

1 BEFORE THE PUBLIC SERVICE COMMISSION
2 OF THE STATE OF MISSOURI
3
4 TRANSCRIPT OF PROCEEDINGS
5 Oral Argument
6 June 3, 2004
7 Jefferson City, Missouri
8 Volume 9
9 In the Matter of Missouri Gas)
10 Energy's Tariffs to Implement a)
 General Rate Increase for) Case No.
11 Natural Gas) GR-2004-0209
12
13 MORRIS L. WOODRUFF, presiding,
 SENIOR REGULATORY LAW JUDGE
14 STEVE GAW, Chairman
 CONNIE MURRAY,
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1 PROCEEDINGS

2 JUDGE WOODRUFF: Let's go ahead and go on the
3 record. This is Case No. GR-2004-0209, which concerns
4 Missouri Gas Energy's tariffs to implement a general rate
5 increase for their natural gas service. We're here today for
6 oral arguments on a motion that was filed by Missouri Gas
7 Energy to exclude certain testimony and opinions of David
8 Murray, who is a witness for the Staff.

9 We'll begin today by taking entries of
10 appearance for the parties that are here today, and we'll
11 begin with MGE.

12 MR. BOUDREAU: Thank you, let the record
13 reflect the Boudreau with the law firm of Brydon, Swearengen,
14 England, 312 East Capital Avenue, Jefferson City, Missouri.

15 With me today is -- also appearing on behalf
16 of MGE is Eric Daniel Herschmann with the law firm of
17 Kasowitz, Benson, Torres & Friedman, 1633 Broadway, New York,
18 New York, appearing pro hock visa.

19 JUDGE WOODRUFF: Okay. Thank you. For Staff.

20 MR. SCHWARZ: If I might with respect to
21 Mr. Herschmann's appearance pro hock visa, Supreme Court rule
22 9.03 requires that the attorney present the receipt required
23 by rule Supreme Court Rule 6.01 at the time of his entry.

24 JUDGE WOODRUFF: I believe that rule does not
25 go into effect until like, I believe, the end of this month.

1 MR. SCHWARZ: Very well.

2 JUDGE WOODRUFF: And if there was a motion
3 there, I will deny it. Okay. Entry of appearance for Staff.

4 MR. BERLIN: Appearing on behalf of Staff, Bob
5 Berlin and Tim Schwarz, Post Office Box 360, Jefferson City,
6 Missouri, 65102.

7 JUDGE WOODRUFF: And for Public Counsel.

8 MR. DANDINO: Michael Dandino and Douglas
9 Micheel, Office of the Public Counsel, Post Office Box 2230,
10 Jefferson City, Missouri, 65102, representing the Office of
11 Public Counsel and the Public.

12 JUDGE WOODRUFF: All right. Any other parties
13 here?

14 MR. CONRAD: Your Honor, let the record show
15 the appearance of Stuart Conrad, Finnegan, Conrad & Peterson,
16 1209 Penntower Office Center, 3100 Broadway, Kansas City,
17 Missouri, 64111, on behalf of Midwest Gas Users Association.

18 JUDGE WOODRUFF: Any other parties represented
19 here?

20 All right. What we'll do, then, is allow for
21 oral argument, beginning with MGE since it is their motion.
22 Then I'll give all the other parties a chance to respond, and
23 finally giving MGE the chance for the last shot. Since we
24 have Commissioners here, I'm going to advise the
25 Commissioners that I intend to run this essentially the same

1 way that the Court of Appeal's argument would be run in that
2 if you have any questions of the counsel as they're making
3 their arguments, feel free to ask it. And after they finish
4 their arguments, we'll have more time for questions as each
5 counsel finishes their aspect of the argument. All right.
6 Let's, then, begin with MGE.

7 MR. BOUDREAU: May it please the Commission.
8 Good afternoon.

9 My purpose up here is fairly limited to some
10 mechanical matters not the least of which is to introduce to
11 you the attorney for MGE, who will be making the primary
12 argument today. But I would like to introduce myself first.
13 Paul Boudreau. Our firm Brydon, Swearngen & England is
14 local Missouri regulatory counsel for MGE.

