

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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6 TRANSCRIPT OF PROCEEDINGS
7 Prehearing Conference
8 December 6, 2006
9 Jefferson City, Missouri
Volume 2

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11

12 The Staff of the Missouri Public)
Service Commission,)
13)
Complainant,)
14)
v.) Case No. GC-2006-0491
15)
Missouri Pipeline Company, LLC,)
16 and Missouri Gas Company, LLC,)
)
17 Respondent.)

18

MORRIS L. WOODRUFF, Presiding,
19 SENIOR REGULATORY LAW JUDGE.

20

21 REPORTED BY:

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FOR: Staff of the Missouri Public
Service Commission.

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

2 JUDGE WOODRUFF: Well, I think everyone's
3 represented. We'll start today by taking entries of
4 appearance. First of all, this is Case No. GC-2006-0491,
5 which is Staff's complaint against Missouri Pipeline
6 Company and Missouri Gas Company. And we're here today
7 for a prehearing conference, and we'll begin by taking
8 entries of appearance, first for Staff.

9 MS. SHEMWELL: Lera Shemwell, Steven Reed,
10 Blaine Baker, Kevin Thompson and Peggy Whipple for the
11 Staff of the Commission.

12 JUDGE WOODRUFF: And for the pipeline
13 companies?

14 MR. DeFORD: Paul DeFord and Aimee
15 Davenport with the law firm of Lathrop & Gage, 2345 Grand
16 Boulevard, Kansas City, Missouri 64108, appearing on
17 behalf of Respondents Missouri Pipeline Company and
18 Missouri Gas Company.

19 JUDGE WOODRUFF: And for Public Counsel?

20 MR. POSTON: Marc Poston appearing on
21 behalf of the Office of the Public Counsel.

22 JUDGE WOODRUFF: For Ameren?

23 MS. DURLEY: Colly Durley, the law firm of
24 Smith Lewis, Columbia, Missouri.

25 JUDGE WOODRUFF: And for Municipal Gas

1 Commission of Missouri?

2 MR. WOODSMALL: David Woodsmall, the firm
3 of Finnegan, Conrad & Peterson.

4 JUDGE WOODRUFF: I believe that's
5 everybody. The first thing I want to do today is take up
6 a couple of small pending motions that were filed, motions
7 to late file list of issues filed by Staff, motion to file
8 late statement of positions by Municipal Gas Commission of
9 Missouri, and Ameren's motion for leave to file
10 supplemental statement of positions. Does anyone have any
11 objections to any of those motions?

12 (No response.)

13 JUDGE WOODRUFF: Hearing none, I'll go
14 ahead and grant them, so get those out of the way.

15 The main reason I asked to have this
16 hearing was -- or this prehearing conference was, of
17 course, the hearing starts next week, and I just wanted to
18 get some idea of what's going to happen at the hearing,
19 what the procedures are going to be, and deal with a few
20 issues that have recently come up. I will tell you that
21 this is on agenda for tomorrow for prehearing discussion
22 with the Commissioners, so I'll be able to -- I'll be in a
23 position to report to them what I learned today from the
24 attorneys.

25 The first thing I want to bring up was

1 Staff's statement of issues and list of witnesses indicate
2 there will be some additional witnesses. First of all, I
3 wanted to find out, are these people going to actually be
4 testifying or will this be by deposition?

5 MS. SHEMWELL: We have deposed all of these
6 people. We haven't deposed Jim Massman. He's Ameren, of
7 course. And Smith and John are their witnesses. We have
8 deposed Mr. Simpson, Mr. Lodholz and Mr. Wallen, and if
9 they can come in by deposition, I think that that will be
10 satisfactory for the Staff.

