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PUBLIC SERVICE COMMISSION

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Evidentiary Hearing

May 19, 2008
Jefferson City, Missouri
Volume 9

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

CHERLYN D. VOSS, Presiding,
REGULATORY LAW JUDGE.

JEFF DAVIS, Chairman,
CONNIE MURRAY
ROBERT CLAYTON, III,
TERRY JARRETT,
KEVIN GUNN,

COMMISSIONERS.

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P R O C E E D I N G S

JUDGE VOSS: We are on the record in the matter of the Empire District Electric Company of Joplin, Missouri for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company, Commission Case No. ER-2008-0093. We are ready for opening statements on the issues related to the fuel adjustment clause.

MR. MITTEN: If it please the Commission, Empire's requesting that the Commission approve in this case a fuel adjustment clause for the company. And if you want to know why Empire needs a fuel adjustment clause and why you ought to authorize one in this case, that's the reason (pointed).

Staff estimates that since 2003, Empire has had to absorb 85 and a half million dollars of fuel and purchased power costs. It's had to do that because under traditional modes of regulation, there is no way to adjust rates between general rate cases. And in a period in which fuel and purchased power costs continue to increase, there's no way for the company to timely recover those costs. And it's not like Empire hasn't been trying, because this is Empire's third general rate case since 2003.

With the passage of Senate Bill 179 which was later codified as Section 386.266, the legislature changed all that. And now the Commission has the authority to approve fuel adjustment clauses for electric utilities that allow those utilities to timely recover their prudently incurred fuel and purchased power costs.

Now, that's the context in which Empire makes its request in this case. And there's one additional contextual issue that you need to consider, and that is the fact that the Commission approved a fuel adjustment clause for Aquila in the rate case for that company that was decided last year.

Empire in this case has patterned its requested fuel adjustment clause after the one that you approved for Aquila, not because it believes that's the best fuel adjustment clause, but it's the one that the company knows the Commission has approved. In terms of the costs that get passed through the clause, Empire has proposed that the same clause gets passed through its clause as were passed through Aquila's, and it also has adopted 95 percent recovery of fuel and purchased power costs that the Commission adopted in the Aquila case.

But Empire is concerned that the fuel adjustment clause that the Commission approved for Aquila may not satisfy the requirements of Section 386.266. And given the recent history of this company in appeals of rate case decisions, we're going to ask the Commission that you be very careful as you consider the various fuel adjustment clause proposals in this case to make sure that your decision in this case is as appeal-proof as it can be.

We believe that the fuel adjustment clause proposals that the parties have made in this case have three potential problems, and we're asking that the Commission consider the evidence in light of those potential problems.

First of all, we believe that when the General Assembly passed Senate Bill 179, it intended that electric companies recover all of their prudently incurred fuel and purchased power costs.

Secondly, we don't believe that any of the proposed fuel adjustment clauses in this case actually will allow Empire a sufficient opportunity to earn a fair return on equity.

And finally, we believe that the so-called incentive mechanisms that have been proposed in each of the fuel clauses in this case don't satisfy the requirements of the fuel adjustment clause statute.

Let me return briefly to point 1. We can't find anything in the statute that suggests to us that the legislature intended that electric utilities be denied a portion of their prudently incurred fuel and purchased power costs. We believe that the intention of the General Assembly was that electric utilities recover no more than their prudently incurred fuel and purchased power costs but also no less.

As to point 2, Empire believes that any fuel adjustment clause that prohibits -- and let me emphasize the word prohibits -- the company from recovering all of its prudently incurred fuel and purchased power costs prevents that utility a reasonable opportunity from earning a fair rate of return.

As you know, utility rates are set on a cost-plus basis, the cost being the Commission's determination of a reasonable level of operating expenses, and the plus being the earnings that the Commission allows in rates to provide shareholders with a reasonable return on their investment, including a reasonable return on equity.

But each of the fuel adjustment clauses that are proposed in this case would require Empire to divert a portion of its earnings to cover fuel and purchased power costs that are not being recovered through the fuel adjustment clause. So rather than providing investors an opportunity to earn a fair return, these fuel adjustment clauses, instead, divert earnings to provide a subsidy to ratepayers.

Now, the amount of the subsidies that are being proposed by the parties in this case varies. Had Staff's proposed fuel adjustment clause been in effect since 2003, the amount of costs that Empire would have had to absorb would have only been about 28 million. Only 28 million. And had Public Counsel's proposal been in effect, Empire would have been required to absorb approximately $35 million in prudently incurred costs.

It's difficult to put a percentage on Mr. Brubaker's proposal, but he would provide for taking as much as 50 basis points off the top of the return that Empire otherwise would earn. And because all of the amounts that are being diverted come directly from the company's earnings, then we believe that none of the Commission -- none of the fuel adjustment clause proposals in this case would allow the company an opportunity to earn a fair rate of return.

Now, the parties justify these proposals on the basis that they are, quote, incentive mechanisms, and they point to the fuel adjustment clause statute which specifically authorizes the Commission to include incentive mechanisms in any fuel adjustment clause it adopts. But we would ask the Commission to look at the statute because the language there says that you can adopt incentive mechanisms if they are designed to improve the efficiency and cost-effectiveness of fuel and purchased power procurement activities.

It's an inconvenient truth, at least insofar as the fuel adjustment clause recommendations in this case are concerned, that Empire, regardless of how well it manages its business, cannot control a significant portion of its fuel and purchased power costs. And the best evidence of that fact is, again, the 85 and a half million dollars in costs that the company has had to absorb since 2003.

Does anybody seriously believe that during that period of time Empire wasn't doing everything within its power to keep its costs at the absolute minimum? Yet, despite its best efforts, it still had to absorb 85 and a half million dollars.

If in approving a fuel adjustment clause in this case the Commission would require that a portion of the costs that Empire can't control still be absorbed by the company, then that's not an incentive mechanism, that's a penalty.

We would also ask the Commission to keep in mind that by law in Missouri, only prudently incurred costs can be passed through the fuel adjustment clause, and the law requires that the Commission examine the prudency of all the procurement activities of Empire on at least an every-18-month basis.

If the Commission has determined that the fuel and purchased power costs are prudently incurred, then you've satisfied your responsibility to customers by assuring that the rates that they pay for energy are just and reasonable. But if after determining that costs are prudently incurred you still prevent Empire from recovering a portion of those costs, you haven't fulfilled your responsibility to shareholders that they be allowed a reasonable opportunity to earn a fair rate of return.

Empire is asking the Commission to

consider, or maybe reconsider the fuel adjustment clause proposals in this case in light of legal requirements. If you believe that the law allows you to adopt incentive mechanisms as had been proposed in this case, then Empire believes that its fuel adjustment clause proposal alone gives the company any opportunity to earn anything close to a reasonable rate of return.

But if you decide that prohibiting the company from recovering a portion of its prudently incurred fuel and purchased power costs is unlawful, then -- or bad regulatory policy, then we would ask the Commission to exercise the authority that is specifically granted to you by Section 386.266 to modify the fuel adjustment proposals that have been made in this case and to instead adopt one that would allow Empire to recover 100 percent of its prudently incurred fuel and purchased power costs. Thank you.

JUDGE VOSS: Staff?

MR. DOTTHEIM: May it please the Commission. Staff has recommended that the Commission approve a fuel adjustment clause for Empire on the basis of the criteria that the Commission set for granting a fuel adjustment clause in Case No. ER-2007-0004 regarding Aquila, Inc.

Empire meets a greater percentage of its needs with gas-fired generation and spot-purchased power than Aquila does. Section 386.266.1 RSMo gives the Commission the authority to approve incentive programs as part of a fuel adjustment clause to provide the electric utility with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased power procurement activities.

It is the Staff's position that 100 percent passthrough of fuel and purchased power costs for Empire would only be correct for Empire if 100 percent of its fuel and purchased power costs were completely out of its control, which is not the case.

There are actions that Empire can undertake or not undertake that affect the efficiency and cost-effectiveness of its fuel and purchased power costs. Being responsible for a portion of any increase in cost above or receiving the benefit of any -- of any savings below the base provides Empire an incentive to manage its fuel and purchased power costs.

In Aquila's recent rate case, the Commission concluded that allowing Aquila to pass through 95 percent of its prudently incurred fuel and purchased power costs above those included in its base rates through its FAC would not violate Section 386.266.4 (1) in that it would afford Aquila a sufficient opportunity to earn a fair return on equity.

By passing through 95 percent of its fuel and purchased power costs, Aquila would be protected from extreme fluctuations in fuel and purchased power costs and would retain a significant incentive to take all reasonable actions to keep its fuel and purchased power costs as low as possible. It is the Staff's position that 5 percent -- that the 5 percent level gives Empire very little serious incentive to manage its fuel costs efficiently.

The Staff estimated that over the period 2003 to 2006, Empire absorbed approximately $85.5 million of fuel and purchased power costs between rate cases which equates to allowing about 40 percent of the fuel and purchased power costs to flow through FAC to Empire's ratepayers. Any passthrough greater than 40 percent would shift more of the fuel and purchased power risks to the ratepayers than the ratepayers had without an FAC in place in 2003 to 2006.

In this proceeding, Staff is recommending a passthrough to ratepayers of 70 percent of fuel and purchased power costs so that Empire still has an incentive to control and reduce fuel and purchased power costs.

The Staff is also proposing that off-system sales and SO2 emission allowances be part of Empire's FAC. Empire's principal witness on the fuel adjustment clause matter asserts that the law requires that Empire collect 100 percent of its prudent costs in general and 100 percent of its fuel and purchased power costs in particular.

That position is at odds with Section 386.266.1, and it is at odds with case law in Missouri, such as State ex rel Laclede Gas Company V Public Service Commission, 600 S.W. 2d 222 Mo. App Western District 1980 and cert. denied was -- there was cert. denied in that case by the U.S. Supreme Court. Prudence is not the only basis for recovering costs. Benefit for ratepayers is another basis for recovering costs in Missouri.

This same Empire witness has asserted that Empire cannot earn its authorized rate of return if Empire does not recover 100 percent of its prudently incurred fuel and purchased power costs. This assertion clearly ignores the fact that the FAC is authorized single-issue ratemaking, and as a consequence, no other items are being looked at; that is, items that might be positively in excess of what is built into rates and as a consequence would have the utility earn its authorized or in excess of its authorized rate of return are not being looked at. Thank you.

JUDGE VOSS: Thank you. Public Counsel?

MR. MILLS: Good morning. May it please the Commission. It's a normal part of ratemaking that every increase in expense is not automatically recovered. Even Dr. Overcast has conceded this point. In Senate Bill 179, the legislature decided that fuel costs can be such a different kind of expense that it authorized you, not mandated you, but authorized you to treat fuel costs differently.

In this case Public Counsel does not believe that fuel costs are so different that you need to treat them differently than other expenses. The rebuttal testimony of Public Counsel witness Ryan Kind went through the four main reasons why we believe that they are not so sufficiently different for Empire in the period of time in which rates will be in effect in this case that they need to be treated differently. That's at page 6 -- 6 and 7 of his testimony. I won't go through those here this morning.

Senate Bill 179, which as Mr. Mitten pointed out has been codified as 386.266, allows you to accept, reject or modify any fuel adjustment clause proposal. If a company requests a fuel adjustment clause that would pass through 100 percent of the changes in fuel costs such as Empire's proposed here, you can reject that proposal and allow zero percent of fuel costs to be passed through.

It is logically and legally incorrect to argue as Empire does that you cannot modify a fuel adjustment clause proposal to allow something between zero percent and 100 percent. Of course, you would need evidence on the record upon which to base this modification, but if you have sufficient evidence, you can do that. Furthermore, Senate Bill 179 specifically provides for incentive mechanisms. There is no way to properly create an incentive mechanism without some risk being on the company.

If you accept the Staff's proposal or Brubaker's proposal or Mr. Kinds' proposal, you will be treating costs very differently from other expenses. You will be allowing automatic passthrough of much of the increases that occur outside -- and decreases that occur outside of the context of a rate case.

But Empire complains that, no, that's not differently enough. Even though you normally allow zero percent of increase in expenses to be automatically passed through, Empire argues that if you don't automatically pass through 100 percent of fuel increases, you have not treated them differently enough.

In fact, I believe Mr. Mitten just argued that if you do not allow 100 percent of passthrough, you'll be in violation of the law. 60 percent, even 95 percent, according to Dr. Overcast, is not good enough for Empire District Electric Company. Empire is simply wrong on this point. The Commission has the authority, has the discretion to allow a smaller passthrough or to allow no fuel adjustment clause at all. Thank you.

JUDGE VOSS: Thank you. Industrials?

MR. WOODSMALL: Good morning. Missouri is still having some growing pains when it comes to the implementation of a fuel adjustment clause. While the Commission authorized a fuel adjustment clause for Aquila, it denied a request for AmerenUE. Therefore, we are still trying to determine the proper structure for a fuel adjustment clause in the company-specific details that may affect that structure.

In the case at hand, there is considerable debate over various aspects of the fuel adjustment clause. Of primary importance is the debate over the amount of sharing that should be reflected in any fuel adjustment clause. In its rules implementing the General Assembly's authority, the Commission recognized the relevance and importance of an incentive mechanism.

In the first case in which it discussed the fuel adjustment clause, the Commission noted that a prudency review alone would not ensure that Aquila procures fuel in a least-cost manner. Therefore, the Commission established a flat 95 percent sharing plan whereby 95 percent of all fuel changes would flow to ratepayers.

Based solely on the Commission's decision in the Aquila case, Empire proposes an identical type of fuel adjustment clause. Nevertheless, Empire's witness asserts that it should be permitted to recover every penny of fuel cost changes. The Industrials, through the testimony of Mr. Brubaker, do not believe that a 95 percent sharing mechanism provides adequate incentive or assurance that the utility will devote the necessary resources to fuel procurement and minimization of fuel costs.

First, Mr. Brubaker notes that prudency reviews are not adequate to ensure least-cost fuel procurement. Unlike a purchased gas adjustment which may have a handful of decision points, electric utilities are faced with decisions on an hourly basis.

On an hourly basis, utilities must decide which plants to operate, how much to generate from each plant and the scheduled outages for generation -- excuse me -- how much to generate from each plant and how much power to sell or buy in the spot market. Longer term decisions may focus on the scheduled outages for generation facilities and the execution of longer term bilateral contracts.

Still, more long-term, the utility bases decisions of their generation mix, the diversity of fuel in their generation mix and the timing of generation additions.

Given the hundreds of decisions made on a daily, monthly and annual basis, it is ludicrous to believe that a prudency review would be effective for this reason. Mr. Brubaker suggests that the

Commission lessen the reliance on prudence reviews and strengthen the incentives which would cause the utility to provide the proper focus on cost minimization.

Moving from that to the second point, in his direct testimony -- in his direct testimony, Exhibit 502, Mr. Brubaker suggests that the Commission implement a fuel adjustment clause that is based upon a sharing grid surrounding the Commission-authorized return on equity. Surrounding this return on equity, there would be a small dead band.

Now, the purpose of this dead band is to provide some certainty in rates. Any minor increases or decreases within this dead band would not be passed through to customers. Therefore, minor nuisance-type changes, background noise, would not cause a fuel adjustment change; rather, such changes would be reserved for more material adjustments.

Outside this dead band, however, there would be increasing sharing grids. Ultimately, however, and this is important, there is a cap on the amount of sharing the shareholders are expected to retain. This way, if we see a tremendous fluctuation in gas prices or purchased power prices, the shareholders are protected.

The other issue that should be discussed is the type of items that flow through the fuel adjustment clause. The Commission recognized in its Aquila order that certain fuel-related costs should not necessarily flow through the FAC. Demand costs, because they do not vary with the amount of generation, should be recovered through base rates. Mr. Brubaker suggests that fixed costs such as demand costs, natural gas reservation costs and unit train costs should not flow through the fuel adjustment clause.

Similarly, Mr. Brubaker suggested only volatile costs should be recovered through the FAC. Fuel handling costs, for instance, they are a labor cost, are not volatile and should not flow through the FAC. This limitation on the types of costs that are flowed through the FAC is consistent with this Commission's past order in the Aquila case as well as the decisions of numerous other jurisdictions.

Mr. Brubaker is here today, and I encourage you to question him. He has over 38 years of experience in utility regulation, he has appeared before over 35 different regulatory -- excuse me -- regulatory utility commissions and is very familiar

with Missouri utilities. Thank you.
JUDGE VOSS: Thank you. Mr. Mitten, are you ready to call your first witness?
MR. MITTEN: We call Mr. Keith. Your Honor, Mr. Keith's prefiled testimony has previously been marked and identified. This is his last issue, so I would ask at this time that his testimony be admitted into evidence.
JUDGE VOSS: And before we start cross-examination, Mr. Keith, just a reminder that you're still under oath.
THE WITNESS: Yes.
JUDGE VOSS: All right. Let's see. I have Mr. Keith, his direct is 2 NP and HC, rebuttal is 3 NP, surrebuttal is 4 NP and HC. Is there any objection to the admission of those exhibits?
MR. DOTTHEIM: Yes. I was hoping we could -- I don't think that I -- I have an objection to either the direct or rebuttal. If I could have a moment. Right, I don't have an objection to the direct or rebuttal. I'd like the opportunity to ask Mr. Keith a few questions about his surrebuttal.
JUDGE VOSS: Surrebuttal?
MR. DOTTHEIM: I suspect I won't, but I'd like the opportunity to ask him a few questions

though.

JUDGE VOSS: Are there any other objections to any...

(NO RESPONSE.)

JUDGE VOSS: Well, then, for now, we'll go ahead and admit Exhibits 2 NP, HC and 3, and we will reserve ruling on Mr. Keith's surrebuttal testimony until a little bit later.

(EXHIBIT NOS. 2 NP AND HC AND 3 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

MR. MITTEN: Thank you, your Honor. Mr. Keith is available for cross-examination.

JUDGE VOSS: And I believe Staff is first.

MR. DOTTHEIM: Thank you.

CROSS-EXAMINATION BY MR. DOTTHEIM:

Q. Good morning, Mr. Keith.

A. Good morning.

Q. Mr. Keith, I'd like to direct you to your surrebuttal testimony, Exhibit No. 4.

A. I have a copy.

Q. And I'd like to direct you to page No. 3.

A. I have it.

Q. And I'd like to direct you to the bottom of the page after line 17 where you are referring to certain sections of the Southwest Power Pool EIS tariff.

A. Yes, I have it.

Q. And EIS stands for?

A. Energy imbalance service.

Q. Okay. And in particular, I'd like to refer you to that -- that chart at the bottom of the page, sections 5.3, 5.4 and 5.5. Are you familiar with those sections?

A. I -- I have reviewed them when I put together this chart.

MR. DOTTHEIM: Okay. At this time I'd like to have an exhibit marked.

JUDGE VOSS: That would be 226?

MR. DOTTHEIM: I believe so. May I approach the bench and the witness?

JUDGE VOSS: Yes, please.

(EXHIBIT NO. 226 WAS MARKED FOR IDENTIFICATION BY THE COURT REPORTER.)

BY MR. DOTTHEIM:

Q. Mr. Keith, in particular, I'd like to direct you to the -- the write-ups, the -- the language for sections 5.3, 5.4 and 5.5.

A. I see it.
Q. Do you recognize these sheets that have been marked as Exhibit 226?
A. Yes. They're out of the Southwest Power Pool FERC transmission tariff.
Q. Okay. And the sections that refer to 5.3, Underscheduling Charges, 5.4, Overscheduling Charges and 5.5, Uninstructed Deviation Charges, are those the sections that you are referring to on the bottom of page 3 of your surrebuttal testimony?
A. Yes, they are.
Q. Okay. Are those charges penalties?
A. I don't know that I'd view them as penalties. It's hard to stay in balance when they ask you to dispatch your system and they have these -- these charges when you are out of balance a little bit. It's just part of their tariff and part of the EIS market charges.
Q. Could you identify what is the 5.2 energy imbalance service charges/credits item that -- that appears on the first page of Exhibit 2. -- excuse me -- 226?
A. That's part of the EIS revenue or costs as you participate in the energy imbalance market on the SPP.

Q. Is there a difference between 5.2 on the one hand and 5.3, 5.4 and 5.5 on the other?

A. Yes. I mean, they're separate charges.

Q. Are the charges for 5.2 for when you're a little bit out of balance and the charges for 5.3, 5.4 and 5.4 [sic] when you are more out of balance than under 5.2?

A. Yes.

Q. Mr. Keith, are you familiar with Empire's recent resource plan filing?

A. Generally, yes, I am.

Q. Did you have any role or responsibility in that filing?

A. Yes, my department put the filing together.

Q. Do you recall whether the case number for that filing in Missouri was EO-2008-0069?

A. That sounds correct.

MR. DOTTHEIM: May I approach the bench and the witness?

JUDGE VOSS: Please proceed. Were you going to offer 226?

MR. DOTTHEIM: Eventually.

JUDGE VOSS: Okay. I wasn't sure. Okay. Is this 227?

MR. DOTTHEIM: Yes. Why don't we mark this 227.

JUDGE VOSS: It should be 227 HC?

MR. DOTTHEIM: Yes.

JUDGE VOSS: I was just making sure that -- the component of the document might be HC.

MR. DOTTHEIM: I don't know if we're going to have to go in-camera yet. I think I'm going to ask Mr. Keith just some very general questions.

MR. MITTEN: I'll withhold a request to go in-camera until I see the question.

JUDGE VOSS: Okay.

(EXHIBIT NO. 227 WAS MARKED FOR IDENTIFICATION BY THE COURT REPORTER.)

BY MR. DOTTHEIM:

Q. Mr. Keith, have you had an opportunity to take a look at what's been marked as Exhibit 227?

A. Yes.

Q. Okay. And I've -- I've handed to you two objects. I've handed to you a two-page document that I've had marked as Exhibit 227. The -- the first page has on the cover an Empire logo that says "Service You Count On, 2007-2026, Integrated Resource Plan for the Empire District Electric Company, Volume 3, Supply-Side Resources Analysis (4 CSR 240-22.040), September 2007," and then also the words "Denotes highly confidential," and then attached to that page 16.

And then I've also handed to you what I'll represent is the -- the full document from which that cover page and page 16 were copied from. Do you recognize those documents?

A. Yes, I do.

Q. Could you identify them?

A. They're part of -- they're Volume 3 of our latest IRP filing that we made in the fall of 2007.

Q. Okay. And in what's been marked as Exhibit 227 on page 16, there's a section which -- before I go any further, let me first check with your counsel.

(DISCUSSION HELD OUT OF THE HEARING OF THE COURT REPORTER.)

BY MR. DOTTHEIM:

Q. Mr. Keith, I just checked with your counsel, and he's indicated that if we don't get into specifics, it appears we can prevent from going in-camera, and I'm not planning to go into specifics. So I'd like to direct you on -- on page 16, there's a heading, "2.3.2 Natural Gas Risk Management Policy," is there not?

A. Yes, there is.

Q. And then there's a paragraph that follows, is there not?

A. Yes.

Q. Okay. Is that paragraph that then follows a write-up of the risk management policy that has been established by Empire respecting natural gas?

A. Yes.

Q. Okay. Thank you. Mr. Keith, do you recall what is the test year level of fuel and purchased -- purchased power expense for Empire?

A. In our original filing?

Q. Yes.

A. It was somewhere around 172 million, I want to say, on a total company basis.

Q. And has that number been updated?

A. I believe it was updated through December, certainly by the Staff.

Q. Was the number you gave me the adjusted level?

A. Yes, I believe it was.

Q. Could you give me the ProBooks level?

A. I'd have to look it up. I don't

remember.

Q. You don't recall whether the ProBooks level was 160 million?

A. No, I don't.

Q. When we are on a break, maybe if I could ask that you check that number and provide it?

A. I can do that, provide it.

MR. DOTTHEIM: Thank you, Mr. Keith. No further questions. And at this time, I'd like to offer Exhibits 226 and 227.

JUDGE VOSS: Is there any objection to the admission of Exhibit 226 and 227 HC?

MR. MILLS: I don't have an objection, but I don't see anything on Exhibit 227 that's actually indicated that it is HC. Typically -- well, it says HC on the cover which means that parts of the document contain highly confidential material, but on this particular page, there's nothing that's indicated with asterisks the way highly confidential information is usually indicated. So I mean, I think we should -- we could have Empire confirm that, but it doesn't appear to have any highly confidential information.

JUDGE VOSS: Based on their conversation earlier, I assumed that it had.

MR. DOTTHEIM: I mean, other than, of course, in the upper right-hand corner there's the -- the letters HC, but -- but there's nothing -- Mr. Mills, you're saying there's nothing -- the double asterisks and the underlining...

MR. MITTEN: Your Honor, the best source of information as to whether or not the information that's included on page 2 of Exhibit 227 is, in fact, highly confidential is Mr. Keith. Mr. Keith, is any of the information that's on this page highly confidential?

THE WITNESS: I need to check with somebody. The only thing I can think of are the percentages that show up may be confidential in the bullet points.

MR. MITTEN: Your Honor, would it be possible to accept into evidence the exhibit designated HC? If Mr. Keith later determines that there's no highly confidential information, we'll so advise the Commission that the HC designation can be removed.

JUDGE VOSS: For now we'll put it in as 227 and then if the HC needs to be added, because it won't go into the record until the transcript is finalized.

MR. MITTEN: The only potential problem is if I am going to do some redirect on this witness, I may want to, in an abundance of caution, go in-camera if we're going to discuss any of the specific information that's page 2 of the exhibit. If you don't designate it HC now --

JUDGE VOSS: All right. We'll --

MR. MITTEN: -- it will be incongruous to go in-camera for purposes of that redirect examination.

JUDGE VOSS: All right. Out of an abundance of caution, then, we'll mark it 227 HC and then reclassify it later NP if there's no problem.

MR. MITTEN: Thank you, your Honor.

JUDGE VOSS: So any objection to the admission of 226 and 227 HC?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they're admitted.

(EXHIBIT NOS. 226 AND 227 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: Public Counsel?

MR. MILLS: Just very briefly.

CROSS-EXAMINATION BY MR. MILLS:

Q. Mr. Keith, can you clarify for me what is Empire's proposal in this case? Are you proposing a 95 percent passthrough or a 100 percent passthrough?

A.   We have tailored our tariff to follow Aquila's, and Aquila's tariff included a 95 percent passthrough limitation, so we have proposed that same limitation.

