
20 for this tariff sheet?

21 A. First sentence says, this interim rider
22 shall be in effect from March 27, 2005 through March 26,
23 2008.

24 Q. And now do you have Exhibit 114 in front of
25 you? It's a similar document, a letter, a transmittal

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1 letter dated April 30, 2004 with a tariff sheet attached.

2 A. I have that.

3 Q. And I think you were asked some questions
4 about this yesterday, and I'm not sure whether the exhibit
5 was ultimately offered and received into evidence, but
6 have you had the opportunity to look at this document?

7 A. I did yesterday, yes.

8 Q. And are you familiar with the third page,
9 the tariff sheet entitled interim energy charge rider,
10 rider IEC?

11 A. I am today.

12 Q. And if you could look at the conditions
13 paragraph and read into the record the first sentence.

14 A. This interim rider shall be in effect from
15 April 27, 2004 through April 27, 2009.

16 Q. So can I conclude from that that this
17 tariff, at least as it went into effect initially, was to
18 be in effect for five years?

19 MR. MILLS: Your Honor, I guess at this
20 point I would object because the tariff being referenced
21 in Exhibit 114 never went into effect. It was suspended
22 by the Commission. It was an initiated tariff. So it
23 never went into effect.

24 JUDGE DALE: Could the reporter read back
25 the question?

1 THE REPORTER: "Question: So can I
2 conclude from that that this tariff, at least as it went
3 into effect initially, was to be in effect for five
4 years?"

5 MR. SWEARENGEN: And based on that, I would
6 withdraw that question and restate it.

7 JUDGE DALE: Thank you.

8 BY MR. SWEARENGEN:

9 Q. Was it designed to be in effect for five
10 years as initially filed?

11 A. I'm confused. This is not -- Exhibit 118
12 is the IEC that was implemented as a result of our last
13 case --

14 Q. That's right.

15 A. -- 0570. Exhibit 114 is not the interim
16 energy charge rider that was implemented in our 2001 case.

17 Q. Would I be correct if I said it is the
18 tariff that you filed to initiate that proceeding? Is
19 that your understanding?

20 MR. MILLS: Your Honor, I'd object to his
21 use of "that proceeding".

22 MR. SWEARENGEN: The 2001 case.

23 JUDGE DALE: Isn't Exhibit 114 an April 30,
24 2004 tariff filing?

25 MR. SWEARENGEN: Excuse me. You're right

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1 about that. Let me just withdraw the question and
2 proceed.

3 JUDGE DALE: Thank you.

4 MR. SWEARENGEN: That will speed things
5 along. Thank you.

6 BY MR. SWEARENGEN:

7 Q. Let me ask you this, Mr. Gipson: When you
8 entered into the agreement that -- for fuel cost recovery
9 that was the subject of the last rate case and is an issue
10 in this proceeding as to whether or not you are locked
11 into that method of recovery and the amount that it
12 produces, given your past experience with the interim
13 energy charge in the prior rate proceeding, was it your --
14 was it your belief in the last case that by entering into
15 this agreement, that you were, in fact, locked in to both
16 a method and an amount of recovery?

17 MR. MILLS: I object. That's one of the
18 most leading questions I've ever heard. I think it's a
19 leading question, and it virtually compels a particular
20 answer, and I think it's way too leading for redirect
21 examination. I object on that basis.

22 MR. SWEARENGEN: Let me ask this question
23 then. I'll withdraw that one.

24 BY MR. SWEARENGEN:

25 Q. Was it your belief that sometime during the

1 three-year period that the current interim energy charge
2 was to be in effect and right now is in effect, that you
3 retain the right to seek to terminate it?

4 MR. WOODSMALL: Your Honor, asked and
5 answered, repeatedly.

6 MR. MILLS: And it's also slightly less
7 leading but still quite leading. I nonleading question
8 would be what was your belief about it, not was your
9 belief XYZ and on and on and on. So I still think it's
10 leading. I object on that basis.

11 BY MR. SWEARENGEN:

12 Q. What was your belief about that agreement,
13 Mr. Gipson?

14 A. My belief about the agreement that is the
15 subject of this proceeding and is in effect with the
16 tariff in effect today based on our prior experience with
17 an interim energy charge and the fact that it was earlier
18 terminated by this Commission, that, in fact, we could
19 seek to terminate the interim energy charge tariff prior
20 to 2008.

21 Q. Having said that, are you saying that you
22 entered into the current IEC agreement with the intention
23 of not trying to make it work?

24 A. No, Mr. Swearngen. We had every intention
25 of making it work, and I think some of the exercise I went

1 through yesterday with Mr. Woodsmall with, you know, the
2 presentation to our board of directors, our discussion
3 with analysts as to some of the measures that we were
4 taking to indeed make it work are evidence of our intent.

5 Q. Now, when you say presentations to
6 analysts, were those presentations the subject of those
7 exhibits, those slide exhibits that Mr. Woodsmall
8 yesterday introduced?

9 A. No. Specifically what I was talking about
10 was the earnings conference call transcript where we
11 discussed what we were doing to manage the interim energy
12 charge.

13 Q. Has Empire had to curtail any services or
14 reduce any services that you're providing currently in an
15 effort to make the IEC work?

16 A. We have not.

17 Q. Have you reduced or curtailed any programs
18 of any type that you currently have in an effort to try to
19 make the IEC work?

20 A. No, I don't believe we have. We still are
21 moving forward with our -- I believe it was a subject of
22 testimony on last Friday with respect to the programs for
23 low income weatherization, things of that nature, I think
24 what's called the collaborative.

25 Q. Now, yesterday Mr. Woodsmall introduced

1 some evidence from other proceedings suggesting that
2 either you or Mr. Brad Beecher have testified that the
3 interim energy charge is a proven regulatory tool. Do you
4 recall those questions and those exhibits he offered?

5 A. Yes, I do.

6 Q. And do you recall telling this Commission
7 previously that the interim energy charge is a proven
8 regulatory tool?

9 A. I have testified to that previously, yes.

10 Q. Would that testimony have occurred prior to
11 the time the current energy charge went into effect?

12 A. Yes. I believe it was the testimony,
13 direct testimony -- I have to look at it, but testimony
14 prior to the implementation of the tariffs that are in
15 effect today.

16 Q. Would that testimony have taken place in
17 the proceeding in which you were authorized to implement
18 an interim energy charge and then subsequently terminated
19 that charge early and made a refund?

20 A. I'd have -- frankly, I'd have to look at
21 the testimony, Mr. Swarengen.

22 Q. Is it true that the first interim energy
23 charge that you had in place as a result of the 2001 case
24 resulted in over-collections?

25 A. Over-collections and a complete refund of

1 all the money.

2 Q. Now, with regard to the interim energy
3 charge being a proven regulatory tool, what is the current
4 interim energy charge proving in that regard?

5 A. It's proving it doesn't work. The first
6 case we set a -- we set a number to try to forecast fuel
7 and purchased power. It was wrong. All the money was
8 refunded. In a second case, we set a -- we set an interim
9 energy charge attempting to try to collect all -- collect
10 fuel and purchased power. It's been terribly wrong as
11 well. It's proven to me that IECs don't work.

12 Q. How has the capital market reacted to it?

13 A. The capital market has not been
14 enthusiastic about interim energy charges. You can read
15 any number of analyst reports, debt and equity, and you'll
16 find that they all point to what they refer to as a
17 permanent solution with respect to recovery of fuel and
18 purchased power costs. And until that occurs -- well, my
19 view is, until that occurs, they're going to continue to
20 look with a jaundiced eye at our ability to recover fuel
21 and purchased power costs.

22 Q. As far as a proven regulatory tool is
23 concerned, what has the current IEC proven with respect to
24 your ability to earn your authorized return?

25 A. I believe our authorized return in the last

1 case, the rates went into effect in '05, was an 11 percent
2 return on book equity, and to date we're at about
3 7 percent on book equity. Simply has not allowed us to
4 earn the return or even close to the return that was
5 authorized by this Commission.

6 JUDGE DALE: How much more do you have,
7 Mr. Swearengen?

8 MR. SWEARENGEN: Maybe 10 or 15 minutes.

9 JUDGE DALE: This would normally be the
10 time for our break. We've gone for an hour and a half.
11 If we could go ahead and break for five minutes, and then
12 I know that Chairman Davis has questions for this witness,
13 so we'll have more questions from the Bench and another
14 round. So let's go ahead and take a quick break.

15 (A BREAK WAS TAKEN.)

16 JUDGE DALE: We are continuing with
17 redirect by Mr. Swearengen of Mr. Gipson.

18 MR. SWEARENGEN: Thank you.

19 BY MR. SWEARENGEN:

20 Q. Mr. Gipson, I think it was Mr. Mills who
21 asked you some questions about the possibility of the
22 company doubling up on expense or double recovering some
23 of its expenses, and I think your answer to that was that
24 that was a possibility. Do you recall that?

25 A. I do recall that.

1 Q. And can you explain how that could be a
2 possibility with respect to expenses in general?

3 A. I think his question was with respect to
4 traditional ratemaking, is that possible, and I suppose if
5 in the test year what was considered appropriate cost of
6 service we had an expense item, for simplicity sake I'll
7 make it two boxes of paper clips, and then following the
8 implementation of the new tariffs we only bought one box
9 of paper clips, then I suppose there's an opportunity
10 there for us to double up, if you will, on expenses.

11 Q. Mr. Mills also asked you the situation, he
12 asked you to assume that you would have an interim energy
13 charge and some sort of a fuel adjustment clause mechanism
14 operating simultaneously. Do you recall those questions?

15 A. I do.

16 Q. And under those circumstances, could the
17 company over-recover its fuel costs?

18 A. Again, it was a hypothetical situation.
19 Certainly not what we requested. But I believe my answer
20 was no, if the two instruments were operating side by
21 side, although being certainly confusing for customers,
22 that it would not allow the over- or under-recovery of
23 fuel and purchased power.

24 Q. And why is that?

25 A. Fuel adjustment mechanisms, whether they're

1 coupled with base rates or coupled, I suppose, in this
2 hypothetical situation with a -- with an interim energy
3 charge, are designed to move negative as well as positive
4 in terms of how they adjust the customer's bill. And so I
5 suppose if we had a -- if we had base -- we had some
6 element of fuel being recovered in base rates, some
7 element of fuel being recovered in an interim energy
8 charge, and at that particular time that was sufficient to
9 cover the prudently incurred fuel and purchased power
10 costs, then the fuel adjustment would actually go negative
11 in terms of its surcharge, and thus not allowing any over-
12 or under-recovery.

13 Q. Turning to a little different topic,
14 yesterday Mr. Woodsmall asked you some questions about
15 board of director meetings, and I think you had in front
16 of you at that time some minutes from the board of
17 director meetings, which I believe ultimately were not
18 received into evidence, but do you recall those questions?

19 A. A couple of times, yes.

20 Q. With respect to Empire's board of director
21 meetings, are the minutes that are put together as a
22 result of those meetings verbatim transcripts of what
23 transpired at those meetings?

24 A. No, not at all.

25 Q. And going back to, I think, the original

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1 line of questions that Mr. Woodsmall put to you yesterday
2 concerning your belief that your right to terminate the
3 IEC was a material part of the agreement in the last case,
4 let me ask you this question: If something is material
5 from the standpoint of an agreement, is it your view that
6 that necessarily means it is material for financial
7 reporting purposes?

8 A. No. There are a number of examples for
9 that. What is material to an agreement is not always
10 material for financial reporting purposes, and an example
11 of that would be where we enter into a purchased power
12 agreement, a material provision of that agreement might be
13 the cost for which we pay the supplier for that -- for
14 that power. That is material to that agreement but not
15 necessarily material for financial reporting purposes.
16 What would be material for financial reporting purposes in
17 that instance is that we have the agreement in place to
18 purchase the power.

19 Q. For financial reporting purposes, is it
20 possible that something can be immaterial in one quarter
21 and then be material in the next quarter?

22 A. Absolutely. And I think, again, to draw an
23 analogy for that, if you're really bored, you can read our
24 SEC filing with respect to the changes that are occurring
25 within the Southwest Power Pool and its efforts to become

1 a true regional transmission organization. Those issues
2 have evolved over time as facts and circumstances have
3 changed, and events become material that would not have
4 been material in the previous quarter.

5 Q. Now, yesterday Mr. Woodsmall introduced
6 into evidence through you a series of SEC filings, and I
7 think they were marked as Exhibits 121, 122 and 123 and
8 124. Do you recall that?

9 A. I do.

10 Q. And do you have those documents in front of
11 you?

12 A. I'm working to get to them. What was the
13 first number?

14 Q. Exhibit 121, which I believe was a 10-K; is
15 that correct?

16 A. It is our 10-K for the fiscal year ended
17 December 31, 2004.

18 Q. And then just briefly, the other three
19 exhibits, 122, 123 and 124, what were they?

20 A. 122 is our 10-Q filed with the SEC for the
21 first -- yeah, the first quarter, March 31, 2005. It was
22 actually filed on May 9, 2005. 123 is our second quarter
23 K in 2005 filed on August 8, 2005, and 124 is our third
24 quarter Q filed with the SEC on November 9, 2005.

25 Q. Now, looking at those documents, those

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1 exhibits, could you briefly summarize for the Commission
2 the evolution of Empire's disclosures regarding the
3 interim energy charge, starting with Exhibit 121, the
4 10-K?

5 MR. WOODSMALL: Your Honor, as
6 Mr. Swearengen repeatedly stated yesterday, I believe the
7 documents speak for themselves here. The documents are in
8 their entirety in evidence and speak for themselves.

9 MR. SWEARENGEN: And I think the documents
10 do speak for themselves, your Honor, and Mr. Woodsmall
11 through the introduction of this attempted to demonstrate
12 to the Commission that Empire somehow has acted
13 inconsistent with its belief that it has the right to
14 terminate the interim energy charge, and these documents I
15 think demonstrate just the opposite. And I think the
16 witness ought to be entitled to explain that to the
17 Commission.

18 JUDGE DALE: If you would like to explain
19 that without reading the documents into the record, that
20 would be fine.

21 MR. SWEARENGEN: I'm not going to ask him
22 to read them in.

23 THE WITNESS: I'll be pleased to. In
24 our -- when we first disclosed the existence of the IEC
25 was in our 10-K for 2004, which was filed in mid March of

1 2005. The IEC had not become effective. We collected no
2 dollars under the surcharge. We disclosed -- we disclosed
3 the existence of the agreement.

4 In our 2000 -- in our second quarter
5 2005 -- no. Excuse me. Our first quarter 2005 Q, we had
6 a similar disclosure with respect to the agreement of its
7 existence and its terms. In the third quarter Q -- pardon
8 me -- the second quarter Q, we described the instrument
9 similarly.

10 The difference now is that we've collected
11 money under the -- under the instruments in a material way
12 for all of the quarter. We then refer to in that Q the
13 early termination provision of the IEC. The reason for
14 that is we were explaining to the reader that the -- that
15 we had collected money under the instrument, but we also
16 explained that we had not set up any kind of offsetting
17 liability, if you will, for refunds because we had not
18 collected sufficient dollars, that we were over the top of
19 the collar.

20 And the reason we included the early
21 termination was to give the reader a sense that if refunds
22 were necessary, that they might occur earlier than the --
23 than the -- than the full three-year term.

24 BY MR. SWEARENGEN:

25 Q. And just for the record, can you identify

1 the page numbers in those documents where this is
2 discussed?

3 A. On Exhibit --

4 MR. WOODSMALL: Your Honor, again, as
5 Mr. Swearngen has repeatedly stated, the documents speak
6 for themselves.

7 JUDGE DALE: If you could just direct us to
8 the last page.

9 THE WITNESS: Of each document?

10 JUDGE DALE: No. Just the last page
11 pertaining to what you were just talking about, the last
12 quarterly that you discussed the termination.

13 THE WITNESS: Beginning with the June 30,
14 2005 10-Q, which was filed on August 8, and all subsequent
15 SEC filings since that period of time, we've included this
16 sentence with respect to early termination, and that is on
17 Exhibit 123, page 24.

18 JUDGE DALE: Thank you.

19 BY MR. SWEARENGEN:

20 Q. Yesterday, Mr. Gipson, Mr. Woodsmall put
21 into evidence, subject to my objection, Empire's response
22 to Praxair's Data Request No. 269. Do you recall that?

23 A. I do.

24 Q. And have you had a chance to review the
25 material that made up that exhibit, meaning Empire's

1 response to that Data Request?

2 MR. WOODSMALL: Could you tell us which
3 exhibit you're referring to?

4 MR. SWEARENGEN: I have to look and see.

5 JUDGE DALE: Is it 133HC?

6 MR. WOODSMALL: DR 269 was put in in
7 various places. This morning it was put in, the Fitch
8 part was accepted. Yesterday 133 was put in, and I
9 believe 132 was also part of it.