11 JUDGE WOODRUFF: First of all, who is
12 Mr. Simpson?

13 MS. SHEMWELL: Mr. Simpson is at the Fort.
14 He is their gas buyer. He's Fort Leonard Wood's gas
15 buyer.

16 JUDGE WOODRUFF: And the other two
17 individuals are?

18 MS. SHEMWELL: Work for MPC or MGC, or did
19 work for MPC and MGC and Omega.

20 JUDGE WOODRUFF: So you're proposing just
21 to submit their testimony by deposition?

22 MS. SHEMWELL: Yes.

23 JUDGE WOODRUFF: Is there going to be any
24 objection to that from any other party?

25 MR. DeFORD: I believe that depends.

1 Normally in the course of litigation if a party intends to
2 use deposition testimony, they would designate those
3 portions of the transcripts that they intended to put in,
4 and the -- we would be then entitled to counter
5 designations of portions. I haven't seen any designation
6 or proposed designation from any party.

7 JUDGE WOODRUFF: What's Staff's position on
8 that?

9 MS. SHEMWELL: I guess we can designate.

10 MR. THOMPSON: I'm not aware of any
11 Commission rule requiring that. The rule is that
12 depositions can be used for any purpose, and that's what
13 we plan to do.

14 JUDGE WOODRUFF: So you would just offer
15 the entire deposition? I assume all parties participated
16 in the deposition?

17 MS. SHEMWELL: All parties were invited to
18 participate and were offered the opportunity to
19 participate. And I believe that all parties have the
20 option of or have received them if they want to, have
21 received copies.

22 JUDGE WOODRUFF: Okay. Well, we can deal
23 with that at that point, then. And can you tell me what
24 issues they'll be talking about?

25 MS. SHEMWELL: Mr. Lodholz is -- was their

1 controller, so he is the man whose invoices are part of
2 the exfoliation argument, and he kept the books and
3 records. Mr. Wallen is their operations vice president, I
4 think. And they both testified about what they do for MPC
5 and MGC and Omega. They have different roles.

6 Mr. Lodholz has left the company, but his
7 was the first deposition that we took, and he talked about
8 how money was received and distributed and those sorts of
9 things, various employees and their roles with the
10 company.

11 JUDGE WOODRUFF: Okay. And Mr. Simpson?

12 MS. SHEMWELL: Mr. Simpson talks -- is Fort
13 Leonard Wood's gas buyer. He is familiar with Omega's
14 processes at the Fort, how much they buy, what kind of
15 contracts they have. While he's not an attorney, he is
16 their contract administrator, so he was able to talk about
17 the various provisions of the Omega contract with the
18 Fort, how much capacity they have, what arrangements they
19 make in terms of peak shaving facilities and operations
20 and that sort of thing.

21 JUDGE WOODRUFF: Okay. I was also curious
22 about estimates of time that's going to be required for
23 the hearing.

24 MR. DeFORD: Your Honor, before we leave
25 the deposition issue, I guess the other problem that I

1 would raise with use of the depositions that Staff now
2 suggests is that the depositions were in their possession
3 and they could have addressed all of those issues in their
4 surrebuttal testimony, and we would then have at least
5 notice of what portions of the depositions the Staff
6 intends to use in order to attempt to prove its case.

7 Not having taken that opportunity, I think
8 it's an abuse of process to now come back and at the
9 eleventh hour say, gee, we're going to use parts of this
10 without again, you know, notice of any sort to the parties
11 that there was intent to use those transcripts.

12 Staff, in fact, in its direct case attached
13 portions or all of deposition transcripts, and we were
14 able to address that in our rebuttal testimony. This
15 completely defeats the purpose of requiring the parties to
16 file prepared testimony.

17 MS. SHEMWELL: Again, Judge, the rules are
18 that depositions may be used in a hearing for essentially
19 any purpose. That can be no surprise at all to
20 Mr. DeFord. The fact that we may want to use portions of
21 this again can be no surprise to him. That's the reason
22 you take depositions.

23 We did not attach them because it's our
24 understanding that the Commission actually prefers we not
25 dump an entire deposition in, but in terms of picking out

1 certain portions that we may or may not use at hearing, it
2 seems to me that that's disclosing our strategy. As we go
3 along, as the hearing proceeds, that may change as well.