Q.   Okay. Do you disagree with the Empire witness Overcast that 100 percent passthrough is necessary and appropriate?

A.   No, I don't disagree with him.

Q.   But nonetheless, that's not your position in this case?

A.   No. We have proposed to limit it to 95 percent so that we're consistent with what the Commission approved for Aquila.

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

JUDGE VOSS: Industrials?

MR. WOODSMALL: Just one.

CROSS-EXAMINATION BY MR. WOODSMALL:

Q.   By way of clarification, can you tell me what the company's position is at this point in time on the inclusion of off-system sales in the FAC?

A.   We're not opposed to it as long as it's

handled properly.
MR. WOODSMALL: Thank you.
JUDGE VOSS: Is that all you had, Mr. Woodsmall?
MR. WOODSMALL: Yes. Yes, I'm sorry.
JUDGE VOSS: I wasn't sure if you were looking...
Questions from the bench? Commissioner Clayton?
COMMISSIONER CLAYTON: I don't have any questions. Thank you.
JUDGE VOSS: Commissioner Jarrett?
QUESTIONS BY COMMISSIONER JARRETT:
Q. Good morning, sir.
A. Good morning.
Q. I just had one question from the opening statements. I know that Staff is proposing a 70 percent figure rather than a 95 percent, and I just wanted to give you a chance to explain why you believe 95 percent -- why 70 percent is inadequate rather than 95.
A. The 70 percent proposal by the Staff wouldn't give us a fair opportunity to earn our authorized rate of return because the -- of the significance of fuel and purchased power in our

overall -- overall costs.

For example, as you saw in the opening statement, Empire absorbed around $85 million over the last few years of fuel costs and has essentially eroded the company's retained earnings. If you just apply the 30 percent limitation proposed by the Staff to it, or exclusion, that would be roughly 27, $28 million that we would still absorb, and that's the equivalent of almost one year's authorized ROE.

Q. And so do you believe that a 5 percent incentive is an adequate incentive for Empire to be cost-effective in its purchase of -- of fuel?

A. Yes, I do.

COMMISSIONER JARRETT: Okay. Thank you.

JUDGE VOSS: Redirect? Oh, just wait a minute. It's Monday morning, isn't it? Recross based on questions from the bench. Mr. Dottheim?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Mr. Mills?

MR. MILLS: No questions.

MR. WOODSMALL: No questions.

JUDGE VOSS: Now redirect?

MR. MITTEN: Thank you, your Honor.

REDIRECT EXAMINATION BY MR. MITTEN:

Q. Mr. Keith, I'd like you to direct your attention to Exhibit 227 HC, and I'm going to see if I can handle these questions and your answer in a manner that will not require us to go in-camera. Do you have that exhibit in front of you?

A. Yes, I do.

Q. I notice that in section 2.3.2, Natural Gas Risk Management Policy, it describes the minimum hedging targets that Empire has set for a four-year period; is that correct?

A. Up to five, really.

Q. Five-year period. Excuse me.

A. Because it talks about the current year too.

Q. Well, I noticed that beginning with year 1 and continuing through year 4, the targets decline in terms of percentages. Could you explain why that is?

A. I'm not sure I understand the problem. It builds out in year 4 at a lower percentage. It gradually builds up over the term of the program rather than down.

Q. Well, maybe you could help me understand. The percentage figure that is stated for year 1 is higher than the percentage figure stated for year 4.

A. That's because that -- that's dealing with a more current year. In other words, the program is a gradual averaging of purchases over a five-year term, so it builds so that more and more gas is covered towards the end of the five-year period.

Q. So as you get closer to year 4, is what you're saying that the target will be higher than what is stated in this document?

A. No. These are the targets in the current risk management policy.

MR. MITTEN: I don't have any further questions. Thank you.

JUDGE VOSS: In case that changed your mind. Still no further questions?

MR. MITTEN: One additional question.

BY MR. MITTEN:

Q. Commissioner Jarrett asked you about the 5 percent amount of fuel in purchased power cost that Empire proposes to absorb in its fuel adjustment clause.

A. Yes.

Q. Do you consider that to be an incentive?

A. I view it more as a potential penalty, but I can understand the term incentive in that context.

MR. MITTEN: That's all the questions I had. Thank you.

JUDGE VOSS: Mr. Keith, I'm not certain. The Chairman may well have had a few questions for you because we've moved along very rapidly all of a sudden when Staff was completed, so will you be available later this morning in case he has additional questions?

THE WITNESS: Yes.

JUDGE VOSS: Okay. Thank you. Please step down.

MR. MITTEN: Your Honor, does Staff still have objections about Mr. Keith's surrebuttal testimony or --

JUDGE VOSS: Oh, thank you for reminding me.

MR. DOTTHEIM: No. Staff -- Staff has no objections to Mr. Keith's surrebuttal testimony being received into evidence.

JUDGE VOSS: So there are no additional objections to Exhibit 4 NP and HC?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they will be admitted.

(EXHIBIT NOS. 4 NP AND HC WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: And my understanding is that Mr. Mertens is not going to be here today and that none of the parties have cross-examination for Mr. Mertens?

(NO RESPONSE.)

JUDGE VOSS: Okay. Did you want to at this time -- I believe his testimony was offered. It will be Exhibit 5 NP and HC, Exhibit 6 and Exhibit 7. They were offered earlier, but we were waiting to rule on them until his last issue. Are there any objections to the admission of those exhibits?

MR. WOODSMALL: Your Honor, not an objection, only a note that it puts me in a strange position that we're assuming that the stipulation will be approved.

MS. CARTER: Yeah, we should probably wait on Mr. Mertens because he testifies on issues that are part of the stipulation.

JUDGE VOSS: Part of the stipulation? Okay. Then Staff, are you ready to call your first witness?

MR. DOTTHEIM: Yes, Staff would call --

MR. CONRAD: If your Honor please, I'm

sorry to interrupt. Just -- if I might close up one -- one matter and seek a little bit of instruction from the bench on this. On day one, the Chairman asked Mr. Woodsmall for some information about Explorer Pipeline and returns and so on.

The information that we have collected is essentially public material and is quite voluminous because most of it reflects FERC filings or in one case, I believe, actually the permanent waiver for the petroleum producer pricing, if I've got the terminology right.

Depending on what your pleasure is -- and I'm sorry I didn't dig this out before Chairman Davis left or stepped out -- I would propose to send him, copying the other parties, links to that material on the -- on the web rather than an avalanche letter.

Now, I don't know whether we need to do that just in the form of a -- of a letter from me to him or from Mr. Woodsmall to him closing out or whether we need to do that in the form of an exhibit, and I guess I seek direction from your Honor as to how best to handle that.

JUDGE VOSS: You might wait and see what the Chairman wants to do when he's in the room, and you might talk to the parties. I mean, did the parties discuss this information, being that it's public?

MR. CONRAD: Well, to my knowledge, they have not, other than...

JUDGE VOSS: Okay. Well, then, let's wait until the end of our -- after our next break. Maybe the parties can discuss any objections they might have to doing it either way and give the Chairman an opportunity to step in the room and see what he wanted the information for.

MR. CONRAD: Okay.

JUDGE VOSS: Okay. Thanks.

(The witness was sworn.)

JUDGE VOSS: Please proceed.

DIRECT EXAMINATION BY MR. DOTTHEIM:

Q. Ms. Mantle, this is the first time you're taking the stand in this case?

A. Yes, it is.

Q. Okay. And you have copies of Exhibit No. 214 which is your rebuttal testimony and Exhibit No. 215 which is your surrebuttal testimony?

A. Yes, I do.

Q. Do you have a copy of what has been marked as Exhibit 204 which is the Staff report?

A. Yes, I do.
Q. Okay. And in Exhibit 204, the Staff report on Exhibit -- on page 63, you were shown as the Staff expert at the end of the section 10 for fuel adjustment clause?
A. Yes.
Q. Do you have any corrections?
A. I have one correction. In my surrebuttal testimony on page 2, line 11, the sentence that starts, "The Southwest Power Pool energy imbalance market settlements and neutrality," I wish to insert the word "revenue" between "and" and "neutrality" so it reads "the imbalance market settlements and revenue neutrality uplift charges." That's my only correction.
MR. DOTTHEIM: Staff would tender Ms. Mantle for cross-examination and would -- would offer Exhibits 214 and 215.
JUDGE VOSS: Are there any objections to the admission of Exhibits 214 and 215?
(NO RESPONSE.)
JUDGE VOSS: Hearing none, they're admitted.
(EXHIBIT NOS. 214 AND 215 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: And I believe the Industrials.

MR. WOODSMALL: No questions.

JUDGE VOSS: I want to make sure, because originally I had Public Counsel and Empire which would seem to make sense on this issue, but this was in the FAC and the off-system sales issues. And when I earlier was going down this list, I was told Empire was before Public Counsel. But on this issue, is that still the way it is or is Empire last?

MR. MITTEN: It's my understanding Empire's last.

JUDGE VOSS: Okay.

MR. MILLS: That's fine.

JUDGE VOSS: I just want to make sure because that's how it was earlier, but then on, what was it, off-system sales, it flipped. All right, then. Public Counsel?

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

CROSS-EXAMINATION BY MR. MILLS:

Q. Ms. Mantle, do you have a copy of the Staff report with you?

A. Yes, I do.

Q. On page 61 in the last paragraph on that

page, you talk about a series of Empire rate cases --
A. Yes.
Q. -- 2002, 2004 and 2006 rate cases?
A. Yes.
Q. Who decides when a rate case is filed? Is it the utility's decision or someone else's?
A. It's the utility's decision.
Q. Okay. I note that there are no -- that the -- that the rate cases listed here are two years apart; is that correct? 2002, 2004, 2006?
A. I don't know the exact filing dates, but they look to be about two years apart, each of them.
Q. Is there anything that would prohibit a utility from filing a rate case every year?
A. No, sir.
Q. Now, with respect to the $85.5 million that you calculated that Empire absorbed, if Empire had filed rate cases more frequently, would that number likely be lower?
A. That number would likely be lower, yes.
MR. MILLS: No further questions.
JUDGE VOSS: That brings us to Empire.
CROSS-EXAMINATION BY MR. MITTEN:
Q. Good morning, Ms. Mantle.
A. Good morning.

Q. The fuel adjustment clause that Staff is proposing in this case would limit to 70 percent the amount of fuel and purchased power cost increases that Empire can collect from customers; is that correct?

A. It would limit -- there's more in that -- in that amount than just fuel and purchased power costs. But in general speaking, if you -- if you define all the costs that have been set out, the off-system sales margin, SO2 allowance, sales and revenues and certain SPP costs, if you define those in total as fuel and purchased power costs, that is correct, the Staff's position is 70 percent of those can be passed through to a fuel adjustment clause.

Q. Let me make it clear, then. Staff would limit to 70 percent the amount of costs passed through the fuel adjustment clause that Empire could collect from customers, whatever those costs may be?

A. That's correct.

MR. MITTEN: Your Honor, could I have a document marked, please?

JUDGE VOSS: I have that as 31. Is that where you have it?

MR. MITTEN: I don't know what the number would be.

JUDGE VOSS: Yeah, No. 31.

MR. MITTEN: And may I approach the witness?

JUDGE VOSS: Yes.

(EXHIBIT NO. 31 WAS MARKED FOR IDENTIFICATION BY THE COURT REPORTER.)

BY MR. MITTEN:

Q. Ms. Mantle, I've handed you a document which has been marked for identification as Exhibit 31. Let me give you a moment to look that over and see if you can identify it.

Have you had a chance to look at the document?

A. Yes.

Q. Are those, in fact, exemplar tariff sheets that reflect the Staff's fuel adjustment clause proposal in this case?

A. With the exception of the percentage that would be flowed through the fuel adjustment clause in this tariff. It shows it is .70/.095.

Q. I'm sorry. This was the document I received from your counsel. What change would need to be made to that so that it accurately reflects Staff's proposal in this case?

A. Just the .070.

Q. So if we crossed out the .095, then it would be accurate?

A. Yes. That's also up under the heading Fuel Adjustment Clause in the second sentence that -- that states, "The price will reflect 70/95 percent..."

MR. DOTTHEIM: Could you be specific as to where you're referring?

THE WITNESS: I'm sorry. Sheet 7 B.

MR. DOTTHEIM: 17 B?

THE WITNESS: 17 B, under the heading Fuel Adjustment Clause. The second sentence starts, "The price will reflect 70/95 percent of the cumulation period cost."

BY MR. MITTEN:

Q. So again, if we struck 95, that would accurately reflect Staff's proposal in this case?

A. Yes.

MR. MITTEN: Your Honor, with the two changes that Ms. Mantle has indicated, I would offer into evidence Exhibit 31.

JUDGE VOSS: You might clarify the changes. So basically, the highlighted section that has "70/95"?

MR. MITTEN: Yes, at the -- at the top

of page 2 --

JUDGE VOSS: Yes, I see where they are. I'm just trying to make sure that you're going to submit a different copy to her or just note that --

MR. MITTEN: I wasn't. I was just going to have the changes made on the exhibit --

JUDGE VOSS: Okay.

MR. MITTEN: -- and the changed exhibit be received into evidence.

JUDGE VOSS: Okay. That's fine. Are there any objections to Exhibit 31?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, it's admitted.

(EXHIBIT NO. 31 WAS RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

BY MR. MITTEN:

Q. As I understand your testimony in this case, the reason that Staff would prohibit Empire from collecting 30 percent of any increases in fuel and purchased power costs from customers is that Staff believes it would be a great incentive for the company to reduce its fuel and purchased power costs; is that correct?

MR. MILLS: I object, assumes facts not

in the record. There's no testimony that the Staff has proposed to prohibit recovery.

JUDGE VOSS: Do you want to rephrase your question?

MR. MITTEN: Your Honor, no, because I believe I'm able to characterize Staff's evidence in any way I choose. They're going to deny recovery of 30 percent of fuel and purchased power costs. That's a prohibition in my dictionary.

JUDGE VOSS: If -- I'm sorry.

MR. MILLS: It assumes facts that are not in the record about what Staff's position is. Staff's position, I believe, is not that they are planning to prohibit recovery.

JUDGE VOSS: I believe Ms. Mantle's capable of clarifying Staff's position. Answer the question to the best of your ability, please.

THE WITNESS: It's Staff's position that 70 percent of the cost -- the difference between actual cost and the base cost, that 70 percent of that be flowed through to the ratepayers through a fuel adjustment clause.

BY MR. MITTEN:

Q. And the reason for that is you believe that creates a great incentive for Empire to reduce

its fuel and purchased power cost?
A. We believe that it does provide some incentive for the -- for Empire to actively work towards getting the most cost-effective fuel sources for -- to supply energy to its customers.
Q. I'm not trying to put words in your mouth, Ms. Mantle. Let me have you turn to page 7 of your rebuttal testimony, and specifically lines 13 and 14. It says there, "Staff's proposal gives Empire a great incentive to reduce its fuel and purchased power costs below the base rate"; is that correct?
A. That's correct, that's what it says.
Q. At the time Staff made its proposal, did you understand that by law in Missouri, only prudently incurred fuel and purchased power costs can be passed through the fuel adjustment clause?
MR. WOODSMALL: Objection, your Honor. I believe he's asking for a legal conclusion here. Maybe he can rephrase it.
JUDGE VOSS: Yes. Could you please rephrase?
BY MR. MITTEN:
Q. At the time you made that recommendation, was it your understanding that only

prudently incurred fuel and purchased power costs can be passed through the fuel adjustment clause?

A. It's my understanding that the costs will be flowed through and then a prudence evaluation would be done after the costs are allowed to flow through and perhaps a prudence adjustment be made in the future.

Q. So that in the future, if costs were flowed through the fuel adjustment clause which were later determined not to have been prudently incurred, those costs would be refunded to customers with interest. Is that your understanding?

A. They would be returned to the customers with interest, yes.

Q. So at the end of the day after the prudency review was concluded and any necessary refunds had been made, only prudently incurred fuel and purchased power costs would have been paid by the customers?

A. Eventually, only the prudent -- the costs that the Commission determined were prudent would be allowed through.

Q. And despite that fact, Staff still believed an incentive was necessary for Empire to control its fuel and purchased power costs?

A. Based on the Commission's decision in the Aquila case that there be an incentive plan and the fact that the statute allows for an incentive plan, yes, the Staff proposed a percentage -- only a percentage be allowed to be recovered.

Q. And you felt that was necessary even though only prudently incurred costs can be collected through the fuel adjustment clause?

A. Yes.

Q. Now, in this case, Staff has proposed a tracker mechanism that would allow Empire to recover increased costs associated with vegetation management. Are you aware of that?

A. In general terms, yes.

Q. Do you know whether Staff was proposing to limit recovery of vegetation management costs to 70 percent of actual?

A. I do not believe that they did.

Q. Could you please turn to page 3 of your surrebuttal testimony? Now, beginning at line 10 of that testimony, you use a hypothetical to explain and justify what Staff refers to as an incentive mechanism. And that hypothetical involves a driver that is provided 100 percent recovery of his fuel costs and you argue that, and I quote: "The typical driver would really not care how far he drives, how much the gas costs or whether the car is running efficiently or not." Is that correct?

A. Yes.

Q. Now, what if your hypothetical driver was required at regular intervals to justify every trip he took, every mile he drove and how well he maintained his car, and if it was determined that he had acted imprudently with respect to any of those items, he would have to repay his fuel costs plus interest? Would that make him care how far he drives, how much the fuel costs and whether his car was running efficiently?

A. I believe that it would to an extent, but not until after a few times that he found out that he hit that point.

Q. Even if he had to make the refunds with interest?

A. Yes.

MR. MITTEN: I don't have any further questions for Ms. Mantle. Thank you very much.

JUDGE VOSS: Questions from the bench? Commissioner Murray?

COMMISSIONER MURRAY: Thank you.

QUESTIONS BY COMMISSIONER MURRAY:

Q. Good morning, Ms. Mantle.
A. Good morning.
Q. My only question is regarding Staff's -- well, I guess I should put it this way. On page 7 of your rebuttal testimony in that first full paragraph, you talk about, "Staff believes that requiring Empire to retain a percentage of the change in the FAC in the range of 20 to 40 percent would result in a much greater incentive for them to manage the costs and -- and reduce the risk of Empire having to absorb increased fuel costs."
Where did you come up with the range of 20 to 40 percent?
A. I did the analysis that was in the Staff's cost of service report looking at -- because Empire had filed rate cases, I was able to use the fuel and purchased power numbers, the final runs of the Staff to estimate how much cost Empire had absorbed during the four-year period of 2003 through 2006 and how much that the customers had paid of that, the difference -- the incremental costs between the end of 2002 through the end of 2006.
That analysis showed that Empire absorbed approximately 60 percent of its increase in its fuel costs, and the customers -- the ratepayers

paid about 40 percent. So I had that number in front of me as a guideline as to what Empire had been able to do in the past.

I also considered the Aquila rate case where some of the parties offered a 50/50 as a -- an appropriate split, and the Commission determined that that was not appropriate, it needed to be higher than that.

Q. What was the number that the Commission determined in the Aquila case?

A. The Commission determined it to be a 95/5 split. I tried to give -- lay out some information for the Commission to consider. In the Staff report, you'll see that I did do it by increments so that the Commission could see where each one of those percentage would have -- the amount that Empire would have paid, the amount customers would have paid to give some information on which to base that decision.

Staff -- we looked at those numbers and determined that we would set a range between 60 percent and 80 percent would be the increment that the customers would recover.

Q. And you partly based that on the fact that Empire had in the past absorbed as much as 60

percent of the increase?
A. Over those four years they had absorbed 60 percent of the increase, yes.
Q. But then with the fuel adjustment clause, the purpose of the fuel adjustment clause is that they are to be able to pass through those prudently incurred costs; isn't that correct?
A. That's correct.
Q. So I'm trying to see what -- what relationship -- what they were able to do in the past would have had to -- what they should be able to pass through today.
A. The fuel adjustment clause -- if 100 percent is passed through, the company no longer has that risk of fuel and purchased power cost. That risk is totally laid on the customers who have very little, if any, say-so in the purchase of fuel and purchased power.
Q. Even though they're -- they have to show that they were prudently incurred, albeit after the fact, that the customers would get repaid with interest if they are passing through any that is shown not to have been prudently incurred?
A. That's correct.
Q. And you really don't think that's an

incentive for them to use efficient purchasing practices?

A. It can be. It is an after-the-fact prudence allowance which is harder to demonstrate. It isn't as great an incentive as was in -- without a fuel adjustment clause where the company has to very carefully watch that all the time knowing that any cost above what it has in the rate case, that it absorbs. But then at the same time, it also knows that if it can come below that mark, it gets to keep 100 percent of that dollars.

Q. In your experience in the past several years, how many utilities have come below the fuel costs that were estimated for the rate case?

A. I know Empire did in one case where we had a I -- interim energy charge, IEC, and Empire came back rather quickly because its fuel costs had dropped and all of those costs were refunded back to the utility -- or to the customers. Somewhere in my testimony I have that case number.

Q. Do you know of any other instances?

A. No, no.

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

THE WITNESS: Uh-huh.

JUDGE VOSS: Commissioner Clayton, do you have anything?

CHAIRMAN DAVIS: I do but I'll go ahead and wait.

QUESTIONS BY COMMISSIONER CLAYTON:

Q. Ms. Mantle, does the statute mandate that 100 percent of the company's fuel costs shall be passed through to ratepayers as part of a fuel adjustment mechanism?

A. So your question was, does the statute mandate --

Q. That 100 percent passthrough.

A. -- that 100 percent passthrough? No. My background's engineering, not law, but I have looked at this statute quite a bit. I don't believe that it mandates that 100 percent of it has to be passed through.

Q. Well, that'd be quite a problem for Staff's case if it did mandate 100 percent passthrough, wouldn't it?

A. That's right.

Q. Okay. So -- so the best of your understanding is that the statute does not mandate 100 percent passthrough of prudently incurred fuel costs; is that correct?

A. Yes. It allows the Commission to have -- set up incentive plans.

Q. All right. So it's your understanding that there is some flexibility in how a fuel adjustment mechanism will be designed?

A. Yes.

Q. Okay. Now, can I ask you to -- you're -- you're director or manager of the energy department here at the Public Service Commission?

A. I'm manager of the department, yes, sir.

Q. Okay. Can you give me a general outline of Staff's position as it relates to fuel, and also give me an outline of the witnesses that support each component? And if there's only one witness, two witnesses, that's fine. But I'd like you to give me just an outline on the fuel cost issue because I want to make sure I don't waste your time with asking questions that are inappropriate.

A. We have an engineer typically within the engineering department or engineering analysis section that runs a simulation model to determine fuel and purchased power. The prices that go into that model, the fuel prices come from the auditing department.

Q. Okay. Let's go back to the engineer

before you go too fast. Who is the engineer that -- that will be supporting Staff's case on fuel?

A. That would be Leon Bender.

Q. Okay. And then go ahead. Next step? The prices, I think you were talking about, is that the procurement?

A. The prices -- the fuel prices that go into the model are given to him by the auditing department. our Staff develops the purchased power prices and the availability of purchased power prices on the spot market from the historical-test-year purchased power prices and purchased power availability.

Q. Okay. And who -- who is that on -- on this issue?

A. Leon Bender.

Q. Oh, so he's both engineer and the accounting?

A. No. The auditors give the fuel price, but the engineer does do the purchased power prices and availability.

Q. Okay. Is there an auditing witness associated with fuel?

A. Dana Eaves provided the fuel prices.

Q. Okay. And then is there anyone else? Is that it or is that...

A. There are various other components to fuel and purchased power that auditing does come up with. Fuel train handling, coal handling, those types of numbers the engineering staff does not do. Those numbers are given to us by auditing. But to come up -- or to come up with a full fuel and purchased power costs, there's usually some miscellaneous types of costs.

Q. All right. Well, then, how many other witnesses from Staff participate on the fuel issue other than Mr. Bender and Mr. Eaves and you?

A. If there's any other, it would be Mark Oligschlaeger.

Q. Okay. I noticed he's sitting at the table there, so I assume he'd have some role here.

Okay. So the purpose of your testimony, are you giving us the overview, and then the supporting Staff witnesses will give more specificity to some of the inputs in terms of the outline of Staff's testimony?

A. I'm giving the Staff's position regarding the fuel adjustment clause. As a part of that clause, there are base rates that are set based off these fuel runs. It's my understanding that the parties that come to an agreement on those base costs for the update period, I don't -- Leon is here. I'm assuming he would be available to answer any questions on running the model.

Q. Okay. Thank you. So are you -- your -- your role as a Staff witness is to give an overview in the general policy issue associated with the fuel adjustment clause; is that correct?

A. Yes, sir.

Q. It is. Okay. Now, Staff's position is that a fuel adjustment mechanism should be put in place --

A. Yes.

Q. -- for Empire; is that correct?

A. That is correct.

Q. All right. Can you tell me what Staff's position was in the last Aquila rate case? What was Staff's position, not what the Commission ultimately did?

A. The Staff's position was that an interim energy charge would be the rate adjustment mechanism that should be implemented, not a fuel adjustment clause.

Q. All right. So an interim energy charge is different than a fuel adjustment mechanism, would you agree with that?

A. Yes.
Q. Or at least as proposed by -- by the Staff in this case, they're different?
A. Yes.
Q. Okay. And in the IEC proposal by Staff in the Aquila case, do -- are you familiar with Staff's position in how that IEC would be designed?
A. I'm familiar in general with how IECs are designed. If I remember correctly, Cary Featherstone was the witness from the Staff for the interim energy charge for Aquila.
Q. Can you give me a -- just a general explanation of what that IEC proposal would have been?
A. An IEC -- with an IEC, typically there is a base level set for fuel and purchased power. And then another amount that's collected from the ratepayers that is over a range, a higher fuel and purchased power price.
The idea is if fuel and purchased power prices go up, the company is covered, but only to a certain limit, to a ceiling. There's how much the company is covered. And then -- and the vice versa, if they do bring their fuel and purchased power down below that base, they get to keep what it is below

the base while refunding what they've collected from the customer in that IEC charge.

Q. Do you recall in the Aquila case Staff's position in terms of how much -- what percentage of fuel costs was included in base rates versus what would be in the adjustable IEC?