10 MR. SWEARENGEN: I just remember it by the
11 Data Request number, and I recall the Bench saying that we
12 would have a right to review that response and make sure
13 it was complete. In fact, I think you asked us to review
14 all of the Data Request responses and let you know if the
15 answers that were put into evidence were the complete
16 answers or responses, and we have done that. And with
17 respect to Data Request No. 269, I do not think the
18 response was complete.

19 JUDGE DALE: Which parts were not included?
20 What I have is that this -- that what was put into
21 evidence was the response to DR 269 that was the
22 presentation for S&P and for Moody's.

23 MR. SWEARENGEN: Right. And what I'm about
24 to do, if the Bench will permit me, is to have an exhibit
25 marked that is the rest of the response by the company to

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1 Data Request No. 269.

2 JUDGE DALE: Is it pertaining to the
3 Standard & Poor's and Moody's presentations?

4 MR. SWEARENGEN: It does.

5 JUDGE DALE: Okay.

6 MR. WOODSMALL: Your Honor, I believe the
7 confusion comes here in that the document says DR No. 269.
8 269 is, as I recall, a document that asked for any notes
9 that were taken during the presentation, and that's why
10 you see the handwritten notes there. Another Data Request
11 asked for the presentations. I did not offer the
12 presentations. I merely offered the notes that were being
13 provided, and that's what was accepted. So the entirety
14 of the DR with the notes is what was provided.

15 In fact, you will see when they attempt to
16 offer the presentation that it doesn't include the
17 handwritten notes. That's because that is the subject of
18 a different DR, which I did not offer. I offered the DR
19 with the notes.

20 MR. SWEARENGEN: Why don't you let me mark
21 the exhibit and proceed in that fashion, and then he can
22 make his objection? Can we do that?

23 JUDGE DALE: Yes.

24 MR. SWEARENGEN: Thank you.

25 JUDGE DALE: So this will be Exhibit 137.

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1 THE WITNESS: HC.

2 MR. SWEARENGEN: It should be HC. And we
3 probably need to go in-camera.

4 JUDGE DALE: 137HC.

5 (EXHIBIT NO. 137HC WAS MARKED FOR
6 IDENTIFICATION BY THE REPORTER.)

7 (REPORTER'S NOTE: At this point an
8 in-camera session was held, which is contained in
9 Volume 17, pages 969 through page 975 of the transcript.)

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1 BY MR. SWEARENGEN:

2 Q. Just a few more questions, Mr. Gipson.
3 Yesterday Mr. Woodsmall put into evidence testimony from
4 some past Empire rate cases in which you or Mr. Beecher or
5 someone on behalf of Empire testified that the interim
6 energy charge was preferable to a forecasted fuel approach
7 in setting rates. Do you recall that?

8 A. Yes.

9 Q. And since that was testimony from a case
10 some time ago, can I assume that that testimony --

11 MR. WOODSMALL: Your Honor, leading
12 question.

13 MR. SWEARENGEN: I'll rephrase.

14 BY MR. SWEARENGEN:

15 Q. Let me ask you this question: What was the
16 company's position on that issue at that time based on?

17 A. I believe our -- I believe I testified
18 to this yesterday as well. Our position has been
19 consistent in the evidence that -- and the testimony that
20 Mr. Woodsmall referred me to yesterday that we believe
21 that the very best solution is a fuel adjustment
22 mechanism. That goes back to our 2001 case we -- I
23 believe I read or was asked to refer to some of Mr.
24 McKinney's testimony in that case. He pointed -- he even
25 went so far as to point to attempts by Empire to cure this

1 issue with legislation.

2 We were successful in 2001 in passing
3 legislation to allow Empire to implement a fuel adjustment
4 mechanism. It was vetoed by the Governor. That was our
5 position then. It was our position in the last case.
6 It's frankly our position in this case.

7 The next best alternative, one which has
8 not worked, but frankly the next best alternative to give
9 some protection to the consumer and some protection to the
10 company is an interim energy charge. Our -- what I
11 believe is the worst alternative or the least preferable
12 would be to set fuel and purchased power in base rates.

13 Q. Yesterday Mr. Woodsmall introduced
14 Exhibit 132, and it was consisting of two parts, Part 1
15 and Part 2. Do you have that exhibit there with you?

16 A. I do.

17 Q. I think it was with respect to the second
18 part, which is a three-page document. It's a highly
19 confidential exhibit, and I'm going to ask the question
20 and then, Mr. Gipson, you're going to have to tell me
21 whether we need to go in-camera for the answer.

22 The question is, do you recall
23 Mr. Woodsmall asking you about some assumptions that were
24 made in connection with that document?

25 A. I do.

1 Q. And would the basis of those assumptions be
2 something that would be highly confidential?

3 A. I don't think so.

4 Q. Okay. Can you go ahead and tell us, then,
5 what those assumptions were and why you had to make them?

6 A. One of the assumptions and the one that
7 Mr. Woodsmall pointed to was that a fuel adjustment clause
8 assumed in April of 2008 forward -- and again, it's --
9 these assumptions were on -- prepared according to page 2
10 on April 4th of 2005, seven days into the interim energy
11 charge that's in effect today.

12 I responded to Mr. Woodsmall, we had to
13 assume that. Senate Bill 179 had not been passed by the
14 General Assembly. That didn't occur until May of 2005,
15 had not been signed into law by the Governor, and my
16 experience with rating agencies is you don't present
17 assumptions based on conjecture. You present assumptions
18 based on the facts and circumstances that are in play at
19 the time.

20 They don't care much about what I think is
21 going to happen, particularly in the area of what might
22 occur in the General Assembly or in the Governor's Office.

23 Q. Exhibit 134 that was put into evidence
24 yesterday, which I believe was a transcript of an earnings
25 call, do you recall that?

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1 A. I do.

2 Q. And do you have that transcript in front of
3 you, the Exhibit 134?

4 A. I do.

5 Q. Tell me how that works. Does Empire have
6 someone prepare a transcript of those earning calls?

7 A. We contract with a service to provide the
8 call-in numbers and manage the -- manage the earnings call
9 from bow to stern in terms of managing the call during the
10 processing, getting the caller connected with us so we can
11 have the exchange of information, and as a part of that,
12 they provide a transcript for us.

13 Q. Now, in that transcript that they provide
14 to you, are portions of that transcript bolded, is the
15 text bolded as set out on Exhibit 134?

16 A. I've never seen our transcript -- our
17 service provider make any embellishment to any of our
18 transcripts.

19 Q. Let me ask you a question about
20 Exhibit 108, which is a highly confidential exhibit, and
21 my question is going to be what it has to say with respect
22 to when a fuel adjustment clause would begin. Would that
23 response be highly confidential?

24 Exhibit 108 was part of a response to Data
25 Request 269 that we discussed earlier, notes for the Fitch

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1 presentation that Mr. Knapp had prepared.

2 A. Is this all you're going to ask me about
3 this, Mr. Swearingen?

4 Q. That's my intention.

5 A. I think I've previously stated that we
6 intended to implement a fuel adjustment clause prior to
7 2008, and this confirms that we presented that information
8 to the analyst. On page -- what is page 29 of the
9 presentation, it says, FAC beginning January 2007. This
10 was a presentation that was made, looks like on
11 October 18th of '05 to Fitch.

12 Q. Finally, Mr. Gipson, there was some
13 discussion earlier about the tariff that -- the interim
14 energy charge tariff that went into effect as a result of
15 your 2001 rate case, and I think that's been marked for
16 identification as Exhibit 1-1-2, 112. I can't recall
17 whether it has been received into evidence or not.
18 Perhaps the Bench can tell me.

19 But do you have a copy of that exhibit in
20 front of you, Mr. Gipson?

21 A. I do.

22 MR. WOODSMALL: Your Honor, Exhibit 112 was
23 not recognized by this witness. He said he'd never seen
24 it before and, therefore, it was never received.

25 JUDGE DALE: That's correct.

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1 BY MR. SWEARENGEN:

2 Q. Okay. Mr. Gipson, since you apparently
3 made that statement yesterday, have you had an opportunity
4 to become familiar with this exhibit?

5 MR. WOODSMALL: Your Honor, I object
6 because clearly it's outside the scope of my cross since
7 he didn't recognize it at that time.

8 MR. SWEARENGEN: And I recognize that that
9 puts Mr. Woodsmall in an awkward position, and if
10 permitted to go forward and if this is received into
11 evidence, I would have no objection to Mr. Woodsmall
12 having an opportunity to do further cross of Mr. Gipson on
13 this document.

14 MR. WOODSMALL: Your Honor, I decline.
15 Giving him the opportunity overnight to try and
16 familiarize himself with an exhibit is clearly not
17 appropriate. He didn't recognize it at the time. I was
18 denied cross on it and it was not accepted into evidence.

19 JUDGE DALE: The objection is sustained.

20 MR. SWEARENGEN: Thank you. That's all we
21 have. Thank you.

22 JUDGE DALE: I believe Chairman Davis has
23 some questions for you, Mr. Gipson.

24 QUESTIONS BY CHAIRMAN DAVIS:

25 Q. Good morning, Mr. Gipson.

1 A. Good morning.

2 Q. What is your opinion as to what needs to
3 happen with your fuel costs in this case, you know, based
4 on the -- based on the fact that this Commission has
5 already decided that you are not eligible for another fuel
6 adjustment mechanism in this case? I mean, just put it
7 all in base rates, is that what you're asking for? I'm
8 just trying to figure out what you're asking for here.

9 A. I think if I understood the Commission's
10 Order with respect to our motion for clarification, the
11 Commission has determined that we cannot request fuel
12 adjustment in this case, and I don't want to reargue that
13 point.

14 Q. Okay. So what are you asking for in this
15 case?

16 A. I think what I outlined in my testimony was
17 the Commission to keep an open mind, that when setting
18 just and reasonable rates that provide for an opportunity
19 to collect our fuel costs, purchased power cost and have a
20 reasonable opportunity to earn whatever ROE you authorize
21 in this case, that it may take -- may take the
22 implementation of some kind of mechanism, although we're
23 precluded from requesting it.

24 Q. Okay. Well, let's say that the Commission
25 is not sua sponte going to issue some fuel adjustment

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1 mechanism. Then what?

2 A. I think the Commission is left to base
3 rates.

4 Q. Okay. And then do you have an opinion
5 about what a sufficient amount would be to put in base
6 rates so that you would not instantaneously be filing for
7 another rate case at the conclusion of this rate case?

8 A. I believe we have testimony on record that
9 would indicate something in that \$166 million range, total
10 company, is what has been we believe proven up to take
11 into account our hedged position, our outage schedules,
12 the forecasted -- you know, best forecast we can get our
13 hands on.

14 I don't know that that will be sufficient.
15 I don't know what commodity markets are going to do. I
16 don't know that we're going to suffer again rail
17 transportation curtailment out of the Powder River Basin
18 that had a dramatic impact on the purchased power market
19 last summer.

20 Q. Mr. Gipson, I believe you testified earlier
21 that you spend a lot of time with financial analysts; is
22 that correct?

23 A. I do.

24 Q. Do you have a mental impression about how
25 S&P, Fitch or Moody's would view a decision by this

1 Commission to adopt Staff's recommended ROE?

2 MR. MILLS: I'm not going to object to that
3 question, but I would note that it calls for a certain
4 amount of speculation as to what a rating agency might or
5 might not do, but I'm not going to object on that basis.

6 BY CHAIRMAN DAVIS:

7 Q. Have they said anything to you that would
8 cause you to have a mental impression?

9 A. I think if I could, I'd refer back to
10 the last case and any discussions I've had with both debt
11 and equity analysts with respect to the ROE that was
12 granted in that case, and a number of written articles --
13 I don't have any of them with me here today -- by both
14 debt and equity analysts. We're pleased with that number,
15 11 percent, as pleased as they ever get with any kind of
16 number.

17 Some of them regarded it as a, you know, a
18 sign of things to come, if you will. I don't think it's
19 any secret. There have been a number of articles written
20 by those same kind of analysts about previous Commissions'
21 decisions with respect to ROE and recovery of costs that
22 have not been in the best light. So my mental impression
23 is that they wouldn't be very happy if the Commission
24 adopted Staff or OPC's recommended return on equity in
25 this case.

1 Q. Do you think that could lead to another
2 downgrade?

3 A. Well, our last down --

4 MR. WOODSMALL: Your Honor, I don't have a
5 problem with him answering, but I note this is purely
6 speculative and would not constitute competent and
7 substantial evidence. But be that as it may, he may
8 answer. It's just not evidence.

9 MR. SWEARENGEN: I'm glad to have that
10 pronouncement from the Bench.

11 MR. WOODSMALL: I'm just attempting not to
12 object to a Commissioner's question.

13 JUDGE DALE: I think the standard Bench
14 response to such a predicament is to say that we will take
15 the evidence for what it is worth. Is that the phrase,
16 Mr. Mills?

17 THE WITNESS: Can I have the question
18 again? Sorry.

19 JUDGE DALE: Could the reporter read that
20 back?

21 (THE REQUESTED TESTIMONY WAS READ BY THE
22 REPORTER.)

23 THE WITNESS: And I don't purport to know
24 what gets into the rating agencies' mind in terms of what
25 triggers them to do a downgrade. I know that a downgrade

1 occurred by Standard & Poor's following the Commission's
2 order on our motion for clarification. That occurred.
3 That's a fact.

4 BY CHAIRMAN DAVIS:

5 Q. So it's your position that with regard to
6 that most recent downgrade that certainly S&P was aware of
7 all other relevant factors, they were aware of Plum Point,
8 they were aware of the acquisition of the Aquila gas
9 properties, they were well -- they were well aware of all
10 other relevant factors?

11 A. They --

12 MR. WOODSMALL: Your Honor, again, asking
13 for speculation on what this witness may believe the
14 analysts knew.

15 JUDGE DALE: Same response.

16 THE WITNESS: We had a number of meetings
17 with Standard & Poor's, Moody's and Fitch to outline all
18 of our plans, all of the issues that you referenced, Plum
19 Point, the gas acquisition, Iatan 2, Riverton 12, all of
20 those investments. They were fully aware of what our
21 plans were. I find it less than -- I don't think it's a
22 coincidence that the downgrade occurred following the
23 Commission's order with respect to our motion for
24 clarification.

25 CHAIRMAN DAVIS: Thank you, Mr. Gipson.

1 JUDGE DALE: Is there recross based on
2 questions from the Bench?

3 MR. WOODSMALL: None, your Honor.

4 RECROSS-EXAMINATION BY MR. MILLS:

5 Q. Just very briefly. I believe in response
6 to one of the Chairman's questions, you testified that
7 analysts were very pleased with the return on equity you
8 were authorized in the last case; is that correct?

9 A. I think I said they were pleased.

10 Q. Not very pleased, just pleased?

11 A. And I think I went on to say that, you
12 know, as pleased as they ever get.

13 Q. In any rate, they viewed that as a positive
14 development?

15 A. They did view that as positive, as did we.

16 Q. Nonetheless, you were downgraded while you
17 still had that same authorized return on equity?

18 A. The actual return was more like 6 percent
19 because we were unable to recover our fuel and purchased
20 power costs.

21 Q. Are you familiar with the amortization
22 calculations and the amortization mechanism that's
23 reflected in the regulatory plan?

24 A. Yes.

25 Q. Is not the expressed purpose of

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1 amortization to allow Empire to try to avoid downgrades
2 based on the typical kind of metrics that analysts look at
3 when they're determining whether to do a downgrade?

4 A. I think we covered this ground pretty
5 thoroughly a few days ago, and I thought I heard that
6 there was a consent of the parties in the room that the
7 amortization is not a substitute for prudently incurred
8 costs, whether they be capital or cost of service. It is
9 my view that should the Commission do that, it will be
10 viewed very negatively by the capital markets.

11 Q. Okay. But that really wasn't my question.
12 My question was, wasn't the amortization calculation and
13 the amortization mechanism intended to be able to set up
14 so that it would help Empire avoid any possible downgrades
15 by addressing the metrics that equity -- that analysts
16 look at when they're determining whether or not to
17 downgrade a utility?

18 A. That's true.

19 Q. So it's designed specifically at the
20 metrics that, as you said, no one -- I believe you
21 testified that you don't know what's in the minds of those
22 analysts, but as far as we know, this was targeted at the
23 metrics that most likely would lead to downgrades; is that
24 correct?

25 A. They were targeted at certain financial

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1 ratios that are expressly relied upon by the analysts. I
2 can't speak to that these metrics are what lead them to a
3 downgrade. I can't speak to that.

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

6 JUDGE DALE: Thank you. Staff?

7 MR. FREY: No questions, your Honor.

8 JUDGE DALE: Redirect?

9 MR. SWEARENGEN: Just one.

10 FURTHER REDIRECT EXAMINATION BY MR. SWEARENGEN:

11 Q. Mr. Gipson, does an 11 percent ROE that you
12 were awarded in the last case or even an 11.7 ROE that
13 you're asking in this case do the company any good if it
14 is not recovering its prudently incurred fuel and
15 purchased power costs?