4 MR. DeFORD: Well, your Honor, again, that
5 completely -- you know, why did we bother filing prepared
6 testimony? I mean, if the case is going to change and
7 mutate at hearing, then the entire exercise that we've
8 suffered through in putting together prepared testimony
9 and exhibits has been a complete waste of time.

10 And the depositions, at least two of these
11 that they're talking about now using were taken in July
12 and August. That's well before the surrebuttal testimony
13 was due. So to again now in the week before the hearing
14 to identify these people as witnesses who apparently will
15 not even be in attendance, again, I think it certainly is
16 not consistent with the Commission's order establishing a
17 procedural schedule.

18 MR. WOODSMALL: I guess, your Honor, just
19 as an initial matter, we would support Staff on this
20 issue. I don't believe -- are you searching -- are you
21 going to make a decision? I notice there's no pending
22 motion, so --

23 JUDGE WOODRUFF: I'm not intending to make
24 a decision on it today.

25 MR. WOODSMALL: Okay. So you're not

1 looking for argument on this at this point?

2 JUDGE WOODRUFF: That's right. Although
3 it's certainly helpful to me to know what's going to be
4 facing me when I get on the bench on Wednesday.

5 MR. WOODSMALL: Well, then I'll weigh in
6 fully when we get to the hearing.

7 JUDGE WOODRUFF: Certainly. And that's the
8 main purpose of today is to give me some idea of what's
9 going to be coming. So no, I'm not going to make a ruling
10 on it today, and I will make a ruling on it at the
11 appropriate time.

12 MR. THOMPSON: And we'll be happy to
13 present you with a memorandum at the opening of the
14 hearing explaining why we think we can do what we're
15 doing.

16 JUDGE WOODRUFF: I think that's fine.

17 MR. THOMPSON: Thank you, your Honor.

18 JUDGE WOODRUFF: All right. One other
19 thing I wanted to bring up. In both parties' -- both the
20 issues list and order of cross-examination that was
21 submitted by the pipelines as well as by Staff, you
22 mentioned the Federal Executive Agencies, and I don't
23 believe they're a party in this case, unless I've missed
24 something.

25 MR. WOODSMALL: I think you're correct.

1 They're in the 378 case, but not this one.

2 MS. SHEMWELL: That's true.

3 JUDGE WOODRUFF: I just wanted to make sure
4 I haven't overlooked something.

5 I know there was also a statement in
6 Staff's filing suggesting that we might need to go into
7 evenings and weekends, and I wanted to explore whether or
8 not -- what's your reason for thinking that is going to
9 be, and whether or not all the parties agree that that's
10 going to be necessary. Ms. Shemwell, do you want to
11 address that?

12 MS. SHEMWELL: Judge, as you know, it's
13 very difficult to predict how a hearing is going to go and
14 how many questions are going to come from the Bench, which
15 then of course generate recross and redirect.

16 JUDGE WOODRUFF: Certainly.

17 MS. SHEMWELL: So in looking at the volume
18 of information that we have and also some additional
19 arguments that will need to be made, Staff just thought it
20 was wise to alert the Commission that we're not sure that
21 three days eight to five will be adequate, and thought
22 that it might be a good idea to be prepared to go longer
23 if necessary.

24 I think our preference would be to try to
25 get it done within the three days rather than go into the

1 weekend if we need to go late. And I'm thinking that
2 perhaps we will know, have some idea the first day of how
3 many questions there will be from the Bench, and how far
4 we get on that first day may give us an idea of how we can
5 proceed.

6 JUDGE WOODRUFF: Mr. DeFord, what's your
7 view on that possibility?

8 MR. DeFORD: Well, I would agree that you
9 never know how the hearings are going to go, but --

10 JUDGE WOODRUFF: I'd certainly agree with
11 that also.

12 MR. DeFORD: Yeah. And it's not at all
13 unusual, I think, to in some instances go into the
14 evening. Unfortunately, or maybe fortunately, I have a
15 conflict for that coming weekend that --

16 MR. THOMPSON: Me, too.

17 MR. DeFORD: I think it's pretty
18 unavoidable.

19 JUDGE WOODRUFF: I'm certainly not inclined
20 to try and go on a Saturday or Sunday either.

21 MR. WOODSMALL: I think as Ms. Shemwell
22 noted, I think the two key witnesses in this case are
23 probably Mr. Schallenberg and Mr. Ries, and after we get
24 done with Mr. Schallenberg, we'll have a much better idea.
25 If he's done early on Wednesday, we'll probably be okay.