A. No, I don't recall.

Q. I mean, is it -- is it something where we could say, oh, it would have been 50/50 or 60/40 or you just have no idea?

A. I have no idea.

Q. Okay. Okay. So Staff has -- has offered a different proposal in this case?

A. Yes.

Q. And -- and this is actually a -- a fuel adjustment mechanism does offer some degree of passthrough to the customers that is quite different from an IEC that's been used in the past?

A. That is correct.

Q. All right. And Staff's position is that you would have a base amount included in rates which I'm assuming would be the 30 percent level, and then a -- then a component reflecting 70 percent of costs would be put into the fuel adjustment mechanism or do I have it backwards?

A. The base rate for the fuel adjustment clause that we proposed is based on the normalized fuel and purchased power costs estimated for this case. That is the base. Then there is an accumulation period over which time Empire would collect information on what it actually spent on -- on those accounts.

Now, the fuel adjustment clause is the difference between the actual that was spent and that base amount that is being set in this case -- would be set in this case, and that could go up or it could go down. There's no ceiling on it and there's no base on it or amount that it could go below.

Our -- it's our proposal that of that difference between actual and the base, that Empire be allowed to recover 70 percent of that from the customers and it absorbs or retains 30 percent.

Q. Okay. Did -- did I hear you correctly when you said that there were some agreements on some base amounts? Have -- have Staff and the parties come to an agreement on that normalized base amount of fuel costs or is that an issue that's in dispute?

A. To my knowledge that is not in dispute.

Q. It is not. So -- so the 100 percent of the normalized base fuel expenses, that -- that initial component that goes into base rates is -- is agreed to by the parties?

A. Yes.

Q. Okay. And can I -- is that a public number? Can I ask you that or -- I just want to get a frame of reference.

A. It would be on Exhibit 31 that Empire offered, just offered, which is a sample tariff sheet. If you go to the bottom of original sheet 17 B.

Q. Just a dollar amount, Ms. Mantle.

A. I don't -- I have a dollars-per-kilowatt hour, I do not have a total dollar amount.

Q. Oh. We don't have a dollar amount that would be included in the revenue requirement, then?

A. No.

Q. Well, I assume Staff has that number somewhere, somebody would have it?

A. Yes, we have that number.

Q. Mr. Oligschlaeger would be the right guy to ask that?

A. (Nodded head.)

Q. I'm getting a nod from Mr. Oligschlaeger so I'm asking you the wrong question. Okay. So -- so let's -- let's make that number X. We'll just --

we'll just -- it doesn't really matter, I think, for the purposes of these questions.

So Staff's position is that you would have this X dollars of base fuel expenses that are put into rates. Now, would -- is it your understanding that that dollar amount was established in the same way that base fuel costs were established in rate cases over the past five or ten years?

A. In base rate -- in rate cases other than the IEC rate cases, yes.

Q. Other than the IEC cases. Okay. So -- so if we were to compare to Ameren or -- or KCP&L rate case, this base amount of fuel costs was determined in a way that's consistent over the past five or ten years?

A. Yes.

Q. Because I don't think either of them had an IEC --

A. No.

Q. -- to my -- to the best of my knowledge. So in comparing -- in comparing how this number was determined versus either an Aquila or Empire case that included an IEC, was this base amount determined in the same manner as those base amounts?

A. In those cases there was such a number

determined, but they -- base for the IEC typically
was a bit lower than that.
Q. It'd be lower and then you'd have a variable component that would be above that that could adjust up or down?
A. That's correct.
Q. Okay. But -- but you don't recall what percentage was in base rates and what percentage on a going-forward basis would be in the interim energy charge?
A. That was typically negotiated with the parties.
Q. All right. All right. Now, in a traditional ratemaking case with -- with no fuel adjustment mechanism at all, basically the parties would either have to come to an agreement or would have a dispute over this base-normalized amount of fuel costs as a component of the ratemaking formula; is that correct?
A. That's correct.
Q. And -- and in that instance, the company would have a certain amount of money set off to deal with fuel costs and, you know, the risk would be borne by the company one way or the other: Fuel prices went up, fuel prices went down, company would

bear that risk?
A. That is correct.
Q. Okay. So would you say that the ratepayer has any risk in that circumstance where 100 percent is in base rates with no adjustment mechanism?
A. Yes, I would say that.
Q. Okay. Now, what has been proposed by the utility in this instance is either a 95 or 100 percent passthrough of fuel costs as part of a fuel adjustment mechanism; is that correct?
A. That's my understanding.
Q. All right. And -- and does Staff see a significant difference between 95 percent and 100 percent? In the -- in the overall value of this issue, does that 5 percent have a great deal of value to Staff?
A. It has some value, but I wouldn't put a -- not a lot of value to it.
Q. Not a lot of value. Kind of a minimal value --
A. Yes.
Q. -- would you characterize it as that? Now, if you had 100 percent passthrough, would you say that the company and the ratepayer share risk

on -- on changes or volatility in fuel costs?
A. No. I would -- I believe all of that passes through to the ratepayers with 100 percent passthrough on the fuel adjustment clause.
Q. All right. So -- so by doing 100 percent passthrough, you believe that that would shift risk upside down from 100 percent of the company in the first example to 100 percent to the ratepayers, at least on this issue?
A. Yes.
Q. Okay. Can you tell me why Staff is not proposing an interim energy charge in this case along similar lines to what was proposed in the Aquila case, most recent Aquila case?
A. We looked at the Commission's order in the Aquila case, and the Commission determined that a fuel adjustment clause was preferable to an IEC. So to that end, we decided a fuel adjustment clause for this case.
Q. All right. So -- so Staff's position was not -- it did not change because it internally has changed its mind, that -- that the Staff witnesses working on these issues have changed their mind; the change in policies come from Commission decisions and orders?

A. I really can't say, absent the Commission's decision in the last case, what we would have decided for this case. They are both just tools that can be used by the Commission. And given the Commission's last decision, that put more weight on the fuel adjustment clause.

Q. Okay. But in looking at those tools, as you explained, until the -- the Commission rendered the decision in the Aquila case to grant a fuel adjustment mechanism, Staff's preferred tool was an IEC, not a full passthrough fuel adjustment mechanism. Would you agree with that statement?

A. I'd agree with that, yes.

Q. All right. And -- and -- I mean, you-all pay attention to what policy the Commission dictates. And how does that play into your proposals? Does it sway you completely or is it just one additional piece of influence?

A. It sways us quite a bit, and -- and in this case, I attempted to give you some information. In the Aquila case, I don't know that you had a lot of information to set the split 95/5 on, to have any real understanding of what that meant.

And in this case, we did not do the 95/5, but we did give you information to base that split on, whether it's the 70/30 that the Staff proposes, the 60/40 that OPC proposes or the 95/5 that the company proposes.

Q. Okay. So -- so Staff does give some influence to -- to Commission decisions, but in this case you can't say that Staff has gone complete -- completely with what the Commission decided in the Aquila case?

A. That's correct, we didn't go completely.

Q. If -- if -- if Staff would have gone completely the way the Commission went in the last case, it would have been a fuel adjustment mechanism with a 95/5 split or division. Would you agree with that?

A. That's correct.

Q. All right. So Staff is staking out a position that's a little different, although it is the first time that Staff has ever offered a fuel adjustment mechanism under Senate Bill 179?

A. That's correct.

Q. Staff did not suggest a fuel adjustment mechanism in the last Ameren case; is that correct?

A. That's correct.

Q. Has Staff formulated a position with regard to fuel costs in the current Ameren rate case?

Is there -- there is a current Ameren rate case, isn't there?

A. There is a current Ameren rate case and I probably can't -- can't tell you at this point because it is an open...

Q. We're in the open setting. I mean, has Staff even formulated a position? I guess that's what I was -- that is public --

A. We have not --

Q. -- on fuel costs?

A. We have not formulated a public position.

Q. That's what I thought. I wasn't trying to get a sneak peek. We've got too much to do as it is right now.

So -- so this is -- this is -- this is the first time Staff has done such a fuel -- fuel adjustment mechanism, correct?

A. Yes.

Q. Okay. Now, help me understand as part of determining fuel costs and offsets. Can you give me an overview of Staff's position with regard to different elements to the fuel adjustment mechanism? For example, off-system sales or dealing with environmental credits. Can you just give me a general overview of Staff's position with regard to those different pieces?

A. We did propose that off-system sales margin be included. There's -- probably the biggest reason for that is it's really hard to pull out or separate the cost of fuel for off-system sales versus the cost for -- to serve the native customers.

And so to remedy that problem, the off-system sales margin, we recommend that it be included in the calculation of the fuel adjustment clause.

We did look to the Commission's order in the Aquila case where it said that SO2 emissions should be allowed in the fuel adjustment clause and made that same determination based off the Commission's decision in the Aquila case regarding emissions allowance in general, not just SO2 emissions.

Q. All right. Refresh my recollection of what -- what the Commission did with regard to the emission allowances in the Aquila case.

A. I believe I put it in my rebuttal testimony.

Q. Sure. Go ahead.

A. "The Commission stated SO2 emission

allowance costs are variable fuel-related costs in that they vary based upon the volume of coal used and -- as well as the market prices of the allowances themselves."

That was a direct quote from your order in ER-2007-0004 in your order rejecting tariff granting clarification, directing filing and correcting order -- those are three Latin words that I don't know that I could pronounce right, but it was your order -- the Commission's order that stated that you believed that SO2 emissions allowance were variable costs.

Q. Okay. How did that differ or did it differ from Staff's position in the Aquila case with regard to SO2 allowances, if you know?

A. I don't know. I know -- I believe we asked for the clarification just so we would know what to put in the fuel adjustment clause, but I don't know what Staff's position was.

Q. Okay. So you can't tell me whether it's different, the same, similar?

A. No, I can't.

Q. Who would be the witness where I could ask that question?

A. I don't know if there's a witness in

this case. Mark Oligschlaeger may have looked at it, but he wasn't the witness in that case, but --

Q. Well, the reason I ask, if -- if -- if the Staff is adopting a position or endorsing what the Commission has decided in a past case, I just want to get an idea of who is -- who is sponsoring that endorsement, and then I just want an idea of how it compares to the last Aquila case.

A. Well, I would be sponsoring it, but off the top of my head, I cannot remember what we proposed in the Aquila case.

Q. Okay. Aside from environmental credits, what if we were to look at off-system sales. How does the Staff's position in this case compare to what the Commission did in the Aquila case? Is the Staff adopting or endorsing what the Commission directed in the Aquila case?

A. I believe it's the same, yes. Off-system margins were included in Aquila's --

Q. So -- so Staff is basically adopting what -- what the Commission ordered in the Aquila case, you think?

A. I think.

Q. All right. Now, do you know how the position endorsed by the Commission in Aquila compared to what Staff's position was in that case on off-system sales treatment in a fuel adjustment mechanism?

A. Well, remember, in the Aquila case, it was the interim energy charge, not the fuel adjustment clause.

Q. Okay.

A. And I'm not for sure what Mr. Featherstone, how he treated off-system sales margin.

Q. Okay. So is there any witness in this case that could be able to give me that guidance?

A. Maybe Mr. Oligschlaeger if he's looked at it more recently than I have.

Q. Okay. Ms. Mantle, its been suggested that -- at least I believe it's been suggested that ratepayers are protected in a 100 percent passthrough fuel adjustment mechanism because there would be prudency reviews. First of all, do you recognize that assertion, does it sound familiar?

A. Yes, I believe the company's asserted that.

Q. Okay. Can -- can you tell me whether the Staff agrees or disagrees with that assertion?

A. I don't know that I can tell you Staff's opinion.

Q. Well, how about your opinion?

A. Well, I believe after-the-fact prudency is hard -- harder to show. I know our ACA department's had -- had a lot of difficulty showing imprudency.

Q. Okay. Can you give me some examples why establishing imprudent behavior after the fact is so difficult?

A. Well, you don't have a record of decision-makers' thought process at the time they were making the decision. You have a -- you have records of the results of their decision, but you don't necessarily have a good documentation of why certain decisions were made and then retention of those records. And then also Staff being able to find the right record to be able to ferret out exactly all the records and data that's needed to do that.

Q. In -- in the design of a fuel adjustment mechanism, is that information that the Commission has the ability to order be included in the company's tariffs to ensure that the Staff has the information it needs in -- in making those after-the-fact prudency determinations?

A. If it can be determined exactly what those are, yes, the Commission can order either to be included in the tariffs or filed or submitted to Staff. And I do believe our fuel adjustment clause rules were written with that in mind, that the Commission could ask for additional information than what is in the current rules.

Q. But aside from even what's in the rule for fuel -- the fuel adjustment clause, I think what you're saying is that the Staff still doesn't have the information necessary to -- to do these after-the-fact -- after-the-fact prudency decisions?

A. I think we have information to make those -- to come up with those results. It's just if new reports are written or if new ways of tracking costs come about that we are not aware of, that those kind of -- I mean, you can write a rule, you can even issue an order, but you can't cover everything, is what I've found. Working here, there's always something that you'll miss, something that's not thought of at the time.

Q. Can the Staff prepare a list of material or documents that -- that the Commission should be aware of in -- if it does do a fuel adjustment mechanism in this case? Is that something the Staff

has either provided in the past or can provide?
A. At this point in time, not having been through but Aquila's FAC, I believe our best list at this time would be what is in the fuel adjustment clause filing requirement in the 3.161 rule.
Q. Okay. So no additional documents, then?
A. Not that I'm aware of.
Q. All right. So -- but even with those documents, is Staff able to make an effective decision on prudency after the fact?
A. We'll have to see. We haven't done that yet.
Q. You don't know. Okay. Okay. Is this similar to a review that's conducted in the PGA/ACA process on -- for natural gas utilities?
A. My understanding of the ACA process, yes.
Q. The ACA process. So you start with a PGA number and then you move to a ACA prudency evaluation. And that generally takes 18 months, is it your understanding?
A. I don't know how long the ACA audits take. I do know that with the fuel adjustment clause, we're required to do a prudency evaluation every 18 -- at least every 18 months.
Q. At least every 18 months. Would this

review of prudency for a fuel adjustment mechanism occur in the same way as an ACA prudency determination would be made? Even though we're looking at two different utilities, we're still talking about purchase of fuel used to provide service. Are they comparable?

A. I'm not familiar enough with the ACA process to really say. I do know at this time, you know, we would do our best, but having -- we would use the staff that we have. The ACA audits are done by a dedicated staff for that process.

Q. Well, in a fuel adjustment mechanism, I think there have been suggestions of having a dedicated staff for them as well; would you agree with that?

A. If it's fully staffed, yeah, then it would be much more similar.

Q. Okay. Can you give me an idea of the -- the number of disallowances that have occurred, say, over the last five years with regard to the ACA process? I mean, I guess how many occasions Staff has come in with a significant prudency disallowance on a -- through the ACA process.

A. I'm not aware of the number of times that it's come in with a prudency -- I am -- I have been told that there's only been once where the Commission allowed for a prudency disallowance. I don't know anything other than that about it.

Q. Do you know how many cases Staff has filed to litigate a disallowance in the ACA process?

A. No, I do not.

Q. Is that something that Staff could provide, say, over the last five years?

A. Over the last five years? Yes, I believe we could.

Q. And -- and then also just the -- the result of -- of those cases?

A. Yes, sir.

JUDGE VOSS: And I'll reserve Exhibit No., let's see, 228 for a late-filed exhibit.

MR. MITTEN: Your Honor, could I request that the case numbers be included with those disallowance citations as well?

JUDGE VOSS: Okay.

MR. MITTEN: Thank you.

BY COMMISSIONER CLAYTON:

Q. I guess -- and to be clear of -- Ms. Mantle, I guess what I'm looking for, examples of where Staff has made recommendations on disallowances and then what eventually happens.

A. Okay.
Q. And I suppose there could be examples that are litigated or not litigated or settled or something like that. That would be helpful.
A. And that was over the last five years?
Q. Say, five years, yeah. I'm not sure if gas prices longer than five years -- well, seven years ago -- I guess it could have been, but just leave it at five. I think that'd be a sufficient amount of time.
Lastly, I want to talk about how you chose -- or how Staff chose the 70/30 division and -- and what supports Staff's position in -- in that number. Can you tell me that?
A. The analysis that is shown in the Staff report was the -- the very basis for the decision. We looked at what Aquila had -- or excuse me -- Empire had absorbed in the time period of 2003 to 2006. We looked at what the -- we felt the FAC was trying to provide some -- some risk protection for Empire, trying to come up within a reasonable number that would not shift all of the risk to the ratepayers.
My rebuttal -- or the Staff report does give a range between 60 to 80 percent be passed

through the ratepayers. We believe that there needs to be a good incentive for the utility to work hard to keep its fuel and purchased power costs down, and 20 cents or 30 cents on the dollar we believe provides that.

There's -- it's one of those things where there's, you know, 100 percent the Staff feels is wrong. And we had the -- the boundary of 50 percent that the Commission said was not right in the last case. And those boundaries are very clear.

It was the in-between boundaries that we just looked at the numbers and decided that the 60 to 80 percent range would give Empire a lot of incentive to watch how it spent money on fuel and purchased power prices.

If it's 60 percent, they have a much greater risk out on the -- you know, out on the market. If it's at 80 percent, the risk is pretty low. The ratepayers are covering almost all the fuel risk other than the 20 percent.

Q. Aside from the division number of 70/30 when comparing Staff's position with that of Public Counsel -- which I believe you said is a 60/40 division; is that correct?

A. I believe Ryan Kind in his rebuttal

testimony said if you were going to have one, that that was the -- the amount.

Q. Okay.

A. Or I -- I'll let Lewis Mills and Ryan Kind do their own --

Q. That's fine. Are you aware of any other differences -- I -- I'm sure Public Counsel is saying that no fuel adjustment mechanism -- or maybe that's preferable to the 60/40 division, but in terms of structuring the actual fuel adjustment mechanism, are there any other differences between Staff and Public Counsel other than that number division?

A. No. Public Counsel has a different off-system sales margin number that they would like included.

Q. But -- but in terms of once you determine that number, is it included in the -- the adjustment mechanism formula in the same manner? I mean, as I recall, they had a -- they had a higher amount of off-system sales and based on different facts.

But whatever that number is, do both positions have it be placed into the adjustment mechanism formula in the same way?

A. It's my understanding, yes.

Q. Okay. Now, last -- this is lastly, I promise. What is Staff's position or evaluation of the proposal by Mr. Brubaker in -- in his proposal on fuel costs?

A. Mr. Brubaker made two proposals, one in his direct testimony and then one again in his surrebuttal testimony. The one that is in his surrebuttal testimony gives 95 percent -- I believe 95 percent of the costs passed through to the ratepayers -- well, actually, I will let Maurice talk about how -- what his plan does.

Q. That's fine.

A. But there is -- he has bans on how much goes to the utility, how much goes to the ratepayers. And as you get out to a certain point, then 100 percent of that is recovered by the ratepayers.

Q. What does -- what does Staff think of his proposal? I mean, aside from getting into the details of it, can you give me a general idea of concerns or -- or benefits that you think such a proposal would have?

A. With the surrebuttal, his surrebuttal position, it moved that outer band further out, so that makes it a little more tolerable. Staff is concerned that if you get to a point where 100 percent of costs are passed through to the ratepayers, that -- you know, that's a concern of ours. We don't want 100 percent of the costs passed through to the ratepayers.

Other than that, it's -- it's a different incentive mechanism. It's a little more complicated. That's basically my position on it, the Staff's position.

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

THE WITNESS: Uh-huh.

JUDGE VOSS: Commissioner Jarrett?

COMMISSIONER JARRETT: Yes, thank you, Judge. Just a couple of quick questions.

QUESTIONS BY COMMISSIONER JARRETT:

Q. You mentioned and there's been talk about the -- the last Aquila rate case where, I guess we granted a 95 percent passthrough. Can you tell me what facts are different in this case than from the Aquila case that would warrant a 70 percent passthrough that Staff is recommending versus what we granted Aquila in the past?

A. So you want to know what is the difference between the past two rate cases to determine 95 versus 70 percent?

Q. Yeah. And may -- maybe ask it this way. What's different about Empire that might warrant a 70 percent passthrough versus Aquila where we granted a 95 percent passthrough?

A. I don't know that there's a lot. We just have information now before us for fuel cost numbers, some actual numbers to see what the 95 meant versus the 70. And I don't believe the Commission had that information before it for the order that it put out in Aquila.

But as far as differences between Aquila and Empire, Empire has -- buys much more of it or produces much more of its energy from natural gas and purchases more on the spot market than Aquila. But I don't know that that means there should be 70 or -- versus 95.

Q. And then my -- my second question is, in questions from Commissioner Clayton, talking about Dr. Brubaker's plan on the -- kind of a sliding-scale-type plan or grid, from an accounting standpoint, is -- would that be -- from Staff's perspective, is that easy to track and account for versus just a straight 70 percent or 95 percent or does that cause Staff any difficulties in trying to account for that?

A. As far as passing through the cost, the initial passthrough, I don't think it would be a lot more difficult than Staff's, but we might get into disagreements with a prudency audit of where exactly that number should fall. And that would set up boundaries in that prudency audit that parties would try to reach or not reach, or -- so I can see in a prudency audit case how that would provide more difficulty in just determining what should be done.

COMMISSIONER JARRETT: Okay. Thank you, Ms. Mantle. I have no further questions.

JUDGE VOSS: Chairman?

QUESTIONS BY CHAIRMAN DAVIS:

Q. Good morning, Ms. Mantle.

A. Good morning.

Q. Ms. Mantle, going back to some questions by Commissioner Clayton, do you recall the circumstances that led to the formulation of Empire Electric's first interim energy charge?

A. I can't specifically remember when they had their first interim energy charge, but I --

Q. It was in the last seven, eight years?

A. Well, I do remember them having a couple of cases where they had interim energy charges, the first one of which the whole revenues were given back to the customers because the fuel cost fell, and then the last one that's a great contention with some of the parties here.

Q. Now, Empire does business in Oklahoma, Arkansas, Kansas; is that right?

A. Yes.

Q. Do you know how they recover their fuel and purchased power costs in Oklahoma?

A. No, I do not.

Q. Do you know how they recover their fuel and purchased power costs in Arkansas?

A. No, I do not.

Q. Do you know how they recover their fuel and purchased power costs in Kansas?

A. No.

Q. Do you think that how the surrounding states allow fuel and purchased-power-costs recovery might be relevant?

A. It could be a guideline, but I --

Q. It could be -- it could be instructive?

A. It could be instructive, but I don't know that it should be what we determine how we do things here in Missouri.

Q. Is after-the-fact prudency any more difficult to ascertain than before-the-fact prudency?

A. No.
Q. To the best of your knowledge, has Staff ever gone to a utility and said natural gas is $6 per million BTU, you better stock up?
A. No, not to my knowledge.
Q. So if the price of natural gas is $10 per million BTU today, and assume that there's an unlimited amount of storage available to Mr. Mitten and his clients, would you recommend buying, and how much?
A. Personally, I wouldn't make any recommendation. I'm an engineer at heart and I am risk-adverse, so to me, that's more of a financial and somebody that has some expertise in fuel purchasing and --
Q. Okay.
A. -- forecasting the market should make those decisions, not me.
Q. Now, the Commission just approved Empire Electric's -- the stip on their IRP, their most recent IRP plan; is that correct?
A. That's correct.
Q. Were you involved in that process?
A. Yes, I was.
Q. To the best of your knowledge throughout

that process, did anyone here at the PSC or anyone else say to Empire, you should hedge more natural gas?

A. Not to my recollection, no.

Q. Do you have what's been marked as Exhibit 227 HC?

A. Yes, I do have it. It will take me a minute to find it. I have it. Yes, I have it.

Q. Okay. To the best of your knowledge, did anybody look at -- and I guess that's section 2.3.2 on page 16 -- and say, gee, they're not doing it right?

A. When we do our review of resource plans, we are, first of all, looking at the process --

Q. Uh-huh.

A. -- are they doing hedging.

Q. Are they doing what they're saying they're doing or are they doing hedging at all?

A. Are they -- are they -- what are they doing? And I don't even believe our rule requires that they look at -- that they do a hedging. So what we're trying to see is do they -- are they meeting the requirements of the rule as put forward. We do look too at, now, what they put forward, does that seem reasonable, and if it's real off-the-wall, we will comment. But typically we don't make comments or suggestions regarding a position of a utility unless it's really bad.

Q. Okay. Southern Missouri Gas bad?

A. Could be.

Q. Okay. Are you familiar with table LM-1 that was filed as part of the Staff's cost of service report?

A. I would have created that table.

Q. Okay. So can we take that as a yes?

A. Yes.

Q. And those numbers are accurate?

A. Yes.

Q. Okay. So page 61, I believe the Staff cost of service report, 19 percent of Empire Electric's megawatt hours come from burning natural gas?

A. That is correct.

Q. And that is by far a much higher percentage than either Aquila or AmerenUE, correct?

A. That would be because of their State Line combined cycle unit. It's an intermediate plant that they run quite a bit.

Q. Okay. And then if you -- if you throw in spot market purchases of electricity, you add up natural gas, the percentage of megawatt hours and then the purchased power on the spot market, you're looking at 26.8 percent of their electricity being fueled by either natural gas or purchased power?

A. That's correct.

Q. And that's a larger portion than either Ameren or Aquila or anyone else in this state?

A. Of the IOUs, yes.

Q. Of the IOUs. Do you have knowledge of anyone else?

A. No, I don't have knowledge one way or the other.

Q. Did Empire Electric try to build a coal plant a few years ago with the City Utilities, do you recall? Do you recall that they tried -- do you recall that they tried to get financed for one?

A. I'm -- I'm trying to recall. I recall but I'm trying to decide whether I believe it's public information. That's -- seeing no problem out there, yes, I recall that they did talk with Springfield Utilities.

Q. Do you -- do you recall why that -- that financing couldn't make -- make it across the finish line?

A. No, I do not.

Q. Okay. And turning to table LM-2, you indicated that Empire Electric absorbed approximately 85 and a half million dollars' worth of fuel and purchased power costs between rate cases; is that right?
A. Yes.
Q. How many years did that period cover?
A. That was over a four-year period, very similar to what an FAC would be.
Q. Okay. So four years, 85.5 million divided by four, 21.375. Is that fair for an annualized number?
A. 21.138 million.
Q. 21.138 million.
A. You were close.
Q. Okay. Do you know what Empire Electric's net earnings are?
A. No, I do not.
Q. So if we assumed that they were -- were 35 million and you add that annualized number to 35 million and then took a percentage, what percentage would that be?
A. And the 21 million is a percentage of a 35 million?
Q. Uh-huh.