15 I want to thank the Commission for scheduling
16 this argument on such short notice. We think, however, it's
17 a worthwhile activity for all concerned, for purposes of
18 examining a significant development in the law that took
19 place in late December 2003 that we think we'll have a
20 significant impact on the admissibility of testimony of
21 expert witnesses in all Commission cases, including the case
22 in which this argument is being conducted.

23 Before I introduce Mr. Herschmann, we have a
24 number of documents and materials to which he will probably
25 be referring throughout the argument, and I thought it may be

1 advantageous to distribute those to the Commission, and for
2 the coherence of the record, I suppose have it marked for
3 ease of reference.

4 JUDGE WOODRUFF: That would be fine.

5 MR. BOUDREAU: I think if we could mark it
6 Exhibit A, please.

7 (MGE'S EXHIBIT NO. A WAS MARKED FOR
8 IDENTIFICATION BY THE COURT REPORTER.)

9 MR. BOUDREAU: So with that, I offer Exhibit A
10 into the record of this proceeding.

11 JUDGE WOODRUFF: All right. I'm not going to
12 rule on its admission at this point. I'm not sure it even
13 needs to be admitted as an exhibit, but it is marked as an
14 exhibit.

15 MR. BOUDREAU: Very good. Thank you. I would
16 like to take this opportunity to introduce the opportunity
17 for Missouri Gas Energy who will be presenting oral argument
18 on the motion to exclude Mr. Murray's testimony and exhibits.

19 With me today is Eric Daniel Herschmann. He's
20 with the law firm Kasowitz, Benson, Torres & Friedman in New
21 York, New York. He has been Chief Litigation Counsel for
22 Southern Union Company since 1999. He's previously been
23 admitted into this case pro hock visha by the Commission.
24 And with that, I will tender the podium to Mr. Herschmann.

25 JUDGE WOODRUFF: All right. Thank you.

1 Welcome, Mr. Herschmann.

2 MR. HERSCHMANN: Thank you very much, your
3 Honor. If I could have one second.

4 May it please the Commission. First,
5 consistent with what Mr. Boudreau said, I thank the
6 Commission for allowing us the opportunity to address what we
7 believe the Missouri Supreme Court has indicated is a
8 significant, if not change, clarification in the law as to
9 how the rules of evidence and the admissibility of expert
10 testimony now apply in administrative proceedings in this
11 jurisdiction.

12 In the exhibit that's been provided to the
13 Commissioners, the first item that we address is Missouri
14 Revised Statute Section 490.065. The obligation that this
15 Commission now has as of December of -- the end of December
16 of last year have drastically changed.

17 McDonagh, the case that is identified here on
18 the board, now requires the Commission to analyze expert
19 testimony and make an initial determination as to its
20 admissability. That is consistent with how the Federal Rules
21 apply. It is now consistent with how the federal courts
22 operate.

23 The Missouri Supreme Court in the end of
24 December made clear that from now on, in administrative
25 proceedings in this state, this Commission is the gatekeeper

1 of the evidence that comes in. It is no longer a situation
2 where you can hear testimony and weigh the testimony
3 afterwards and see whether it's credible. But as expert
4 testimony goes, it is now the burden and the requirement that
5 the Commission act as the gatekeeper.

6 When proffering what is purported to be expert
7 testimony, Rule 490.065 puts the burden squarely on the
8 proponent of the testimony. Meaning that in this case, the
9 Staff is obligated to establish the parameters and meet the
10 requirements of 490.065 or that testimony is inadmissible.
11 And what I've done is first -- at the first tab is put a copy
12 of the statute.

13 And in fact, Section 490.065 is more stringent
14 than the Federal Rules of Evidence. The Missouri Supreme
15 Court in the McDonagh case has now said that the standards by
16 which expert testimony is admitted in Missouri is different
17 and more stringent than even how it can be admitted in the
18 federal courts. The Daubert standard, a US Supreme Court
19 case of 1993, that established the parameters for the
20 admissibility of expert testimony has a lesser burden than
21 the statute in this case.