1 If he takes the whole day, that will be a good indication.

2 JUDGE WOODRUFF: Okay. And I realize that
3 we can't decide now how long the hearing is going to last.
4 Like Ms. Shemwell said, a lot of that depends upon the
5 questions from the Commissioners as well as how long the
6 cross-examination takes.

7 I certainly encourage everyone to try to
8 make your cross-examination as succinct as possible. And
9 as presiding officer, of course, I'll certainly entertain
10 objections to things that -- keep things moving along, and
11 if you think something's objectionable, don't hesitate to
12 make your objection.

13 One thing that occurred to me -- and I've
14 not run this by the Commissioners at all yet -- would be
15 the possibility of having sort of a bifurcated procedure
16 whereby we would first consider the liability question and
17 then calculate penalties or refunds if the Commission
18 found in Staff's favor on the liability question, or if
19 the Commission found, in fact, that there was a violation
20 of statute. Is that something the parties have
21 considered?

22 MS. SHEMWELL: Actually, we have not
23 considered it.

24 MR. WOODSMALL: I guess I would question,
25 while I would like in this case for the Commission to have

1 the authority, and I need to do some looking at this, I
2 question whether the Commission has the authority to order
3 refunds. That is, the Commission certainly has the
4 authority to interpret the tariff to decide if there were
5 overcharges, but I've been operating -- and as I said,
6 I'll go dig at this further -- I've been operating under
7 the presumption that once we have the Commission decision
8 as to what the appropriate rate was for the appropriate
9 time, that I would then have to go to circuit court to
10 seek refunds.

11 MR. THOMPSON: I think that's pretty clear
12 under the Laundry, Inc. line of cases, and equally with
13 penalties, your Honor, the Commission can authorize
14 General Counsel to seek penalties, but the computation of
15 penalties is within the discretion of the circuit court.

16 JUDGE WOODRUFF: So you wouldn't be
17 expecting the Commission to say penalty should be X amount
18 of dollars?

19 MR. THOMPSON: I'm not expecting that.

20 JUDGE WOODRUFF: And you're not expecting
21 the Commission to say the refund should be X amount of
22 dollars?

23 MR. WOODSMALL: I think they can do it, but
24 they can't order it. They can give a quantification for
25 the benefit of the circuit court.

1 MS. SHEMWELL: And I think that they can
2 determine what the rates --

3 MR. THOMPSON: They certainly can determine
4 what the rates should be, should have been. But as far as
5 ordering refunds, I think that that would be something
6 you'd have to go to circuit court to get.

7 MS. SHEMWELL: Kevin mentioned Laundry, and
8 that's an old, quite an old case, I believe out of Kansas
9 City in which it was actually a case involving a laundry,
10 and we'll be happy to get that for you if you like.

11 JUDGE WOODRUFF: I think I have seen it
12 before.

13 MR. THOMPSON: Sure. And there's several
14 citations to it since over the years, and always with
15 approval. It's not a doctrine that's in question.

16 MS. SHEMWELL: It may be 30 SW 2nd 33.

17 JUDGE WOODRUFF: Does that meet with your
18 agreement also about calculation of refunds and --

19 MR. DeFORD: We would agree that the
20 Commission doesn't have authority to impose an obligation
21 to refund or to actually impose any kind of civil penalty.
22 How you get there, assuming that they do make some sort of
23 a finding that a rate charge was incorrect, again,
24 that's -- that's something that's I think open for some
25 debate.