A. That would be approximately two-thirds or a little over 60 percent.
Q. Okay.
A. Closer to 66 percent.
Q. Okay. Now, if we assume that the number is 21 million a year and we took 5 percent of that number, what would that amount be?
A. A little over a million, I believe.
Q. Okay. And if we took 10 percent, it would be?
A. 2.1 million.
Q. 2.1 million. Now, you gave some testimony regarding customer growth, did you not?
A. I did provide some testimony in my surrebuttal testimony regarding customer growth, yes.
Q. Assuming 1 percent customer growth on Empire's system, do you have any idea what that's worth to Empire Electric?
A. No, I do not.
Q. Okay. Do you recall the testimony on off-system sales in this case?
A. I do not recall that testimony, no.
CHAIRMAN DAVIS: No further questions, Judge.
JUDGE VOSS: Thank you. Commissioner

Clayton, do you have some more questions?

QUESTIONS BY COMMISSIONER CLAYTON:

Q. She made me commit to being very short because she wants to take a break here coming up.

What I wanted to ask is, do you know or can you provide a comparison of -- for Empire's profile with regard to correlations among fuel costs and off-system sales compared to, say, someone like Ameren? And as I recall Ameren, the higher natural gas prices go, the more off-system sales Ameren has. Does that correlation -- do you know -- first of all, is that correlation the same or different with Empire's profile?

A. It would be different than with -- with Empire's profile because Ameren has so much coal that it can sell in the off-system sales market.

Q. Okay. Can -- can you give me any guidance as to what factors cause off-system sales to go up or down for a company like Empire?

A. It's my understanding right now, what causes the number to go up or down is their combined cycle unit that they have that runs that's often on the margin for Southwest Power Pool, that it is a unit that's often in the money where, in the past, they might have had to back that down or sell at below cost just to keep the plan up because it's not cost-effective to keep bringing it down and bringing it back up. So that -- that unit is now cost-effective in many hours on the SPP market.

Q. Okay. The questions that Chairman Davis asked you about these fuel costs and the amount of money that Empire has had to absorb because of fluctuations in fuel cost and the dollar amount that was in the 20s -- $20 million, $21 million range, whatever it was, does that -- was that contemplated by Staff in the position that -- that it formulated in this case?

A. We looked more at the four-year number than the average over the four years. But -- since you take the four-year number and divide it by four to get the average. But that was the number -- I mean, we did look at that number. We -- it's -- it was part of our analysis.

Q. Okay. So you're -- you're aware of that and that was contemplated as part of Staff's recommendation in this case?

A. It was -- it -- we did look at it, yes.

Q. Okay. Can you -- can you give me an explanation of how that was part of the 70/30 proposal that has been made by Staff? I mean, what's

Staff's explanation in light of that information?
A. I can't really give a good -- connect the dots for -- between the 21 million and the 70 percent number. I just know we were aware of it when we looked at -- at determining what our position would be, but other than that...
COMMISSIONER CLAYTON: Okay. Thank you.
JUDGE VOSS: Are there any additional questions from the bench?
(NO RESPONSE.)
JUDGE VOSS: Okay. We're going to take a break until 25 till since we've been going for almost two and a half hours, and then we'll come back with recross and redirect -- or cross based on questions from the bench.
(A RECESS WAS TAKEN.)
JUDGE VOSS: We're going to address an issue -- we'll go back on the record. And a question that arose with some material that had been requested by Chairman Davis that I believe Mr. Conrad has that material, but it's of a voluminous nature, and he wasn't sure whether it should be put into the record as an exhibit or sent to the parties. Did you want to speak to that again, Mr. Conrad?
MR. CONRAD: Well, as I think I

mentioned at the time, I think part of the Commissioner's question was pertaining to rate increases for Explorer, how they were regulated. As an oil pipeline, they are -- they are regulated by FERC, but it's a -- I think the term has kind of come to be used, light-handed regulation. And their -- their rates are tied to a -- an external index called the PPI of which is compiled by -- I want to say, subject to check, it's a permanent waiver. And their -- their tariffs are on their -- are on their web site.

CHAIRMAN DAVIS: Uh-huh.

MR. CONRAD: And that's -- that's where they're tied. There also is a document that is probably the more voluminous one that's called the FERC Form 6 where they make an annual filing. And that's material of that nature that I was just going to -- it's public information. And I suppose one could go back and see when the last cycle of that was done. Those are done on a competitive basis, and they're also subject to discounts. So I don't know...

CHAIRMAN DAVIS: Judge, can I inquire of Mr. Conrad?

JUDGE VOSS: (Nodded head.)

CHAIRMAN DAVIS: Mr. Conrad, do you have -- have one sheet of paper that indicates what Explorer Pipeline's ROE is?

MR. CONRAD: No.

CHAIRMAN DAVIS: No. Do you have a series of sheets of paper?

MR. CONRAD: I don't know that the -- that that specific number is going to be in there. It could be derived from that, but I'm -- I'm not competent to do that derivation.

CHAIRMAN DAVIS: Are all the parties here? Well, DNR's not here. But assuming there's no objection, would it be acceptable to all the parties if Mr. Conrad had all of that information e-mailed to me and e-mailed to all the parties simultaneously?

MR. CONRAD: I could probably -- well...

CHAIRMAN DAVIS: Or you could just file it in EFIS. Do you want to file it in EFIS?

MR. CONRAD: I could gather it up. What I was proposing to do -- I think you were out of the room, Chairman, but was to give you the links to it and, you know, then --

CHAIRMAN DAVIS: Do you want to read those --

MR. CONRAD: That would be a --

CHAIRMAN DAVIS: Do you want to read those links into the record here?

MR. CONRAD: No.

CHAIRMAN DAVIS: No?

MR. CONRAD: No, I don't, because they're -- they're long and --

CHAIRMAN DAVIS: Could you -- could you prepare a document --

MR. CONRAD: Yeah. That's -- if you wanted a single page, that's probably the -- the closest that I could get to you. But they'll -- some of them are -- are long because they're down inside the -- the FERC e-filing web site.

CHAIRMAN DAVIS: Mr. Mills is looking vexed.

MR. MILLS: Well, I just have a question. Judge, if --

CHAIRMAN DAVIS: If you want me to drop it, Mr. Mills, I'll -- I'll say no masse.

MR. MILLS: I'm -- I'm -- if this is information on which the Commission is going to rely in -- in making a decision in this case, then I think it has to be in the record. And if it's going to somehow get in the record, then I think I need to have an opportunity to object to its relevance or lack thereof, and I'm not sure how this process is going to get us there.

CHAIRMAN DAVIS: All right. Mr. Mills, how about I just withdraw my request?

MR. MILLS: It's up to you. I mean, I think, you know, we could -- we could go either way, but if we're going to try and get it in the record somehow, we need to have some process for objections.

CHAIRMAN DAVIS: No, that's all right. I'll withdraw my request respectfully.

JUDGE VOSS: All right. We are going to move forward with recross based on questions from the bench beginning with the Industrials.

MR. WOODSMALL: Just one, briefly.

RECROSS-EXAMINATION BY MR. WOODSMALL:

Q. In response to some questions from Chairman Davis, you were comparing -- you were asked to compare hypothetical earnings of 35 million with an undercollection of fuel and purchased power of 20 million. Do you recall those questions?

A. I recall he asked me to do a calculation on what that percentage would be.

Q. Can you tell me if your calculation took into effect the income tax reduction that would occur as a result of the increased fuel and purchased power expenses?

A. No, it did not.

Q. Okay.

A. It would have been just the 21 million, only fuel and purchased power.

Q. And if a company has increased expenses, would income taxes go down?

A. I don't know. That's an auditing question.

MR. WOODSMALL: Okay. No further questions. Thank you.

JUDGE VOSS: Public Counsel?

MR. MILLS: Yes, thank you. I do have a few.

RECROSS-EXAMINATION BY MR. MILLS:

Q. Ms. Mantle, I believe in response to a question from Commissioner Clayton, you mentioned one ACA disallowance that you were aware of; is that correct?

A. I'm aware that there was one.

Q. Okay. And do you recall whether that was within the last five years?

A. No, I do not.

Q. Okay. Now, do you understand that Aquila is currently operating with a fuel adjustment clause?

A. Yes.

Q. How many people on Staff are dedicated to looking at the fuel purchasing prudence of Aquila?

A. Currently at this -- you mean working on them at this point in time or will be or -- I'm not for sure -- I'm trying to figure out how to answer your question.

Q. How about right now?

A. Right now we've discussed who would be looking at them, and the auditing staff has agreed to be looking at the monthly reports that come in. But as far as prudency of a fuel run at this point -- the fuel costs at this point, we don't have anyone working on that.

Q. Okay. When was Aquila awarded a fuel adjustment clause?

A. In their last rate case, but I'm --

Q. ER-2007-0004?

A. Yes.

Q. Okay. And so it's your testimony at this time no one is dedicated to looking at the prudence of the purchasing; is that correct?

A. That's correct.

Q. Okay. Is there a person on staff that has nothing to do that will be dedicated to looking at Empire's purchasing if Empire is awarded a fuel adjustment clause in this case?

A. There's nobody on staff that has nothing to do, I don't believe, or we'd put them to work.

Q. Does the -- does the -- for the gas utilities, does -- the department that looks at the purchasing practices of gas utilities, does that department report to you?

A. No, they do not.

Q. Okay. Do you know how many people are in that department?

A. I believe seven or eight.

Q. Now, with respect to an electric utility's prudence, let's just sort of start with some numbers. How many hours are there in a year?

A. 8,760.

Q. Okay.

A. That's a nonleap year.

Q. Okay. And is it your understanding that -- that a utility is faced with decisions each of those hours?

A. Yes, they are.

Q. And just pick any one given hour. How many different options does an electric utility like

Empire have to satisfy its -- its native load?

A. Well, typically, there's the base load units that are just -- must run anyway, they're on all the time. Then past that, they also have -- must take from their wind farms in Kansas that they have a purchased power agreement from, they must take that power also. So when there's power -- when the wind's blowing and they're generating power, they must take that power.

But then to meet the loads, they -- at that point, they can -- there's -- their contract -- long-term contracts, I'm not real familiar with those, how much they have to take off those. There are their -- their combined cycle plant, there are numerous CTs that they have, and then also the spot market that they can purchase power from.

Q. And how many different options are there in the spot market at any given time?

A. I would probably say tens of hundreds. I don't know.

Q. Lots?

A. Lots.

Q. Okay.

A. That's a good number.

Q. And how does Empire today document all those different choices and the reasoning -- well, first of all, how many people at Empire at a given hour have responsibility for making decisions about what to do, what to run, what to buy?

A. I don't know that.

Q. Probably more than one?

A. Most likely, yes.

Q. And today how -- how does Empire document how those people make their decisions and what their options are hour to hour?

A. They do document the generation of each one of their power plants, they document how much they purchase from each of their contracts, how much they purchase on the spot market and how much each of their gas turbines run, but as far as the decision-making as to why they run each of those, I'm not aware of any documentation. That does not mean it doesn't exist. I'm just not aware of it.

Q. Okay. And I think the stuff that you said that they do document, is it a fair summary to say that they document what they actually did, not what they could have done?

MR. MITTEN: Your Honor, I think we're getting pretty far afield. This witness is not an Empire employee, and my guess is that she's speculating on how many employees are devoted to this and what documentation is available. Certainly, Commissioner Clayton asked some general questions regarding prudency review, but I think Mr. Mills has gone way beyond the scope of those general questions.

MR. MILLS: Well, I think there were sort of two objections in there and let me address them both. One is whether it's speculation or not. Certainly, if the witness doesn't know, she can say she doesn't know. I'm asking what kinds of information she's aware of, not what kind of information exists. So if she doesn't know, she can say she doesn't know.

In terms of whether this is far afield from questions from the bench, I don't think so. Both Commissioner Murray and Commissioner Clayton asked questions about prudence reviews, and implicit in all of the questions that Chairman Davis asked about whether or not a different split is different than 95/5 or 70/30 or whatever, implicit in that is the degree to which he relied on after-the-fact prudence reviews as opposed to upfront sorts of incentives. So I think virtually all the questions from the bench either explicitly or implicitly had to do with prudence reviews.

JUDGE VOSS: I'm going to have to overrule the objection. There was a significant amount of questioning, both general and specific, from the bench on this topic. And if Ms. Mantle doesn't know an answer with certainty, I'm sure she's qualified and willing to clarify that. Please proceed.

BY MR. MILLS:

Q. Do you recall the question?

A. I don't recall the last one.

Q. The question was, are you aware of whether or not Empire documents for every given hour in every year all the options it could have chosen to generate power as opposed to the ones that it actually did take?

A. No, I'm not aware that they do that.

Q. Are you familiar with the ACA process?

A. No.

Q. Okay. Now, with respect to doing after-the-fact prudence reviews of electric utility fuel and purchased power decisions, would you have a role in if staff is ever hired to do that in -- in hiring the staff and would that staff report to you?

A. Currently, we are working on developing a section to do -- to look at FAC true-ups, prudence and also the resource planning, and currently that group would report to me.

Q. Okay. And will there be a section of that group that would just look at FAC information for the -- whatever utilities end up operating under FACs, or will they have other responsibilities as well?

A. They -- they will also have responsibilities of reviewing resource plans also.

Q. Okay. Now, are you currently in charge of the group that -- that reviews resource plans?

A. Yes, I am.

Q. In your opinion, is that group adequately staffed?

A. We have good staff. They are just also working on rate cases and numerous other cases, so they aren't able to give as much time to it as -- as I would prefer.

Q. Okay. And how many people do you anticipate adding to that group to take on the additional responsibilities of reviewing fuel adjustment clause filings?

A. Currently, we're looking at having four FTEs to do that and perhaps adding more in the future if they become available.

Q. And when you say "to do that," what do you mean by that?
A. To do FAC and the resource plan filings.
Q. And in terms of full-time equivalents, how many FTEs now do resource plan review?
A. Full-time equivalents, I would probably say maybe one to two.
Q. Okay. Did you mention anything about nuclear power plant reviews in that group or would that be a different group?
A. There has been some mention of that as a part of the resource planning requirements of that group. Reviewing the plans for nuclear power plant additions would also be included.
Q. So that would be a responsibility of those same four FTE as well?
A. Could be.
Q. Okay. What -- what sorts of skills are you looking for for people on staff to do these kinds of FAC reviews?
A. We need some auditors, somebody that has done auditing work for utility companies. Specifically for the FAC prudency reviews, we'd also need an engineer that could run a fuel model to check the fuel cost. And I'm trying to think if an -- if

an economist would be involved or not, but we are looking at an economist in that group also.

Q. Have you had responsibility for hiring engineers at the Commission Staff in the recent past?

A. Yes, I have.

Q. And has it been your experience that it's easy to hire an experienced engineer to work on the Commission Staff?

A. No, it's extremely difficult.

MR. MILLS: I believe that's all I have. Thank you.

JUDGE VOSS: Empire?

MR. MITTEN: Your Honor, one housekeeping matter. We determined that Exhibit 227 HC does not need to be designated HC.

RECROSS-EXAMINATION BY MR. MITTEN:

Q. Ms. Mantle, I have a few questions based upon an exchange you had between Commissioner Clayton about the amount of information that would be available to the Staff and any other interested parties to determine prudency of Empire's energy acquisition decisions.

Are you familiar with the Commission's rule or rules that govern the administration of fuel adjustment clauses that have been approved by the

Commission?

A. Yes, I am.

Q. So you're aware that under those rules, any electric utility that has a fuel adjustment clause has to file monthly reports regarding that clause; is that correct?

A. I believe they have to submit monthly reports.

Q. And the length of information that has to be included in those reports -- the amount of information, is pretty lengthy, isn't it?

A. There's quite a bit of information. The list itself I don't think is lengthy.

Q. They also have to file quarterly -- or excuse me -- submit quarterly reports regarding the fuel adjustment clause; is that right?

A. I believe the quarterly reports are surveillance reports having to do with the financial aspects of the utility. But, yes, they are required to file quarter -- those quarterly.

Q. And there's quite a bit of information that's required to be filed as part of those quarterly reports; is that correct?

A. Again, submitted, yes.

Q. Do you know whether or not under the

Commission's rule governing the administration of fuel adjustment clause, parties who participate in prudency reviews have the ability to ask for additional information in connection with those prudency reviews?

A. I don't know the answer to that question.

Q. But the rules would speak for themselves on that issue?

A. I don't know if they'd speak to it or not. They may be silent.

Q. And do you know if under the Commission's rule there is a time limit within which the Commission has to make a decision regarding the prudency of the fuel and purchased power acquisition decisions that are made by a utility?

A. Yes, there is a time.

Q. And do you know what that time limit is?

A. No, but I could look it up.

Q. But again, the rules will speak to that as well?

A. That's right.

Q. Do you know if it's more or less than the 11-month period that the Commission is required to reach rate case decisions in?

A. It would be less than the 11 months.

THE COURT REPORTER: I didn't hear you, ma'am.

THE WITNESS: It would be less than the 11 months required in a rate case.

MR. MITTEN: I don't think I have any further questions for Ms. Mantle. Thank you.

JUDGE VOSS: Redirect?

MR. DOTTHEIM: Yes, just a couple of questions.

REDIRECT EXAMINATION BY MR. DOTTHEIM:

Q. Ms. Mantle, Commissioner Clayton asked you about differences between the Staff's position on fuel adjustment clause and the position filed by the Office of Public Counsel. Do the Staff and the Office of Public Counsel have a similar position regarding SO2 emission allowances?

A. I don't know.

Q. And pardon me. You may have already addressed this in a follow-up question, but you were asked in questions from the bench regarding true-up audits. Has the Staff performed a true-up audit to date respecting the Aquila fuel adjustment clause?

A. No, we have not.

Q. Has the Staff performed a prudence review to date respecting the Aquila fuel adjustment clause?

A. No, we have not.

MR. DOTTHEIM: Those are all the questions I have.

JUDGE VOSS: Thank you, Ms. Mantle. You may step down.

I'd like to press through and try to go to like 12:30 to see if we can get at least Mr. Watkins done before we take a break for lunch. So Staff, would you like to call your next witness?

MR. DOTTHEIM: Staff would call as its next witness Mark Oligschlaeger.

JUDGE VOSS: You're not going to call Watkins? I had Watkins and Taylor before Mr. Oligschlaeger.

MR. DOTTHEIM: Well, we can call Mr. Watkins.

JUDGE VOSS: This is your second -- you were already sworn; is that correct?

THE WITNESS: That's correct.

DIRECT EXAMINATION BY MR. DOTTHEIM:

Q. Mr. Watkins, do you have any corrections to make to any of your testimony?

A. I do not.

MR. DOTTHEIM: Okay. Staff would tender

Mr. Watkins for cross-examination.
JUDGE VOSS: Did you want to offer his exhibits at this time as well or is he part of the stipulation?
MR. DOTTHEIM: Yes, Staff would offer Mr. Watkins' 210, 211, 212 and 213 into evidence.
JUDGE VOSS: Okay. I have 211 as the class cost of service and rate design report. Is that what you have? I just want to make sure --
MR. DOTTHEIM: Yes, I have -- that is correct.
JUDGE VOSS: Okay.
MR. DOTTHEIM: I've got 210 as his direct testimony, 211 as the Staff class cost of service and rate design report.
JUDGE VOSS: Okay.
MR. DOTTHEIM: 212 as his rebuttal testimony and 213 as his surrebuttal testimony.
JUDGE VOSS: Are there any objections to Exhibits 210, 211, 212 or 213?
MR. MILLS: No objections per se, but like the last witness, I think some of this is tied up in the Stipulation and Agreement.
JUDGE VOSS: In the stipulation? Okay. I'll make a note. How about the class cost of

service report, that as well?

MR. MILLS: (Nodded head.)

JUDGE VOSS: Okay. All right. Industrials?

MR. WOODSMALL: Nothing, your Honor.

JUDGE VOSS: Public Counsel?

MR. MILLS: No questions.

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Are there any questions from the bench? Commissioner Murray?

COMMISSIONER MURRAY: No questions, thank you.

JUDGE VOSS: Commissioner Jarrett?

COMMISSIONER JARRETT: No questions.

JUDGE VOSS: Chairman?

CHAIRMAN DAVIS: Good afternoon, Mr. Watkins.

THE WITNESS: Good afternoon to you too.

JUDGE VOSS: Mr. Watkins, you may step down.

MR. WOODSMALL: So now we go to lunch?

JUDGE VOSS: We're going to -- we're going to keep on moving until close to 12:30 or we get through Staff's witnesses, whichever comes first, if there's any motivation in that.

I have Mr. Taylor as your next witness. Is that what you have, Mr. Dottheim?

MR. DOTTHEIM: That would be fine. The Staff would call Mr. Michael Taylor as its next witness.

(The witness was sworn.)

JUDGE VOSS: Please proceed.

DIRECT EXAMINATION BY MR. DOTTHEIM:

Q. Mr. Taylor, do you have with you copies of what has been marked as Exhibit 205, your rebuttal testimony?

A. Yes.

Q. Do you have what has been marked as Exhibit 207 -- excuse me, 206, your surrebuttal testimony?

A. Yes.

Q. Do you have any corrections to make to Exhibits 205 or 206?

A. No, sir.

MR. DOTTHEIM: At this time the Staff would offer into evidence Exhibits 205 and 206. Mr. Taylor was going to be testifying on one of his issues on heat rate testing which Mr. Blake Mertens was the witness on. There have been some additional developments on that -- on that issue, and some outstanding matters apparently are no longer outstanding. They've been resolved.

And I could ask Mr. Taylor to update the record on that. I visited with the company and they have no objection. The -- the update obviates the need for -- for Mr. Mertens to appear.

JUDGE VOSS: Are there any objections to Staff's request?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, please proceed.

BY MR. DOTTHEIM:

Q. Mr. Taylor, could you please provide an update on any outstanding matters regarding heat rate testing as they were last reflected in your testimony?

A. In my testimony I reflected that we had reviewed a testing of the heat rate testing procedures that Empire was developing, and in -- in Mr. Mertens' surrebuttal testimony, he expanded on that and provided a further update with respect to what was incomplete.

Since then, the company has submitted all of their proposed heat rate testing procedures for Staff review, and Staff has completed that review.

Q. And based upon the Staff's review of the company's proposed procedures and dates for heat rate testing, what is the Staff's conclusion? And could you identify what -- what units you would be referring to?

A. The company has submitted procedures for the following units, and Staff has reviewed these procedures and deemed them to be in our opinion acceptable for conducting heat rate testing. And that would be State Line combined cycle unit; Energy Center units 1 through 4; State Line unit 1; the Asbury unit; Riverton units -- combustion turbine units 9, 10, 11 and 12; Riverton steam units 7 and 8 and the ownership portion of Iatan 1.

Q. Okay.

A. And a proposed schedule has been submitting -- submitted for our review and we consider it acceptable also for the testing to be conducted.

Q. Okay. And most recently the Staff received proposed procedures and dates for the testing of various Riverton units?

A. Yes.

Q. And which -- which units of Riverton?
A. All -- all the Riverton units, 7, 8, 9, 10, 11 and 12.
Q. Okay. And the various heat rate testing will be done prospectively in certain instances over what time frame?
A. Generally the next two years.
Q. And that is acceptable to the Staff?
A. Yes.
MR. DOTTHEIM: At this time the Staff would tender Mr. Taylor for cross-examination.
JUDGE VOSS: Thank you. Industrials?
MR. WOODSMALL: Just real briefly.
CROSS-EXAMINATION BY MR. WOODSMALL:
Q. The heat rate testing procedure and schedule that you've agreed to with the company, can you tell me, has that been memorialized in any place that's available to the parties or is that just a private agreement?
A. At this point the Staff has reviewed those proposed procedures. It would be my understanding that this would be handled similar to the Aquila heat rate testing procedures, although those were filed after the case. It was -- it is my understanding that the company would file these

procedures and schedules.

MR. WOODSMALL: Okay. Thank you.

JUDGE VOSS: Public Counsel?

CROSS-EXAMINATION BY MR. MILLS:

Q. Mr. Taylor, you went through a long list of the plants for which you had approved, I'll use that term, the heat rate testing procedures. Are there any that the Staff has not yet seen proposals or has not accepted the proposals of the company?

A. No, that was the complete list.

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

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Questions from the bench? Commissioner Murray?

COMMISSIONER MURRAY: No questions, thank you.

JUDGE VOSS: Commissioner Clayton?

COMMISSIONER CLAYTON: No questions, thank you.

JUDGE VOSS: Commissioner Jarrett?

COMMISSIONER JARRETT: No questions.

JUDGE VOSS: Chairman?

CHAIRMAN DAVIS: Thanks for stopping by,

Mr. Taylor.

THE WITNESS: You're welcome.

JUDGE VOSS: Redirect?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Thank you, Mr. Taylor. You may step down.

THE WITNESS: Thank you.

JUDGE VOSS: And will his testimony be reoffered after the stipulation? Oh, I'm sorry.

MR. DOTTHEIM: Mr. Taylor was also going to answer -- I think there may have been some selective catalytic reduction questions from last week. If there are any outstanding, Mr. Taylor is available to address those.

MR. WOODSMALL: Perhaps to help you out, your questions had to do with the in-service date of the SCR if that helps.

COMMISSIONER CLAYTON: I got the general nature. Thank you, Mr. Woodsmall. Appreciate you bringing that out on the record.

MR. WOODSMALL: I'm sorry.

QUESTIONS BY COMMISSIONER CLAYTON:

Q. I guess I just -- if it's all right, I don't -- procedurally I came down, so I wasn't sure exactly what Mr. Taylor was addressing.

But on the Asbury issue, does Staff have a position as to whether their -- the delays in the in-service date of the Asbury facility was something that should be taken into consideration by this Commission -- aside from the actual date, but any other details which should be taken into consideration by the Commission in terms of including the SCR in rate base following this case?

A. My -- my testimony was based on the technical review that we performed. The SCR met the technical requirements. It did not meet those requirements until after the update period for the case. But technically, the SCR was satisfactory as of late February. The -- the delay was related to other plant equipment and not the SCR.

Q. How would you characterize the fault of the -- of the delay if at all?

A. The delay -- the delay, as I understand it, was due to work that was performed on the turbine generator, and specifically the generator, and at the completion of the initial work scope during the plant shutdown, there were problems discovered and they had to go back and basically repeat that work project.