22 If you look at the easel that's here and look
23 at the Tab 3 in the exhibit that's been handed out, the
24 Missouri Supreme Court has made clear that the standard for
25 the admission of expert testimony in civil cases is that set

1 forth in Section 490.065. As discussed herein, this is also
2 the standard to be applied in administrative cases.

3 May I continue?

4 COMMISSIONER DAVIS: Go ahead.

5 MR. HERSCHMANN: If there was any doubt as to
6 what the standard is, you look -- you need look no further
7 than the McDonagh case.

8 The Public Counsel has argued that 490.065 is
9 not an issue of admissibility, it's an issue of weight and
10 credibility. But the McDonagh court makes abundantly clear
11 in one of its headings when it says standard for
12 admissibility of expert testimony. Section 490.065 provides
13 the standard for admission for expert testimony in civil
14 actions.

15 The Court quotes and says while contested
16 administrative proceedings are not required to follow the
17 technical rules of evidence, the fundamental rules of
18 evidence applicable to civil cases are also applicable in
19 such administrative hearings. The standards for admission,
20 not weight, not credibility, of expert testimony constitutes
21 such a fundamental rule of evidence.

22 The standard set out in Section 490.064
23 therefore guide the admission of expert testimony in
24 contested case administrative proceedings such as this one.

25 And then the Court says if you want guidance

1 and you want to know whether something in the Federal Rules,
2 in the federal case law is relevant, then it cites to
3 Daubert, the US Supreme Court case, which has a list of
4 non-exclusive factors for consideration in determining
5 whether the evidence, the expert testimony that's being
6 offered satisfies the standard.

7 It says whether the theory or technique can be
8 and has been tested, whether the theory or technique has been
9 subjected to peer review and publication. The known or
10 potential rate of error in general acceptance. This record
11 as the Staff has submitted testimony is void of any of the
12 standards that are required to the testimony.

13 The Staff witness simply says we do this model
14 this way because we do it this way. We don't check with
15 anyone else, we don't compare it with any other
16 jurisdictions, we don't look at any other analysis. And in
17 his own testimony in this case, says I got to the Commission,
18 someone handed me quote-unquote canned testimony that came
19 from years before.

20 He doesn't know who wrote the original
21 testimony, doesn't know where it came from, and yet submits
22 to this Commission that that testimony meets the standards of
23 490.065. And the answer to that is it doesn't. This record
24 is devoid of any facts that would demonstrate that this
25 witness is qualified as an expert because it's a two-prong

1 test.

2 One is do you have the qualifications to
3 provide the expert testimony. The second prong of the test
4 is have you established that the methodologies that you
5 you've relied upon are reasonable. And then you have to
6 identify in Missouri that it is within a field. You are
7 providing expert testimony within a field and that it is
8 reasonably relied upon.

9 And there is not one drop of evidence in this
10 record to support that requirement. In fact, the staff in
11 opposing our motion simply cites to the job description. In
12 the circular reasoning says we posted a job description that
13 says you have to provide this testimony. We hired David
14 Murray. Therefore, David Murray is an expert.

15 But we've done our research to determine is
16 there one case in this land that has upheld a Daubert
17 standard on the federal side or anything in Missouri on
18 McDonagh side that would support such an argument. And the
19 answer is we have not found any because none exists. And
20 that is why when you look at the Staff's opposition, they do
21 not cite to one authority that supports their position.
22 Because no authority exists.

23 The Missouri Supreme Court in McDonagh
24 continued and said few cases have interpreted Section
25 490.065. To the extent that Section 490.065 mirrors the

1 Federal Rules of Evidence 702 and 703, as interpreted and
2 applied in Daubert and its progeny, these cases interpreting
3 those Federal Rules provide relevant and useful guidance in
4 interpreting and applying Section 490.065.