16 A. You know, I can only answer that in
17 hindsight here. 11 percent, we were not able to achieve
18 anything close to 11 percent from the last case. As I
19 said, I think through March of this last year or this year
20 we were at about 6, 6.7 percent. I went through a -- I
21 did kind of a back of the envelope calculation. In order
22 for us to have achieved that 11 percent ROE, this
23 Commission would have had to award us with 14.1 percent
24 ROE to make up for what we under-recovered fuel and
25 purchased power costs through March of this year.

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1 MR. SWEARENGEN: Thank you. That's all I
2 have.

3 JUDGE DALE: Do you have anything else for
4 Mr. Gipson?

5 Thank you, Mr. Gipson. You may step down,
6 and you are excused.

7 MR. SWEARENGEN: Mr. Tarter is our other
8 witness on this, but Mr. Mills may or may not have some
9 questions for him, and I said if he does, I said I would
10 bring him back on Friday.

11 MR. MILLS: I have no more questions for
12 Mr. Tarter on this issue.

13 JUDGE DALE: Thank you. So he will not
14 need to come back on Friday.

15 MR. SWEARENGEN: Given that, I don't
16 believe we offered Mr. Tarter's testimony, which would
17 be -- Mr. Tarter had several pieces of testimony,
18 Exhibit 15, and I think he has an HC and NP version of
19 that, Exhibit 16, the supplemental direct and also an
20 HC and NP version, Exhibit 17, rebuttal NP and HC and
21 Exhibit 18, also HC and NP, and I would offer into
22 evidence those exhibits at this time.

23 MR. WOODSMALL: Your Honor, my only
24 objection would be to the portions that were previously
25 stricken pursuant to the Commission's Order.

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1 MR. SWEARENGEN: And I would ask that
2 under 4 CSR 242.130, that those portions be nonetheless
3 heard and preserved in the record. Thank you.

4 JUDGE DALE: The unstricken portions of
5 Mr. Tarter's testimony, Exhibits 15, 16, 17 and 18HC and
6 NP, will be accepted into evidence. In addition, the
7 stricken material will be preserved as requested.

8 (EXHIBIT NOS. 15, 16, 17 AND 18HC AND 18NP
9 WERE RECEIVED INTO EVIDENCE.)

10 MR. SWEARENGEN: Thank you.

11 CHAIRMAN DAVIS: Judge, can I ask
12 Mr. Woodsmall some questions now about IEC?

13 JUDGE DALE: As you please, sir.

14 CHAIRMAN DAVIS: Thank you. Mr. Woodsmall,
15 I think you offered Exhibit No. 117, but I don't think it
16 was ever put into evidence, but it's the Nonunanimous
17 Stipulation & Agreement regarding fuel and purchased power
18 in Case No. ER-2004-570. Are you familiar with that?

19 MR. WOODSMALL: Yes, I am.

20 CHAIRMAN DAVIS: All right. Page 2, I
21 guess I would call it the first paragraph before you get
22 the subletters. Could you read the last two sentences,
23 please?

24 MR. WOODSMALL: The IEC shall be in effect
25 for three years as described herein. The three-year

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1 period during which the IEC is in effect is referred to as
2 the IEC period.

3 CHAIRMAN DAVIS: What does the phrase as
4 described herein mean?

5 MR. WOODSMALL: First off, the fact that it
6 uses the word shall is an indicator of mandatory. It
7 means to me --

8 CHAIRMAN DAVIS: Well, I didn't ask you
9 that, Mr. Woodsmall. Please answer the question. I asked
10 you what the phrase as described herein means.

11 MR. WOODSMALL: And I'm attempting to
12 answer. Given that the word shall is used --

13 CHAIRMAN DAVIS: What do the words as
14 described herein mean, Mr. Woodsmall? We know what the
15 word shall means.

16 MR. WOODSMALL: Okay. Given that word, it
17 means that the IEC must, mandatory, be in effect for three
18 years.

19 CHAIRMAN DAVIS: Okay. And in the next
20 sentence it says the three-year period during which the
21 IEC is in effect is referred to as IEC period. If you
22 have an IEC period, then why -- why do they refer to an
23 IEC period if we all know that the period is going to be
24 three years, Mr. Woodsmall?

25 MR. WOODSMALL: They do that as merely a

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1 way to define so that they can use that phrase, IEC
2 period, later in the document.

3 CHAIRMAN DAVIS: Why don't they just say
4 three years if everybody knows that's what the intent is?

5 MR. WOODSMALL: They use that purely as
6 convenience, just like they do in any other contract, as
7 this is.

8 CHAIRMAN DAVIS: So it was convenience.
9 Okay. All right. Would you look at -- let's see -- the
10 last sentence on page -- let's see. Page 4, I guess that
11 would be numbered paragraph C, the last sentence, can you
12 read that for me?

13 MR. WOODSMALL: The entire last sentence
14 reads --

15 CHAIRMAN DAVIS: Yes, please.

16 MR. WOODSMALL: -- the IEC tariff or rate
17 schedule will expire no later than 12:01 a.m. on the date
18 that is three years after the original effective date of
19 the revised tariff sheets authorized by the Commission in
20 this case, Case No. ER-2004-0570, unless earlier
21 terminated by order of the Commission.

22 CHAIRMAN DAVIS: Now, the first part of
23 that sentence states that the IEC tariff or rate schedule
24 will expire no later than 12:01 a.m. on the date that is
25 three years after the original effective date of the order

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1 in that case, correct?

2 MR. WOODSMALL: Correct.

3 CHAIRMAN DAVIS: It doesn't state that the
4 tariff expressly expires on that date, does it?

5 MR. WOODSMALL: If it has not been -- as
6 says earlier, unless earlier terminated by order of the
7 Commission, it will expressly expire on that date.

8 CHAIRMAN DAVIS: Okay. So what does the --
9 I mean, unless earlier terminated by order of the
10 Commission, what does that mean to you, Mr. Woodsmall,
11 that we can terminate the Order earlier than that?

12 MR. WOODSMALL: As we've expressed in
13 numerous pleadings before the Commission, that phrase
14 means that the Commission in using its overarching
15 superintendent powers, responsibilities over regulated
16 utilities, that it could, such as in situations of
17 financial duress, terminate this IEC early.

18 CHAIRMAN DAVIS: So what constitutes
19 duress?

20 MR. WOODSMALL: Well, I would note also
21 that this provision --

22 CHAIRMAN DAVIS: Wait. What constitutes
23 duress?

24 MR. WOODSMALL: As we've stated in our
25 Prehearing Briefs, it is the emergency standard that has

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1 been applied previously by the Commission, and as was
2 presented by Mr. Gipson, the elements of that emergency
3 standard clearly aren't applicable.

4 CHAIRMAN DAVIS: I mean, I don't see
5 anything about duress or emergency standards in this
6 document.

7 MR. WOODSMALL: You asked me my opinion.

8 CHAIRMAN DAVIS: That's your opinion, but
9 that's not the law or the contract, is it, Mr. Woodsmall?

10 MR. WOODSMALL: You asked me what I believe
11 it meant, and that's what I provided you.

12 CHAIRMAN DAVIS: Okay. So if this
13 Commission does have the authority to terminate an Order,
14 then wouldn't it be only a logical extension that parties
15 have the ability to come in and ask that the Order be
16 terminated?

17 MR. WOODSMALL: I would give you that, but
18 this Commission doesn't have that authority.

19 CHAIRMAN DAVIS: So this Commission doesn't
20 have that authority?

21 MR. WOODSMALL: No. SB 179 took that
22 authority away.

23 CHAIRMAN DAVIS: But SB 179 is not
24 effective until the rules are promulgated, are they -- is
25 it?

1 MR. WOODSMALL: The provisions of SB 179
2 that state that the Commission can grant a fuel adjustment
3 clause, it uses the words under this section, do not
4 become effective until the rules are promulgated. There
5 are other sections that are in effect once signed by the
6 Governor, and those provisions expressly preclude the
7 Commission from earlier terminating such a plan.

8 CHAIRMAN DAVIS: That's an interesting
9 legal reasoning.

10 MR. WOODSMALL: I can provide you citations
11 to that, if you'd like.

12 CHAIRMAN DAVIS: That's all right,
13 Mr. Woodsmall. I've read some of your citations.

14 Mr. Woodsmall, can you go on to page 12?
15 Can you read Item No. 4 for me? Just read the entire Item
16 No. 4 that stretches over to page 13.

17 MR. WOODSMALL: Certainly. In
18 consideration of the implementation of the IEC in this
19 case, and the agreement of the parties to waive their
20 respective rights to judicial review or to otherwise
21 challenge a Commission Order in this case authorizing and
22 approving the subject IEC for the duration of the IEC
23 approved in this case, Empire agrees to forego any right
24 it may have to request the use of or to use any other
25 procedure or remedy available under current Missouri

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1 statute or subsequently enacted Missouri statute in the
2 form of a fuel adjustment clause, a natural gas cost
3 recovery mechanism or other energy-related adjustment
4 mechanism to which the company would otherwise be
5 entitled. Empire also agrees not to request an Accounting
6 Authority Order or other regulatory mechanism to
7 accumulate and/or recover any amount of variable fuel and
8 purchased power cost that exceeds the IEC ceiling.

9 CHAIRMAN DAVIS: Okay. Could you go back
10 to line No.5. Says subject to the -- subject IEC, for the
11 duration of the IEC approved in this case.

12 MR. WOODSMALL: Yes, I'm there.

13 CHAIRMAN DAVIS: Okay. Do you see the
14 words three years in there or any date or anything else in
15 there?

16 MR. WOODSMALL: No, I do not.

17 CHAIRMAN DAVIS: Is it anywhere else in
18 this paragraph?

19 MR. WOODSMALL: No, it is not.

20 CHAIRMAN DAVIS: Okay. Now let's go back
21 down to the latter part. We talk about the phrase -- I
22 think we had some discussion earlier on the phrase any
23 other procedure or remedy. And if you read on further, it
24 says in the form of a fuel adjustment clause, a natural
25 gas cost recovery mechanism or other energy-related

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1 adjustment mechanism to which the company would otherwise
2 be entitled.

3 What does that -- I'm not -- my English, I
4 must confess, is not what it should be. I can't think if
5 that is an adverbial phrase. Judge, can you help me?
6 What kind of phrase is that, in the form of a fuel
7 adjustment clause, a natural gas -- a prepositional
8 phrase?

9 JUDGE DALE: That's what it starts with.

10 CHAIRMAN DAVIS: Okay. I'm going to call
11 it a prepositional phrase, even though it may not be one.
12 What does that refer to in that sentence?

13 MR. WOODSMALL: The portion of the sentence
14 starting with in the form of?

15 CHAIRMAN DAVIS: Yes. What does the
16 remainder of that sentence, that phrase, what does that
17 refer to?

18 MR. WOODSMALL: It refers to the Missouri
19 statute.

20 CHAIRMAN DAVIS: It refers to the Missouri
21 statute. Available under current Missouri statute in the
22 form of a fuel adjustment clause, a natural gas cost
23 recovery mechanism. So you're -- and what does
24 Missouri -- what does the preceding phrase, under current
25 Missouri statute or subsequently enacted Missouri statute

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1 refer to?

2 MR. WOODSMALL: I don't know if I can
3 explain it any clearer than that. It refers to the laws,
4 the statutes that are on the books of Missouri, either
5 currently, that is when this document was executed, or
6 after that point in time.

7 CHAIRMAN DAVIS: So you're going to tell me
8 that the phrase available under current Missouri statute
9 or subsequently enacted Missouri statute doesn't refer
10 back to the clause any other procedure or remedy?

11 MR. WOODSMALL: You asked me what the in
12 the form of referred to, and I was saying that that
13 referred to --

14 CHAIRMAN DAVIS: Well, and you answered
15 that question. You said it referred to Missouri statute.
16 And then I asked you what the phrase -- so you're saying
17 that it refers to the Missouri statutes, that it doesn't
18 even refer to this preceding phrase in that sentence. Is
19 that what you're telling me, Mr. Woodsmall?

20 MR. WOODSMALL: I've become lost in the
21 questioning. I'm sorry.

22 CHAIRMAN DAVIS: Okay. Well, all right.
23 Let's -- you said that a natural gas -- in the form of a
24 fuel adjustment clause, a natural gas cost recovery
25 mechanism or other energy-related adjustment mechanism to

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1 which the company would otherwise be entitled, you said
2 that phrase referred to Missouri statutes, correct?

3 MR. WOODSMALL: It refers to current
4 Missouri statute or subsequently enacted Missouri statute.

5 CHAIRMAN DAVIS: Okay. And it would
6 also -- would you include the words available under in
7 that phrase as well?

8 MR. WOODSMALL: Absolutely.

9 CHAIRMAN DAVIS: Okay. What does the
10 phrase available under current Missouri statute or
11 subsequently enacted Missouri statute refer to in that
12 sentence?

13 MR. WOODSMALL: It refers to going back to
14 the previous phrase, any procedure or remedy that is
15 contained in those current statutes or any subsequently
16 enacted statute.

17 CHAIRMAN DAVIS: Okay. Now, so is it
18 your -- and when you talk about in the form of a fuel
19 adjustment clause, do you think that refers to base rates?

20 MR. WOODSMALL: No, we have not made that
21 assertion.

22 CHAIRMAN DAVIS: Okay. And do you think
23 that a, quote, other energy-related adjustment mechanism
24 to which the company would otherwise be entitled, does
25 that refer to base rates?

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1 MR. WOODSMALL: We've not made that
2 assertion.

3 CHAIRMAN DAVIS: Okay. I wasn't asking
4 whether you'd made that assertion. I'm just asking you
5 for your legal opinion.

6 MR. WOODSMALL: My legal opinion on behalf
7 of my client is that, no, it does not.

8 CHAIRMAN DAVIS: Okay. A natural gas cost
9 recovery mechanism when it's included in between those two
10 phrases in the context of this sentence, do you think that
11 would operate to prohibit the parties from seeking to
12 include full costs in base rates?

13 MR. WOODSMALL: No. Again, we have not
14 made that assertion, and I don't believe that that is
15 correct.

16 CHAIRMAN DAVIS: Okay. Let's see, what
17 else? Mr. Woodsmall, your clients got some consideration
18 in this agreement, didn't they?

19 MR. WOODSMALL: Most definitely.

20 CHAIRMAN DAVIS: And what consideration did
21 they get?

22 MR. WOODSMALL: Oh, you asked whether my
23 client received consideration?

24 CHAIRMAN DAVIS: Yes.

25 MR. WOODSMALL: We thought we had. We did

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1 not receive any consideration.

2 CHAIRMAN DAVIS: So your clients didn't get
3 any sort of discount or anything? They have not gotten
4 any discount?

5 MR. WOODSMALL: Our -- I understand
6 your question. Yes, our client -- one of our clients,
7 Praxair -- and I don't know if Explorer is covered in
8 here. Praxair did get part of its consideration in this
9 case. That is the part referred to on page 11. But
10 again, only part of the consideration that it bargained
11 for.

12 CHAIRMAN DAVIS: Okay. So on page 11,
13 Praxair gets, what is it, approximately \$100,000 per year;
14 is that correct?

15 MR. WOODSMALL: That was a portion of the
16 consideration that Praxair was supposed to receive and we
17 did receive that, yes.

18 CHAIRMAN DAVIS: So you've received
19 100,000. Now, is that prorated? Do you get 100,000 a
20 year at the end of the year, the beginning of the year, is
21 that prorated over 12 months, how does that work?

22 MR. WOODSMALL: I believe it is -- it says
23 in the quoted indented portion, the following monthly
24 credit. So I believe everything is prorated on a monthly
25 basis and may be even within a month, if there is a

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1 partial month, but I'm not certain.

2 CHAIRMAN DAVIS: Okay. What was your
3 reference to Explorer Pipeline? Were they getting a
4 benefit, yes or no or --

5 MR. WOODSMALL: No, I don't believe
6 Explorer Pipeline received any consideration in this.

7 CHAIRMAN DAVIS: Would you read page --
8 bottom of page 11, Numeral 3? Can you read that for me,
9 please?

10 MR. WOODSMALL: I stand corrected. They
11 did receive partial consideration. They did receive that.

12 CHAIRMAN DAVIS: And what consideration did
13 they receive?

14 MR. WOODSMALL: The consideration denoted
15 in paragraph 3 on page 11, the \$1 per kilowatt
16 distribution substation credit.

17 CHAIRMAN DAVIS: And how much does that
18 amount to on an annual basis?

19 MR. WOODSMALL: I couldn't tell you.

20 CHAIRMAN DAVIS: And then what's the --
21 what's the next phrase there? Explorer will be eligible
22 for an additional credit of 30 cents per kilowatt demand.