Q. So -- so Staff believes that there were significant problems that caused the delay, mechanical problems, and that the delay was warranted?

A. Yes.

Q. And I think it was suggested last week that safety would demand that those corrections be made prior to placing the unit back in service?

A. It would be, I assume, equipment safety, yes.

Q. Okay. So it doesn't sound to me that the -- that the company really had any alternative --

A. Not from --

Q. -- in terms of getting the unit back in service?

A. Not from the information we were provided, no.

Q. Okay. Okay. And you saw nothing that would suggest that the delay was anything other than what you've already said?

A. No, sir.

COMMISSIONER CLAYTON: Okay. Thank you.

JUDGE VOSS: Any other questions from the bench?

(NO RESPONSE.)

JUDGE VOSS. Any redirect based on the additional questions from the bench on this topic? I mean, recross?

(NO RESPONSE.)

JUDGE VOSS: All right. Thank you.

MR. DOTTHEIM: No. And Commissioner, I -- Commissioners, I should have made clear that the two pieces of testimony that Mr. Taylor had, one of them was relating to the fuel adjustment clause and the other piece of testimony related to plant in service, and he was taking the stand on both pieces of testimony at this time.

JUDGE VOSS: Thank you, Mr. Taylor. If Staff would like to call their last witness?

MR. DOTTHEIM: Yes. The Staff would call as its last witness on fuel adjustment clause, Mark Oligschlaeger.

JUDGE VOSS: Mr. Oligschlaeger, it's my understanding you're still under oath. Thank you.

DIRECT EXAMINATION BY MR. DOTTHEIM:

Q. Mr. Oligschlaeger, you have with you copies of various testimonies that you have caused to be filed, Exhibit 200 which is your direct testimony, Exhibit 201 which is your rebuttal testimony, Exhibit 202 which is your surrebuttal testimony, Exhibit 203 which are the direct Staff accounting schedules which I believe you are sponsoring, and

Exhibit 204 which is the Staff revenue requirement cost of service?

A. Yes.

Q. Okay. And I should also mention, I'm not certain that anything otherwise was decided to be done with the piece of testimony -- what was marked as Exhibit 221, your responsive testimony on additional amortizations.

A. Actually, I do not have that with me, but...

Q. Okay. Do you have any corrections to, in particular, what would be your surrebuttal testimony, Exhibit 202, which would be specifically on fuel adjustment clause, or at least covering, in part, fuel adjustment clause?

A. No, I do not.

MR. DOTTHEIM: At this time the Staff would tender Mr. Oligschlaeger for cross-examination.

JUDGE VOSS: Thank you. Industrials?

MR. WOODSMALL: Nothing.

JUDGE VOSS: Public Counsel?

MR. MILLS: No questions.

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Commissioner Murray?

COMMISSIONER MURRAY: No questions, thank you.

JUDGE VOSS: Commissioner Clayton? Commissioner Jarrett?

COMMISSIONER JARRETT: (Shook head.)

JUDGE VOSS: Chairman?

CHAIRMAN DAVIS: No questions, Mr. Oligschlaeger.

JUDGE VOSS: Oh, yes, okay. Commissioner Clayton.

QUESTIONS BY COMMISSIONER CLAYTON:

Q. I -- I do just have several questions on this -- on the fuel adjustment mechanism, and you are one of the witnesses for Staff on that issue; is that correct?

A. Yes, I am.

Q. Describe -- describe which aspects of this issue you're dealing with in your testimony.

A. In my testimony I address certain of the, I would call policy arguments made by company witness Overcast in his rebuttal testimony which has to do with the sharing percentages questions and the prudence questions in particular.

Q. Okay. Let's talk about prudence just quickly. Does -- does -- from your perspective from the angle of your testimony, does Staff believe that the prudence reviews that occur after the fact are sufficient to encourage prudent fuel purchases?

A. Not in and of themselves, no.

Q. Okay. And can you -- can you describe to me the reasons why you say that?

A. Okay. I have participated in various prudence reviews and, in fact, prudence issues before this Commission over time. They -- I won't speak for other parties, but they are very frustrating in some respects because generally they're not black-and-white issues, they're quite subjective, there's no smoking guns, but yet you have to prove beyond a reasonable doubt or whatever the applicable legal standard is that the -- the company acted in an imprudent manner.

I think that's very difficult to prove in terms of the sufficiency of the evidence to go before the Commission, and I think the Commission itself is perhaps rightly reluctant to find a company guilty, so to speak, of imprudent behavior without quite clearcut evidence to that -- of that type of actions.

Q. Okay. Ms. Mantle at a -- at a certain degree for a policy level testified in support of the

70/30 division of -- of costs in setting up this fuel adjustment mechanism. Do you support that 70/30 mix?
A. Yes, I do.
Q. Did you participate in Staff's review in evaluating in coming up with that position?
A. To some degree. I would say I was more kept informed of the status of that issue and the discussions that were taking place internally to the Staff.
Q. Is this -- is this an auditing issue, is it an engineering issue, accounting issue? Tell me from what perspective Staff looks at a fuel adjustment mechanism in coming up with -- with its policy positions.
A. I wouldn't say it's either purely engineering or purely auditing. I think it has aspects of both, and the best decisions are probably made through a collaborative effort among the Staff.
Q. Okay. Have you reviewed the testimony of Mr. Brubaker regarding fuel adjustment mechanism?
A. Yes, I have.
Q. And do you have a position or does -- in your role in reviewing the testimony on this issue, what is your position with regard to his proposal?
A. His proposal, particularly I think as it

pertains to the sharing plan, and he has kind of a different approach certainly than what the Staff or the company or Public Counsel have proposed, in that respect, we certainly continue to recommend our proposal. We believe it's more appropriate from an incentives standpoint.

Having said that, I think certainly Mr. Brubaker's proposals, either the one he put forth in direct testimony and even more so the one he put forth in surrebuttal testimony, do offer stronger incentives for management efficiency and prudence on the part of the company than what the company's proposal with a 95 percent passthrough would.

Q. Okay. Tell me why you reject Mr. Brubaker's proposal compared to the Staff proposal. Give me some -- give me some details of -- or specifics why you believe the Staff proposal's better.

A. I think our major concern with Mr. Brubaker's proposals are that the amount of sharing is capped at a certain level, and once you pass that cap, either in terms of increases or decreases to fuel and purchased power expenses, then 100 percent either is flowed through to the company or 100 percent would be passed on to customers. And we think that kind of blunts any incentives for -- for efficiency and prudency somewhat compared to what the Staff's proposal in this case is.

Q. Can you tell me whether the base amount of fuel expenses that are included -- that will be included in base rates, that total amount of expense is -- is that amount, how it was calculated, consistent with the way past amounts have been calculated in electric company rate cases for fuel?

A. First I'll give you the amount. The amount -- total company amount for Empire that has been agreed to or at least not challenged by other parties in this case is approximately $174.3 million.

Q. Okay.

A. That --

Q. So that's going to be included in base rates, they're going to recover that amount?

A. Yes, adjusted, however, for off-system sales margin, and the parties are somewhat in dispute of what that amount will be, and also adjusted in the FAC itself for emission allowances, or at least according to some parties' proposals.

Now, to your -- second question was, was that amount calculated consistent with what we've done in other cases? To my knowledge, yes, it was.

Q. Okay. So -- so this amount hasn't -- the way it has been calculated is no different than in past cases; this is going to set the benchmark for any adjustments in the future?

A. Under an FAC, yes.

COMMISSIONER CLAYTON: Okay. Okay. I don't think I have any other questions. Thank you.

JUDGE VOSS: Are there any additional questions from the -- Chairman?

CHAIRMAN DAVIS: (Shook head.)

JUDGE VOSS: Recross based on questions from the bench. Industrials?

MR. WOODSMALL: No, thank you.

JUDGE VOSS: Public Counsel?

MR. MILLS: Just very briefly.

RECROSS-EXAMINATION BY MR. MILLS:

Q. Mr. Oligschlaeger, if the Commission agrees with the $174 million number for fuel, would that be the highest amount ever included in rates for Empire for fuel costs?

A. To my knowledge, and I think that's a very safe assumption, yes.

MR. MILLS: No further questions.

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Redirect?
MR. DOTTHEIM: No questions.
JUDGE VOSS: Thank you, Mr. Oligschlaeger. okay. We will now break for lunch and we'll come back at 1:30. Thank you, guys. Off the record.
(THE LUNCH RECESS WAS TAKEN.)
MR. DOTTHEIM: Judge, I don't think I offered Exhibit -- maybe I did -- 202, maybe 221 of Mr. Oligschlaeger. I don't know if I should be offering the other exhibits of Mr. Oligschlaeger's because of the outstanding stipulations and agreements that are before the Commission.
JUDGE VOSS: Yes, I think we're going to reserve on his.
MR. DOTTHEIM: The 202 is the -- we're going to do that on all of his exhibits?
JUDGE VOSS: I can ask. Do the parties have any objections to the admission of 200, 201, 202, and 203, the accounting schedules? 204 is the Staff report cost of service.
MR. WOODSMALL: I don't have any.
JUDGE VOSS: With going ahead and admitting them now?
MR. MITTEN: I have no objection.
JUDGE VOSS: How about you, Lewis?

MR. MILLS: No objection.

JUDGE VOSS: Hearing none, I'll go ahead and receive those into the record: 200, 201, 202.

(EXHIBIT NOS. 200, 201 AND 202 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: And 203 which is the accounting schedules --

MR. WOODSMALL: 203...

JUDGE VOSS: Wait until the stip?

MR. WOODSMALL: Well, they always present a problem for me because I question the relevance of it now because 203, while it was relevant when it was filed in February, has undergone numerous iterations since, so it's no longer relevant to Staff's position where we stand right now.

I would have no problems if they wanted to offer the updated one. I don't know. It's just -- it has no relevance given all the changes in the case since it was filed.

MR. DOTTHEIM: I'm not sure that there actually is a -- is there an updated packet? I'm trying to think. Do we have another --

MR. WOODSMALL: I'm virtually certain I've received electronic copies of it.

MR. DOTTHEIM: Marked as an exhibit?

MR. WOODSMALL: No, not marked as an exhibit. No, you're correct.

JUDGE VOSS: How about the class cost of service report which is 204?

MR. WOODSMALL: I have no problems with that.

JUDGE VOSS: We'll reserve ruling on 203. If you think there's an updated one you'd prefer to substitute, we can discuss that.

MR. DOTTHEIM: And 221?

JUDGE VOSS: I think that one's definitely tied to the Stipulation and Agreement, I believe 221, so we'll reserve ruling on 221.

MR. DOTTHEIM: The -- the 221 was related to the additional amortization issue --

JUDGE VOSS: With Asbury?

MR. DOTTHEIM: No.

JUDGE VOSS: Oh, that's right. Okay.

MR. DOTTHEIM: And I think maybe that was the surrebuttal testimony of Mr. Sager that possibly was withdrawn. No?

MS. CARTER: No. It's tied in with the second stip.

JUDGE VOSS: It's tied in with the second stipulation, so I think --

MS. CARTER: The regulatory plan additionally.

MR. DOTTHEIM: Gotcha. Okay. Yes.

JUDGE VOSS: All right. Would Public Counsel like to call their first witness?

MR. MILLS: Yes. I'll call Ryan Kind to the stand.

JUDGE VOSS: Mr. Kind, I believe this is a repeat appearance for you, so just remind you, you're still under oath.

THE WITNESS: Okay.

JUDGE VOSS: Please proceed.

MR. MILLS: And we've previously marked and identified as his -- his testimony, gone through his qualifications, so this is his last appearance. So I'll offer Exhibit 303 and tender the witness for cross-examination.

JUDGE VOSS: Is there any objection to the admission of Exhibit 303?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, it is admitted.

MR. MILLS: And Mr. Kind reminds me that he does have one correction to Exhibit 303.

JUDGE VOSS: That was already made.

MR. MILLS: One more.

JUDGE VOSS: Oh, another one. Okay.

THE WITNESS: I -- I did previously make an adjustment -- a correction in the off-system sales portion of my testimony, and I have one correction to make in the fuel adjustment clause portion of the testimony.

That correction is on page 8 in line 9. I mistakenly referred to Empire witness Scott Keith there as Scott Tarter. So the fourth word in line 9 should be changed from "Tarter" to "Keith."

JUDGE VOSS: Got it. All right. Are there any objections to Mr. Kind's testimony as updated or corrected?

(NO RESPONSE.)

JUDGE VOSS: All right. Hearing none, it's admitted.

(EXHIBIT NO. 303 WAS RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: Please proceed. Industrials?

MR. WOODSMALL: No questions.

JUDGE VOSS: Staff?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Empire?

CROSS-EXAMINATION BY MR. MITTEN:

Q. Good afternoon, Mr. Kind.

A. Good afternoon.

Q. Under the fuel adjustment clause that has been proposed by the Public Counsel in the event the Commission adopts a fuel adjustment clause, if Empire's fuel and purchased power costs exceed the amount that's in base rates, the company could only recover 60 percent of those costs from customers; is that correct?

A. That is correct.

Q. And it would be prohibited from recovering the other 40 percent from customers, also correct?

A. Correct.

Q. Are there any other items in the company's cost of service for which Public Counsel is recommending that the company be limited to recovering 60 percent of those costs?

A. I'm actually not aware of most of the other aspects of Public Counsel's case, but to the extent I am aware of the rest of the Public Counsel's case, I don't know of any.

Q. Now, under the fuel adjustment clause that Public Counsel is proposing, if Empire's fuel and purchased power costs fell below the amount that's included in base rates, then the company would only have to refund to customers 60 percent of the decreased cost; is that correct?

A. That's correct.

Q. By statute, Public Counsel represents the public in these proceedings, and I'm wondering if Public Counsel has surveyed its clients to determine how they feel about the possibility of Empire recovering more than 100 percent of its fuel and purchased power costs through rates. Have you done such a study?

A. I think it's -- it's more based upon our belief that our clients benefit from incentives that closely align the interests of shareholders and ratepayers.

Q. But more to my question, have you done a survey to determine how your clientele might feel about the possibility of Empire recovering more than 100 percent of its fuel and purchased power costs through rates?

A. We have not done the specific survey that you're asking about.

Q. Mr. Kind, my next series of questions is going to concern a hypothetical, and my hypothetical involves a business venture that I'm going to offer you. I'm going to offer you the opportunity to go into the business of selling dimes. And if you decide to take me up on my offer, I have a roll of dimes that I will sell you and get you started.

Your business is not going to manufacture dimes, it has to buy them, and it has to pay ten cents for each of the dimes that it buys because that's what dimes cost. And in my hypothetical, selling dimes is akin to being a public utility, so you have to sell all the dimes that people want to buy. Here's the catch. You have to sell each of those dimes for six cents. You want to be in that business?

A. I guess under the -- those specific circumstances and assumptions of this hypothetical, which to me --

Q. Just answer my question. Yes or no, do you want to be in the business of selling dimes for six cents?

A. I'm really not interested in taking on any private business other -- in addition to my work as a state employee.

Q. But I'm asking you specifically about this business. Assuming --

A. It would include that business as well.
Q. Well, I'm asking you specific about this business. Assuming you were open to taking on a business, do you want to go into the business of selling dimes for six cents, yes or no?
A. Not when I don't have the resources to make sure I can do the job well because my time is fully dedicated to working for our clients as an economist for the Office of Public Counsel.
Q. Mr. Kind, I'm not asking you for a qualification, just a simple yes-or-no answer. Do you want to go into the business --
MR. MILLS: He's already said no. It's been asked and answered.
MR. MITTEN: It was qualified --
JUDGE VOSS: It has been asked and answered many times, at least two or three.
BY MR. MITTEN:
Q. Well, let me ask you, are you ever going to earn a profit in that business?
A. I wouldn't be in the business so I wouldn't have any losses or profits.
Q. Well, I'm asking you, if you were in the business, are you going to earn a profit selling dimes for six cents? You have to think about that?

A. Just -- yeah, to think about if I'm in a business that I would never choose to be in --
Q. This is a hypothetical, Mr. Kind.
A. Uh-huh. Okay.
Q. You don't have to actually want to be in the business. I'm just asking you.
A. All right. We're not --
Q. Hypothetically, are you ever going to make a profit in a business where --
A. I understand.
Q. -- you're selling dimes for six cents?
A. Assuming we're not talking about a real-world situation, no, I wouldn't be in that business.
Q. That wasn't my question. Are you ever going to earn a profit in that business?
A. No. When you enter a business, there's generally lots of unanticipated circumstances that arise afterwards, and I guess you're asking me to ignore all those unanticipated circumstances?
Q. I'm simply asking you if you're ever going to earn a profit in a business where you're selling dimes for six cents.
MR. MITTEN: Your Honor, that question could be answered yes or no, and I would ask that you

direct the witness to do so.

MR. MILLS: Judge, in response to a hypothetical question, the witness is allowed to explain why he disagrees with the relevance of the hypothetical to the issues in the case. You can't simply throw out a bunch of unreasonable assumptions and force the witness to say yes or no to them without being allowed to explain why the hypothetical doesn't match any issues in this particular case. And I think the witness is trying to explain why it doesn't match up with what we're talking about here.

MR. MITTEN: I think he can do that on redirect. I think I'm owed a direct answer to my question.

JUDGE VOSS: To the best of your ability, can you answer the question?

THE WITNESS: If I were in that business, I believe my sales volumes would be zero and I would have no profits and no losses.

BY MR. MITTEN:

Q. Well, let's -- assuming your sales volumes weren't zero, would you make a profit in a business selling dimes for six cents?

A. Probably not unless you were doing something illegal, and that wouldn't be within the range of options for me.

Q. And since you wouldn't earn a profit, you also wouldn't earn a positive return on investment either, would you?

A. I don't believe I would be making any investments in this business, so earning a return on the investment wouldn't be a question.

Q. But you can't earn a return on investment if you don't have any profits, can you?

A. Nor if you don't make any investments.

Q. Let me change the hypothetical a little bit. Instead of a standalone business, you're going to be head of a division of a larger company that sells dimes for six cents. You still have to buy the dimes for ten cents apiece.

At the end of the fiscal year, you get called into a meeting with the CEO and the CFO of your company and they say, Mr. Kind, we have a problem. Since your dimes cost you ten cents and you're only selling them for six cents, every time you sell a dime, we have to dip into earnings and make up the difference in cost. So every time you sell a dime, our net income goes down and our rate of return goes down.

They're correct, aren't they?

MR. MILLS: Judge, at this point I'm going to object to the relevance of this. I don't think there's any relevance to the issues in this case. We're going on and on about an elaborate hypothetical that doesn't match up to any of the issues in this case and it's simply not relevant.

JUDGE VOSS: I have to sustain.

MR. MITTEN: Your Honor, it's clearly relevant. Mr. Kind is proposing to require my client to basically sell ten cents' worth of electricity for six cents. He's claiming that's not going to have an effect on the rate of return for my client, and I'm entitled to inquire as to whether or not he would go into a business under the same circumstances. So it's completely relevant to the testimony he's given in this case.

MR. MILLS: Judge, not only is it not relevant, but the hypothetical doesn't even match up. There has been evidence in this case given by the CEO of this company that Empire has turned a profit over the last reasonable number of years. So long as they are making a profit, they're not losing money, they're making money. They may not be making as much money as they want, but they're making money.

It's not the same thing as selling dimes for ten cents [sic], so it's not relevant and it doesn't match up with the situation here, and besides, I think you already sustained the objection.

JUDGE VOSS: I did sustain the objection, and it stands.

MR. MITTEN: I have no further questions for this witness. Thank you, Mr. Kind.

THE WITNESS: Thank you.

JUDGE VOSS: Are there questions from the bench? Commissioner Jarrett?

COMMISSIONER JARRETT: No questions.

JUDGE VOSS: Okay. Redirect?

MR. MILLS: Nothing, your Honor.

JUDGE VOSS: Thank you, Mr. Kind.

THE WITNESS: Thank you.

JUDGE VOSS: Public Counsel, would you like to call your second witness?

MR. MILLS: Yes. I would like to call Barbara Meisenheimer to the stand.

(The witness was sworn.)

JUDGE VOSS: Thank you. Please proceed.

DIRECT EXAMINATION BY MR. MILLS:

Q. Can you state your name for the record.

A. Barbara Meisenheimer.

Q. And by whom are you employed and in what capacity?

A. I work for the Missouri Office of the Public Counsel as a chief economist.

Q. And have you caused to be filed in this case direct testimony on revenue requirement, direct testimony on rate design and surrebuttal testimony?

A. Yes, I did.

Q. And I will represent to you that your direct testimony on revenue requirement has been marked as 304, your direct testimony on rate design has been marked as 305 and your surrebuttal as 306. Do you have any additions or corrections to make to that testimony?

A. No, I don't.

Q. Okay. If I were to ask you the same questions that are contained therein today, would your answers be the same?

A. Yes, they would.

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

A. Yes.

MR. MILLS: Okay. Judge, with that, I will -- even though Ms. Meisenheimer's testimony is actually tied up in both Stipulations and Agreements, I'll go ahead and offer her testimony. If you want to reserve ruling until tomorrow after you rule on the Stipulation, that will be fine. And she's available for cross.

JUDGE VOSS: Okay. I'll reserve ruling on that until after the stipulation. All right.

MR. WOODSMALL: No questions.

JUDGE VOSS: Staff?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Are there questions from the bench? Commissioner Clayton? Would you like to --

COMMISSIONER CLAYTON: That doesn't look like Mr. Kind who was on the stand when I left.

JUDGE VOSS: He's still here.

QUESTIONS BY COMMISSIONER CLAYTON:

Q. I'll just -- I'll try to get through some quick questions. I apologize for being late. I was listening in upstairs, and testimony reaches its conclusion a lot faster than I had anticipated.

On the fuel adjustment mechanism, give me an overview of Public Counsel's position with regard to the structure of the inputs of the fuel adjustment clause.

A. That is an issue that Ryan Kind testified to. If you go with the fuel adjustment clause, what should it be?
Q. Yes. What is your -- what is your -- what is your issue? Help me --
A. Mine --
Q. Refresh my recollection of your testimony.
A. Mine states more on Public Counsel's position that at the time the company filed for a rate increase, the -- the IEC was still in place and the previous tariffs were still in effect.
Q. Yeah. Okay. That's your only role in fuel adjustment clause?
A. Yes.
MR. MILLS: Judge, Mr. Kind is still here, he's still able. He'd be quite happy --
COMMISSIONER CLAYTON: I apologize.
MR. MILLS: -- to testify. As long as you're not going to make him sell dimes for six cents, he'll be happy to take the stand again. Even -- even if you are, I'm sure he would be happy to take the stand again.
COMMISSIONER CLAYTON: I mean, if it's okay, I would -- I do have just a handful of

questions for Mr. Kind, and I'll leave Ms. Meisenheimer alone.

JUDGE VOSS: Just let me check. Commissioner Jarrett, do you have any questions for Ms. Meisenheimer?

COMMISSIONER JARRETT: No.

JUDGE VOSS: Thank you. You may step down.

THE WITNESS: Thank you.

JUDGE VOSS: Mr. Kind, will you please return to the witness box? Mr. Kind, you're still under oath.

THE WITNESS: Okay.

JUDGE VOSS: Commissioner Clayton?

QUESTIONS BY COMMISSIONER CLAYTON:

Q. Mr. Kind, some basic questions here. I hope they're basic. First of all, it has been stated earlier today in testimony that the base amount of fuel and purchased power costs have been agreed to among the parties, and although I took the sheet of paper upstairs that had that figure on it, it was 174 million I want to say; is that right? Are you-all in agreement with that figure, the benchmark for fuel and purchased power costs?

A. It's my understanding we haven't opposed

that stipulation. Now, if you -- if you broaden --
Q. Well, let's start -- I want to start --
A. -- you know, fuel and purchased power costs to include off-system sales --
Q. I want to stand with a benchmark and then let's build from that. I want to know where you stand on -- on each of the pieces. So -- so on -- if we just look at what I believe Staff and the utility have agreed to, there is a -- there is a dollar amount that at least hasn't been objected to as you say --
A. Uh-huh.
Q. -- as the baseline benchmark for a snapshot in time the cost of fuel and purchased power?
A. That's correct.
Q. And you-all do not object to that figure?
A. That's correct.
Q. All right. Now, that figure is designed to recover 100 percent of Empire's cost today, is it not?
A. It really goes a little bit beyond today's level of cost --
Q. Okay.

A. -- in that it's -- it's reflecting costs for -- well, I guess I should say it does reflect today's costs. It reflects the inputs to the fuel model's reflected 2008 numbers for -- for fuel prices.
Q. For -- for either --
A. Yes.
Q. -- the test year, the update period, the true-up period --
A. Uh-huh.
Q. -- I mean, there's a general agreement that -- that 100 percent of what their costs are is 174 million. And I -- if that's incorrect, somebody tell me. I think that's the figure that we talked about earlier. So you'd -- you'd agree that's 100 percent?
A. Of today's costs?
Q. Yes.
A. Yes.
Q. Okay. So that's -- that's a ten-cent dime right there, they're getting -- they're getting 100 percent back on this benchmark?
A. Correct.
Q. Okay. Now, the 60 percent sharing mechanism that you have proposed is 60/40 for any

incremental amount over and above that benchmark; is that correct?

A. Yes, for either positive or negative variations from that benchmark.

Q. So -- so in two years' time say their fuel and purchased power costs are exactly the same, which they're probably not going to be, it's unlikely, but for purposes of this question, if their -- their fuel and purchased power costs are that same number, then they will be collecting 100 percent of their fuel and purchased power costs, correct?

A. For the periodic adjustment factor that would be in place at that point in time, they would -- they would be collecting 100 percent.

Q. The adjustment factor would still be zero?

A. It would.

Q. It would not be a plus or a negative number, it would be zero?

A. It might have varied over that two-year period, but under your hypothetical for that point in time, it would be zero.

Q. Thank you for correcting me there. I did set up the hypothetical that way.

So Public Counsel recommends a division of 60/40 for any incremental amount of increase or reduction in fuel and purchased power expense, correct?

A. Yes.

Q. All right. Now, tell me how Public Counsel believes the Commission should treat off-system sales in light of a fuel adjustment mechanism.

A. Okay. First of all, it should be reflected in the -- in the baseline for -- fuel and purchased power costs should also reflect a reduction for the net margin on off-system sales. And we have a figure that we've recommended for that amount which is a little bit higher than the figures that have been recommended by Staff and the company.