5 That is the standard that most state courts
6 accept and acknowledge because 490.065 is almost identical to
7 the federal rules. It's designed from the federal rules, and
8 therefore, you look to the federal case law for guidance, as
9 the court says, relevant and useful guidance in interpreting
10 and applying the section.

11 But Section 490.065.3 goes on to require that
12 the facts or data on which an expert bases an opinion or
13 inference must be of a type reasonably relied upon by experts
14 in the field in forming opinions or inferences upon the
15 subject, and that these facts and data must be otherwise
16 reasonably reliable.

17 What that requires is that if you're going to
18 purport to be an expert in a field, you need to identify for
19 this Commission in the record your basis for making the
20 statements. You can't simply say the Court says the ipse
21 dixit of saying I'm an expert therefore this is the way it is
22 is not satisfied parameters.

23 The court says thus Section 490.065.3
24 expressly requires a showing that the facts and data are of a
25 type reasonably relied on by experts in the field in forming

1 opinions or inferences upon the subjects of the expert's
2 testimony. It says the Court must also independently assess
3 the reliability. The Court in Missouri requires that the
4 witness identify the field in which they claim to be an
5 expert.

6 It's not enough to say I'm going to use a DCF
7 model and therefore that's acceptable and therefore it's
8 admissible. We cite in our brief, cases in various
9 jurisdictions, where a DCF model was used and yet the
10 witness' testimony as a purported expert was stricken. It's
11 not enough to say I use the model and therefore that's all
12 that it takes.

13 And there's a good reason that this witness
14 cannot articulate the reasons and the basis for his claims.
15 Because they don't have any. When this witness got to the
16 Commission, shortly after he arrived, he was handed
17 testimony. He submitted that testimony and then he got
18 deposed about that testimony. And some of the portions of
19 his testimony that are relevant are in Tab 4.

20 He was asked would I be correct if I said that
21 for the most part, for the most part, your direct testimony
22 in this case is very similar, if not almost word for word
23 identical, to Mr. Bible's testimony in case GR-98-140? I
24 would say we have department policy, and some of those
25 policies were followed.

1 He's then asked what are the primary sources,
2 what are the textbooks that exist at the Commission that you
3 would rely upon in providing testimony? And he identifies
4 two textbooks, and one of them, is by Professor Roger Morin.
5 Professor Roger Morin is an expert that has submitted
6 testimony in this case.

7 And Professor Morin says unequivocally that
8 the testimony submitted by David Murray in this case does not
9 meet the standards, is not credible, it does not follow
10 accepted methodologies. So the person who the Staff says
11 wrote the textbook that we would rely upon in creating our
12 testimony, says the submission of this testimony in this case
13 is not credible, is not reliable, and doesn't satisfy the
14 standards to be admissible.

15 More importantly, this witness, when he first
16 submitted this canned testimony not knowing where it came
17 from, didn't bother to read the four cases that he says are
18 the standard by which this Commission should operate. And we
19 submit he's now taken a step back and realized that there are
20 not four cases, but there are really two or three primary
21 cases, which I'm sure this Commission is familiar with. The
22 Hope and Bluefield cases and the Munn case.

23 What's important is he was asked did you read
24 any of those cases in their entirety before you submitted
25 testimony to this Commission claiming to be an expert. The

1 answer was no. Someone provided you with photocopies of
2 those cases? Yes. Do you recall whether or not those
3 photocopies have on them any notations or underlining? There
4 may have been some highlighted portions.

5 But to talk about a lack of training that this
6 witness had when he first came before this Commission and
7 submitted testimony, he actually testified under oath that a
8 Pennsylvania Supreme Court case, a state court case, had
9 expanded and extended the United States Supreme Court rules.

10 Now, I will tell you that whatever research
11 we've done has not uncovered any precedent for that type of
12 statement. Because clearly, it doesn't exist. The
13 Pennsylvania Supreme Court doesn't expand and doesn't change
14 the US Supreme Court standards for which how much every
15 jurisdiction operates when it comes to being a regulated
16 entity. More importantly, the Pennsylvania Supreme Court
17 case was about Three Mile Island for which this witness knew
18 nothing.