1 I do agree that the Commission can't award
2 damages, can't order refunds or can't impose an actual
3 civil penalty.

4 JUDGE WOODRUFF: Okay. Do you agree that
5 the Commission does not need to calculate, then, an amount
6 of a refund, simply -- assuming that we found a violation,
7 the Commission would have to just determine what the
8 proper rate was, but it wouldn't necessarily have to
9 determine that Ameren is entitled to so much and
10 Municipals are entitled to so much?

11 MR. DeFORD: Actually, that may be
12 something that would have to be the subject of a separate
13 proceeding. I'm not sure that a circuit court has the
14 authority to make those determinations either.

15 MR. THOMPSON: I guess we'll find out as
16 this unfolds.

17 JUDGE WOODRUFF: I guess so. All right.
18 One other thing I wanted to bring up for your
19 consideration. In some of the larger rate cases we've
20 been preassigning exhibit number blocks. Staff gets
21 numbers 1 through 100 and so forth. Do you think that
22 would be helpful in this case?

23 MS. SHEMWELL: I think that would be just
24 fine.

25 JUDGE WOODRUFF: I'll issue an Order

1 assigning numbers. That way we can spend less time before
2 the hearing starts on figuring out what numbers to assign
3 to the exhibits. So everybody -- for all the parties,
4 then, what you need to do is premark your exhibits and
5 just bring them the day of the hearing and we'll just
6 assign them that way.

7 Okay. I believe that's all I wanted to
8 talk about. Is there anything anybody else wants to bring
9 up?

10 MR. WOODSMALL: I had one matter. I'll
11 note that, as you're aware, the Commission denied our
12 application for rehearing, reconsideration yesterday, and
13 I'm not going to use this as an opportunity to reargue
14 that.

15 I would note, however, that it is my
16 intention now to make an offer of proof at the hearing.
17 It shouldn't take much time. I'll put the witness up, ask
18 her the foundation questions and make an offer of proof,
19 but she should be up and down pretty quickly and it
20 shouldn't delay anything.

21 JUDGE WOODRUFF: Thank you for letting me
22 know that.

23 MR. WOODSMALL: Sure. And I don't know if
24 you have a particular time in the schedule, maybe after
25 Staff's done, after UE's witness is done, whenever you

1 want to do it, and I'll check with my witness and make
2 sure she's available then.

3 MS. SHEMWELL: If I could bring up what I'm
4 calling the last issue, the destruction of documents
5 issue.

6 JUDGE WOODRUFF: Yes.

7 MS. SHEMWELL: Staff received documents
8 today. Staff does not agree that those documents satisfy
9 its issue on destruction of documents, and we would like
10 to reserve a little time to present witnesses on that
11 issue.

12 JUDGE WOODRUFF: Do you know who the
13 witnesses would be?

14 MS. SHEMWELL: Yes. It would be Janis
15 Fischer, Bob Schallenberg, potentially Mark Oligschlaeger.
16 As you may know, he is off work right now. And Craig --

17 JUDGE WOODRUFF: Actually, I didn't know
18 that.

19 MS. SHEMWELL: Potentially Craig Branum.

20 JUDGE WOODRUFF: And what would these
21 witnesses be offering?

22 MS. SHEMWELL: I'll let Steve...

23 JUDGE WOODRUFF: Mr. Reed?

24 MR. REED: Primarily they would be
25 testifying to admissions.

1 JUDGE WOODRUFF: Admissions made by the
2 pipeline?

3 MS. SHEMWELL: Yes.

4 MR. REED: Yes. And I think that with
5 regard to the issue of the use of depositions, we've
6 litigated that through motions, of course, and there's
7 been some discussion about what B.J. Lodholz said in his
8 deposition. So with regard to the use of depositions at
9 this hearing, you know, obviously Mr. Lodholz's deposition
10 would be useful to the Staff on this particular issue.

11 So I would think that Mr. DeFord can review
12 that deposition, determine what the Staff may use from
13 that deposition, and then either bring Mr. Lodholz to the
14 hearing or use whatever part of that deposition Mr. DeFord
15 thinks is useful for him.