And then you would, you know, as you -- as you calculate the level of fuel and purchased power costs in off-system sales margins at the time that you would possibly make a periodic adjustment under the fuel adjustment clause, you would compare their -- their costs and their off-system sales margins at that point in time with the fuel and purchased power costs and off-system sales margins that's in the baseline.

Q. Okay. Aside from the percentage division, 60/40 versus Staff's proposal of 70/30, does Public Counsel -- and excuse me, the percentage number differences and the off-system sales revenues, there's a difference of around a million dollars or so. Other than those two factors, is Public Counsel's position the same as Staff with regard to a fuel adjustment mechanism?

A. I think it's the same except with regard to the treatment of revenues and costs related to SO2 allowances.

Q. Okay.

A. And then on page 10 of my testimony --

Q. Yeah.

A. -- starting at line 12, I discuss how we believe that the agreement on treatment of SO2 emission allowance revenues that was entered into in Case No. EO 2005-0263 which was the case where Empire's regulatory plan was approved, we feel that there's a commitment that all the parties agreed to at that point in time, a stipulation, and was approved by the Commission and should impact how those revenues are treated in the fuel adjustment clause calculation.

Q. All right. Well, I need you to work me through that --

A. Uh-huh.

Q. -- because I'm not following.

A. Okay.

Q. So -- so tell me what -- how Public Counsel believes the SO2 issue needs to be addressed in this fuel adjustment mechanism.

A. Okay. Well, we think that pursuant to that Stipulation and Agreement in the case that I referenced, that Empire's required to record gains on the sales of allowances in a regulatory liability account. And that account then would be used as an offset to rate base amortized over time and then would have a slight downward adjustment on rates.

You know, if you have them include those kinds of revenues either place, they're going to put downward pressure on rates, but we feel like our office signed the Stipulation and Agreement, we have no flexibility to propose any other treatment.

Q. Well, does that mean that the SO2 revenues would be used to offset increases in fuel costs during periodic adjustments, during periods of adjustment?

A. No. It means they would just be looked at in the next rate case --

Q. In the next rate case?
A. -- as an offset to rate base in the next rate case.
Q. All right. So -- so you-all would then -- you would defer that question into the next rate case with presumably an accumulating regulatory liability account?
A. Yes. And we believe that since we're doing it for revenues, it should be done for costs as well.
Q. Okay. Okay. Now, your understanding of Staff's position is that the SO2 revenues would be included rather than in the next rate case at the time of periodic adjustments with the evaluation of fuel costs?
A. That's correct, with revenues and costs.
Q. Now, Public Counsel's position is based on its agreement with a prior stip rather than one necessarily on philosophy here today; did I understand that correctly?
A. I didn't mean to imply that. We were supportive of that -- that provision in the Stipulation and Agreement, and we still think that that's an appropriate approach.
Q. All right. The way Staff -- aside from

that agreement, do you have a philosophical problem with -- with these being included in a fuel adjustment mechanism? I mean, is it -- is it completely inappropriate? Does it violate ratemaking principles?

A. Well, really, the philosophical problem we have has to do with the fact that the Commission has, you know, promulgated a ECRM rule for environmental costs, and that rule has a cap on it in terms of how many environmental costs can be put into any adjustment factors.

And we believe that the legislator -- legislature intended for there to be a limit on the increase in rates through an adjustment mechanism for environmental costs, and that to put some in here works against the intent of the legislation.

Q. In the event that -- in the event that there were a cost, how would that apply if -- if there were increases in revenue, how would that apply with an ECRM?

A. Well, it seems appropriate to treat them both in the same place. And so we would -- we would think that unless there were some prior agreement such as we have here in the prior Stipulation and Agreement, that it be appropriate to -- to reflect both the costs and the revenues associated with SO2 allowances in an -- in an ECRM adjustment.

Q. Now, to understand -- understand your position in light of what Staff's position is, Staff argues for inclusion of both cost and for revenues in this fuel adjustment mechanism, correct?

A. Correct.

Q. All right. So the plus or the minus is included in the fuel adjustment clause. It's your position that perhaps those should be included in an environmental cost recovery mechanism?

A. Yes, and that's partly, you know, in anticipation of the expectation that we will be seeing companies come in in -- probably in the near future to -- to request environmental adjustment mechanisms. Empire was not able to do so, I don't believe, at the time that they filed this rate case because the Commission hadn't completed its rulemaking.

Q. Okay. What do you think of Mr. Brubaker's proposal for dealing with fuel costs?

A. Well, I -- I think we -- I'm probably very close to the Staff position that you heard this morning from Mr. Oligschlaeger in that we think -- we would agree it's an improvement relative to the company's proposal of having a 95/5 split, but we would share the concern that Mr. Oligschlaeger stated when he said that the sharing amounts for the company are capped in Mr. Brubaker's proposal. And so if you do reach that cap, then it sort of does away with their incentive to contain costs, so that would be a concern.

Q. And I suppose, lastly, can you give me just a very brief rundown what factors support your proposal of 60/40 versus 70/30 or versus 95/5?

A. Okay. Well, I think that we -- we believe the Staff had a reasonable approach to performing their analysis of what the -- what the range of sharing should be if you do approve a fuel adjustment clause in this case.

And I think we felt, though, that it probably should be towards the low end of that range for the -- for the reasons that we believe -- same reasons that we believe the company really should get no fuel adjustment clause at all, which has to do with the circumstances and the environment that the company is operating in right now, and those four factors were described starting on page 6 of my testimony.

Q. So Public Counsel's primary position is that no fuel adjustment mechanism's appropriate in this case?

A. That's correct.

Q. Do you recall Staff's position in the last Aquila rate case with regard to fuel costs?

A. With regard to a fuel adjustment clause?

Q. Fuel costs.

A. Fuel costs?

Q. Yes, whether it'd be a IEC fuel adjustment mechanism --

A. Oh, okay.

Q. -- or base -- baseline rates. Were you the witness that testified in the Aquila case?

A. I did -- think probably both Mr. Trippensee and I testified in that case.

Q. Okay. Do you recall Public Counsel's position in that case? Did you advocate for an IEC or just base -- base-rates treatment of costs or --

A. I believe that we advocated for no fuel adjustment clause at all.

Q. Okay. So -- so your position here is still consistent, it's consistent with what you advocated for in the last Aquila case?

A. As far as I recall, yes. I haven't reviewed our position recently in that case.

Q. How quickly we forget, huh?
A. How many cases there are in between, yes.
Q. Did Public Counsel propose -- in light of its opposition to a fuel adjustment mechanism, did Public Counsel offer a dollar amount for base-rates fuel cost in this case?
A. No, we did not.
Q. You did not do a fuel run or --
A. We don't have a production cost model with which to do fuel runs.
Q. So even though you advocate for no fuel adjustment clause and just a base-rates fuel cost be included in the revenue requirement, you don't have a dollar amount that would be that input, right?
A. We have not opposed the dollar amount that was agreed upon by the company and the utility. And I am recalling a little more about our position in the Aquila case in that I know we actually -- I think we proposed 50/50 sharing in that case, as did a number of parties.
COMMISSIONER CLAYTON: Thank you for coming back.
THE WITNESS: You're welcome.
JUDGE VOSS: Commissioner Jarrett, did

you have any questions?

COMMISSIONER JARRETT: No.

JUDGE VOSS: We'll do recross based on questions from the bench. Industrials?

MR. WOODSMALL: No.

JUDGE VOSS: Staff?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Empire?

MR. MITTEN: No questions.

JUDGE VOSS: Redirect based on questions from the bench?

MR. MILLS: No, I have no redirect, thank you.

JUDGE VOSS: Thank you, Mr. Kind.

THE WITNESS: Thank you.

JUDGE VOSS: Are the Industrials ready to call their first witness?

MR. WOODSMALL: Yes. We'd call Maurice Brubaker to the stand.

(The witness was sworn.)

JUDGE VOSS: Thank you. Please proceed.

MR. WOODSMALL: Thank you.

DIRECT EXAMINATION BY MR. WOODSMALL:

Q. Would you state your name for the record, please.

A. Maurice Brubaker.
Q. And on whose behalf are you testifying here today?
A. On behalf of the Industrial Intervenors.
Q. And have you -- have you -- did you help or did you prepare what has been marked Exhibit 500, your direct testimony, revenue requirement; 502, direct testimony, rate design; 503, rebuttal; and 505, surrebuttal testimony?
A. Yes.
Q. Do you have any corrections to make to any of those?
A. I do not.
Q. Okay. If I were to ask you the same questions contained in there, would your answers be the same?
A. Yes.
Q. And are those correct to the best of your knowledge and belief?
A. Yes.
MR. WOODSMALL: Your Honor, I would note that 502 -- or excuse me, 502 has aspects of rate design which are encompassed in a stipulation, but I believe 500, 503 and 505 are entirely FAC. I would offer all four and would let you reserve ruling on

502 since it's tied up in the stipulation.

JUDGE VOSS: Are there any objections to the admission of 500, 503 and 505?

MR. MITTEN: Your Honor, on the front page of each of the copies of Mr. Brubaker's testimony and also in the body of the testimony, he indicates he's filing testimony on behalf of Enbridge Energy and Wal-Mart Stores.

JUDGE VOSS: I think I saw that.

MR. MITTEN: You may recall back in February Mr. Conrad filed a pleading indicating that those two entities have indicated an interest in the subject matter of the proceeding, but he specifically said they weren't intervenors. If they're not intervenors, I object to Mr. Brubaker filing testimony on their behalf and would ask that references to those companies be stricken from all of his testimony in this case.

JUDGE VOSS: Do you have any objections to striking of the references to --

MR. WOODSMALL: I believe the references are accurate. We've never held them out as intervening parties. After we intervened and after the intervention deadline, we were contacted by those parties and they agreed with the positions being taken. So they are helping to pay Mr. Brubaker's compensation.

So in the interest of full disclosure, we noted that they were sponsoring parties and that's how they're characterized. We don't characterize them as intervenors and they are sponsoring parties, they are helping to pay his compensation on these issues.

JUDGE VOSS: What authority do nonparties have to file any testimony in a case before the Commission?

MR. WOODSMALL: They didn't file it. You'll notice in EFIS it is filed on behalf of General Mills -- General Mills, Praxair and Explorer Pipeline, and we just noted -- noted them as sponsoring parties, so...

JUDGE VOSS: Does that clarification for the record make it any better for you?

MR. MITTEN: No. If they're not parties as you pointed out, they don't have the ability to file testimony. Their names appear on the testimony and Mr. Brubaker says he's submitting testimony on their behalf.

MR. WOODSMALL: He is, on their behalf. They are not the parties in this case. This is much ado about nothing. All we're trying to indicate by this is that he was being compensated by these other parties as well. They agree with the positions being advanced, and we put them down in the interest of full disclosure. To the extent you want to make note that they are not intervening parties, I have no problems with that.

JUDGE VOSS: Well, I think you've made clear for the record that they are sponsoring parties and paying for part of Mr. Brubaker's fee.

MR. WOODSMALL: Uh-huh.

JUDGE VOSS: However, I -- I will agree that the references to the nonparties in the testimony should be stricken.

MR. WOODSMALL: That's fine.

JUDGE VOSS: Aside from that, are there any objections to the admission of Exhibits 500, 503 and 505?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they're admitted.

(EXHIBIT NOS. 500, 503 AND 505 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

MR. WOODSMALL: Tender the witness for

cross-examination, your Honor.

JUDGE VOSS: Okay. Staff?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Public Counsel?

MR. MILLS: Just briefly.

CROSS-EXAMINATION BY MR. MILLS:

Q. And just sort of as a clarifying question, Mr. Brubaker, you have a somewhat different proposal in your surrebuttal than -- than in your direct. Which of those is your preferred approach in this case?

A. My preferred approach is the one in surrebuttal.

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

JUDGE VOSS: Industrials? I'm sorry. I'm getting off on my chart. Wait a minute. Okay. Sorry. Empire?

CROSS-EXAMINATION BY MR. MITTEN:

Q. Good afternoon, Mr. Brubaker.

A. Good afternoon.

Q. I just have a couple of questions. In your surrebuttal testimony beginning on page 10, you reference a general order of the Louisiana Public Service Commission, and I believe that you've included that in your testimony as support for the position you take on what costs ought to be flowed through the fuel adjustment clause; is that correct?

A. Just -- essentially, yes. I did it as an illustration of what other commissions have done.

Q. Did you happen to read the entire general order that you referenced in your surrebuttal testimony?

A. I'm sure I did.

Q. And would it be fair to say that in Louisiana, the Public Service Commission passes through 100 percent of the actual incurred fuel and purchased power costs?

A. That is correct.

Q. Do you also recall provisions in the Louisiana Commission's general order regarding prudency reviews for a fuel adjustment clause?

A. I recall their presence. I don't recall the details of them.

Q. Do you recall anything in those orders wherein the Louisiana Commission suggested that it would be unable to do prudency reviews of the fuel adjustment clause for the electric utilities in that state?

A. No.

MR. MITTEN: I have no further questions. Thank you.

JUDGE VOSS: Questions from the bench? Commissioner Clayton?

COMMISSIONER CLAYTON: No.

JUDGE VOSS: Commissioner Jarrett?

QUESTIONS BY COMMISSIONER JARRETT:

Q. Good afternoon.

A. Good afternoon.

Q. Given the question about the Louisiana Commission, I just had a general question about fuel adjustment clauses in other jurisdictions. Are you generally familiar with how other jurisdictions treat these fuel adjustment clauses?

A. With a number of them. I couldn't, you know, obviously say all.

Q. I think you proposed a grid?

A. I did.

Q. Has any other jurisdictions applied an FAC according to a similar-type grid?

A. State of Wyoming has in place that -- that type of structure for Rocky Mountain Power Company.

Q. Okay.

A. There may be others. That's the one

that comes to mind.

Q. And -- and I also had a question about fuel adjustment clauses as they were proposed by Staff and OPC, and it was a 70/30 split or a 60/40 split. In your experience, has it been common in other jurisdictions to have fuel adjustment clauses with splits similar to that?

A. I think my experience has been that the retention percentage on the part of the utility has been smaller than what's implied by that, closer to the 80 to 90, 95 percent range. I kind of said that backwards. As the percentage that the customers would pick up through the fuel clause with the remaining 5, 10 or 15 percent and maybe as much as 20 to be retained by the utility.

Q. Right. And do you know why generally they are that high?

A. If I had to characterize it, I would say that fuel cost is a pretty substantial portion of the cost of running an electric utility, and there is a financial consideration to be had as to what happens if there's less than all the passthrough through the fuel clause.

COMMISSIONER JARRETT: All right. Thank you, sir. Appreciate it.

JUDGE VOSS: Commissioner Clayton?

QUESTIONS BY COMMISSIONER CLAYTON:

Q. Mr. Brubaker, can you just walk me through the basics of your proposal on a fuel adjustment mechanism?

A. Sure, yes.

Q. If you remember.

A. Basic -- sure. I'm just trying to organize my thoughts for a second here.

Q. Don't think too hard here.

A. I know. I should, I guess, start with what -- what do you put in the fuel clause, and my testimony is it should be the variable fuel and purchased power costs incurred by the utility that would exclude such things as capacity charges on purchased power contracts, any depreciation or fixed charges on unit trains, reservation charges for natural gas pipeline transportation and similar items I've laid out in my testimony.

Q. Now, on just -- on those exclusionary items, does your position differ -- differ from positions of Staff, Public Counsel and the utility?

A. I believe Staff includes some of those items that I would not include. Pipeline -- natural gas pipeline reservation charges I believe they would include. I don't believe they've addressed the unit train expense. I believe we're all together on excluding capacity charges on purchased power contracts.

Q. Okay.

A. As is the utility.

Q. Okay. All right. Moving beyond inputs, then?

A. Okay. Then I would include all of the -- all of the eligible fuel and purchased power costs incurred, and then I would subtract the 100 percent of the revenues received from off-system sales.

Q. Actual revenues?

A. Actual revenues. And I guess the only other thing I should mention, I would exclude SO2 costs from the FAC. I believe --

Q. And you exclude both costs and revenues from SO2?

A. Yes, sir. Yes. I believe that is more properly part of any environmental cost recovery mechanism or it's to be captured in base rates.

Q. Is there a correlation between the use of fuel and -- and SO2 emissions that could be affected by those credits?

A. Emissions, yes. Costs, not necessarily, because Empire says they have enough allowances that they don't expect to incur any SO2 costs in the near future. So it really becomes sort of a nonissue short term for them.

Q. Okay. All right. And then moving beyond your off-system sales revenues, you do not add or subtract SO2 items?

A. Correct.

Q. And then explain to me how your adjustment mechanism would be implemented at that point.

A. Okay. My adjustment mechanism -- and maybe it's helpful to look at the schedule attached to my surrebuttal.

Q. Sure. Which one is that?

A. It's Exhibit 505. It's labeled MEB schedule 1. So if we start at the middle of the page with the line opposite the word "base," my proposal sets forth in column 2 the amount of dollars in the band. And column 3, the percentage passed through the FAC to customers and column 4, the percentage retained by the stockholder.

So it goes beginning the first $20 million, the passthrough percentage is 95 percent, for the next $20 million, effectively, it's 90 percent and then at $40 million we cap. There's no further sharing.

And if you read across to the right, column 7 represents the dollars out of the total amount of the band that the customers pay through the FAC. And column 8 represents the responsibility of the shareholders.

The max is $3 million in any annual period, any two successive consecutive periods, which is equivalent to 50 basis points return on equity. And then if you go down the page instead of up from the center, it works the same way in the opposite direction.

As the company would be successful in driving costs down, it would be allowed to -- to retain a percentage of that benefit until we get to some level that's symmetrical with what we -- what the ratepayers cap their exposure on the top end and then ratepayers would get all the benefit from there on down.

So the max is $3 million. Once you get -- get beyond the point where it's -- equates to $3 million, you don't recapture the 3 million, that still stays where it was, but there is no additional

incremental sharing.
Q. Do you agree with the baseline amount? Are the parties in agreement on the baseline amounts on field costs?
A. I believe we are, yes.
Q. Okay. So there's no dispute there?
A. No.
Q. Has Missouri ever done a sharing structure like this before with bands and -- the way you've designed this?
A. Not to my knowledge.
Q. Okay. How many states that you're aware of have used this type of structure?
A. I mentioned Wyoming --
Q. Uh-huh.
A. -- earlier has that in place and Rocky Mountain Power Company. I believe there's a similar not quite as complex one in place for Xcel Energy in Colorado. It has several different dimensions to it. And I've lost track of the specifics, but several of the northwest utilities like Avista, Puget Sound, Portland General have sharing percentages on their FACs.
Q. Okay. Did you testify in the Aquila -- most recent Aquila rate case?

A. I did.
Q. You did. And did you propose a structure like this in that case?
A. No, sir. That was not my issue in that case. I only testified about line losses on the fuel clause.
Q. Oh, you only did the line losses --
A. Right.
Q. -- and weren't ready to buck up on this issue?
A. Right.
Q. Yeah.
A. If I may, another witness for the same clients testified and did have a proposal. I just wanted to indicate that it was not my testimony.
Q. Well -- so is this consistent with what that prior proposal was?
A. In concept, I believe it is. It had a different sharing percentage.
COMMISSIONER CLAYTON: Okay. I don't think I have any other questions. Thank you.
JUDGE VOSS: Commissioner Jarrett?
COMMISSIONER JARRETT: No. No, thanks.
QUESTIONS BY JUDGE VOSS:
Q. I have one question from one of the

Commissioners that's not here. Mr. Brubaker, what are you getting paid on an hourly basis?

A. $315.

Q. Do you have an estimate of how many hours you've spent in preparation for this case?

A. No, I don't.

JUDGE VOSS: Thank you. Okay. Recross based on questions from the bench beginning with Public Counsel?

MR. MILLS: No questions.

JUDGE VOSS: Staff?

MR. DOTTHEIM: No questions.

JUDGE VOSS: Empire?

MR. MITTEN: Just a few.

RECROSS-EXAMINATION BY MR. MITTEN:

Q. Mr. Brubaker, in response to questions from both Commissioner Clayton and Commissioner Jarrett, you referenced a sharing proposal that's in place for Rocky Mountain Power in Wyoming. Do you recall that?

A. Yes.

Q. Now, you also mentioned that you were a witness in the Aquila case. Is that the same fuel adjustment clause for Rocky Mountain Power that was discussed in that case, in the Aquila case?

A. I'm not sure if there was a recent Rocky Mountain Power fuel adjustment clause discussed in that case. And there was in the companion or the nearby Ameren case. I suspect it was the same thing.

Q. As I recall, and maybe you can tell me if this -- this is the fuel adjustment clause that you were referring to. The sharing mechanism in that case was agreed to in the stipulation. Is that your recollection?

A. It was initially implemented in a stipulation. It was subsequently readopted in a follow-up electric power rate proceeding.

Q. Was that a contested case or was it again stipulated by the parties as to the structure of the fuel adjustment clause?

A. The case -- the case was a contested case. I -- you know, I don't know that there were contentions about the fuel adjustment clause. I wasn't that closely involved with it.

Q. Okay. You also indicated that you were aware of several commissions that had imposed a requirement that companies collect less than 100 percent of their fuel and purchased power costs through their fuel adjustment clause?

A. That there was a sharing, yes.

Q. Would you be willing to provide a list of those utilities that you're aware of?

A. Sure.

Q. And could you give me case numbers where the fuel adjustment clause was adopted for those companies?

A. If we have that, yes.

MR. MITTEN: I have no further questions. Thank you.

JUDGE VOSS: Did you want to reserve a late-filed exhibit for that?

MR. MITTEN: That's fine.

JUDGE VOSS: Would that be Empire Exhibit 32, late-filed?

MR. MITTEN: That's fine.

JUDGE VOSS: Redirect?

MR. WOODSMALL: Just one question.

REDIRECT EXAMINATION BY MR. WOODSMALL:

Q. In response to some questions from Commissioner Clayton, you were talking about some costs that were excluded under your proposal. Do you recall that question?

A. I do.

Q. Can you tell me if fuel handling costs was one of the items that you would exclude or include?

A. Yes, I would exclude fuel handling costs.

Q. And what is the basis for excluding that?

A. These are basically labor costs that are within the management and control of the utility that do not need to be dragged through an FAC.

MR. WOODSMALL: No further questions, your Honor.

JUDGE VOSS: Thank you, Mr. Brubaker. I believe you may step down.

THE WITNESS: Thank you.

JUDGE VOSS: Let's take a brief break so I can make sure that the Commissioners have an opportunity to get down here if they are interested in ROE testimony. Sorry?

MR. DOTTHEIM: Just a housekeeping matter. I was wondering if you might tell me, Judge, whether you received -- I didn't mark it down if you did -- Exhibits 205 and 206, Mr. Michael E. Taylor's rebuttal testimony and surrebuttal testimony?

JUDGE VOSS: I don't have it in yet. Would you like to --

MR. DOTTHEIM: Yes, I'd like to offer

Exhibits 205 and 206.

JUDGE VOSS: Are there any objections to the admissions of Exhibits 205 and 206?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they're admitted.

(EXHIBIT NOS. 205 AND 206 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

MR. MITTEN: Your Honor, Mr. Dottheim earlier, I believe, asked Mr. Keith if he could provide him the amount of actual fuel and purchased power expense that Empire had incurred for the 12-month period ended June 30th, 2007.

JUDGE VOSS: Uh-huh.

MR. MITTEN: And I have that information and would be happy to read it into the record at this time.

JUDGE VOSS: Would that be sufficient? Because testimony, you know, from an attorney doesn't count as evidence.

MR. DOTTHEIM: Well, if the company -- if that could be stipulated to.

MR. MITTEN: I will stipulate that this is the amount that Mr. Dottheim requested.

JUDGE VOSS: Okay.

MR. DOTTHEIM: It could be treated as evidence on that basis.

JUDGE VOSS: Could you clarify what you're reading into the record?

MR. MITTEN: This is the actual fuel and purchased power expense for Empire on a total-company basis for the 12 months ended June 30, 2007, and that number is $160,024,399.

MR. DOTTHEIM: Thank you, Mr. Mitten.

MS. CARTER: And then, Judge, also if we could offer some testimony into the record. I understand that you'll need to reserve the ruling until after there's a decision regarding the stipulations, but if we could offer into the record the following exhibits.

It would be the testimony of Blake Mertens which is Exhibit 5 HC and NP, Exhibit 6 and Exhibit 7; and then also the testimony of Jayna Long which is Exhibit 12 HC and NP; and then also Exhibit 14 which is the testimony of Laurie Delano; Exhibit 15 HC and NP which is the testimony of Todd Tarter; Exhibit 16 which is the testimony of Mark Quan; Exhibit 17 which is the testimony of Dale Harrington; Exhibit 18, the testimony of Kenneth Vogl; Exhibits 19, 20 and 21, which is the testimony of Sherrill

McCormack; Exhibit 22 HC and NP, which is the testimony and schedules of Robert Sager and then also Exhibits 23 and 24 which is additional -- additional testimony of Robert Sager.

And all of that relates to the two stipulations which are pending.

JUDGE VOSS: Okay. Thank you. And the only other exhibit is a late-filed exhibit which will come in at a future time which I assume I'll give the time for parties to object to. All right. Anything else before we take a break or did you want...

And then for Staff I don't think 207 and 208 have been offered yet.

MR. DOTTHEIM: Okay. At this time, then, I'd like to offer Exhibits 207 and 208.

JUDGE VOSS: And is that -- part of that's in with the stipulation, isn't it? Okay. And 220 and 221? Or no, excuse me, just 220, Mr. Wells?

MR. DOTTHEIM: Thank you. At this time I'd like to offer Exhibit 220, Mr. Wells' surrebuttal testimony.

JUDGE VOSS: I'll suspend ruling on those following the stipulation. That's the only Staff exhibits other than the late-filed that haven't been admitted. Okay. The only ones I may have simply not marked -- I'm not sure if Mr. Dunkel's have been offered.

MR. MILLS: Then I would like to offer Mr. Dunkel's testimony. That would be Exhibits --

JUDGE VOSS: 300 --

MR. MILLS: -- 300, 301 and 302.

JUDGE VOSS: Everything else has at least been offered. Thanks. All right. Let's --

MR. MILLS: And his testimony isn't tied up in the --

JUDGE VOSS: In the stipulation --

MR. MILLS: -- Stipulation and Agreement, I don't believe.