19 Even to this date when he was asked last month
20 about his testimony and whether the facts of Three Mile
21 Island compared to the operations of MGE have any correlation
22 whatsoever, the witness didn't know. And the issue -- the
23 Pennsylvania case was the nuclear reactor was shut down and
24 the property was no longer used and useful, and therefore the
25 ratepayers weren't going to pay for a property that was no

1 longer servicing them. But this was a fact that the witness
2 did not know at a time when he provided sworn testimony to
3 this Commission.

4 Importantly, the burden lies with the
5 proponent of the testimony to meet the criteria. And there
6 is nothing in this record that would support that this
7 witness meets the first prong of Section 490.065. No
8 testimony about any training, no testimony about running any
9 peer review articles, no testimony about giving any lectures,
10 no testimony about even contacting other regulatory bodies to
11 say is the mechanism that we're using here reasonable.
12 Is it relied upon in other jurisdictions. And the answer to
13 that is no. Well, why not? Because there's a policy at the
14 Staff that says we don't talk to other Commissions.

15 There's a policy at the Staff that says when
16 you make a recommendation at one point in time as what you
17 believe the authorized return on equity or rate of return
18 should be, do you ever go back and look at what your
19 recommendation was and what reality was? And the answer was
20 no, I don't do that. Well, how could you go ahead and
21 represent that you have a standard that's reasonably relied
22 upon by experts in this field if you don't make the effort?

23 and what he does in this case he says, well, I
24 ran my DCF model, and then I do these two checks. Well,
25 there's a discrepancy between the model and the checks. What

1 did you do when you saw the discrepancy. And the answer is
2 nothing. Have you ever done anything? No. Because the
3 mechanism by which we do it is if I'm confident in this, and
4 I'll give you the cite of his testimony previously, he said
5 it will take an act of God to change his opinion.

6 Well that's not a standard that any regulatory
7 finance expert has ever articulated in any of the textbooks
8 or any of the cases that we've reviewed. And the witness was
9 asked are there different forms or types of DCF models. He
10 said there are different types. And why did you select this
11 particular form of the DCF model? It's been what our
12 department has used for quite some time.

13 Have you ever used any other DCF form or
14 types? No. Are there various ways to manage a DCF
15 calculation? No. Question: There are not? No. There is
16 only one way to make one as far as the formula. Well, if
17 that were true, number one, we wouldn't need any experts
18 because the formula would be filled in by the numbers and
19 everyone would come out with the same answer.

20 But in this case alone, the Staff and the OPC
21 don't come out with the same numbers, they clearly don't come
22 out with the same numbers as MGE, and they don't come out
23 with any remotely similar numbers that you find in the
24 comparative -- what's called a proxy group.

25 And the witness was asked, and this is one

1 point where I think everybody agrees. That there's a basic
2 principle in finance which says the greater the risk, the
3 higher the return requirement. Holding all else the same, if
4 there's a larger risk, investor may expect a higher rate of
5 return.

6 And the witness is asked when you're trying to
7 predict in the balancing test that the Supreme Court
8 requires, the interest of the customers and the ratepayers
9 and the interest of the shareholders, do you -- you're
10 supposed to try to predict what will the reasonable investor
11 expect as a return.

12 Now, investor presumably is going to buy a
13 stock with an expectation that the stock price is going to go
14 up. That's the reasonable investment that the Supreme Court
15 is talking about. Yet this witness, in applying his
16 calculations that he says is in a reasonable relied upon way
17 that's independently accepted in the industry, uses negative
18 growth rates. Meaning he says somebody is going to buy a
19 stock and invest in a company, and I'm going to balance this,
20 and their expectation is they're going to lose money and
21 that's why they're buying it.