23 MR. WOODSMALL: Yes, I see that.

24 CHAIRMAN DAVIS: Is that an additional?
25 And then what does -- okay. If you turn over to page 12,

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1 if you read the first full sentence on page 12, could you
2 read that for me, Mr. Woodsmall?

3 MR. WOODSMALL: Certainly. Using
4 annualized test year demands for applicable matters
5 involved, this would mean that under this provision
6 Explorer would receive a credit of approximately 45,000
7 per year.

8 CHAIRMAN DAVIS: Okay. Is there any doubt
9 they received that 45 -- approximately \$45,000 last year?

10 MR. WOODSMALL: This \$45,000, as it says,
11 was based upon an annualized test year demand. I have no
12 knowledge -- and it's a factual question that I'm not
13 familiar with as to what their actual, in this case, test
14 year demands were, so I don't know if it was 45,000, over,
15 under, where it was. I have no idea.

16 CHAIRMAN DAVIS: Did any other industrial
17 or commercial consumers get any other kind of
18 consideration in this case, Mr. Woodsmall, to the best of
19 your knowledge?

20 MR. WOODSMALL: I'm not aware of any other
21 industrial or commercial consumers, customers that were
22 represented in this case, and I'm not aware of any
23 consideration they would have received by this
24 stipulation.

25 CHAIRMAN DAVIS: Do you think unequal

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1 treatment of customers in a particular rate class is
2 lawful in Missouri?

3 MR. WOODSMALL: No. I believe the statutes
4 and the case law require the Commission to implement rates
5 on a nondiscriminatory basis; therefore -- on an undue
6 discriminatory basis. Therefore, the Commission must find
7 a difference between customers in order to treat them
8 differently.

9 CHAIRMAN DAVIS: Thank you, Judge. No
10 further questions of Mr. Woodsmall at this time.

11 JUDGE DALE: I would like to remind
12 everyone that the exchange between the Chairman and
13 Mr. Woodsmall was in the nature of argument.
14 Mr. Woodsmall's not under oath and not able to testify.

15 MR. MILLS: Your Honor --

16 JUDGE DALE: And administrative notice has
17 been taken of the underlying document.

18 MR. MILLS: -- would other parties be
19 allowed to weigh in on some of those topics at this point
20 or not?

21 JUDGE DALE: That would be at the
22 Chairman's pleasure.

23 CHAIRMAN DAVIS: Mr. Mills, I would be more
24 than happy to allow you to offer whatever comments that
25 you have to make in the interest of the law here.

1 MR. MILLS: I'm going to be brief because
2 this argument has been made fairly thoroughly. I think
3 really, you know, the operative provisions that you-all
4 have seen cited over and over again, and you talked about
5 them this morning, really are the provisions that you've
6 talked about where Empire agrees to forego the right to
7 any other recovery. And then there's the provision that
8 talks about this agreement shall be in effect for three
9 years unless earlier terminated by the Commission.

10 And it's my understanding -- and I was not
11 involved in the drafting of this agreement either from
12 that side of the Bench or from this, so my understanding
13 is based on the reading of the document -- that the
14 parties agreed that there would be a three-year term, but
15 nonetheless, while agreeing that they would all abide by
16 that three-year term, recognized that the Commission has
17 the ongoing supervision and the ongoing police power that
18 the Commission could terminate it at any time.

19 Recognizing that fact does not in any way
20 take away from the parties' ability to contract among
21 themselves that they would not seek termination and that
22 they would not attempt to terminate it themselves. And
23 that's -- I understand what the document says, and that's
24 why I think that's a perfectly consistent reading of all
25 the provisions in the agreement. And it's my

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1 understanding that that is the argument that we have made
2 in previous pleadings and that's the argument I would like
3 to bring home this morning.

4 And that's all I have to offer at this
5 point.

6 CHAIRMAN DAVIS: So, Mr. Mills, it's your
7 position that it would be just entirely up to the
8 Commission to just raise these issues sua sponte?

9 MR. MILLS: Yes. It's my understanding
10 that the parties have contracted away their ability to
11 request that, but nonetheless recognize that the
12 Commission can do it.

13 CHAIRMAN DAVIS: Is it your legal opinion
14 that such a contract would be enforceable here or in
15 circuit court?

16 MR. MILLS: Well, there's case law that
17 says this Commission doesn't really have the authority to
18 interpret a contract, so I suppose it would be enforceable
19 in circuit court.

20 CHAIRMAN DAVIS: Okay. So we're not doing
21 anything here to preclude you from that remedy from the
22 benefit of your bargain?

23 MR. MILLS: At this point, I don't think
24 the Commission has done anything either side. I think
25 it's -- it won't be until after the Commission makes a

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1 decision on that question that we know what's happening,
2 but I would not anticipate that the Commission's decision
3 would preclude review of the circuit court of the
4 underlying contract.

5 CHAIRMAN DAVIS: Unless you were to somehow
6 voluntarily contract away those rights on behalf of the
7 tax-paying citizens of this state.

8 MR. MILLS: I suppose. I'm not even sure
9 if that's possible, but we certainly haven't and don't
10 intend to.

11 CHAIRMAN DAVIS: Thank you, Mr. Mills.

12 MR. MILLS: Thank you.

13 JUDGE DALE: It seems that this would
14 be a good time for a break. Let us return at 12:30 --
15 1 o'clock I heard up here on the Bench. And let's just go
16 with 1 o'clock.

17 We're off the record.

18 (A BREAK WAS TAKEN.)

19 JUDGE DALE: If we could go back on the
20 record. I believe next up is witness for Staff.

21 MR. FREY: Yes, your Honor. Staff calls
22 Janis Fischer.

23 JUDGE DALE: Thank you. Ms. Fischer, I'll
24 just remind you that you're under oath.

25 THE WITNESS: Yes.

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1 MR. FREY: I believe Ms. Fischer's
2 testimony has been admitted into the record in its
3 entirety, so I tender her for cross.

4 JUDGE DALE: Thank you. Do you have any
5 questions?

6 MS. CARTER: I have no questions. Thank
7 you.

8 JUDGE DALE: Thank you.

9 MR. WOODSMALL: No questions, your Honor.

10 MR. MILLS: No questions.

11 JUDGE DALE: Oh, Empire. Sorry.

12 MR. SWEARENGEN: That's all right. I have
13 no questions either.

14 JUDGE DALE: Well, that was easy. Thank
15 you.

16 MR. FREY: I believe Mark Oligschlaeger is
17 next, so the Staff would call Mr. Oligschlaeger.

18 JUDGE DALE: Mr. Oligschlaeger, let me
19 remind you that you're still under oath.

20 MR. FREY: I believe some of
21 Mr. Oligschlaeger's testimony has been admitted, but as to
22 this issue, his direct testimony, Exhibit 54, and I
23 believe we're talking about page -- beginning on page 3,
24 line 12, through page 12, line 19, would be appropriate
25 for admission at this time.

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1 JUDGE DALE: Is that the remainder of
2 Exhibit 54?

3 MR. FREY: I'm not sure, your Honor. There
4 is a Schedule 1, I guess, that we might admit, too. I
5 guess it's Mr. Oligschlaeger's past cases that you've been
6 involved in. Is that correct, Mr. Oligschlaeger?

7 THE WITNESS: Yes, it is.

8 MR. FREY: I don't know, for example, about
9 the executive summary.

10 JUDGE DALE: If the parties -- for the sake
11 of simplicity, if we can go with assuming that we're now
12 admitting the remainder of his direct testimony, are there
13 any objections?

14 MR. WOODSMALL: None, your Honor.

15 MS. CARTER: No.

16 JUDGE DALE: Then it is admitted in its
17 entirety.

18 (EXHIBIT NO. 54 WAS RECEIVED INTO
19 EVIDENCE.)

20 MR. FREY: Tender the witness for cross.
21 Thank you.

22 JUDGE DALE: Thank you.

23 MS. CARTER: No questions.

24 JUDGE DALE: Thank you.

25 MR. WOODSMALL: Just one exhibit, your

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1 Honor.

2 JUDGE DALE: This will be 138.

3 (EXHIBIT NO. 138 WAS MARKED FOR
4 IDENTIFICATION BY THE REPORTER.)

5 MR. FREY: May I have a moment to confer
6 with counsel?

7 MARK OLIGSCHLAEGER testified as follows:

8 CROSS-EXAMINATION BY MR. WOODSMALL:

9 Q. Mr. Oligschlaeger, do you have in front of
10 you what's been marked as Exhibit No. 138?

11 A. Yes, I do.

12 Q. Can you identify that document for us,
13 please?

14 A. It appears to be a document entitled Staff
15 recommendation with an attached Staff memorandum
16 supporting the recommendation that was filed in the
17 previous Empire electric rate case.

18 Q. Can you identify what previous Empire
19 electric rate case that was?

20 A. It was Case No. ER-2004-0570.

21 Q. Turning to the actual memorandum which is
22 attached to the pleading, the fourth full paragraph, could
23 you read the first sentence, please?

24 A. The Missouri Public Service Commission
25 energy department staff, paren, Staff, close paren, has

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1 reviewed the filed tariff sheets and is of the opinion
2 that they were filed in a timely manner and are in
3 compliance with the Commission's Order.

4 MR. WOODSMALL: I have no further
5 questions. I'd move for Exhibit 138 into evidence, your
6 Honor.

7 JUDGE DALE: Is there any objection?

8 (No response.)

9 JUDGE DALE: Hearing none, it will be
10 admitted.

11 (EXHIBIT NO. 138 WAS RECEIVED INTO
12 EVIDENCE.)

13 MR. WOODSMALL: No further questions, your
14 Honor.

15 MR. MILLS: No questions.

16 JUDGE DALE: Mr. Swearengen?

17 MR. SWEARENGEN: My turn. Thank you.

18 CROSS-EXAMINATION BY MR. SWEARENGEN:

19 Q. Mr. Oligschlaeger, just by way of
20 background, the Staff memorandum that's Appendix A to this
21 recommendation, I noted it's signed by Mr. Watkins and
22 Mr. Dottheim; is that correct?

23 A. That is correct.

24 MR. SWEARENGEN: Okay. Could I have just a
25 minute, please?

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1 JUDGE DALE: Certainly.

2 MR. SWEARENGEN: That's all I have. Thank
3 you.

4 JUDGE DALE: Are there any questions from
5 the Bench?

6 COMMISSIONER MURRAY: No questions.

7 CHAIRMAN DAVIS: No questions.

8 JUDGE DALE: Any redirect?

9 MR. FREY: No, your Honor. Thanks.

10 JUDGE DALE: Thank you, Mr. Oligschlaeger.

11 (Witness excused.)

12 MR. MILLS: Shall I go ahead?

13 JUDGE DALE: Uh-huh. Oh, I'm supposed to
14 remind you that you're still under oath. Sorry.

15 BARBARA MEISENHEIMER testified as follows:

16 DIRECT EXAMINATION BY MR. MILLS:

17 Q. Ms. Meisenheimer, I believe that the
18 testimony that you filed relative to this issue is
19 Exhibit 75, which was the June 23rd direct testimony
20 having to do with revenue requirement, and that had
21 previously been admitted, I believe in part, but not in
22 its entirety.

23 Exhibit 76, which was your rate design
24 testimony that had primarily to do with rate design, but
25 as you noted, had a brief mention of this issue at sort of

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1 the introductory portion of that testimony. And is there
2 anything to do with this issue in your rebuttal testimony?

3 A. No.

4 MR. MILLS: Okay. With that, your Honor, I
5 will offer Exhibit 75 because I believe this is the last
6 time that this witness will be on the stand having to do
7 with that testimony, and then I'll tender the witness for
8 cross-examination.

9 I will plan to offer Exhibit 76 and 77 when
10 we get to the rate design portion.

11 JUDGE DALE: That's fine. I have that 75
12 was already admitted in its entirety, except that Praxair
13 preserves a potential objection, so --

14 MR. MILLS: Now would be the time for them
15 to object if they have any objections.

16 MR. CONRAD: Since I was the one doing
17 that, I think that was -- at least in my thought, that was
18 with respect to the rate design class cost of service
19 stuff, so I may have not been very accurate with what I
20 told your Honor, and if so, I apologize, but I don't think
21 we have -- with the -- on this issue, we can withdraw an
22 objection with respect to Ms. Meisenheimer's testimony on
23 this issue, if that helps to clarify it. I hope I'm not
24 making it worse.

25 JUDGE DALE: I think it clarifies. You

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1 thought there was something with rate design in this set
2 of testimony, which there is not.

3 Is that correct, Ms. Meisenheimer?

4 THE WITNESS: That's correct. Only to the
5 extent that there were issues related to the ELIP that I
6 indicated I would later be talking about, which isn't the
7 issue we're dealing with now.

8 MR. CONRAD: Okay. We withdraw that
9 objection.

10 JUDGE DALE: Okay. Then it's already been
11 received.

12 MR. MILLS: Thank you. I'll tender the
13 witness for cross-examination.

14 JUDGE DALE: Staff?

15 MR. FREY: No questions.

16 JUDGE DALE: Mr. Woodsmall?

17 MR. WOODSMALL: No questions, your Honor.

18 JUDGE DALE: Ms. Carter?

19 MS. CARTER: No questions.

20 JUDGE DALE: Mr. Swearingen?

21 MR. SWEARENGEN: I have no questions.

22 Thank you.

23 JUDGE DALE: Other questions from the
24 Bench?

25 COMMISSIONER MURRAY: No questions.

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1 CHAIRMAN DAVIS: No.

2 JUDGE DALE: You may step down.

3 JUDGE DALE: I believe that concludes fuel
4 recovery method/IEC continuation.

5 The next subject is gain from unwinding
6 forward natural gas contract. Do parties wish to do an
7 opening on that?

8 MR. CONRAD: If your Honor please, we do
9 not -- in direct response to your question, I just lift up
10 for your recollection, Mr. Brubaker was up and down on
11 that yesterday, so his comments have already been included
12 in the record.

13 JUDGE DALE: Thank you. So with respect to
14 openings, are there any?

15 MR. SWEARENGEN: I can't say. Mr. Cooper
16 is going to try the issue. I'm sure he's on his way over
17 right now, so if we could beg the Commission's indulgence
18 for a minute or two, he may have something he wants to
19 say.

20 JUDGE DALE: Certainly, in light of how
21 long we took. Mr. Woodsmall, did you have one?

22 MR. WOODSMALL: No. I'm getting ready to
23 leave. I'm sorry.

24 JUDGE DALE: Do you have one or does Staff
25 have one?

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1 MR. MILLS: I'm not getting ready to leave,
2 but I don't have an opening on this particular issue.

3 MR. FREY: I don't have anything prepared,
4 your Honor.

5 JUDGE DALE: Well, then we will just go off
6 the record for a few minutes and give Mr. Cooper an
7 opportunity to get here.

8 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

9 JUDGE DALE: We're going back on the
10 record.

11 MR. COOPER: Good afternoon. During the
12 third quarter of 2005, Empire elected to unwind a portion
13 of a long-term forward natural gas contract that it had
14 with British Petroleum. Empire sold back its positions on
15 certain deliveries and recorded a gain of slightly more
16 than \$5 million during 2005. It did so in an effort to
17 offset dramatic price increases in the cost of natural gas
18 that the company needed for the summer, fall and winter of
19 2005 to reduce its credit exposure with BP and to use this
20 decrease in its credit exposure to increase its near-term
21 natural gas hedge positions.

22 Staff proposes to amortize the
23 \$5 million gain over five years by reducing the company's
24 Missouri fuel and purchased power expense on a
25 going-forward basis by approximately \$850,000 per year and

1 continuing that reduction until the Missouri
2 jurisdictional piece of the gain is fully amortized.

3 The industrial intervenors propose to
4 reduce annual fuel and purchased power expense by the full
5 amount of the gain, which has the effect of continuing to
6 pass through to customers the entire gain each and every
7 year rates set in this case remain in effect. Both of
8 these proposals should be rejected.

9 As the Commission has heard, Empire
10 suffered huge losses in regard to fuel and purchased power
11 expenses during calendar year 2005. There's no proposal
12 in this case to seek to recover on a going-forward basis.
13 Those losses are gone. Identified gains should be treated
14 in like manner. There's no reason to pull the past fuel
15 and purchased power gain forward to account for it as a
16 going-forward -- on a going-forward basis when the losses
17 are not being treated in this fashion.

18 Thank you.

19 JUDGE DALE: Thank you. All of the other
20 parties have waived opening.

21 MR. COOPER: Empire would call Mr. Scott
22 Keith.

23 (Witness sworn.)

24 JUDGE DALE: Thank you. Please be seated.

25 SCOTT KEITH testified as follows:

1 DIRECT EXAMINATION BY MR. COOPER:

2 Q. Please state your name.

3 A. My name is Scott Keith, K-e-i-t-h.

4 Q. By whom are you employed and in what
5 capacity?

6 A. I'm employed by Empire as director of
7 planning and regulatory.

8 Q. Have you caused to be prepared for the
9 purposes of this proceeding certain direct, rebuttal and
10 surrebuttal testimony in question and answer form?