16 MR. DeFORD: Again, I mean, I've got a
17 significant problem. I mean, these folks that you're
18 talking about putting on the stand --

19 MR. THOMPSON: We agree you have a
20 significant problem.

21 MR. DeFORD: There was a procedural
22 schedule wherein you had the ability to file prepared
23 testimony. If you had an issue that you didn't raise,
24 then it's too late. I think that there's -- that it's
25 been completely disingenuous of the Staff to wait until

1 seven days before a hearing and then disclose that, oh,
2 there may be seven more witnesses. And frankly, we will
3 object to the admission of any of that testimony.

4 MS. SHEMWELL: You're going to object to
5 the admission of any of the depositions?

6 MR. DeFORD: No. The way that should have
7 been handled should have been that you should have taken
8 the issues that you had and put those depositions,
9 included it in your surrebuttal testimony. You didn't do
10 it. You had every opportunity to do it, and Staff didn't.

11 And now to say that you intend to put on
12 additional live direct testimony on yet a completely
13 separate issue, you know, what you should have asked for
14 is an extension of time and the ability to ask to file
15 supplemental surrebuttal testimony that we could have
16 responded to.

17 MR. THOMPSON: Well, you'll have every
18 opportunity to cross-examine these witnesses.

19 MR. DeFORD: No, that's not the case.

20 MR. THOMPSON: That's all due process
21 allows you to do. And let me point out further that the
22 alteration of the records of a regulated entity is I
23 believe a felony under Chapter 386, Mr. DeFord.

24 MR. DeFORD: You know, this is getting
25 nowhere, and making these kinds of unfounded,

1 unsubstantiated accusations. Again, if you can prove this
2 stuff, ask for an extension, follow the Commission's
3 procedures, file prepared testimony, which we will respond
4 to. We may have to call additional witnesses. I mean,
5 this is kind of this amorphous, you know, Perry Mason
6 stuff that we're going to bring in our secret witnesses at
7 the eleventh hour.

8 MS. SHEMWELL: Judge, we deposed these.

9 MR. DeFORD: That's not the way Commission
10 practice works. At least in my experience it certainly
11 isn't.

12 MS. SHEMWELL: There's no surprise here,
13 Judge. Mr. DeFord's been in on all of these depositions.
14 It's not like we went and secretly deposed somebody. He's
15 been in on all of these depositions. He knows what the
16 witnesses said.

17 JUDGE WOODRUFF: It's my understanding that
18 the last I believe you said four witness, Ms. Fischer,
19 Oligschlaeger, Branum and Schallenberg, would be -- those
20 were just on the exfoliation issue?

21 MS. SHEMWELL: Absolutely, yes.

22 JUDGE WOODRUFF: Which I assume is going to
23 be fairly limited?

24 MS. SHEMWELL: Yes.

25 MR. REED: Yes, brief, real short.

1 JUDGE WOODRUFF: All right. Mr. DeFord,
2 did you intend to bring any additional live witnesses in
3 on the exfoliation issue?

4 MR. DeFORD: Your Honor, at this point, how
5 could I? I have no idea what their testimony is going to
6 be. I can't get a subpoena because I believe it has to be
7 issued 20 days before the hearing, and frankly, I don't
8 know who I would subpoena at this point anyway. I have no
9 idea what the testimony is going to be. So, you know, to
10 the extent that we're calling surprise witnesses, I just
11 can't say.

12 I mean, Mr. Lodholz is not an employee of
13 the company. I can't compel him to appear or do anything
14 without a subpoena. I just -- and I don't know who else I
15 may have to get involved in this. Again, if Staff wants
16 to raise these issues, you know, ask for an extension, put
17 it in the typical Commission practice, file prepared
18 testimony so that we'll have an opportunity to conduct
19 discovery of our own.

20 JUDGE WOODRUFF: Well, as I indicated, I'm
21 not going to try and rule on any motions today. So we'll
22 deal with this when the hearing starts.