JUDGE VOSS: In that case, do I have any objection to the admissions of Exhibits 300, 301 and 302?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they're admitted.

(EXHIBIT NOS. 300, 301 AND 302 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

JUDGE VOSS: All right. Let's take a break until a quarter till just to -- so I can check with the Commissioners so that no one's surprised that when we go back to the ROE -- oh, sorry.

MS. CARTER: One more thing. Probably not appropriate for me to offer someone else's testimony, but since Department of Revenue attorney is not here, just if we'll keep in mind that Exhibits 400 and 401 have not been offered into the record as of yet.

JUDGE VOSS: Thanks. All right. So we will come back at a quarter till and start with Mr. Gorman. That way I can make sure that any Commissioner that has questions and wants to be done here can come down. So with that, we'll take a break.

(A RECESS WAS TAKEN.)

(The witness was sworn.)

JUDGE VOSS: Thank you. Please proceed.

MR. WOODSMALL: Thank you, your Honor.

DIRECT EXAMINATION BY MR. WOODSMALL:

Q. Would you state your name for the record, please.

A. Michael Gorman.

Q. And did you cause to be filed what has been marked in this case 501 NP and HC, your direct testimony, 504, your rebuttal testimony and 506, your -- NP and HC, your surrebuttal testimony?

A. Yes.

MR. WOODSMALL: And just for clarity, your Honor, I would note that all three of these contain the same reference to Wal-Mart and Enbridge as we had in the last -- Mr. Brubaker's testimony.

BY MR. WOODSMALL:

Q. So subject to striking that, I'm not going to debate that again, would your answers contained therein be the same if I asked you those questions today?

A. They would.

Q. And do you have any corrections to make?

A. I do not.

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

A. Yes.

MR. WOODSMALL: Your Honor, I'd offer Exhibits 501, 504 and 506 and tender the witness for cross-examination.

JUDGE VOSS: With the exception of striking the references to nonparties to the case being sponsoring parties of the testimony, are there any objections to these exhibits?

MR. SWEARENGEN: I understand you're going to make the same ruling that you did with regard to Mr. Brubaker's testimony --

JUDGE VOSS: Yes, if the references to the nonparties as sponsoring parties to the testimony can be stricken.

MR. SWEARENGEN: Fine, thank you.

JUDGE VOSS: Everything else will be the same. All right. They're admitted.

(EXHIBIT NOS. 501, 504 AND 506 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

MR. WOODSMALL: I tender the witness, your Honor.

JUDGE VOSS: Public Counsel?

MR. MILLS: No questions.

JUDGE VOSS: Staff?

CROSS-EXAMINATION BY MS. KLIETHERMES:

Q. Good morning.

A. Morning.

Q. Or afternoon, I'm sorry.

A. Good afternoon.

MS. KLIETHERMES: If I can approach?

JUDGE VOSS: Please do.

MS. KLIETHERMES: Sorry.

(EXHIBIT NOS. 229 AND 230 WERE MARKED FOR IDENTIFICATION BY THE COURT REPORTER.)

BY MS. KLIETHERMES:

Q. Mr. Gorman, do you recognize these documents?

A. Yes, I do.

Q. And could you tell us briefly what those documents are?

A. These are summary reports issued by the Regulatory Research Associates on Commission-authorized returns for electric and gas utilities.

Q. Do those documents contain information used by ROE experts in analysis in preparation of recommendations?

A. Most are we -- analysts who use this information, yes.

MS. KLIETHERMES: I move for the admittance of 229 and 230.

JUDGE VOSS: Are there any objections to the admission of Exhibits 229 and 230?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, they're admitted.

(EXHIBIT NOS. 229 AND 230 WERE RECEIVED INTO EVIDENCE AND MADE A PART OF THE RECORD.)

MS. KLIETHERMES: That's all I have for this witness.

JUDGE VOSS: Empire?
MR. SWEARENGEN: Thank you, Judge.
CROSS-EXAMINATION BY MR. SWEARENGEN:
Q. Good afternoon, Mr. Gorman.
A. Good afternoon.
Q. I'm looking at page 2 of your direct testimony.
A. I'm there.
Q. Beginning on line 11, you were asked the question to summarize your rate of return recommendation, and in your answer on line 13 is a range of 9.5 to 10.3 percent; is that correct?
A. Yes.
Q. And then you elected the midpoint of that, the 10 percent as your recommendation in this case; is that correct?
A. That is correct.
Q. Now, if the Commission were to award the 9.5, the 10.3 or anything in between, they would be within your recommended range; is that correct?
A. It is.
Q. And you would not particularly take issue with that, would that be a fair statement?
A. Well, I think that would be consistent with my estimate of the cost of equity, so I think

that would be reasonable.

Q. Okay. Thank you. Now, I believe the record will show that the Staff return on equity recommendation, at least the high end, is approximately 10.8 percent. Is that your understanding?

A. I recall that being correct, yes.

Q. Which would be about 50 basis points above the high end of your recommendation. Would that be true?

A. It is.

Q. Would you regard a 50-basis-point difference to be significant?

A. Yes.

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

JUDGE VOSS: Questions from the bench? Commissioner Clayton?

COMMISSIONER CLAYTON: No questions.

JUDGE VOSS: Commission Jarrett?

QUESTIONS BY COMMISSIONER JARRETT:

Q. Good afternoon, sir.

A. Good afternoon.

Q. I have just a real quick question. Were you here last week? I can't remember. Were you here

last week when the other witnesses testified on ROE?
A. No, sir. I had a conflict so I was not able to be here on Friday.
Q. We had a series of questions regarding the zone of reasonableness and what the midpoint should be. And the testimony -- there were two schools of thought, one was that you would use the ROE for all electric companies, in which case it would be around a 10.3, or just the integrated electric companies which would have a midpoint of 10.7 or an average.
And I was wanting to ask the question, what school of thought would you subscribe to as far as a zone of reasonableness, the 10.3 or the 10.7?
A. Well, I would suggest that the appropriate development of the fair return on equity is to consider the risk that the company's included in that sample. It's -- it's too simplistic to differentiate the risk of a regulated utility company simply by categorizing it as an integrated utility company or a transmission and distribution utility company.
Integrated utility companies can have lower risks than T&D utility companies or they can have higher risk depending on which integrated

utility company is at issue and the T&D companies you're comparing it to. As example -- as an example, in Illinois there are two main wires companies that operate in that jurisdiction: Commonwealth Edison Company and the Ameren Illinois utility companies, the affiliates of the Ameren Union Electric Company that operates here in Missouri.

Those T&D utility companies are much higher risk than the integrated utility companies here in Missouri. The issues they are confronted with at this point is whether or not they can fully recover their purchased power cost that they're required to buy to serve smaller customers in their jurisdiction. There's legislative and executive issues that needed to be worked through that will allow them to implement rate structures that allow them to fully recover that purchased power cost.

So the real issue between an integrated company and a -- and a T&D or a wires company deals with cost recovery of commodities. Some integrated utility companies have commodity risk, some T&D utility companies have commodity risk. The issue is the relative amount of commodity risk assumed by the utility and whether or not and to what extent that commodity risk is passed onto customers through rate changes and the frequency of rate changes.

So my assessment of that and my opinion on that is that there needs to be a more detailed review of the relative risk to the subject company in comparison to the relative risk of the proxy groups you're looking at.

If it's an industry average, I would recommend not excluding companies on the basis of a simplistic characterization of them as being either integrated or wires or delivery service utilities because that doesn't give a proper assessment of the risk of those two enterprises.

Those two Illinois utilities I just mentioned lost their investment-grade bond rating status because of that uncertainty in fully recovering purchased powers. While they are wires utilities, there is risk associated with providing that service in Illinois.

So I would recommend using an industry average that relates to regulated utility service as an appropriate benchmark and then make more detailed assessment of the relative risk of the underlying enterprise, the subject of the rate proceeding, to compare its risk to other companies of comparable risk, develop a return on equity investment based on market factors and compare that result to what the -- to what generally is going on in the industry as a double-check of the reasonableness of your -- your end result.

COMMISSIONER JARRETT: Thank you. I appreciate that answer.

JUDGE VOSS: Chairman?

QUESTIONS BY CHAIRMAN DAVIS:

Q. Good afternoon, Mr. Gorman.

A. Good afternoon.

Q. Did you -- and maybe I just missed it -- did you provide a list of the cases that you've been -- given testimony in in conjunction with your testimony in this case?

A. If I did, it would have been through discovery, and I don't recall specifically. Normally the utilities do ask for that list, but it would have been in discovery. It was not in my testimony.

Q. Okay.

A. Although, I identified the jurisdictions I testified to in my testimony.

Q. Okay. Can you provide -- provide us with a copy of that list?

A. I can.

Q. Okay. Is your firm providing ROE

testimony in AmerenUE's current Illinois case?
A. Ameren Illinois utilities. AmerenUE is a Missouri --
Q. That's right. I'm sorry. AmerenCIPS, SILCO, whatever they're going by this week.
A. Yes, sir.
Q. You are?
A. I did, yes.
Q. You did?
A. Yes.
Q. Okay. So have you made an ROE recommendation in that case?
A. Yes.
Q. And what was it?
A. I believe it was 10 percent.
Q. Okay. 10 percent seems to be a magic number.
A. Well, would you like me to explain why it was similar to this case?
Q. Sure. Indulge me, Mr. Gorman.
A. All right. Well, consistent with the explanation I just provided, what's important in determining a fair return on equity is to look at the risk of the enterprise. In Illinois, the Ameren Illinois utilities corporate bond ratings, the

unsecured bond ratings were downgraded to below investment grade. They're actually one notch more risky than is Empire's unsecured bond rating in this case which is at the minimum investment-grade level.

But new Illinois legislation has been passed. It hasn't yet been enacted because there's a time period before it will be fully enacted which will mitigate a lot of the underlying risk the Illinois utilities are currently facing; that is, full recovery of all purchased power costs.

So there is light at the end of the tunnel in mitigating the main issue deriving the significant operating risk of those companies, but it hasn't yet been fully realized. Consequently, the bond rating risk of the Illinois utilities is a little bit more risky than -- than Empire, but there is improvements, legislative improvements and regulatory mechanisms in place to help mitigate that risk. Consequently, Ameren Illinois Utilities' risk I believe is very comparable to the risk of Empire in this case.

Q. Okay. Mr. Gorman, did you review Mr. -- is it Mr. or Dr. Overcast's? Did you review his rebuttal testimony?

A. I believe it's Dr. Overcast, and yes, I did.

Q. Okay. And is it -- is it fair to characterize your -- your assessment of his rebuttal testimony as that he did not account for the total investment risk which included financial and operational risk?

A. Yes, I don't believe he actually --

Q. Yes, that's --

A. -- thoroughly reviewed operating risk --

Q. That's good.

A. -- but yes.

Q. Okay. You reviewed his surrebuttal testimony as well, didn't you?

A. Yes.

Q. Is there anything factually inaccurate about schedules HEO-1, -2, -3 and -4 of his surrebuttal testimony?

A. May I get a copy of those?

Q. Sure.

MR. WOODSMALL: Do you know what exhibit numbers those were, by any chance?

CHAIRMAN DAVIS: I have no idea.

JUDGE VOSS: What was the question? I didn't hear.

CHAIRMAN DAVIS: Dr. Overcast's

surrebuttal testimony.
MS. CARTER: Overcast's surrebuttal is --
MR. WOODSMALL: 10 and 11.
THE WITNESS: Sorry. Could you read that schedule list off again, please?
CHAIRMAN DAVIS: HEO-1, -2, -3 and -4 of his surrebuttal testimony.
THE WITNESS: This only has one of them.
CHAIRMAN DAVIS: Did I get that right? Maybe it was just...
BY CHAIRMAN DAVIS:
Q. All right. I'm sorry. Let's skip that question, Mr. Gorman.
In considering all relevant factors, you've got to look at revenues and expenses, correct?
A. Yes.
Q. Okay. When you look at Empire's revenues, in terms of revenue surprises, positives, you've got off-system sales, you've got customer growth. Is there -- assuming some load growth from your existing customers, are there -- are there any other potential revenue surprises out there?
A. Well --
Q. Any more -- any more way to get money

out?

A. Well, you mentioned off-system sales margin, you mentioned customer growth. There's also changes in consumption on a per-customer basis.

Q. Uh-huh.

A. That would be the primary factors. There may be more insignificant items which could -- there could be nonsales revenue growth associated with, you know, renting poles to telephone and cable companies and customer deposit --

Q. Did you look at those factors in this case?

A. No, I did not spend -- I looked at the company's overall filing, but I did not do any detailed review of those factors.

Q. Okay. Is it -- is it -- is it fair to say that with the exception of off-system sales and, what is it, about 1 percent customer growth, that there aren't -- there aren't any additional -- any other possibilities out there that are known and measurable that we're just not taking into account?

A. Well, another possible, it's kind of a -- along with the customer growth is a use per customer.

Q. Right.

A. As houses become more electrified, there are additional electric appliances, they use more per household. Businesses can use more electricity to operate their business. So revenue growth would be the sum of customer growth and use per customer.
Q. Uh-huh. Did you look at Empire Electric's expenses in this case?
A. I looked at the overall filing, but I didn't do a detailed review of those.
Q. And you've looked at their filings in previous cases too, haven't you?
A. This is the first time I've testified on an Empire filing.
Q. Okay. Well, based on what you know, is it -- is it fair to say that Empire's cost of service has risen significantly in the last few years?
A. Yes, I believe their rates have increased, and my assumption is, is their rates are following their costs.
Q. Is it fair to say that fuel and purchased power costs are a significant cost driver of those rates?
A. Yes.
Q. Is it fair to say that Empire District Electric buys a lot of natural gas?

A. With the addition of its last gas-fired generating unit, yes.

Q. Do you recall what Empire Electric's weighted average cost of gas for the historical test period is in this case?

A. I do not.

Q. Do you know what the spot market price for natural gas on the New York Mercantile Exchange is today?

A. Not of today, no.

Q. Did you look last week, do you have any idea at all?

A. It's been moving in the range of ten and as high as 12, I believe.

Q. Okay.

A. That's dollars per million BTU.

Q. Mr. Gorman, you opined in this case that the presence of a fuel adjustment clause is worth a 50-basis-point reduction in Empire Electric's return on equity; is that correct?

A. Yes.

Q. Do you recall your testimony before this Commission in a previous case where you sat there in that very witness stand and told me that the absence of a fuel adjustment clause was worth only 25 or 30 basis points to the utility? Do you recall that testimony?

A. I do not.

Q. That's fine. You don't recall it.

A. I mean, that's not to -- well, sorry.

Q. That's all right. In selecting your proxy group, you listed seven criteria. No. 7 was, "Not exposed to corporate or market restructuring."

A. Yes, sir.

Q. What -- what does that mean?

A. Well, restructuring suggests that the enterprise is undergoing some change, and that can impact the valuation of the stock, it can impact the beta estimate of the stock, it can impact analyst growth projections for that stock. And those changes may reflect -- or those -- those valuation measures and those growth measures may reflect more largely on the change in structure rather than the long-term valuation and earnings outlook for that enterprise.

Consequently, the DCF and the CAPM return estimate from that enterprise may not reflect the underlying risk associated with providing regulated utility service. So because that point estimate could be skewed, it's appropriate to remove it from the comparable group.

Q. Okay. Is it fair to say that most utilities that -- most electric utilities that are not exposed to corporate or market restructuring are your traditionally vertically integrated utilities?

A. No. There are some wires companies now that are in the midst of ongoing market structures and -- and their corporate structures have been established and they're up and running.

Q. Mr. Gorman, what's the average Value Line safety rank of your proxy group?

A. I have not looked at that.

Q. Okay. You are the only ROE expert in this case to use Exelon in your proxy group, weren't you?

A. I believe so.

Q. Do you recall what Exelon's market cap is?

A. I don't recall that off the top of my head.

Q. So if I said it was somewhere in the neighborhood of more than 50 billion, you'd have no reason to doubt that?

A. I know it's one of the biggest market cap utility companies followed by Value Line.

Q. Uh-huh. Do you recall what Empire Electric's market cap is?
A. It's considerably smaller than Exelon, but I don't have the number in front of me.
Q. Are they a small cap?
A. They are a smaller capitalization than Exelon, yes, but they are an integrated utility company which largely mitigates the --
Q. Okay. I asked the question, are they a small cap. Do you know what a small cap is?
A. Well, it can be defined differently by different people.
Q. How would you define it?
A. It depends on for what purpose you're using the concept for.
Q. Well, in common terminology.
A. Well, there is no common terminology. If you're buying a mutual fund, a small cap could be a company that is a market cap of $1 billion or less. It could be 500 million or less. They define what they mean by small cap and they're -- they're SEC disclosures.
Q. Okay. Is it -- is it fair to say that most small caps are less than 2 billion?
A. There are indexes that would

characterize small caps as less than 2 billion.
Q. Okay. Do you know how much -- how many megawatts of generation Exelon owns?
A. I don't know that number anymore. I did at one point. I do not know.
Q. Something in the neighborhood of 24,000 megawatts?
A. That sounds -- something in that neighborhood, yes.
Q. A lot of nuclear?
A. Predominantly nuclear.
Q. Predominantly nuclear. Does Empire Electric have any nuclear?
A. They do not.
Q. Do you recall how much generation Empire Electric owns?
A. I don't have the number in front of me, but it's considerably smaller than Exelon.
Q. All right. Do you know if most of Exelon's revenues come from selling electricity in the wholesale market as opposed to its -- the distribution utilities it owns, like ComEd?
A. That's how Exelon generates its revenue?
Q. Right. Do you have any inkling where Exelon gets its revenues?

A. Yeah, I'm familiar with many of Exelon's wholesale market contracts, and they do not sell on the spot market predominantly.
Q. Right.
A. They're under longer-term contracts with the wholesale customers.
Q. Right, right. Is it fair to say that that's where most of their revenue comes from?
A. Well, it is, but it's under a contract. It's not spot purchases and sales.
Q. Okay. Do you know any utility executives that get paid more than John Rowe?
A. I haven't done a survey on that.
Q. But Empire Electric and Exelon are both diversified electric utilities that meet the criteria for your proxy group?
A. Well, diversification -- diversified electric utility was not a criteria of my proxy group, but having similar bond ratings was. And the overall assessment of risk for Exelon in comparison to Empire suggested that they were reasonable risk proxies to one another, and I relied on independent assessment by credit analysts to draw that comparison.
They look at all the factors in detail

that you just identified, and they concluded that the bond ratings of those two companies are reasonably -- well, they assigned bond ratings to those two enterprises, and I used those bond ratings as a factor to determine whether or not they're reasonable risk proxies of one another.

Q. Okay. On page 6 of your direct testimony, you stated Empire Electric had a business score of 6 from S&P, correct?

A. Page 6?

Q. Uh-huh.

A. Sorry. I say that on page 8.

Q. Page 8, okay. So, page 8, my apologies. S&P is Standard & Poor's, correct?

A. Yes.

Q. They use a 10-point scale with 1 being excellent and 10 being vulnerable?

A. They've recently upgraded that scale, but at the time I filed the testimony, yes, that -- that is -- that was the scale.

Q. Which number is closer to 6, 10 or 1?

A. 10.

Q. Okay. Do you recall reviewing Dr. Vander Weide's testimony?

A. Yes.

Q. And do you recall that his -- in his direct testimony one of the criteria that he cited was Empire Electric's S&P bond rating of triple B minus?

A. I believe that was the risk factor he considered, yes.

Q. Okay. You used a different factor, didn't you? Didn't you use the Senior Secured bond rating?

A. I used Empire's Senior Secured bond rating as well as the Senior Secured bond ratings for the companies I -- I included in my analysis.

Q. You have access to Staff's cost of service study, the Staff report?

A. Thank you, yes.

Q. Okay. Take a look at schedule 10.

A. Okay.

Q. Okay. Is that a list of Empire's bonds and unsecured notes?

A. Yes.

Q. Can you tell me which ones of those are, quote, Senior Secured, which ones are secured and which ones are unsecured?

A. Not from the information presented here. Normally the pollution control bonds will be tied to some specific asset.

Q. Okay.

A. But they do not distinguish whether or not the listed items are the secured or unsecured securities.

Q. Now, moving on through your DCF analysis, you use both a constant growth and a two-stage DCF analysis?

A. Yes.

CHAIRMAN DAVIS: Okay. Judge, is the SMART Board working?

JUDGE VOSS: It is, but I don't know how to work it.

CHAIRMAN DAVIS: Okay. All right.

JUDGE VOSS: I think you just go up and I point to it and you write on it.

CHAIRMAN DAVIS: Mr. Mills might be able to coach you through it. Could you help us, Mr. Mills?

MR. MILLS: I think you have to switch your view first from the Elmo to SMART Board.

MS. CARTER: He showed us that button, if anybody recalls. Did he show you how to do it on the remote?

JUDGE VOSS: I can't do it with the

remote.

MR. WOODSMALL: We're still on the record.

MS. KLIETHERMES: It's on the other side.

CHAIRMAN DAVIS: Well, if we preserve this on the record, then we might know how to use it for the future.

MS. CARTER: If you could stop typing while I talk. The minus side? Keep it until we get there.

MS. KLIETHERMES: Touch the SMART Board.

MS. CARTER: And then you just have to pick up the pen, he told us.

CHAIRMAN DAVIS: That's not my laptop, is it?

JUDGE VOSS: No.

MR. MILLS: No, don't do that.

MS. CARTER: Oh, don't do that? I thought you said to keep pushing it.

MR. MILLS: No. Nope. It will find it. There, that's the one. You can also do that with the note being up.

BY CHAIRMAN DAVIS:

Q. All right. Mr. Gorman, your constant

growth DCF was 11.54 percent; is that correct?
A. Yes.
Q. Okay. Can you -- can you write that on the screen for me?
JUDGE VOSS: There's an eraser up there too that works.
MR. MILLS: Now put the eraser back.
CHAIRMAN DAVIS: Do you have to put the eraser back?
THE WITNESS: Yeah.
CHAIRMAN DAVIS: Could be here a while.
THE WITNESS: (Witness complied.)
BY CHAIRMAN DAVIS:
Q. Okay. Now, your two-stage growth DCF was 9.46 percent; is that correct?
A. 9.46 percent?
Q. 9.46.
A. Yes.
Q. Can you -- can you give me the sum of those two numbers and then divide by two to give me the average?
A. Be 10.5 percent.
Q. Okay. 10.5. All right. Do you recall page 20 of your direct testimony where you noted the current projected payout ratios of your group?

A. Yes.
Q. Is that the -- is that what's referred to as the dividend payout ratio?
A. It is.
Q. Okay. Can you tell me what Empire Electric's dividend payout ratio was in 2003?
A. I don't have that number in front of me.
Q. Okay. '04, '05, '06, '07?
A. I did not bring those numbers with me.
Q. All right. You still have Staff's report on cost of service in front of you?
A. Yes.
Q. If you go to, I guess it would be the 1, 2, 3, 4 lines down, the Common Dividend Payout Ratio?
A. I'm sorry. What schedule are you on?
Q. Schedule 8.
A. Yes.
Q. Okay. Does the dividend payout ratio for 2003, is that reflected as 99.22 percent?
A. It is.
Q. 2004 is 148.84 percent?
A. Yes.
Q. 2005 is 139.13 percent?
A. Yes.
Q. 2006 is 90.78 percent?

A. It is.
Q. 2007 is 102.4 percent?
A. Yes, sir.
Q. Okay. Is it fair to say that the five-year average would be in excess of 100 percent?
A. It looks like that's most likely the correct number, yes.
Q. Is it fair to say the three-year average would be in excess of 100 percent?
A. Yes.
Q. And 2007 was 102 percent?
A. Correct.
Q. Now, the way you calculated in footnote 6, you calculated ROE equals G divided by earnings retention or 7.4 percent divided by 40 equals 18.5 percent. Is that a -- is that a fair characterization?
A. Yes.
Q. Okay. And you derived the 40 percent from subtracting your 60 percent payout ratio of your proxy group from 100 to get that 40 percent, correct?
A. Yes.
Q. Okay. 100 minus 100 is zero?
A. Correct.
Q. Can you divide 7.4 percent by zero?

A. No.
Q. No. Okay. Now, in your two-stage DCF model, you use the 5 percent growth rate; is that correct?
A. That's the -- that's the second-stage growth.
Q. That's what you -- that's what -- that's the -- the value you assigned to their -- their long-term growth rate for your 6 through 10, wasn't it?
A. Yeah, the second-stage growth --
Q. Uh-huh.
A. -- was -- was 5 percent, yes.
Q. Okay. So if you assume 5 percent growth and we assume that Empire's payout ratio was actually 80 percent, so you'd have 5 percent divided by 20 percent, come up with the number of 25 percent, wouldn't you?
A. You would.
Q. Okay. 25 percent's greater than 18.5 percent, isn't it?
A. It is.
Q. Okay. Okay. Moving onto your CAPM analysis, is the yield on the treasury bond the starting point of where anyone should begin their

CAPM analysis?

A. Well, the risk-free rate is one of the --

Q. You've got to figure the risk-free rate but -- I mean, you've got to add that to the treasury bond yield, correct?

A. No, sir. That's not how it works.

Q. Okay.

A. Well, I mean, you can do it that way, but that's not how it was designed to be constructed. The CAPM analysis requires an independent assessment of a risk-free rate and the independent assessment of a market risk premium and then an independent measurement of the company-specific risk factor or beta, because theoretically a lot of those factors can be determined independently. The reality is, is they are often interrelated to one another.

Q. Okay. But you did -- you did calculate a treasury bond yield for -- for purposes of your CAPM analysis, didn't you?

A. Well, I didn't calculate it. I looked at the observed market actual treasury bond rate and I looked at the consensus economists' projections of where treasury bond yields will be two years on. So it wasn't calculated.

Q. Okay.
A. It was --
Q. All right.
A. -- it was derived by publications.
Q. Okay. So what number did you use in your direct testimony?
A. That's shown on schedule MPG-16, the risk-free rate which is -- which is -- the projected treasury bond yield was 4.6 percent.
Q. Okay. Do you have your rebuttal testimony in front of you?
A. Yes.
Q. Turn to page 16.
A. I'm there.
Q. Okay. Lines 17 through 18 you said the projected 30-year treasury bond yield out over the next two years is approximately 4.8 percent; is that correct?
A. Yes.
Q. Okay. And if we look at your schedule MPG-10 which I believe is your direct testimony.
A. I'm there.
Q. Okay. You had a -- a 2007 number for the period January through June 2007. What was that number?