11 A. Yes, I have.

12 Q. Is it your understanding that that
13 testimony has been marked as Exhibits 20, 21 and 22 for
14 identification?

15 A. It is now.

16 Q. Do you have any changes that you would like
17 to make to that testimony at this time?

18 A. Yes, I do have a few changes.

19 Q. Why don't you proceed to tell us about
20 those?

21 A. On Exhibit 21, the rebuttal testimony, I
22 have a correction at page 9, lines 10, 11 and 12, and it's
23 a response to a question why I disagreed with the Staff.
24 On line 10, I would like to strike the word past and
25 insert the last, so that it reads, first it is my

1 understanding that in the last Empire rate. And then I
2 have cases right now, and that plural, the S needs to be
3 stricken so that it reads Empire rate case.

4 On line 11, the last word on that line is
5 currently has. That should be stricken and was should be
6 inserted. And then on line 12, the two words consistently
7 been need to be stricken.

8 Q. Okay. Do you have any other changes you
9 need to make?

10 A. Yes, I do. On page 10, line 1, the first
11 line, at the present time it reads, inconsistent with the
12 past rate case treatment. The word past should be
13 stricken and most recent should be inserted.

14 Q. So would you read that part of the sentence
15 now with your change?

16 A. It would read, inconsistent with the most
17 recent rate treatment given this issue.

18 Q. Do you have any other changes you need to
19 make?

20 A. Yes. Page 14, lines 4 and 5. There are
21 two percentages that show up in those lines. This is HC.

22 Q. Why don't we set that aside?

23 Do you have any other changes that wouldn't
24 require highly confidential information that we can go
25 ahead and make?

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1 A. Yes. On Exhibit 22, page 3, line 12.

2 MR. FREY: Is that your surrebuttal,

3 Mr. Keith?

4 THE WITNESS: Yes, it is.

5 MR. FREY: Thank you.

6 THE WITNESS: The word historical shows up.

7 The portion of the sentence reads this way right now:

8 Inconsistent with the historical treatment of this issue

9 in Missouri. The word historical needs to be stricken,

10 and the phrase in the most recent Empire rate case in

11 Missouri needs to be inserted. In addition, on --

12 BY MR. COOPER:

13 Q. Let's back up just a second. Would you
14 read that part of the sentence again now with your change,
15 starting with inconsistent?

16 A. Inconsistent with the treatment of this
17 issue in the most recent Empire rate case in Missouri.

18 Q. Okay. What's your next change?

19 A. Finally on Exhibit 22, which is the
20 surrebuttal, the header on pages 2 through 9 is incorrect.
21 It reads rebuttal, and it should read surrebuttal on each
22 of those pages.

23 Q. Are those all your changes other than the
24 HC change that you mentioned previously?

25 A. Yes.

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1 MR. COOPER: Your Honor, could we go into
2 in-camera for a moment?

3 (REPORTER'S NOTE: At this point an
4 in-camera session was held, which is contained in
5 Volume 17, page 1023 of the transcript.)

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1 BY MR. COOPER:

2 Q. If I were to ask you the questions which
3 are contained in Exhibits 20, 21HC and NP and 22HC and NP
4 today, would your answers as amended be the same?

5 A. Yes, they would.

6 Q. Are those answers as amended true and
7 correct to the best of your information, knowledge and
8 belief?

9 A. Yes, they are.

10 MR. COOPER: Your Honor, I would
11 offer at this time Exhibit 20, Exhibit 21NP and HC, and
12 Exhibit 22NP and HC into evidence, and in doing so would
13 note that I am offering all of those exhibits at this time
14 and would anticipate an objection to Exhibit 20 because I
15 believe it falls within the Commission's Order -- earlier
16 Order striking portions of testimony.

17 MR. CONRAD: And if it's appropriate, I
18 didn't know if you were asking for objections yet.

19 JUDGE DALE: I was just about to.

20 MR. CONRAD: I'm sorry. If you want to
21 ask, I'll respond.

22 JUDGE DALE: Are there any objections?

23 MR. CONRAD: Yes. To the portions of
24 Mr. Keith's offered exhibits and testimony that have been
25 previously struck by the Commission in its Orders, I

1 believe, of I think it was May 15 -- and sorry if I've got
2 the date wrong -- May 2 or May 15, previously struck by
3 order of the Commission.

4 JUDGE DALE: Are there any other
5 objections?

6 MR. CONRAD: Beyond that, no.

7 JUDGE DALE: Okay. Then I will admit in
8 their entirety Exhibits 21 and 22, both HC and NP, and I
9 will admit the part that has not been previously stricken
10 of 20, but in keeping with Empire's position, preserve it
11 in the record for future whatever.

12 (EXHIBIT NOS. 20, 21HC, 21NP, 22HC AND 22NP
13 WERE RECEIVED INTO EVIDENCE.)

14 MR. COOPER: Thank you, your Honor. At
15 this time we would tender Mr. Keith for cross-examination
16 on the unwinding issue.

17 JUDGE DALE: I believe you're first,
18 Mr. Conrad.

19 MR. CONRAD: Thank you, your Honor.

20 CROSS-EXAMINATION BY MR. CONRAD:

21 Q. Mr. Keith, is it true that you used to work
22 for Aquila?

23 A. Yes.

24 MR. CONRAD: Thank you. No further
25 questions.

1 JUDGE DALE: Mr. Mills?

2 MR. MILLS: I have no questions about the
3 unwinding issue. I do have questions on the next issue.

4 JUDGE DALE: Thank you. Staff?

5 MR. FREY: Thank you, your Honor.

6 CROSS-EXAMINATION BY MR. FREY:

7 Q. Good afternoon, Mr. Keith.

8 A. Good afternoon.

9 Q. I'd just like to ask you, with respect to
10 the corrections that you just entered into your testimony,
11 if you could state the reason you made those corrections.

12 A. Certainly. I read Ms. Fischer's testimony
13 and verified that the case prior to the very -- the most
14 recent rate case did use a current 12-month period to
15 establish an off-system sales level. So I accepted her
16 position, her statements that she made in her rebuttal
17 testimony.

18 Q. Did you read any of the other cases that
19 she listed in the testimony?

20 A. No, I did not.

21 Q. Can you state, how would you define the
22 term unwinding?

23 A. To me, the term means they had a commitment
24 to purchase physical gas in this particular case for an
25 extended period of time in the future. They chose to

1 liquidate that position or sell that position back, in
2 this case to make a gain on it.

3 Q. In this case, then -- in this case, the
4 unwinding refers to natural gas purchases that were to
5 take place in the summers of 2009 to 2011; is that
6 correct?

7 A. Yes, that's correct.

8 Q. And could you explain what's meant by the
9 term physical hedge?

10 A. They had committed to purchase certain
11 quantities of gas at a fixed price during the three
12 summers you just mentioned, '09, '10 and '11.

13 Q. And briefly how is that distinguished, if
14 you would, from a financial hedge?

15 A. Well, a financial hedge is -- it's a
16 financial instrument, not necessarily a physical delivery
17 of gas. These contracts were all fixed price gas delivery
18 at specified quantities.

19 Q. So it's physical hedges that are at issue
20 here, correct?

21 A. Yes.

22 Q. Okay. We're talking about two summer
23 months, July and August, the years 2009 through 2011.
24 That's correct?

25 A. That's correct. It was the summers in

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1 those three calendar years. I don't recall off the top of
2 my head whether it was two or three months during each of
3 those summers.

4 Q. Is it true that these physical hedges were
5 entered into during November, the month of November 2004,
6 if you recall?

7 A. I don't recall.

8 MR. FREY: Your Honor, I have a few
9 questions that I think are going to be HC.

10 (REPORTER'S NOTE: At this point an
11 in-camera session was held, which is contained in
12 Volume 17, pages 1029 through 1030 of the transcript.)

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1 MR. FREY: Out of in-camera. I'm sorry.

2 BY MR. FREY:

3 Q. On page 4 of your rebuttal testimony -- do
4 you have that with you? I guess you do.

5 A. Yes, I do.

6 Q. Beginning at line 5 --

7 A. I have it.

8 Q. -- there you criticize, do you not, the
9 Staff's proposal that the \$5 million gain from the
10 unwinding be amortized over a five-year period?

11 A. I think I'm criticizing both proposals, the
12 Staff's and the industrials'.

13 Q. Okay. And do you point out there that the
14 5 million is subject to potential refund following a
15 true-up audit from the expiration of the IEC?

16 A. Yes.

17 Q. On page 6 of your rebuttal, you state that
18 Empire's energy costs had exceeded the IEC cap by almost
19 24 million without the \$5 million offset from the
20 unwinding transaction; is that correct?

21 A. That's correct.

22 Q. And are you aware that Empire has proposed
23 that the IEC be discontinued in this proceeding?

24 A. Yes, I am.

25 Q. And if the Commission were to grant

1 Empire's request, the IEC would be history by the end of
2 this year, would it not?

3 A. Assuming an operation of law date of
4 January 1, yes, I'd agree with that.

5 Q. Under an early termination scenario, then,
6 would you say that chances that the ratepayers would
7 receive a refund of all or a portion of the 5 million
8 following a true-up audit is highly unlikely?

9 A. No, I don't see that the two are connected.
10 I think there would still be an audit of the revenues
11 collected under the IEC during whatever term it's in
12 effect.

13 Q. And so you think there's a chance that
14 by the end of the year it would be determined that
15 ratepayers would be due a refund of all or a portion of
16 the \$5 million?

17 A. Not unless the proceeding started fairly
18 quickly. I don't think the timing of any refunds that may
19 occur related to that 5 million has to take place prior to
20 the end of this year. I think it could take place any
21 time next year, whenever the audit of the IEC is completed
22 and recommendations are filed.

23 Q. If I understand you correctly, you're
24 saying at about this time you're about \$24 million in
25 excess of the IEC cap?

1 A. Not counting the \$5 million gain, yes.

2 Q. So with the 5 million, you'd presumably be
3 about 19 million in excess, correct?

4 A. As of June, yes, that's about right.

5 Q. And so in order for there to be a refund,
6 doesn't that \$19 million have to be eaten up by the end of
7 the year?

8 A. That would be certainly my position, yes.

9 Q. And you think there's a likelihood that
10 that will occur?

11 A. No.

12 Q. Thank you. So when you speak in your
13 testimony about potential refunds of 5 million to Empire's
14 customers, that's really only kind of a theoretical point,
15 isn't it?

16 A. It could be. What I was thinking about was
17 if the Staff were to do an audit and find certain
18 improprieties or things they didn't think were quite right
19 or things that should be excluded, that I thought the
20 \$5 million issue could be a single issue to address in the
21 form of some sort of sharing or refunds if it was
22 applicable to that gain, notwithstanding the fact that we
23 would be in total well over the IEC cap.

24 Q. I see. Okay. Sticking with your -- with
25 page 6 of your rebuttal, you state that this type of

1 unwinding transaction is unique and has not been used
2 since August 2005. Do I have that correct?

3 A. Correct.

4 Q. And given that you filed your rebuttal in
5 July of this year, do you conclude that the transaction is
6 unique because it has not been used for almost a year?

7 A. Yes. That and the fact that any future
8 unwindings of this nature might jeopardize our derivative
9 accounting.

10 Q. What frequency less than a year would you
11 consider it not unique, then, if you were to do it? Say,
12 within six months, would you then consider it not to be
13 unique?

14 A. That would lessen its uniqueness, yes.

15 Q. You also mentioned that the -- in the
16 quotation that I offered here, you said this type of
17 unwinding transaction. Can you explain what you mean by
18 this type of unwinding transaction?

19 A. Yes. This is a -- this was a physical gas
20 purchase that the company is able to exclude from its FAS
21 133 accounting because it's bought in the ordinary course
22 of the business for future delivery for use by
23 its customers. These type of transactions if they are
24 unwound -- in our case it appears more than once. This
25 transaction's exception to this accounting is no longer

1 valid. A mark to market accounting on our physical gas
2 purchases would have to be -- would have to take place on
3 our books. And the uniqueness of it is, it's this
4 physical long-term gas delivery and not a financial hedge.

5 Q. So when you speak of this type of
6 transaction, it's not the -- it's not necessarily the size
7 of the amounts of dollars involved, then, is it?

8 A. That's correct.

9 Q. I want to make sure I understand what
10 you're saying here. Are you saying that the transaction
11 in question has been exempted from the mark to market
12 accounting, and that if it were to be done again, that
13 wouldn't be the case?

14 A. That's correct.

15 Q. And why is that?

16 A. Because one of the exemptions is that, as I
17 understand it, the physical nature of the transaction you
18 can avoid derivative accounting if it's done in the
19 ordinary course of business for your customers. Once
20 these type of physical arrangements start getting unwound
21 periodically, then it has to go into derivative accounting
22 and you have to reflect it on your statements.

23 Q. Okay. And you mentioned that in your
24 testimony, do you not, in your rebuttal testimony?

25 A. Yes.

1 Q. I think it's on page 6 as well.

2 A. That's correct.

3 Q. If I might quote you, I believe it says, in
4 addition, Empire's external auditor, Price Waterhouse
5 Coopers, has advised them that additional transactions of
6 this type could jeopardize Empire's current accounting
7 treatment of derivatives. Is that an accurate quote?

8 A. Yes, it is.

9 Q. And if I understand you correctly, the type
10 you're talking about is a physical hedge that's being
11 unwound, and if you do those more frequently, if you start
12 doing them on what looks like a routine basis, then you
13 run into this difficulty?

14 A. Yes, that's correct. In our case, as a
15 matter of fact, I think more than once is what we were
16 told.

17 Q. Are there other types of unwinding
18 transactions that Empire could enter into without
19 jeopardizing its current FAS 133 accounting?

20 A. I'm not certain of that. I don't know.

21 Q. Okay. And can you just kind of explain why
22 this is a problem for Empire or a concern for Empire?

23 A. The -- yes. The concern for Empire would
24 be if we were forced to do mark to market accounting on
25 our physical gas purchases, which are quite substantial,

1 we would introduce a lot of volatility into our statements
2 in terms of earnings. It would sort of defeat the purpose
3 of our hedging policy.

4 Q. And does that mean if another opportunity
5 were to come along in the future that might yield a
6 \$5 million gain, for example, that Empire would not be
7 willing to unwind the contract or --

8 A. I really can't say. It would most
9 certainly depend upon the circumstances at the time.

10 Q. So there is still a possibility that the
11 company would find it in its interests, despite having to
12 reflect some variability on its financial statements as a
13 result?

14 A. Well, I can't think of all the
15 circumstances, but I couldn't say with 100 percent
16 certainty that it would never be -- that they would never
17 try this sort of transaction again. It would just depend
18 upon the circumstances.

19 Q. But you're not saying that it's highly
20 unlikely, are you?

21 A. I think it's highly unlikely.

22 Q. Does Empire expect the price of gas to be
23 higher or lower than the price of the unwound hedge
24 contract in July and August 2009 through 2011?

25 A. I don't know. I don't know that we can

1 predict the price of gas in the summer of 2009 through
2 '11.

3 Q. If Empire thought the price would be
4 higher, is it your testimony that the company might
5 necessary -- might nevertheless still unwind the contract
6 or might nevertheless have unwound that contract?

7 A. Could you repeat that?

8 Q. If the company thought that the prices are
9 going to be higher and was projecting higher prices, do
10 you think it's possible that the company might still have
11 decided to unwind those forward hedges?

12 A. I don't know. I can't answer that.

13 Q. With the passage of Senate Bill 179, does
14 Empire anticipate being able to avail itself of a type of
15 fuel adjustment mechanism by the time there is a need to
16 purchase gas for those years?

17 A. Certainly I'd hope so, yes.

18 Q. And if the company has such a fuel
19 adjustment clause in place and its prices are
20 substantially higher than the price of the contract now
21 unwound, who will be footing the bill for the increased
22 cost in those years, the shareholders or the ratepayers?

23 A. I don't think I can answer that at this
24 point. Certainly the fuel adjustment clause that I've
25 seen draft rules for envisions disallowances for

1 imprudence. So to the extent the costs in 2009, '10 and
2 '11 were being audited by the Staff and other parties, and
3 the purchases of gas were found to be imprudent during
4 that period, costs would be disallowed. It could be
5 related to this particular unwinding, the way I see it.

6 Q. But in the event there is not a prudence
7 disallowance, the additional cost would be borne by the
8 customers, correct?

9 A. Yes, if the fuel adjustment were in place
10 and the costs weren't disallowed.

11 Q. Are you familiar with the regulatory
12 mechanism known as the Accounting Authority Order?

13 A. Somewhat.

14 Q. And can you state in general what the
15 purpose is?

16 A. Generally utilities can come to the
17 Commission and ask for some cost deferrals, capture that
18 on their balance sheet, with the hope of future recovery
19 following proceedings.