23 MS. SHEMWELL: The exfoliation issue really
24 has come up recently. That's not -- that's not -- that's
25 something that has been going on, but that's something on

1 which we'll do the law.

2 MR. DeFORD: My understanding is, your
3 Honor, that this issue, as I understand it -- now, maybe I
4 don't understand what Staff's allegations are because they
5 haven't clearly made them, but I thought that exfoliation
6 had to do with some documents that Mr. Lodholz referenced
7 in his deposition, which we think we may have found, but
8 until we track him down, we don't know if that's actually
9 what he was referencing at all.

10 But we provided those to the Staff
11 conditionally saying that we think this might be it, we're
12 not sure. As soon as we track him down, we'll know.

13 MR. REED: Well, he executed an affidavit
14 saying that he would be available for, I think it was for
15 a year to respond to questions or depositions for this
16 case.

17 MR. DeFORD: Well, and that's why we intend
18 to track him down.

19 JUDGE WOODRUFF: Is there a possibility
20 that Mr. Lodholz will be there at the hearing? Apparently
21 no one subpoenaed him.

22 MR. DeFORD: I don't know. We didn't plan
23 to use him. We didn't think that there was anything of
24 any substantial value in the deposition. We didn't feel a
25 need to. Had we intended to use him, we would have had

1 prepared testimony.

2 JUDGE WOODRUFF: Okay. Well, I guess there
3 will be some issues coming up on Wednesday, then.

4 MR. REED: Yeah. There's another I need to
5 bring to your attention as well.

6 JUDGE WOODRUFF: Go ahead, Mr. Reed.

7 MR. REED: We anticipate, but we're not
8 sure, that there may be an allegation by a witness from
9 the pipelines that the contract with Cuba was somehow --
10 the written contract was somehow verbally altered. If
11 that allegation is made, we would, of course, need to
12 bring in a witness from the City of Cuba to rebut that.

13 So we've identified the person we think we
14 would need to rebut that sort of an allegation. But if
15 Mr. DeFord were to tell us that none of his witnesses
16 intend to make that sort of allegation, then we would not
17 need to subpoena this witness.

18 MR. DeFORD: Again, I mean, I cannot tell
19 my witnesses what to say or not say. I have never thought
20 that that was within my power. Witnesses are, I believe,
21 required to truthfully answer questions, and I would
22 expect my witnesses to do so. I can't tell you what my
23 witnesses are going to say.

24 Again, it appears to me that maybe we're
25 just not ready to go with this thing if Staff's case isn't

1 complete. If you think you need a witness from the City
2 of Cuba, ask for an extension, we'll conduct discovery,
3 we'll see what the testimony is and we'll respond to it.

4 MR. REED: Well, there have been many, many
5 times where I've told a witness that, for instance, the
6 judge has entered a motion in limine and you will not talk
7 about this issue. It happens every day in a courtroom.

8 MR. DeFORD: Well, there's no motion in
9 limine here.

10 MR. REED: Well, this is it. Either we get
11 an agreement or we bring in the witness from the City of
12 Cuba and we put the witness on in rebuttal.

13 MR. DeFORD: Well, I'll tell you, you're
14 not going to get agreement, and I'm going to move for an
15 extension because there's no way I'm going to walk into
16 this thing not even knowing what all of the issues are a
17 week before. I mean, this is -- again, this should have
18 been handled in direct or prepared testimony. These are
19 not apparently issues that are surprising the Staff.

20 MR. REED: So you don't know whether you're
21 going to allege that the contract with Cuba was verbally
22 altered?

23 MR. DeFORD: As I told you, I cannot tell
24 my witnesses what to say.

25 MR. THOMPSON: Can you ask them what

1 they're going to say?

2 MR. DeFORD: If I ask them what they're
3 going to say, I think that that would be attorney/client
4 privilege, and I would not be under any obligation to
5 disclose in advance.