22 Such aberrational use of the data demonstrates
23 the unreliability of the methodologies. And more
24 importantly, we asked Mr. Murray what methodologies did you
25 use? The answer was first none, except I used a DCF model.

1 The second was I'm not sure what you mean by methodologies.

2 Well, the Missouri Supreme Court and the US
3 Supreme Court in Section 490.065 all require that you
4 articulate in which field are you claiming to be an expert
5 and that you demonstrate that it's reasonably relied upon in
6 that field. Mr. Murray was asked in March of '04 in another
7 case before this Commission had he ever checked any other
8 decisions from any other state agencies. And to see whether
9 or not those authorized returns that they were allowing for
10 the companies under their jurisdictions were at all
11 comparable to what he was recommending here.

12 Now, he doesn't deny that the Supreme Court
13 says you need to look at companies in similarly situated
14 industries in similar parts of the country. He doesn't deny
15 that fact. He was asked did you ever try to do it in Kansas.
16 He says no, I have enough stuff to do here as far as doing my
17 economic analysis using the DCF model and the capital asset
18 pricing model. As far as what goes on in the specifics of
19 cases throughout this country, I would be working 24/7 to be
20 able to keep up with that. I submit he wouldn't be working
21 24/7.

22 I submit that if you look at Professor Morin's
23 submission in this testimony, he says the information is
24 readily available and you need to do it to determine what
25 other experts in the field for which you're claiming to have

1 qualifications say is the reasonable return on equity.

2 The McDonagh court made clear that the process
3 for which the admissibility of testimony -- of expert
4 testimony before this Commission is now the same as it is in
5 the court system. There's no difference. You're the
6 gatekeepers to determine whether or not it comes in. Well,
7 what do you do in these situations?

8 The burden first starts with the Staff.
9 They're submitting the testimony. They need to comply with
10 the statute. If they don't comply with the statute, the
11 testimony is inadmissible. That's the end of the story. The
12 burden lies with the Staff.

13 In this case, they don't submit any basis or
14 any authority. In fact, the irony of the situation is MGE
15 moves to exclude the testimony. And you would think they had
16 their prepared testimony, they had a deposition, they had the
17 opportunity to explain the basis and what the sources are and
18 who else uses it this way and how do you address the issues.

19 And instead of citing to anything, not one
20 cite, they say MGE has put in front of this Commission no
21 less than seven financial textbooks in order to part Staff's
22 rate of return recommendation. And that is exactly right.
23 That is the process that we use in the court system to move
24 to strike an expert's testimony or purported expert's
25 testimony who doesn't satisfy the statutes.

1 They didn't meet their burden when they put
2 the papers in. So we move to strike it. We submit the basis
3 and the sources that say your methodologies, your claimed
4 qualifications are not what is recognizable in the industry.
5 Do they counter with any sources? The answer to that is no
6 because none exist.

7 Instead, the response is fundamental justice
8 demands the admission of Mr. Murray's rate of return
9 testimony recommendation. Well, with all due respect,
10 fundamental justice is just the opposite. That's what the
11 Missouri Supreme Court said in December of last year. That
12 is what the statute says and that is, in essence, the law of
13 the land in this country.

14 Expert testimony no longer comes in simply
15 because someone says this is the way I do things and you need
16 to hear it. If you don't meet the criteria, justice demands
17 that unreliable, inadmissible testimony not be heard. OPC in
18 their response, even though there's conflicts between the two
19 purported experts from OPC and Missouri, actually say that
20 the issue of credibility of the witness and the evidentiary
21 weight that the PSC may assign are to his opinion. It is not
22 a question of admissability, it's a question of weight.

23 I'm not sure how the OPC has come to that
24 determination since, and if you look in Tab 3 of the exhibit,
25 Page 2, says that the question is not weight, as Staff would

1 have you believe.

2 The statute requires that to be admissible,
3 expert opinion must be based on facts or data of a type
4 reasonably relied upon by experts in the field.
5 And it continues. It says 490.065.3 simply requires that the
6 facts and data used by the expert are of a type reasonably
7 relied on by experts in the field. If not, then the
8 testimony does not meet the standard -- I'm sorry, the
9 statutory standard and is inadmissible.