20 Q. And these are for what kind of events? I'm
21 sorry. Did you say what kind of occurrences?

22 A. No, I didn't.

23 Q. What kind of occurrences do they apply to?

24 A. Something that's unforeseen, special
25 circumstances, maybe -- I'm trying to think of one off the

1 top of my head in Missouri. There was in the past some of
2 the coal units, for example, I think Missouri Public
3 Service Company had one that had to be retooled to burn
4 low-sulfur coal, and some of those costs were set aside in
5 an Accounting Order and then subsequently taken into
6 account in following rate cases.

7 Q. Do the words extraordinary, nonrecurring,
8 are they applicable?

9 A. Extraordinary might be. I'm not certain
10 that I would say nonrecurring would apply.

11 Q. Just for the sake of argument that the
12 Commission finds the unwinding transaction at issue in
13 this proceeding to be extraordinary, given that under the
14 AAO, Accounting Authority Order, the utility may be
15 permitted to recover all or part of such cost, shouldn't
16 there exist also some means by which ratepayers may be
17 able to share in the benefits of extraordinary
18 nonrecurring gains? Wouldn't that just be fair?

19 A. In this particular case, I don't think it's
20 fair, because we haven't asked for any kind of accounting
21 authority on the extraordinary expenses, fuel expenses we
22 incurred and that gain was directly related to those
23 extraordinarily high fuel costs.

24 Q. Isn't it true that under the existing IEC,
25 that the company is precluded from seeking to recover

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1 those additional fuel costs you refer to?

2 A. The IEC tariff precludes that? I'm not
3 aware of that if it does.

4 Q. The Stipulation & Agreement.

5 A. I don't know without reading the
6 Stipulation.

7 MR. FREY: Your Honor, I have no further
8 questions. Thank you, Mr. Keith.

9 JUDGE DALE: Is there redirect or is there
10 questions from the Bench?

11 COMMISSIONER MURRAY: Let me ask one.

12 QUESTIONS BY COMMISSIONER MURRAY:

13 Q. Good afternoon.

14 A. Good afternoon.

15 Q. It's my understanding that Empire is saying
16 that a portion of the under-recovery of the retail fuel
17 and energy costs was reduced by the \$5 million gain; is
18 that correct?

19 A. That's correct.

20 Q. And that Empire's position that this
21 under-recovery -- total under-recovery should be reduced
22 to that extent?

23 A. Yes. We were under-recovered, for example,
24 as of June of this year by -- I believe the number's
25 \$24 million, without taking this gain into account. By

1 using the gain to offset some of that \$24 million loss, we
2 were able to reduce that to 18, \$19 million. So we used
3 the gain to cover those costs we could not pass on.

4 Q. So to call it a gain is a little bit
5 misleading, is it not? You really didn't -- you did not
6 have a net gain from that transaction?

7 A. No. No. We have lost money on our fuel.
8 We have not been able to recover our fuel costs. So we
9 have reduced our losses.

10 COMMISSIONER MURRAY: Okay. Thank you.

11 JUDGE DALE: Thank you. Sorry about that.
12 I was writing that down. It clarified a great deal for
13 me.

14 Are there questions based on the questions
15 from the Bench?

16 (No response.)

17 JUDGE DALE: Is there redirect?

18 MR. COOPER: Yes, your Honor.

19 REDIRECT EXAMINATION BY MR. COOPER:

20 Q. Mr. Keith, you were -- you mentioned
21 earlier mark to market accounting, and I think you as part
22 of your explanation to a question from Mr. Frey made the
23 comment that it would introduce volatility into the
24 company's financial statements. Do you remember that?

25 A. Yes, I do.

1 Q. Could you explain in a little more detail
2 what mark to market accounting is, so that we can see how
3 volatility will result from that? I'm just looking for
4 this on a pretty high level.

5 A. That's what it's going to be. My
6 understanding is you have to measure these instruments
7 periodically compared to -- you have an obligation or an
8 instrument that, say, gives you the right to buy gas for
9 \$5. The market might be \$7 at a given point in time.
10 That \$2 differential would be recorded on the income
11 statements as a gain or loss, and the gain or loss would
12 be related to the volumes involved.

13 Q. And that would be done at various intervals
14 through the life of that contract?

15 A. That's correct.

16 Q. Now, you talked about the reasons for -- or
17 the reason for the unwinding in regard to fuel costs that
18 Empire had for the year. Were there reasons other than
19 that related to counter-party risk, that sort of thing?

20 A. Yes.

21 Q. What were those?

22 A. Part of the hedging plans or regime the
23 company uses involves gauging counter-party risk and not
24 getting too far out on a limb, so to speak, with a
25 supplier, and as the price of gas escalated during the

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1 latter part of 2005, some of these -- this credit exposure
2 got quite large on a couple of the suppliers. So in
3 addition to taking advantage of the gain to reduce our
4 losses on fuel, it also lessened some of the exposure or
5 credit risk exposure with this particular supplier.

6 MR. COOPER: That's all the questions I
7 have.

8 JUDGE DALE: Thank you. You may step down.

9 THE WITNESS: Thank you.

10 MR. FREY: Staff calls Janis Fischer.

11 JUDGE DALE: Ms. Fischer, I'll remind you
12 that you're under oath.

13 THE WITNESS: Yes.

14 MR. FREY: Again, Ms. Fischer's testimony
15 on this issue has been admitted, and so I tender the
16 witness for cross.

17 JUDGE DALE: Public Counsel?

18 MR. MILLS: I have no questions.

19 JUDGE DALE: Empire?

20 MR. COOPER: Yes, your Honor.

21 JANIS FISCHER testified as follows:

22 CROSS-EXAMINATION BY MR. COOPER:

23 Q. Ms. Fischer, the subject unwinding
24 transaction that's at issue here took place in the third
25 quarter of 2005 and was recorded by Empire in August of

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1 2005, wasn't it?

2 A. I presume that's true. I don't recall
3 actually looking at a financial statement that reflects
4 that, but I believe that's true.

5 Q. You'd agree it took place during the
6 calendar year 2005 at any rate, correct?

7 A. Yes.

8 Q. Now, if you'd turn for a second in your
9 surrebuttal to page 18.

10 A. Yes, I'm there.

11 Q. Just a second. I'll get there. On line 5,
12 do you see that a question begins that says -- in part I
13 guess on line 5 and 6 through 7, since Empire purchases
14 natural gas to be used in the generation of electricity
15 and its customers are required to pay for costs associated
16 with Empire's generation of electricity? Do you see that
17 phrase?

18 A. Yes.

19 Q. Now, I suppose that's part of the question.
20 So it's not necessarily your testimony, but I want to ask
21 you whether you agree with that statement.

22 A. I guess in looking at that Q and A, there's
23 two different ways of looking at it. What I was referring
24 to in that Q and A is the fact that the gains and losses
25 from the hedges are captured by Empire and reflected in

1 their reports and financials.

2 Q. So you would agree with me, wouldn't you,
3 that Empire's customers have not been required to
4 reimburse Empire for all its costs associated with
5 generation of electricity since Empire's last rate case?

6 A. Would you please repeat that?

7 Q. Let me ask it a different way. Do you
8 believe that Empire's customers have reimbursed Empire for
9 all its fuel and purchased power costs that have been
10 incurred since the last rate case?

11 A. Well, since the Order in the last rate
12 case implemented the IEC, depending on the point at which
13 the IEC is terminated or expires, there would be a
14 reconciliation of the costs over that period of time to
15 make a determination if they fell within the floor and
16 ceiling. If they exceeded the ceiling, then they would
17 not be recovered from customers.

18 Q. Well, let's focus just for a second on the
19 year 2005. Would you agree with me that if we don't
20 include the unwinding transaction, that Empire's fuel and
21 purchased power recovery -- under-recovery for just the
22 year 2005 would be approximately \$18 million?

23 A. Yes, I believe that's what Mr. Keith
24 testified in his testimony. I haven't found anything to
25 refute that.

1 Q. And so even if we included that gain from
2 the unwinding transaction, empire's recovery would still
3 be somewhere around 13 million just for the year 2005?

4 A. I thought I read that it was 24 million and
5 close to 19 with the 5 million included, so --

6 Q. Yeah. And let's --

7 A. I may be losing track if it's Missouri
8 jurisdictional or --

9 Q. Let's straighten that out a little bit. I
10 think earlier in questions to Mr. Keith, there were
11 questions related to June of 2006 or through June of 2006;
12 is that right?

13 A. I don't recall the questions related to
14 June 2006. I know that's the end of the true-up.

15 Q. Do you have Mr. Keith's testimony in front
16 of you?

17 A. Yes.

18 Q. And in particular his rebuttal testimony?

19 A. Yes, I have it.

20 Q. Could you turn to page 6 in that testimony?

21 A. Yes, I'm there.

22 Q. And if you would, you don't have to read it
23 out loud, but would you take a second and read the answer
24 that starts on line 2 and goes through line 8?

25 A. Okay. I see the reference to 2006. Give

1 me a moment. I'll read it. Okay.

2 Q. Now, would you agree with me that when
3 we're talking about fuel cost through June 30 of 2006,
4 Empire's under-recovery in total is approximately
5 \$24 million?

6 A. Yes.

7 Q. And if we take into account as of June 30,
8 2006, the unwinding transaction, that's what takes us back
9 to about 18.9 or about 19 million?

10 A. Right. I would agree with that.

11 Q. And just one -- now, in your surrebuttal
12 testimony, I believe you provide examples of deferrals or
13 sometimes referred to as Accounting Authority Orders that
14 have been approved by the Commission for Empire in various
15 situations, don't you?

16 A. Yes.

17 Q. Has Empire applied for Commission
18 approval to defer any of its fuel and purchased power
19 under-recovery related to 2005 or through June 30 of 2006?

20 A. Not that I'm aware of.

21 Q. Would the Staff be supportive of such a
22 deferral application?

23 A. Well, in consideration, my understanding of
24 the stipulation with the IEC from the last case, Empire's
25 precluded from having an AAO. If that were not on the

1 table, I don't know if Staff could draw a conclusion
2 unless they had all the information before them. And at
3 least the last AAO that I was involved in, we had a set
4 list of criteria that we looked at in investigating that,
5 and that would just depend on the information pulled
6 together, whether we would or not.

7 Q. Are you familiar with an Aquila application
8 for deferral related to fuel cost under-recovery that was
9 presented to the Commission Case No. EU-2005-0041?

10 A. No. I'm afraid I'm not familiar with that
11 at all.

12 Q. Would you agree with me that the rates set
13 in this case will be designed to recover expenses on a
14 going-forward basis?

15 A. Yes.

16 Q. And they'll not be designed to recover past
17 losses, other than in some situation where there's been an
18 approved deferral or a deferral approved by the
19 Commission, correct?

20 A. Well, when Staff puts together its
21 normalized annualized expenses and revenues, they take
22 into consideration any abnormalities, or I know there have
23 been situations in the past where I believe -- I'm not
24 sure if it was Empire, so I won't say that.

25 But say, for example, expenses associated

1 with the original implementation of Sarbanes-Oxley, some
2 of the companies had those reflected in a test year, and
3 there have been discussions or I believe it may have even
4 been settled where those would be spread over a couple of
5 years or amortized rather than allowed all within a test
6 year. So even without a Commission Order allowing a
7 deferral, sometimes in the rate case process Staff and the
8 parties come up with some similar methods to smooth or
9 spread expenses.

10 Q. Well, let's talk specifically about this
11 case. Is there any proposal by any of the parties to
12 take, for instance, the \$24 million in fuel under-recovery
13 and allow Empire to recover that on a going-forward basis?

14 A. No, that to my knowledge hasn't been
15 discussed.

16 Q. And in spite of that, then, the Staff is
17 recommending that the past gain associated with this
18 unwinding of the contract should be treated differently
19 and netted against fuel expenses on a going-forward basis;
20 is that correct?

21 A. Could you repeat that one more time? I'm
22 sorry.

23 Q. I think you told me there's no proposal in
24 this case to recognize the under-recovery Empire has
25 experienced in the past related to the fuel and purchased

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1 power in some way on a going-forward basis, there's no
2 proposal that Empire be allowed to recover in the future
3 for those past losses; is that correct?

4 A. That is true, and I would say that that is
5 a result of the fact that they're currently under an IEC
6 that has a floor and a ceiling. Without that in place, I
7 don't know if we would be in the same circumstances or
8 not.

9 Q. Well, let's set that aside for a second.
10 Well, so based upon that answer, if there were not an IEC
11 in place, do you think it's possible that within the
12 ratemaking process a company would be allowed to go back
13 and grab those past losses and recover them in rates on a
14 going-forward basis?

15 A. Generally, we would consider that
16 retroactive ratemaking. If there were a specific unusual
17 event, I can't really say if it would be -- I believe we
18 would consider it, but the fact that it's the day-to-day
19 costs of fuel which are always involved in a case that
20 part of the -- you know, the premise of regulatory lag and
21 the expenses in revenue go up and down, and I -- no, I
22 don't believe we would probably go back and allow those.

23 MR. COOPER: That's all the questions I
24 have. Thank you.

25 JUDGE DALE: Thank you. Are there

1 questions from the Bench?

2 COMMISSIONER MURRAY: Please.

3 QUESTIONS BY COMMISSIONER MURRAY:

4 Q. Good afternoon, Ms. Fischer.

5 A. Good afternoon.

6 Q. Can you tell me why -- I mean, it just
7 seems logical to me, if you're trying to determine in
8 setting the revenue requirement why you would not -- why
9 you would want to amortize a gain that simply offset a few
10 losses, why you would want to or why it would be
11 reasonable to amortize the gain in that rate case. I
12 don't see the logic of that.

13 A. I believe I understand your question, and I
14 would tell you when I first became aware of the unwinding
15 and looking at the fact that when Empire places a physical
16 hedge for gas, it's an obligation for gas in the future,
17 and that part of the reason I believe that hedges entered
18 into is to mitigate the risk associated with the increases
19 in prices of gas. And so when Empire entered into these
20 hedges, which were the largest hedges that I have seen in
21 reviewing the transactions that they have made for hedging
22 since the beginning -- or since 2002, these were very
23 large.

24 The prices were very good, and they were
25 obligations going out to 2009 to 2011, which meant that

1 customers, where as that time approached that first month,
2 July of 2009, Empire would have been able to receive this
3 large number -- or large amount of gas at this very
4 reasonable price, and that Empire chose, they weren't
5 forced, to -- and I understand, you know, part of their
6 rationale. They had these charges setting out in the
7 future obligating them to millions of dollars, and they
8 were short on hedges closer in time, so they chose to
9 unwind those hedges and instead replace them with
10 closer-term hedges.

11 And so in looking at it, one of the things
12 that struck me was that customers or Empire in the future
13 may be harmed by letting go of that very reasonably priced
14 gas and instead replacing it now.

15 And the other thing I looked at was the
16 fact that because they were already incurring fuel costs
17 above the ceiling in the current IEC, that that \$5 million
18 gain, even though I believe it was just a paper
19 transaction, would never be allowed to benefit customers
20 because the prices were above the ceiling. All of that
21 would conceptually go to the rate -- to the shareholders,
22 through the financial statements.

23 Q. Okay. So your position is that had they
24 hung on to that hedged position, that the customers would
25 be better off in the future?

1 A. I can't say with certainty, but the price
2 was so reasonable that even if you look at the -- from the
3 point that they entered the hedges in November of '04,
4 even if you just looked at inflation factors you would
5 expect the price of gas to go up. And I would guess maybe
6 gas may go up more, and if that's the case, then yes,
7 customers would be harmed by the fact that those
8 transactions were unwound.

9 Q. And because the IEC was in place that had a
10 cap that they had already exceeded, the unwinding had only
11 the effect of benefiting the company and not the
12 ratepayers; is that your position?

13 A. Yes.

14 COMMISSIONER MURRAY: Thank you.

15 JUDGE DALE: Are there any other -- is
16 there cross based on questions from the Bench?

17 MR. COOPER: Yes.

18 MR. MILLS: No.

19 MR. COOPER: I'm sorry. I jumped ahead of
20 you there. Is that to me, then?

21 JUDGE DALE: Yes.

22 MR. COOPER: I don't want to jump in front
23 of anyone else here.

24 RECROSS-EXAMINATION BY MR. COOPER:

25 Q. Ms. Fischer, you talked about the

1 possibility of customers being harmed in the future. When
2 will you know whether there's been any harm to customers
3 in the future?

4 A. Well, I'm happy you asked me that because I
5 didn't know quite how to work that into Commissioner
6 Murray's question. But truly because of the hedges that
7 they replaced those original hedges with, and what I
8 believe occurs in order to recognize the gain was a
9 netting of at August 15th taking away the hedges out in
10 the future, comparing to market, and the hedges that
11 replaced them compared to market, that truly what you're
12 looking at is, you will not know for sure the ultimate net
13 effect of hedges that were released versus hedges that
14 came into place until December of 2013.