6 UNIDENTIFIED SPEAKER: Hello?

7 JUDGE WOODRUFF: Did someone just join us?

8 UNIDENTIFIED SPEAKER: This is Casey.

9 JUDGE WOODRUFF: I'm sorry. Who?

10 UNIDENTIFIED SPEAKER: Casey.

11 JUDGE WOODRUFF: I think you're on the
12 wrong line. Were you trying to join the four o'clock
13 meeting?

14 UNIDENTIFIED SPEAKER: No. I'm trying to
15 join the 3:30 Headrick meeting.

16 JUDGE WOODRUFF: You're on the wrong line.

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

18 JUDGE WOODRUFF: Okay.

19 MR. DeFORD: I'll tell you this: It
20 appears it's Staff's intent to add an undetermined number
21 of additional witnesses, raise issues that have not been
22 dealt with in prepared testimony, that we have not had the
23 opportunity to conduct discovery on. We are going to ask
24 for a continuance.

25 MR. THOMPSON: And we will oppose that.

1 We're ready to go.

2 MS. SHEMWELL: And how -- if he wants to
3 conduct discovery on B.J. Lodholz and Dave Wallen, those
4 guys have worked for the company. He just has to ask
5 them. They work for the company.

6 JUDGE WOODRUFF: I'm not going to take
7 arguments at this point about whether or not there's a
8 continuance. I will, however, ask the other parties,
9 Public Counsel, would you -- how would you feel about a
10 continuance?

11 MR. POSTON: If Staff wants to agree to a
12 continuance, we'd agree to a continuance.

13 JUDGE WOODRUFF: Municipals?

14 MR. WOODSMALL: No way, no how. This thing
15 has drug on long enough. We need to get this done as soon
16 as possible because we're in the winter heating season.

17 JUDGE WOODRUFF: Ameren?

18 MS. DURLEY: We don't take a position
19 either way. Whatever is in the best interests of this
20 case is fine with us.

21 JUDGE WOODRUFF: Well, Mr. DeFord, if you
22 wanted to make a motion for continuance, please do so, and
23 we'll present it to the Commission.

24 MR. DeFORD: Obviously it's contingent on
25 if the Commission denies the Staff's request to put on all

1 of these additional witnesses and deal with all of these
2 other issues, then probably not, but anticipation of what
3 we've been told here, we definitely -- that's -- this is
4 the most ridiculous violation of due process I've seen in
5 25 years.

6 JUDGE WOODRUFF: All right. Anything else
7 anyone wants to bring up?

8 MS. DURLEY: This is Colly Durley for
9 Ameren. I just wanted to mention that Jim Massman will
10 not be available on Friday if this should go forward and
11 just request that he could either be available and testify
12 on Wednesday or Thursday.

13 JUDGE WOODRUFF: Okay. I'm sure we can
14 work that in.

15 MS. DURLEY: Thank you.

16 JUDGE WOODRUFF: Anything else? My portion
17 of this is done. Do you-all want to talk any more after I
18 leave the room? It may not be productive, but I'll leave
19 the line open until four o'clock if you want it.

20 MR. THOMPSON: Thank you, your Honor.

21 JUDGE WOODRUFF: With that, the
22 on-the-record portion of this conference is adjourned.
23 I'll leave you to your discussions, and as I indicated, we
24 lose the line at four o'clock.

25

1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3 COUNTY OF COLE) ss.

4 I, Kellene K. Feddersen, Certified
5 Shorthand Reporter with the firm of Midwest Litigation
6 Services, and Notary Public within and for the State of
7 Missouri, do hereby certify that I was personally present
8 at the proceedings had in the above-entitled cause at the
9 time and place set forth in the caption sheet thereof;
10 that I then and there took down in Stenotype the
11 proceedings had; and that the foregoing is a full, true
12 and correct transcript of such Stenotype notes so made at
13 such time and place.

14 Given at my office in the City of
15 Jefferson, County of Cole, State of Missouri.

16

17 Kellene K. Feddersen, RPR, CSR, CCR
18 Notary Public (County of Cole)
My commission expires March 28, 2009.

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