10 And they say you should look to the Federal
11 Rules as guidance and illustrated to you as to how the
12 process works. And in the Federal Rules, as Missouri Supreme
13 Court has now established, you need to make an initial
14 determination. You don't hear it and then make the
15 determination. You make the determination before it comes
16 into the record. And at that point, if they don't meet the
17 standards where the burden lies with the proponent of the
18 testimony, then the testimony is not admissible.

19 Also, Missouri Supreme Court made clear that
20 the Federal Statutes, unlike in Missouri, Daubert held that
21 the federal courts and expert need not necessarily identify
22 the relevant scientific community or field in which the data
23 and facts are accepted. In Missouri, you have that
24 requirement.

25 In the McDonagh case, there's a situation

1 where a purported expert, and the question was the treating
2 of vascular disease and whether certain therapy was
3 recognized as being acceptable. The expert, unlike
4 Mr. Murray in this case, had a thousand doctors who said the
5 treatment of vascular disease with this therapy is acceptable
6 and recognizable.

7 And in that case, the Missouri Supreme Court
8 threw out the testimony as unreliable. In this case, there's
9 not one cite to one other authority, to one other regulatory
10 body, to one other financial analyst, who says you do this
11 process the way Mr. Murray says you did it. And there's a
12 very simple reason for that. Because he didn't write the
13 testimony.

14 With all respect to the Staff, it's not clear
15 to us based on the depositions that we've taken as to who
16 wrote the testimony. Because he acknowledged that when he
17 first came to the Commission, someone gave him canned
18 testimony, it was explained to him this is the way we do
19 things, and now he knows that some of it came from even years
20 beforehand, which he hasn't even been able to identify.

21 But if a case in which the court says you need
22 to identify the relevant field and it strikes an expert's
23 testimony who has the source of a thousand doctors who say
24 this is the way we do it, and that's not acceptable, then in
25 this record, Mr. Murray's testimony is not admissible.

1 What is the response that Staff says? It says
2 simply because we do it this way and as has been done this
3 way, because someone told Mr. Murray, we're not sure who it
4 was, this is the way we do it, then therefore it's
5 admissible. Well, the McDonagh court says no, that's not it,
6 that that does not get you to the standard.

7 If you look on Tab 6, the first prong of
8 490.065 is whether or not the person is an expert, a
9 qualified expert. This is the questions and answers of some
10 of the testimony from this case. And when you first came to
11 the Commission in what year was that? June of 2000. And
12 prior to coming to the Commission in June of 2000, you were
13 employed by the Department of Insurance; is that correct?
14 That's correct.

15 And did you have any rate of return testimony
16 that you submitted while employed at Department of Insurance?
17 No, I did not. Did you have any rate return on equity
18 testimony that you submitted or worked on while at Department
19 of Insurance? No. Then he's asked and the first time you
20 ever used it, discussing the DCF modeling in a practical
21 environment, was when you came to work for the Missouri
22 Staff, right. His answer is that's correct.

23 Now, you may hear the Staff say, well, he
24 graduated college with a finance degree. Well, graduating
25 college, with all due respect to all the college graduates,

1 doesn't make you an expert in whatever your topic was. If
2 you graduate college with a biology major, you may look at it
3 and say I understand what pre-med is. I understand what a
4 broken arm is and how you fix a broken arm and you set it in
5 a cast and you wait a certain amount of time and you take the
6 cast off and you're all set.

7 That wouldn't qualify you as an expert to set
8 someone's arm. It wouldn't qualify you as an expert to
9 decide whether or not someone else set an arm correctly, and
10 it clearly wouldn't qualify you as an expert in any more
11 advanced field.