15 Q. Now, that being said, wouldn't you agree
16 with me that the unwinding transaction that we're about or
17 the gain associated with that is recorded in an account
18 that's included in the IEC Stipulation & Agreement?

19 A. I can't -- I don't really recall in the
20 general ledger seeing -- I would -- I don't recall seeing
21 it. It seems to me that it would be in one of those
22 accounts.

23 MR. COOPER: That's all the questions I
24 have.

25 JUDGE DALE: Thank you. Is there redirect?

1 MR. FREY: Just a couple of questions, your
2 Honor.

3 REDIRECT EXAMINATION BY MR. FREY:

4 Q. I believe Commissioner Murray asked you a
5 question or two about the loss that the company is
6 experiencing in terms of its recovery of fuel and
7 purchased power and how the gain from the unwinding would
8 be something of an offset to that. Do you recall that
9 question?

10 A. Yes.

11 Q. Isn't it true that the IEC, if the IEC is
12 allowed to continue, Empire's loss could go away if fuel
13 expense fell between now and the current expiration date
14 of the IEC?

15 A. Yes. My understanding is you would look at
16 cumulative fuel costs over the whole -- the entire term of
17 the IEC, so it's possible that they could fall at the --
18 I'm getting all mixed up on that -- but that the total
19 fuel cost over the term of the IEC could fall within the
20 floor and ceiling or below the floor or above the ceiling.

21 Q. Does the Staff consider the unwinding
22 transaction to be inherently nonrecurring?

23 A. No, and that's based upon our review of the
24 risk management policy, which mentions unwindings prior to
25 this transaction, and also in minute -- minutes after the

1 transaction occurred, the unwinding occurred, they are
2 still talking about unwinding transactions. And the fact
3 that FAS 133, while Empire and Mr. Keith was correct that
4 they currently fall under an exemption from at least my
5 understanding of FAS 133, that they could if they decided
6 that it was worth the tradeoff of having to go to mark to
7 market and they could realize a gain that they felt was
8 more advantageous to the company, I'm sure they would
9 consider it and probably enter into it.

10 Q. Mr. Cooper asked you some questions about
11 the \$18.9 million or \$19 million shortfall --

12 A. Yes.

13 Q. -- in the test year, you recall that?

14 A. Well, I believe it was clarified through
15 reviewing Mr. Keith's testimony was that the 18.9 million
16 was cumulative out through June 30, '06.

17 Q. Okay. Has the Staff eliminated from its
18 case all of the higher fuel and purchased power costs from
19 the test year that contributed to the 18.9 million
20 shortfall in fuel expense?

21 A. No. Actually, we would have included it in
22 our determination, based upon spot prices and actual
23 hedges. Well, actually, we used the spot price that came
24 from reviewing the test year through the update period, so
25 then we would have reflected at least in regard to the gas

1 prices what fell within the test year.

2 MR. FREY: May I have a moment to confer
3 with counsel, your Honor?

4 JUDGE DALE: Sure.

5 MR. FREY: I have no further questions.
6 Thank you, your Honor.

7 JUDGE DALE: Thank you. Ms. Fischer, you
8 may step down.

9 This seems to be a good time to take a
10 break for 15 minutes, and then we will begin off-system
11 sales, if I'm reading the chart correctly.

12 (A BREAK WAS TAKEN.)

13 JUDGE DALE: We're back on the record and
14 ready to begin off-system sales. Do the parties have
15 openings on that?

16 MR. MITTEN: Company has a brief opening,
17 your Honor.

18 JUDGE DALE: Excuse me?

19 MR. MITTEN: The company has a brief
20 opening, your Honor.

21 JUDGE DALE: Please proceed.

22 MR. MITTEN: If it please the Commission,
23 categories of revenue or expense that fluctuate
24 significantly from year to year present special problems
25 for ratemaking. Should the Commission rely on actual

1 from the position Staff took in the company's last general
2 rate case, when Staff used a five-year average of
3 off-system sales margins. Both Empire and the Office of
4 the Public Counsel disagree with Staff's proposal and
5 argue that a five-year average of off-system sales margins
6 is more likely to produce a result that closely
7 approximates what will occur during the period rates set
8 in this case are in effect.

9 But while Empire and the Public Counsel
10 agree that the Commission should use a five-year average,
11 those parties disagree as to how the average should be
12 calculated. Empire believes that the effects of a
13 one-time nonrecurring transaction between the company and
14 AEP should be excluded from historical sales margin data
15 before the average is computed. The evidence will show
16 that the single transaction significantly distorted the
17 off-system sales margins for the 13-month period the AEP
18 transaction was in effect. That distortion, in turn,
19 distorted the five-year average.

20 Removing that transaction, which none of
21 the parties to this case have contended will likely recur
22 in the future before a five-year average is calculated,
23 will produce a result that is closer to what Empire will
24 likely experience during the period rates set in this case
25 are in effect.

1 Public Counsel's methodology, on the other
2 hand, produces a result that is distorted by the effect of
3 the abnormal nonrecurring AEP transaction. The result, we
4 believe, overstates the level of off-system sales margins
5 that Empire is likely to achieve in the foreseeable
6 future. The objective with respect to the level of
7 off-system sales margins that should be used for
8 ratemaking purposes is to fix a level that most closely
9 approximates what Empire will be able to achieve in the
10 future.

11 Empire's proposed methodology, which is
12 based on a five-year average of normalized off-system
13 sales margins, is best likely to achieve that result.
14 Thank you.

15 JUDGE DALE: Thank you. Do you have an
16 opening?

17 MR. FREY: Yes. Thank you, your Honor.
18 Just a couple of brief remarks. Ultimately what we're
19 talking about here is how many dollars to put into rates,
20 and the Staff, as Mr. Mitten pointed out correctly, has
21 gone with a 12-month average ending March of this year,
22 and the other two parties, Public Counsel and the company,
23 are using a five-year average.

24 Our number, as it turns out, is quite close
25 to Public Counsel's recommended figure, so the Staff has

1 indicated that even if we were to use a five-year average,
2 we would certainly use the approach of Public Counsel.
3 And essentially we're almost in agreement as to the number
4 with Public Counsel.

5 The evidence will show that this is -- that
6 a one-year average is an appropriate way to go, and while
7 counsel for Empire is correct when he says in the last
8 case the company -- excuse me -- the Staff used a
9 five-year average, the evidence will show that there are
10 any number of cases in which we used a one-year average.

11 So it's not at all unusual for the Staff to
12 do that, and the evidence will also show that the company
13 in the last rate case itself -- all this boils down to
14 whether or not that AEP transaction is going to be
15 recognized as a contributor to revenues. The evidence
16 will show that the company itself, in that last rate case,
17 included the AEP transaction. I believe that's all I
18 have. Thank you, your Honor.

19 JUDGE DALE: Thank you.

20 MR. MILLS: Good afternoon. May it please
21 the Commission? Public Counsel in this case is in sort of
22 an unusual position in that our number is relatively close
23 to the number that Staff proposes using a different
24 method, and at least on the surface there are more
25 similarities between the method we used and the method the

1 company used.

2 However, while the company gives lip
3 service to the idea of using a five-year average in order
4 to smooth out the peaks and valleys over those five years,
5 they've chosen to completely eviscerate the whole
6 five-year averaging processing by taking out one of the
7 highest peaks. Public Counsel believes that's
8 inappropriate. The whole point of using a five-year
9 average is to capture the highs and lows and try to
10 establish a level of expense that's likely to be
11 representative of that going forward.

12 I don't think you can do that if you
13 willfully ignore the data that's inconvenient during that
14 period of time. Public Counsel proposes that the amount
15 to be used in this case is the five-year unadjusted
16 average of off-system sales. This is the most reasonable
17 approach. It's consistent with prior Commission
18 treatments of similar issues.

19 The number is not coincidentally but
20 importantly very close to the actual test year off-system
21 sales margin. It's very close to budgeted numbers and
22 projected numbers for the company. I think it's -- in
23 conclusion, it's not only the appropriate number, but it's
24 an appropriate method for calculating that number. Thank
25 you.

1 JUDGE DALE: Thank you. I'm presuming that
2 Mr. Conrad has no opening, which leads us to Empire's
3 first witness.

4 MR. MITTEN: We call Scott Keith to the
5 stand.

6 JUDGE DALE: And I'll remind you, sir, that
7 you are still under oath.

8 THE WITNESS: Yes, Judge.

9 MR. MITTEN: Your Honor, as Mr. Keith's
10 testimony has been previously admitted into evidence, I
11 would tender him for cross-examination at this time.

12 JUDGE DALE: Public Counsel?

13 MR. MILLS: I keep looking around behind me
14 for the parties that are supposed to be in front of me, in
15 front of me in order that is, and they're not there
16 anymore.

17 SCOTT KEITH testified as follows:

18 CROSS-EXAMINATION BY MR. MILLS:

19 Q. Good afternoon, Mr. Keith.

20 A. Good afternoon.

21 Q. With respect to your testimony about
22 off-system sales, you use a phrase frequently throughout
23 that testimony, and that phrase is gross profit. How do
24 you define gross profit?

25 A. In this particular case, traditionally

1 gross profit on off-system sales is revenue minus the cost
2 of energy.

3 Q. So essentially it's equivalent to net
4 margin?

5 A. With those two components, yes.

6 Q. Net margin on off-system sales, that is?

7 A. Yes.

8 Q. Okay. So is there a difference between
9 profit on off-system sales and gross profit on off-system
10 sales?

11 A. When I think of it, I think of income taxes
12 coming off any gross profit so that you would end up with
13 net profit.

14 Q. Okay. Let's talk about your rebuttal
15 testimony where you're talking about the off-system sales
16 gross profit. At page 16 of that testimony, you've got a
17 table.

18 A. Yes, I have it.

19 Q. Okay. And it appears as though much of
20 that table is highly confidential, and I'm going to try to
21 not lead you to reveal any of that confidential
22 information, but I'm going to ask you some questions about
23 that table. Two of the columns have numbers for the years
24 2001, 2000 -- through 2005 for off-system gross profit; is
25 that correct?

1 A. Yes.

2 Q. And one of those columns has the five years
3 ending September 30th, 2005, and the other one has five
4 years ending December 31st, 2005; is that correct?

5 A. That's correct.

6 Q. You don't in that table present an average
7 of the profits from those years, do you?

8 A. I present the average after I've eliminated
9 the AEP, the impact of the AEP transaction.

10 Q. Okay. And the average is -- after you've
11 eliminated AEP are not highly confidential; is that
12 correct?

13 A. That's right.

14 Q. If you were to do the simple average, the
15 average leaving AEP in there, would those numbers be
16 highly confidential?

17 A. No, I don't believe they would.

18 Q. And if you were to do that, you would
19 simply -- in that table, you would take the total of the
20 numbers in the first column and divide by five to get that
21 average; is that correct?

22 A. Yes.

23 Q. Okay. And I will suggest, just so we have
24 it in the record here, what that number is, and if anybody
25 wants to fight over it later, they're more than welcome

1 to. I take it you have not done that calculation, or have
2 you?

3 A. I don't think it shows up anywhere else in
4 this testimony, so not that I'm aware of.

5 Q. Let me suggest to you that if you were to
6 do that, the average on the first column would be
7 2,751,705, and for the fourth column it would be
8 2,827,911. Does that seem about right to you?

9 A. It seems reasonable.

10 Q. And the numbers are in the record, and
11 obviously if I've done the math wrong, someone can correct
12 me before we conclude this case, I feel sure.

13 Now, in respect to numbers that are shown
14 in the off-system gross profit columns, Empire actually
15 made sales that led to those numbers, do they not?

16 A. Yes, in the terms I defined earlier,
17 revenue minus energy costs.

18 Q. And wouldn't you agree that in any given
19 year, Empire doesn't make the exact level of off-system
20 sales from the exact same resources?

21 A. No, it doesn't. They vary quite a bit.

22 Q. In your last rate proceeding, which has
23 been called, depending on who the witness is, either Case
24 No. ER-2004-0570 or the 2005 case, the AEP transactions
25 that you're excluding in this case were included by both

1 Empire and Staff in calculating a five-year average
2 off-system sales, weren't they?

3 A. I don't know. I can't answer that. I did
4 look back to a case.

5 Q. Well, I'm not asking you about some other
6 case. I'm asking about that particular case. And if you
7 don't know, you don't know.

8 A. I'm thinking the case where the AEP
9 capacity charges were eliminated by Staff. I can't
10 remember if that was the case you just asked me about or
11 not.

12 Q. How long have you been with Empire?

13 A. Since August of last year.

14 Q. Now, in general, the purpose of using an
15 average is to produce a normalized allowance for inclusion
16 in the determination of revenue requirement, isn't it?

17 A. Could you repeat that?

18 Q. In general, the purpose of using an average
19 is to produce a normalized level for inclusion in the
20 determination of revenue requirement?

21 A. I would agree with that.

22 Q. So with respect to this issue, the
23 objective is to establish a level going forward of
24 off-system sales gross profit that is representative of
25 what's to be expected going forward, is it not?

1 A. That's the objective, yes.

2 MR. MILLS: That's all the questions I
3 have. Thank you.

4 JUDGE DALE: Thank you. Staff?

5 MR. FREY: Thank you, your Honor.

6 CROSS-EXAMINATION BY MR. FREY:

7 Q. Hello again, Mr. Keith.

8 A. Hello.

9 Q. When you made your corrections earlier this
10 afternoon, you wiped out half of my cross-examination, so
11 I'll be brief. Bear with me for a moment.

12 Okay. On page 10 of your rebuttal
13 testimony, you suggest that, I believe, that Staff's
14 determination of the appropriate time frame for developing
15 its proposal for off-system sales revenue number is driven
16 by the result; is that correct?

17 A. I'm sorry. Could you be more specific and
18 point me towards -- I don't --

19 Q. All right.

20 A. -- see where you're --

21 Q. Let's go to page 10. I'm referring to the
22 first -- the first full sentence beginning on the first
23 line, which states, and I quote, jumping back and forth
24 between the use of a five-year average and using the
25 current year, depending on which yields the higher revenue

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1 amount, is unfair and is only designed to artificially
2 lower rates for the customer, not produce a fair or
3 consistent result.

4 A. Yes, I see that.

5 Q. And what I'm asking you is, have you not
6 suggested that the Staff has been opportunistic here,
7 let's say, in determining the appropriate time frame for
8 developing its proposal for off-system sales revenue and
9 that it's driven by the result?

10 A. I would say it's inconsistent once a
11 methodology is established. Unless there's a good reason
12 to leave that methodology, it should be used, because to
13 make a -- to jump back and forth between a five-year and a
14 current year could just lead to taking a higher number.

15 Q. Okay. You're saying it could lead to it
16 now, but you're not -- you're not suggesting that it does
17 lead to it?

18 A. I think it does in this case. I think the
19 Staff's number is somewhat higher than the five-year
20 average.

21 Q. Okay. So you are saying that you believe
22 the Staff made the change just so it could get a higher
23 revenue figure; is that correct?

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

25 Q. Did you read -- I believe your testimony

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1 earlier was that you had read Ms. Fischer's surrebuttal
2 testimony. Is that the case?

3 A. I have read it, and that's why I made those
4 corrections earlier.

5 Q. Do you recall that she indicated in that
6 testimony that, in fact, in Empire's most recent rate
7 proceeding, that the reverse was actually true?

8 A. Yes, I do recall that.

9 Q. So that if Staff is up to something
10 untoward, it hasn't always done that; is that the case?

11 A. It would appear so, yes.

12 Q. And you would agree, then, that that would
13 undermine the charge that Staff is simply trying to find a
14 higher revenue number every time it does off-system sales?

15 A. Yes, it would.

16 Q. In her rebuttal testimony, Ms. Fischer
17 expresses a preference for Public Counsel's approach to
18 use a five-year average over that of Empire; is that
19 correct?

20 A. Yes.

21 Q. And would you agree that the primary
22 difference between the approaches of Empire and Public
23 Counsel is Empire's proposed exclusion of the impact of
24 the resale of AEP power?

25 A. Yes, I would.

1 Q. I believe -- I believe Mr. Mills may have
2 asked you this question, but I'm not sure, so I'm going to
3 ask you again. If he did, I apologize. Are you aware
4 that in the last Empire rate case, ER-2004-0570, the
5 company used a five-year average for OSS and that that
6 average included the AEP dollars?

7 A. I believe there was a five-year average
8 used. I'm not certain whether AEP was included or
9 excluded because I'm not that familiar with the test year.

10 MR. FREY: Your Honor, I have just a few
11 more questions, and I believe we have to go in-camera for
12 those.

13 (REPORTER'S NOTE: At this point an
14 in-camera session was held, which is contained in
15 Volume 17, pages 1073 through 1077 of the transcript.)

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1 JUDGE DALE: You may proceed, then.