A. 4.89 percent.
Q. Okay. Do you have a calculator?
A. Yes.
Q. Okay. Looking at schedule MPG-10 of your direct testimony, do you see the treasury bond yield column?
A. Yes.
Q. Okay. Looking at that entire column, can you tell me what the lowest treasury bond yield you have listed is?
A. Looks to be the yield in 2005 on average annual yield of 4.65 percent.
Q. Okay.
A. But these are annual averages.
Q. All right. I understand. And your -- the average for 2004 was 5.05 percent?
A. Yes.
Q. For 2006 it was 4.91 percent?
A. Correct.
Q. And then the first six months of 2007 it averaged 4.89 percent?
A. Correct.
Q. Okay. If we added up the numbers for the period of 2003 through 2007 and took an average, can you calculate that average for me?

A. I get 4.89 percent.
Q. Okay. Now, Dr. Vander Weide filed his testimony in this case before you did, correct?
A. Yes.
Q. Okay. And he used the 20-year treasury bond rate from July 2007 that had a value of 5.19 percent, didn't he?
A. I believe that's correct.
Q. Okay. And you used the current treasury bond yield of 4.6 percent in your direct testimony, didn't you?
A. I did not. That was a projection of the treasury bond yield two years out at the time I filed my direct testimony.
Q. Okay. So you used -- used the project -- the 4.6 projection two years out?
A. Correct.
Q. Okay. Could you add 4.6 and 5.19 and then divide 2 to give me an average?
A. 4.89.
Q. Okay. Would you agree that 4.89 and 4.80 are closer together than 4.6 and 4.80?
A. It is closer, yes.
Q. Okay. Now, you used a beta value of .85 for your CAPM analysis, correct?

A. Correct.
Q. Dr. Vander Weide used a beta estimate of .94; is that correct?
A. Correct.
Q. Can you add those two numbers up for me and divide by 2 to give me an average?
A. Well, I think it would be .895.
Q. Okay. Now, can you look at schedule MPG-14 of your direct testimony?
A. I'm there.
Q. And what was the -- the comparable group beta average for your 2007?
A. .88.
Q. .88. If you were to exclude the 2003 column as .7 could be considered an outlier and take a four-year average, would that make the numbers higher?
A. Well, I would not agree with you that .7 is an outlier, but if you excluded 2003 and only used 2004 through 2007, the number would be higher --
Q. Okay.
A. -- for the four-year average. The numbers for 2007 would not change.
Q. Okay. Now, if we -- if we took the average of the averages for 2005, '6 and '7, what

number would that be?

A. For '05 through '07?

Q. '05, '06, '07.

A. .88.

Q. Now, Mr. Gorman, I notice that you cited the median on this page too. Do you cite -- cite median values anywhere else in your testimony?

A. Well, no, I don't, and the reason --

Q. That's okay, that's okay. Your attorney can ask you more questions later. Onto the market risk premium. You used two numbers, 6 and a half percent and 7 percent to calculate the range for your CAPM analysis; is that correct?

MR. WOODSMALL: Excuse me, Commissioner, could you repeat that again?

BY CHAIRMAN DAVIS:

Q. Mr. Gorman, you used two numbers, 6 and a half percent and 7 percent to calculate the range for your CAPM analysis; is that correct?

A. The market risk premium, yes.

Q. Yes, okay. Is the average of 6 and a half percent and 7 percent, is that 6.75 percent?

A. Yes.

Q. Okay. Now, your direct testimony on CAPM, that wasn't based on any information that was

provided by Morningstar, was it?
A. I'm sorry. Can you repeat that?
Q. Did you -- in your direct testimony did you rely on any information that you received from Morningstar?
A. Yes, it was all based on Morningstar information.
Q. Okay. Now, with regard to Dr. Vander Weide's testimony, I believe you criticized him because he only took the high number related to market risk premium; is that correct?
A. Estimated by Morningstar, yes.
Q. Okay. Now, you cited three numbers on market risk premium in your rebuttal testimony, didn't you?
A. Yes. For Morningstar?
Q. I don't recall if they were -- I believe they were from Morningstar, but I don't recall.
A. That sounds like they were. I'm just double-checking to see if it was in direct or -- rebuttal or surrebuttal.
Q. Pages 14 and 15 of rebuttal testimony, lines 4, 5, page 15.
A. Yes, sir, those are Morningstar projections of the market risk premium.

Q. Okay. Now, 7.1 percent was one number and that was for the long-horizon market risk premium using the S&P; is that correct?
A. With no adjustments.
Q. Okay.
A. Yes.
Q. Okay. And then you cited 6.8 percent based on the New York Stock Exchange index; is that right?
A. Well, yeah, quoting from Morningstar. These are not my estimates, but the Morningstar measures it various ways.
Q. Okay.
A. One was using the long-horizon risk premium from the S&P 500 which was 7.1. If they did the same thing and applied it to the New York Stock Exchange, it would be 6.8.
Q. Okay.
A. If they did it a third way with certain deciles of the New York Stock Exchange, it would be 6.2 percent.
Q. Okay. Now, you used an approximate average of 6.5 percent for the market risk premium variable, didn't you?
A. I --

Q. That was the low range of your CAPM direct testimony?
A. Well, we just went through mine in my direct testimony. The average of my market risk premium estimates was 6.75.
Q. Right. And 6.5 percent was the low range, correct?
A. The low end of the range, yes.
Q. And when you were recalculating Dr. Vander Weide's numbers in your rebuttal testimony, did you use 6.5 or 6.75?
A. Well, I used 6.5 because that was the --
Q. Okay. Thank you.
A. -- approximate midpoint of the Morningstar data.
Q. Thank you.
MR. WOODSMALL: Your Honor, at this point I would note that at no time throughout the course of this proceeding have you ever cut off another witness, and you are continually cutting off this witness. And I would make the request that you allow him to finish his answers.
CHAIRMAN DAVIS: Duly noted, provided that the witness is responsive to the questions. Okay.

MR. WOODSMALL: Were you done with that last response, sir?
THE WITNESS: Yes.
BY CHAIRMAN DAVIS:
Q. Okay. So Mr. Gorman, if you could, could you add for me 7.1 percent, 6.8 percent and 6.35 percent and then give me the average of those three numbers?
A. 6.75.
Q. Okay. Now, if we assume a 4.89 percent yield on treasury bills, if we assume a beta value of .88 and a market risk premium value of 6.75 percent, what would the CAPM number be? What would the return on equity be?
A. 10.83.
Q. Okay. You calculated your -- your bond yield plus risk premium a couple of ways -- different ways, didn't you?
A. Yes.
Q. Equity risk premium?
A. Yes.
Q. You used the projected 30-year treasury bond yield of 4.6 percent; is that correct?
A. Yes.
Q. And you recall your rebuttal testimony

where you said it was 4.8 percent?

A. I think in my rebuttal testimony I was responding to Dr. Vander Weide's testimony.

Q. Right.

A. So I would have been referring to his risk premium study.

Q. Okay. And so in his -- but still, it's a -- it's a -- it's a projected number, correct?

A. Well, no, it's not.

Q. Let's see. Now I've lost my place here. Excuse me. Do you recall how we just did the calculations and got to the 4.89 percent average for the 30-year treasury bond yield?

A. I did not write down those numbers.

Q. Okay.

A. I believe we worked off the actual numbers from the -- my schedule.

Q. Okay. So if we go to schedule MPG-10 of your direct testimony, the first way you calculated your equity risk premium analysis, you added the 30-year treasury bond yield, the 4.6 percent, plus the two numbers, the 4.4 percent and the 5.9 percent to calculate a range -- I'm sorry -- 4.4 and 5.9 percent, and that produced a range of 9 percent to 10.5 percent; is that correct?

A. For a treasury bond yield?
Q. No. For your equity risk premium analysis.
A. Sorry. Could you repeat that question?
Q. Okay. How did you calculate -- you calculated your equity risk premium analysis two different ways, correct?
A. Yes.
Q. Okay. The first method produced a range of 9 percent to 10.5 percent, correct?
A. That's correct. That's shown on page 26 of my direct testimony.
Q. Okay. Now, if we go back and look at schedule MPG-10, the entire 20-plus year average was 5.04 percent, correct?
A. Well --
Q. For the risk premium?
A. Yes.
Q. And since 2000, the indicated risk premium hasn't been below 5.38 percent, has it?
A. Are you referring to schedule M-10?
Q. Yes, MPG-10, the column 3, Indicated Risk Premium, if you look at the column from 2000 through 2007.
A. Yeah, the most recent year it's 5.83

percent, that's correct.

Q. Okay. So -- so if you took the average of the period of 2005 through 2007, what would that average be, Mr. Gorman?

A. 5.57.

Q. Okay. Now, if you took the average of the period between 2003 and 2007, what would that average be?

A. From '03 through '07?

Q. Uh-huh.

A. 5.69 percent.

Q. Okay. And if you took the average from 2000 through 2007, what would that be?

A. 5.66 percent.

Q. Okay. Now, Mr. Gorman, do you have a copy of -- do you have a copy of Dr. Vander Weide's surrebuttal testimony?

A. Not with me, no.

CHAIRMAN DAVIS: Could somebody provide him with a copy?

THE WITNESS: Thank you.

BY CHAIRMAN DAVIS:

Q. Could you go to page 2 of schedule JVW? I believe that's the first one. It's a three-page listing.

A. Page 2 of schedule JVW 2?
Q. I believe it's JVW-11. It should be three pages for that -- for that particular schedule.
A. JVW-1, page 2. I'm there.
Q. Okay. And there he lists the average ROE for the last year for companies that are not wires only at 10.6 percent, correct?
A. The schedule I'm looking at says 10.7.
Q. Okay. Is that schedule 2?
A. Schedule 2 or schedule 1? Schedule JVW-1, page 2 lists an average ROE without wires at 10.7 percent.
Q. Okay. And that's the -- that's just two quarters, correct?
A. It is.
Q. Okay. And if we go to page 3 which is second quarter 2007 through the first quarter of 2008, the average is 10.6, correct?
A. Yes.
Q. And then on -- we've had -- had previous testimony that the --
CHAIRMAN DAVIS: Let's see, what exhibit was this, Judge?
JUDGE VOSS: 229.
BY CHAIRMAN DAVIS:

Q. Is Exhibit 229 the regulatory focus handout that Ms. Kliethermes asked you about?
A. Yes, sir.
Q. If you go to page -- I believe it's page 3 -- or actually, go to the bottom of page 2 for the -- for the full year of 2007, it was -- the ROE average was 10.36?
A. Correct.
Q. So can we infer from Dr. Vander Weide's schedule as well as from our analysis of this Research Regulatory Associates average of all utilities, that the utilities that Dr. Vander Weide designated as having wires have a lower average ROE than the other utilities?
A. Well, if you don't make necessary corrections to Dr. Vander Weide's schedule. On his schedule JVW, he lists Interstate Power & Light which was duly footnoted as a wind generation return on equity, that's 11.7 percent and certainly drags that average up.
Q. Uh-huh.
A. And I would have to look at other companies that he chose to exclude in the development of this schedule to have him verify it as to being only excludeing T&D utilities, but certainly the

average --

Q. Right.

A. -- for '07 at 10.36 is lower than his 10.6 average.

Q. Okay. Now, also in his schedule JB1-W-- JVW-1, page 3 of 3, he also lists, is it Orange & Rockland for 18 October '07 for New York as having an ROE of 9.1?

A. He does.

Q. Okay. That's well below the national average, isn't it?

A. It is.

Q. Okay. Mr. Gorman, if we plugged the 10.7 number into your 2007 column on MPG-10 in lieu of the authorized electric return of 10.27 --

A. The authorized return as shown on schedule 10 is 11.64.

Q. Right. But the 2007 number in column 22, I guess that would be line 22, you've got your treasury bond yield of 4.89 percent.

A. Yes.

Q. If we inserted 10.7 in lieu of 10.27 --

A. Yes.

Q. Okay.

A. For just calendar year 2007 --

Q. Then we recalculated the indicated risk premium, that would give us a number of 5.81, wouldn't it?
A. Are you just using JVW-1, page 2, the 10.7 or 10.6 percent return?
Q. Yes, I'm using the JVW-1, page 2.
A. Yes. The higher the ROE, the higher the risk premium, and in that case it would be 5.8 percent.
Q. Okay. So if the projected treasury bond yield is 4.8 percent and the risk premium is 5.81 percent, you add those two numbers up and you get 10.1 -- 10.61 percent, don't you?
A. 10.6, yes.
Q. Okay. And if the treasury bond yield is 4.89 percent and you add that to the risk premium of 5.81 percent, you get 10.7?
A. Yes.
Q. Now, is it -- is it fair to say that your second risk premium analysis was based on the difference between regulatory Commission-authorized returns on common equity and contemporary A-rated utility bond yields?
A. Yes.
Q. Okay. What's Empire Electric's utility

bond rating?

A. The secured is BBB plus and the unsecured is BBB minus.

Q. And you started out with Moody's, is it DAA-rated bond yield of 6.42 percent; is that correct?

A. Excuse me?

Q. In your -- in your analysis, you called it -- this was in your second risk premium analysis, I guess it would be schedule MPG-13, you use the -- the 6.42 percent average?

A. Yes, sir, that's described at page 26 and 27 of my direct testimony.

Q. Okay. Now, do you recall page 11 of your rebuttal testimony stating that Dr. Vander Weide has projected A-rated utility bond yield of 6.25 percent was, quote, exaggerated?

A. Yeah, I did characterize it that way. It's higher than the actual observable bond yield at that time.

Q. Okay. So you started out with the 6.42 percent and you added a risk premium range of 3 percent to 4.4 percent over utility bonds; is that correct?

A. Yes.

Q. Okay. Now, according to your schedule MPG-11, line 22, the average for the first six months of 2007 was 4.27 percent, correct?
A. Yes.
Q. And for the period of 2003 through 2007, there's no average risk premium lower than that amount, is there?
A. No. '06 is pretty close, but it's not lower.
Q. So if we added your bond yield rate of 6.42 percent with the -- your 2007 number for a risk premium of 4.27 percent, does that give us 10.69 percent?
A. Yes, sir.
Q. And if we actually used Dr. Vander Weide's authorized electric return for the average of utilities that weren't wires only of 10.6, it would actually produce a higher number, wouldn't it?
A. If you didn't change the A-rated bond yield to reflect the remaining six months of the year and calculate the risk premium that way which would be incomplete, then yes, it would.
Q. Okay. Mr. Gorman, your overall recommendation in this case was 10 percent, wasn't

it?

A. Yes, sir.

Q. And if I take your recommendation of 10 percent, add it to Dr. Vander Weide's recommendation of 11.6 percent and divide by 2 to get the average, what would that average be?

A. 10.85.

Q. Do you recall what the high end of Mr. Barnes' recommended ROE range was?

A. I believe it was close to 10.8 percent.

CHAIRMAN DAVIS: Thank you, Mr. Gorman. No further questions.

JUDGE VOSS: Commissioner Clayton?

QUESTIONS BY COMMISSIONER CLAYTON:

Q. Mr. Gorman, I just -- I know you've been going for quite a while. I just have a couple of general questions. First of all, there is reference in all of the testimony to a concept known as the zone of reasonableness. Are you familiar with that terminology?

A. Yes, sir.

Q. And are you familiar with what -- what has come to be known as the zone of reasonableness in Missouri regulatory policy?

A. Yes.

Q. Okay. Is -- is that concept used in any other regulatory Commission that you've testified before?

A. Not formally, certainly. There -- there certainly is consideration in my -- my view of contemporary authorized returns on equity and the corresponding impact on stock price valuations and the ability to support growing dividends and so on to determine whether or not the recent authorized returns on equity do support stock prices, they do support earnings, they do support dividends.

And I believe if they listen to my testimony, they see the current authorized returns on equity are supporting those significant factors to equity shareholders. But I am not familiar with another commission that specifically has pronounced a zone of reasonableness policy, but that doesn't mean they don't take similar things into consideration.

Q. Well, is it -- does it make sense to just take an average of what companies are making around the country and choose that as the -- that average necessarily as a -- as an ROE for a given utility?

A. Well, not if you're talking about earned returns. The utilities' rates could be too low and produce earned returns on equity which are too low despite financial integrity.

Conversely, if the rates are excessive, customers are paying too much, your end return might be much higher than necessary to support financial integrity. Consequently, the regulatory commissions that I make recommendations to tends to estimate what the returns should be in order to fairly develop rates and also maintain financial integrity.

And that requires a review of market models, not earned returns on equity by utility companies, because if the earnings are overly healthy, that's the number you'll get. If the earnings are sick and not supportive of financial integrity, that's what you get.

But what you -- and my -- what I would recommend you strive for is to estimate what return on equity balances the interest of shareholders and customers by minimizing rates that customers must pay in order to maintain the financial integrity of the utility company.

COMMISSIONER CLAYTON: Okay. I don't think I have any other questions. Thank you.

JUDGE VOSS: Any additional questions from the bench?

(NO RESPONSE.)
JUDGE VOSS: All right. Recross based on questions from the bench? Public Counsel?
MR. MILLS: No questions.
JUDGE VOSS: Staff?
RECROSS-EXAMINATION BY MS. KLIETHERMES:
Q. You were getting some questions about the selection of the appropriate industry average. Do you recall that?
A. Yes.
Q. Does Dr. Vander Weide use 10.6 percent as his industry average for the period April '07 through March '08?
A. I do not believe so, no.
Q. Do you know what number he does use?
A. I don't have his schedules with me. In his ex post study, he measures the actual achieved return, not recent authorized returns on equity. In his ex post risk premium -- again, the ex post risk premium is based on his assessment of utility stock index achieved return and the S&P 500 achieved return in relationship to the yields on bonds. So Dr. Vander Weide didn't do it in the same manner in which I did it.
Q. And what -- what number does he use for

that?

A. Well, he looks at actual earned returns on investments and utility stock index relative to the return that would have been earned alternatively by making a bond investment. So he does not look at Commission-authorized returns in his ex post study.

Q. Are you aware if Dr. Vander Weide presents a proposed industry average for use in determining a zone of reasonableness?

A. Yes.

Q. And what number does he use for that?

A. I don't have that in front of me.

Q. Would you accept it as 10.6 subject to check?

A. Yes.

Q. And that would be reflective of the period April '07 to March '08 excluding transmission and distribution utilities --

A. Yes, that's --

Q. -- subject to check?

A. Yes, that's the schedule we just looked at.

Q. What is your recommended return on equity in this case?

A. 10 percent.

Q. How many basis points is that from the integrated-only industry average that the company recommends?

A. 60.

Q. What is the company's recommended return on equity?

A. 11.6.

Q. And how many basis points is that away from the company's recommended average?

A. 100.

MS. KLIETHERMES: That's all. Thank you.

JUDGE VOSS: Empire?

MR. SWEARENGEN: No questions, thank you.

JUDGE VOSS: Redirect?

MR. WOODSMALL: Thank you, your Honor.

REDIRECT EXAMINATION BY MR. WOODSMALL:

Q. You were asked some questions by Chairman Davis regarding risk reduction for fuel adjustment clause and whether 25 points or 50 points. Do you recall that?

A. Yes.

Q. Do you have any independent support for your recommendation that a fuel adjustment -- or a fuel adjustment clause will lower an ROE?

A. Well, I mean, it's a matter of judgment, but there is other witnesses that do recommend a return on equity adjustment. In the Ameren case Dr. Morin, Roger Morin, recommended a return on equity adjustment if the company's proposal for a fuel adjustment mechanism was not adopted.

He has made similar adjustments in other proceedings, as has company witnesses such as Dr. Hadaway who's testified for many Missouri utilities in other jurisdictions. He has recommended return on equity adjustments for a change in risk caused by the adoption of either a fuel adjustment mechanism or a change in the -- in the band widths used in certain fuel adjustment mechanisms such as those in the Pacific Northwest where fuel costs are reconciled outside of a band width in relationship to what's built into base rates, sort of deferral mechanisms that go along with that.

So there have been company return on equity witnesses that have recognized the adoption of fuel adjustment mechanism as a significant event and can recognize -- can justify a modification to their return on equity that would otherwise be awarded.

Q. You were asked some questions by the

Chairman about a company called Exelon. Do you recall that?

A. I do.

Q. Can you tell me if Exelon was one of the comparable companies used by Dr. Vander Weide in his proxy group?

A. Yes, sir, there was.

Q. Can you tell me in calculating a return on equity, the relevance of a proxy company's market calculation?

A. Well, if the relevance in a market proxy capitalization is whether or not that company has risk associated with its relative size, big companies theoretically can attract management that has more expertise than can smaller companies. Theoretically they can pay them more.

Big companies go out for bigger bond issues. They have better access to capital. Bigger companies can diversify their maintenance crews for a larger service area, and the cost for maintenance on a relative distribution system can be lower because of that economy of scale.

Bigger companies can diversify their -- their customer base over many more business customers, more residential customers and mitigate the revenue impacts associated with changing economic conditions. Weather can be risk in terms of sales, can be mitigated with the larger company.

All of those factors are considered by an investor and a credit analyst in assessing the relative operating risk of a utility company. So these aren't risks that can only be identified in a rate proceeding, but rather, they're risks that investors typically look at. They are risks that credit analysts look at and specifically tell us they look at.

So when you look at companies that have similar bond ratings, those bond ratings reflect the total credit risk and corresponding investment risk of the enterprise, one of those risks being the relative size of the enterprise.

Q. So you could have a company with a market capitalization many times larger than your target company and still have a fee of comparable risk?

A. You could. And the credit analysts would look at that risk and they would assign a bond rating that's supportive of the operations in that company to repay their financial obligations.

Q. And you would -- you still believe that

Exelon is appropriate -- is appropriately included in your proxy group?

A. I do. It has -- it reasonably meets the risk criteria identified in my testimony, it's appropriately included in it.

Q. And would you agree that megawatts of generation is implicitly included in a company's bond rating?

A. Well, yes, specifically the amount of generation, whether or not it's regulated, deregulated, whether or not the output is under contract or it's sold into the clearing markets without the -- the risk reduction aspects of contracts. All of that's considered by credit analysts in assessing the credit quality and bond rating of the enterprise.

Q. And despite the fact that a particular company may have many times more megawatts of generation, they could be included in a proxy group for a target company; is that correct?

A. If they were reasonably -- had the same bond rating, it is -- it is reasonable to conclude that there's a reasonable risk proxy.

Q. Try to handle a lot of questions all at one time. You were asked to do many, many calculations by Chairman Davis. Do any of Chairman Davis's mix-and-match calculations change your view as to an appropriate ROE for Empire?

A. They do not. And the reason is, many of those calculations were done only changing one factor. They didn't completely update all the factors that went into the return on equity study.

As an example, the average bond ratings for both treasury and utility bonds would change if I went from a six-month average in 2007 to a full calendar year average. The Chairman had me change simply the average authorized return on equity for the six months to the annual average. That didn't produce the same risk premium implied through authorized returns on equity for the full calendar year.

He reviewed the calculation of the internal growth rate using Empire data as a payout ratio assumption of 80 percent in a -- in a long-term growth rate implicit in that analysis which suggested an earned return on equity of around 25 percent.

Well, the fact is, it -- maintaining a 5 percent growth rate for a company probably couldn't be done at an 80 percent payout ratio. The more of your earnings you pay out, the lower your growth rate is going to be.

And like a savings account, if you're earning 10 percent on a $100 deposit in your savings account, the end of the first -- you have a $100 deposit at the end of the first year, you have $10 of earnings. If you reinvest that $10 back into your account, you have $110 the second year.

If you earn 10 percent on that $110 deposit the next year, you have a hundred -- you have $11 income. Your income grew by 10 percent in that year because you had 100 percent retention of all earnings. If you would not have returned -- retained any of that interest earnings, the balance would have stayed at $100, your earnings would stay at $10 and your growth rate would be zero.

So there's a direct correlation in your earnings growth and your retention payout ratio, retention ratio and your payout ratio. You can't hold one constant and let the other one float. They interrelate to each other. So that conclusion produced an illogical result because the underlying assumptions that need to go into interpreting those assumptions were not reasonable.

Q. Were any of the methodologies suggested by Chairman Davis' calculation consistent with your methodologies?

A. Well, the mathematics were consistent but the underlying matching of the time period of the data was not because in many cases that was inconsistent.

Q. Did any of the calculations that Chairman Davis had you perform ever end up supporting the 11.6 ROE recommended by Dr. Vander Weide?

A. No, sir, didn't come close to it.

MR. WOODSMALL: No further questions. Thank you.

JUDGE VOSS: Mr. Gorman, thank you for coming today.

THE WITNESS: Thank you.

JUDGE VOSS: And you may step down.

MS. KLIETHERMES: Judge, if I could offer at this time Staff's Exhibits 216 and 203?

JUDGE VOSS: I think 203 was offered, but if not, it's better to offer it again. And I'll rule on all of those after the stip presentation or stip issues are addressed. And I'll make sure tomorrow at the stip presentation to ask Department of Natural Resources if they want to offer their exhibits.

All right. Think about briefing

schedules because I'll probably want to have briefs of the nontrue-up issues, you know, before -- you know, earlier. I don't want to wait until after all the true-up stuff is done. That way I can get the other things in process and the Report and Order.

So we can talk about that tomorrow after the stip presentation which should begin at 10:00. And I'll have the phone ready and everyone has the numbers too. You can get them off the notice. Okay. Are there any other questions we need to address before we go off the record?

(NO RESPONSE.)

JUDGE VOSS: Hearing none, this concludes the on-the-record presentation. Thank you.

(WHEREUPON, the hearing in this case was recessed until the following day, May 20, 2008, at 10:00 a.m., when a Stipulation Hearing was conducted.)

I N D E X

ISSUE: FUEL ADJUSTMENT CLAUSE

EXHIBITS INDEX

* Marked in a previous volume.
** Late-filed. Marked at a later date.
*** Late-filed. Not yet received into evidence.

CERTIFICATE OF REPORTER

STATE OF MISSOURI)
)ss.
COUNTY OF COLE)

I, PAMELA FICK, RMR, RPR, CSR, CCR #447, within and for the State of Missouri, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action to which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

PAMELA FICK, RMR, RPR, CSR, CCR #447