2 REDIRECT EXAMINATION BY MR. MITTEN:

3 Q. Mr. Keith, Mr. Mills asked you a question
4 as to whether or not the sales that Empire makes
5 off-system use a different mix of resources from year to
6 year. Do you recall that?

7 A. Yes, I do.

8 Q. And in this case, Empire is not proposing
9 any adjustment to the data used for the five-year average
10 to reflect those different resources except for the AEP
11 transaction; is that correct?

12 A. That's correct.

13 Q. Why is AEP different?

14 A. I view AEP as being somewhat different
15 because it involved some fixed costs that were never
16 recovered in retail rates in the state of Missouri, and it
17 was a unique transaction that has gone away and isn't
18 going to occur again because it was essentially related to
19 a FERC order to AEP to mitigate some market power they had
20 in the area. That's why it became available.

21 Q. Does Empire anticipate that a transaction
22 similar to the one you had with AEP in the past is going
23 to be available in the foreseeable future?

24 A. No.

25 Q. Mr. Mills also asked you a question as to

1 whether or not the purpose of using an average to
2 calculate off-system sales was to produce a normalized
3 level for ratemaking purposes. Do you recall that
4 question?

5 A. Yes, I do.

6 Q. Is including the AEP transaction in the
7 calculation of the average consistent with that principle?

8 A. I don't believe it is.

9 Q. And why is that?

10 A. Because the cost of the transaction hasn't
11 been fully accounted for in the average. As I mentioned
12 to Mr. Mills, the gross profit as defined, I guess, by
13 myself and the way it was calculated in these numbers was
14 simply revenue minus energy cost, and the AEP fixed
15 charges or capacity charges weren't accounted for in that
16 equation. If they were, the gross profit associated with
17 that transaction would drop considerably.

18 MR. MITTEN: Thank you, Mr. Keith. I have
19 no further questions.

20 JUDGE DALE: Thank you, Mr. Keith. You may
21 step down.

22 THE WITNESS: Thank you.

23 JUDGE DALE: I think it's to Staff.

24 MR. FREY: Yes. We call Janis Fischer.

25 JUDGE DALE: And, Ms. Fischer, I'll just

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1 remind you that you're still under oath.

2 THE WITNESS: Yes.

3 MR. FREY: And again, your Honor, all of
4 Ms. Fischer's testimony has been admitted, so I tender the
5 witness for cross.

6 JUDGE DALE: Mr. Conrad?

7 MR. CONRAD: No questions.

8 JUDGE DALE: Mr. Mills?

9 MR. MILLS: No questions.

10 JUDGE DALE: Mr. Mitten?

11 JANIS FISCHER testified as follows:

12 CROSS-EXAMINATION BY MR. MITTEN:

13 Q. Ms. Fischer, good afternoon.

14 A. Good afternoon.

15 Q. Am I correct that Staff's position in this
16 case with regard to off-system sales is that the level
17 that should be included for ratemaking purposes is the
18 amount that was actually booked for the 12-month period
19 ended March 31st, 2006?

20 A. At this point, that is our position. As we
21 go into the true-up, we will go in and revisit what has
22 occurred related to off-system sales through June '06.

23 MR. MITTEN: Your Honor, the next few
24 questions I have for this witness pertain to an exhibit
25 that she has listed as highly confidential, so if we could

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1 go in-camera.

2 (REPORTER'S NOTE: At this point an
3 in-camera session was held, which is contained in
4 Volume 17, pages 1082 through 1087 of the transcript.)

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1 JUDGE DALE: Please proceed.

2 BY MR. MITTEN:

3 Q. I have a few questions on your
4 Schedule 2HC. I think the nature of my questions are such
5 that we will not need to go in-camera for them. I recall
6 in your testimony that you indicated that the nearly
7 straight line on the three graphs here gave you some
8 comfort that Staff's proposal in this case was reasonable;
9 is that correct?

10 A. This was just one analysis that I did.

11 Q. And I understand, but if you'd just answer
12 my question.

13 A. Could you repeat it? I'm sorry.

14 Q. You did indicate that you gain some comfort
15 with the nearly straight line that is shown on these three
16 graphs, and you believe that that indicated that Staff's
17 proposal in this case was reasonable?

18 A. I don't know if I referenced it as a
19 straight line, but I did say that reviewing the graphs
20 gave me some comfort going out to the more near term, that
21 it appears that they level out.

22 Q. When I first saw these graphs and I knew
23 what the raw numbers in this case were, I had some
24 difficulty understanding how the data could be as is
25 displayed in the graphs and as I knew it to be in the raw

1 form. And I noticed on each of these graphs the vertical
2 access that you've used is very short.

3 A. Uh-huh.

4 Q. Would that tend to distort differences?

5 A. Well, that may be the case. It wasn't my
6 intention, and I have the raw data to support this. I'm
7 not an expert at charts because, yes, what you mention is
8 true. I think if I were to have used a shorter time
9 period or rearranged these, it would have been a better
10 presentation probably.

11 Q. Well, let's look at the top graph, and
12 let's focus our attention on the period that runs from
13 January '03 to January '05. Now, that's a fairly straight
14 line of dots on that graph, wouldn't you agree, with a
15 couple of dots that do drop below the straight line?

16 A. You're talking about the first chart?

17 Q. First chart, yes. I'm sorry.

18 A. Well --

19 Q. Could you answer my question? That is a
20 fairly straight line as portrayed on your graph?

21 A. No, I wouldn't say.

22 Q. You wouldn't say so?

23 A. No.

24 Q. All right. Now, if I look at the data
25 points, for example in let's say May of '03, I interpret

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1 that being \$20 per megawatt hour, and then if you looked
2 at one of the next months, it goes up to \$50 a megawatt
3 hour. Is that a close approximation of what's shown on
4 that graph?

5 A. Yes.

6 Q. Now, that's a significant increase that
7 doesn't show up as much of a blip on your graph; is that
8 correct?

9 A. Well, taking into consideration the scale
10 it does --if you were to measure it with a ruler, it isn't
11 much a difference, but according to the scale on the
12 graph, it would be \$25.

13 Q. So I'm looking at each of these graphs, you
14 have to be very careful to look at exactly what the data
15 points reflect and not simply look at the straight line?

16 A. Well, I wouldn't agree that it's a straight
17 line. I provided the work papers that support these,
18 where the details -- but I did not include that with my
19 testimony. I didn't intend to mislead.

20 MR. MITTEN: Your Honor, I have an exhibit
21 I'd like to have marked.

22 JUDGE DALE: Certainly. This will be 139.

23 (EXHIBIT NO. 139 WAS MARKED FOR

24 IDENTIFICATION BY THE REPORTER.)

25 BY MR. MITTEN:

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1 Q. Ms. Fischer, do you have Exhibit 139 in
2 front of you?

3 A. What is -- what is Exhibit 139, Data
4 Request 229? Yes, I do.

5 Q. Do you recognize that as the company's
6 supplemental response to Staff Data Request 229?

7 A. Oh, yes, August 15th. This just came --

8 Q. Last week.

9 A. Okay.

10 Q. And attached to this are two documents, one
11 an Order by the Federal Energy Regulatory Commission and
12 one a supplemental pleading filed on Empire's behalf at
13 the FERC; is that correct?

14 A. Yes.

15 Q. Did you happen to review the FERC Order
16 that's attached to this supplemental response?

17 A. Yes, I did.

18 Q. So you're aware, aren't you, that Empire
19 has been ordered to make refunds with interest of certain
20 of the off-system sales that it made from the period
21 beginning May 2005?

22 A. In my review of the Order, it wasn't clear
23 to me if they are off-system sales customers or wholesale
24 customers that would be considered on system. I wasn't
25 clear, and I think I -- my understanding, and I think I

1 have issued a Data Request to Empire trying to clarify
2 that.

3 Q. All right. That's fair enough. But the
4 Order itself does order a refund, and I think it will
5 speak for itself in terms of what's to be refunded.

6 A. This Order indicates that, yes.

7 Q. And assuming for purposes of my question
8 that it does pertain to off-system sales, those refunds
9 would be made of amounts that had already been booked by
10 Empire for the period -- the 12-month period ended
11 March 31st of 2006; is that correct?

12 A. I'm sorry. Could you repeat the last part?
13 I kind of lost you there.

14 Q. The refunds --

15 A. Yes.

16 Q. -- would be of amounts that had been booked
17 by the company for the period including the 12 months
18 ended March 2006?

19 A. Yes, I believe that's true.

20 Q. And that would be recorded as a debit so
21 that the net amount of revenue that the company actually
22 received for the 12-month period ended March 31st, 2006
23 would be lower than what Staff currently believes it to
24 be?

25 A. If Empire's required to make the refunds,

1 that's true.

2 MR. MITTEN: Your Honor, I would move for
3 the admission of Exhibit 139.

4 JUDGE DALE: Are there any objections?

5 (No response.)

6 JUDGE DALE: Hearing none, Exhibit 139 will
7 be admitted into evidence.

8 (EXHIBIT NO. 139 WAS RECEIVED INTO
9 EVIDENCE.)

10 MR. MITTEN: I have no further questions of
11 this witness. Thank you, Ms. Fischer.

12 JUDGE DALE: Are there questions from the
13 Bench?

14 COMMISSIONER APPLING: No, thank you.

15 JUDGE DALE: Do you have redirect?

16 MR. FREY: One minute, your Honor.

17 JUDGE DALE: Certainly.

18 REDIRECT EXAMINATION BY MR. FREY:

19 Q. Ms. Fischer, Mr. Mitten has asked you some
20 questions about your Schedule 2HC in your rebuttal
21 testimony. Do you recall that?

22 A. Yes.

23 Q. With regard to the numbers on all three of
24 these charts, would it be fair to say that, irrespective
25 of the scale that you used, that there's considerably more

1 stability in the numbers from, let's say, 2002 forward
2 than there was in years prior to that?

3 A. Well, when you look -- the three charts are
4 different. The first two -- or the top one represents
5 revenue dollars per MWH. The second one represents sales
6 cost dollars per MWH. Those two are closely related,
7 represent the difference between the revenues and the
8 costs, are they in step with each other, and I would say
9 those two starting in '02 seem to have less volatility
10 than what was before, and this chart begins in January
11 '99.

12 So January '99 through what appears to me
13 to be November '01, there seems to be a lot of up and
14 down, which more up and down than what you find after
15 2002, although as you get out past May of '05, it seems
16 that both of the top two charts are heading up, upward,
17 which would indicate in my mind that the revenues are
18 increasing and the costs are increasing.

19 The bottom chart is somewhat different in
20 that it's measuring the margin dollars per MWH, which is
21 somewhat reversed, the second one.

22 The one thing I would like to note that I
23 did explain in my testimony, when you look at the third
24 chart or the bottom chart, the two dots that are close to
25 zero dollars reflect months where I don't believe there

1 were hardly any sales and that's how it happens to go to
2 zero. So if you take those two out and you look at the
3 chart, again, from '99 to November of '01, it has extreme
4 up and down.

5 As you go further out, it seems that from
6 May of '03 through maybe March of '05 have some volatility
7 but not as extreme as earlier. As I get again out past
8 March of '05, it seems that the points are following a
9 trend up, and then there is a blip that seems to come back
10 down.

11 And truly I meant to just have pictures,
12 hoping that they would help, that it would be easier to
13 see the fluctuation than looking at a chart with 60 -- I
14 mean, with 86 points, because I had an analysis for every
15 month. It was included in my work papers, and if that is
16 something that people would still like to see, I would be
17 happy to send that.

18 But, yes, your original question, I do
19 believe that later years have less volatility in the
20 points.

21 Q. Okay. And with respect to this exhibit
22 that we have just had admitted into the record, I just
23 want to clarify, is it your testimony that the effects
24 will be considered -- the effects of this action on the
25 part of the FERC will be considered in connection with

1 true-up?

2 A. Well, the period that FERC is requesting
3 refunds covers the period beginning in January '05. The
4 actual refunds, if they occur -- because my understanding
5 is that Empire has asked for rehearing on this at FERC.
6 If the refunds actually occur, I would guess that that
7 will be well past the point at which we perform other
8 analysis for the true-up.

9 So while they would -- you know, when we go
10 to the true-up, known and measurable is still our method
11 of determining whether costs are included or not. If we
12 felt that the likelihood of rehearing was not likely, I'm
13 not exactly sure, you know, if we would include them or
14 not. It would depend on that, and then a determination of
15 actually what would be refunded.

16 And if it truly was something that would
17 blow through off-system sales versus wholesale revenues,
18 I'm not quite clear how, since that wasn't something I
19 reviewed in this case, you know, where the impact would
20 possibly go.

21 Q. Okay. And I'm glad you added that last
22 sentence because I wanted to clarify. I think you made
23 that point earlier in your testimony. But toward the end
24 I think in response to a question by counsel for Empire,
25 you may have indicated that there would be a reduction in

1 the off-system sales number, but I'm not sure you made the
2 clarification that it's still to be determined by you
3 whether we're talking wholesale on system at this time.

4 A. Truly the period referenced in the Order is
5 within the test year, the update period, the true-up, but
6 when the refunds actually occur and if they occur is yet
7 to be determined.

8 Q. Thank you.

9 MR. FREY: No further questions, your
10 Honor.

11 JUDGE DALE: Thank you. Thank you,
12 Ms. Fischer. You may step down.

13 (Witness excused.)

14 JUDGE DALE: By my calculations, we are
15 back on track. I can tell you that Commissioner Murray
16 has a series of questions she would like to ask the
17 attorneys. I will be getting that notice to you in the
18 morning, after she's had a chance to review a draft. It
19 will be due sometime next week.

20 Is there anything else that I need to
21 address while we're on the record?

22 MR. MILLS: And I don't know that this has
23 to be on the record.

24 Have we set a specific time that we're
25 going to take up return on equity tomorrow?

1 JUDGE DALE: No, we haven't, although we
2 can, if you wish, set a specific time when we can call
3 Mr. King.

4 MR. MILLS: It may be beneficial to do
5 that. It may make it easier for us as well as for him.

6 JUDGE DALE: You-all have a much better
7 idea how much cross will be involved for the witnesses
8 tomorrow. How long do you think rate design will take?

9 MR. MILLS: I don't know, but I would be
10 surprised if it takes very long.

11 JUDGE DALE: Then do you want to shoot for
12 11 o'clock, 1 o'clock?

13 MS. CARTER: Isn't he going to be on the
14 east coast?

15 MR. MILLS: Yes, he's on the east coast,
16 but we can translate.

17 JUDGE DALE: I think she meant don't do it
18 during his lunch hour.

19 MR. MILLS: It doesn't matter to me.
20 Perhaps we should just talk about it in the morning and
21 when it looks like we're about an hour away from that,
22 we'll take a short recess and I'll call him and tell him
23 we're going to be within an hour.

24 Because I hate to make it 1 o'clock and it
25 turns out we're done with rate design at 9:30 and have

1 nothing to do, but on the other hand I hate to tell him 10
2 and have to call him again and again and say, we're not
3 done yet.

4 JUDGE DALE: Why don't you call him this
5 evening, tell him that's what we're planning, and then if
6 he has some conflict he can tell you that and we can kind
7 of work around it.

8 MR. MILLS: That sounds great. Thank you.

9 JUDGE DALE: Is there anything else?

10 MR. FREY: Judge, if I might, I keep
11 forgetting to ask if we could have the accounting --
12 Staff's accounting schedules admitted into the record.
13 It's Exhibit 33, and I'm afraid I'm going to forget before
14 the hearing is over.

15 JUDGE DALE: Are there any objections?

16 (No response.)

17 JUDGE DALE: Then Exhibit No. 33 is
18 admitted into evidence.

19 MR. FREY: Thank you.

20 (EXHIBIT NO. 33 WAS RECEIVED INTO
21 EVIDENCE.)

22 JUDGE DALE: Anything else?

23 (No response.)

24 JUDGE DALE: Then for today we are
25 adjourned. We'll be back at 8:30 tomorrow morning. Off

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1 the record.

2 WHEREUPON, the hearing of this case was
3 recessed until September 14, 2006.

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FUEL RECOVERY MECHANISM

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W.L. GIPSON

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MARK OLIGSCHLAEGER

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OFF-SYSTEM SALES

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C E R T I F I C A T E

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

I, Kellene K. Feddersen, Certified
Shorthand Reporter with the firm of Midwest Litigation
Services, and Notary Public within and for the State of
Missouri, do hereby certify that I was personally present
at the proceedings had in the above-entitled cause at the
time and place set forth in the caption sheet thereof;
that I then and there took down in Stenotype the
proceedings had; and that the foregoing is a full, true
and correct transcript of such Stenotype notes so made at
such time and place.

Given at my office in the City of
Jefferson, County of Cole, State of Missouri.

Kellene K. Feddersen, RPR, CSR, CCR
Notary Public (County of Cole)
My commission expires March 28, 2009.