12 We asked the witness consistent with what
13 Daubert says and the federal cases as to whether you
14 determine reliability. Prior to joining the Missouri Staff,
15 did you ever give any lectures on rates of return? No. Did
16 you ever publish any books dealing with rates of return or
17 return on equity? No. Have you published any peer review
18 studies as it relates to rates of return or return on equity?
19 No.

20 Have you consulted with any other staff's at
21 other Commissions in any other jurisdictions as to how
22 they're applying the DCF model and their recommendations
23 regarding rate of return. Answer: No. Then the witness
24 says, and he submits in his testimony, that I would have used
25 or considered using -- I'm sorry, MGE's capital structure and

1 I would have backed out Panhandle, Southern Union's
2 subsidiary, from the balance sheet. But when I went to do
3 that, things would have been even worse for Southern Union.

4 So we asked the witness how did you do it?
5 How did you calculate it? At first he says he's not a
6 Certified Public Accountant. We asked him the methodology
7 that he described and to how he simply decided to back out
8 the equity from Southern Union's consolidated balance sheet
9 when he attempted to segregate the pipeline from Southern
10 Union says that that conformed to Generally Accepted
11 Accounting Principals. Response: I don't know.

12 Did you consult with anyone at the Missouri
13 Commission to find out whether your proposed methodology had
14 anything to do with GAAP? Not specifically with GAAP. I
15 talked about the process that I did with a couple of people.
16 And I asked him, I'm asking if it turns out that GAAP says
17 your process is completely wrong, would that change your
18 opinion. Answer: No. Because I think this is equity
19 associated with Panhandle.

20 When a witness is confronted, and you're going
21 to see in the rebuttal testimony submitted that the process
22 for which he backed out or attempted to back out, Panhandle
23 from Southern Union is completely inconsistent with GAAP.
24 In fact, if you accepted the methodology that he claims to
25 have used, you would take five hundred or so million dollars

1 from Southern Union's balance sheet and it would just
2 disappear.

3 When he's asked would you change anything, he
4 says no. And I asked him and you're as sure as that answer
5 as everything else you put in your testimony, right? The
6 answer is yes. And only a witness who doesn't have the
7 qualifications as an expert could give that response. We
8 asked him have you ever tested the methodologies that you are
9 using to make sure that they comply with the Supreme Court
10 precedence as it relates to expert testimony? The answer was
11 no, I haven't.

12 490.065, McDonagh says the burden rests with
13 the witness, with the party submitting the testimony. And
14 yet he testifies under oath I didn't do what I'm required to
15 do. Based on that answer alone, there is no way his
16 testimony can be admissible in this case. Then we asked him
17 you picked this criteria, the selection group that you used,
18 to say I'm going to use this comparable company to compare
19 them to MGE and determine what's an appropriate return on
20 equity and rate of return.

21 Have you ever seen any textbooks that have the
22 selection criteria that you've used in your testimony here to
23 select the comparable companies? The answer all these
24 criteria? Yes. In their entirety, I don't recall
25 specifically anything where it sets out the specific criteria

1 I have here. There's a very simple reason. Because the
2 criteria that he got were in the canned testimony. He
3 doesn't know where it came from, he doesn't know the basis
4 for it, and we can't find one textbook in this area that
5 supports it.

6 More importantly, we asked the witness you
7 used 2002 data, and I asked him if the 2003 information was
8 available, would you update your calculations if there were
9 some significant changes. The question is would you make
10 those adjustments. The answer: No. The witness had
11 available to him before he submitted testimony the 2003
12 financial data. He's trying to predict future growth.

13 He's asked if you had the 2003 available
14 information, would you at least make the adjustments because
15 you left it out of your testimony? The response is no. Then
16 we asked him in discussing Professor Morin, the witness for
17 MGE in this case, would you agree that Dr. Morin -- I'm
18 sorry, Professor Morin is an expert on regulatory finance? I
19 believe he's an authoritative figure, that's correct.
20 And do you believe Professor Morin to be one of the leading
21 authoritative figures in the country on regulatory finance?
22 He is one of the most widely quoted, that's correct.

23 If you look on Tab 8, I'm sorry, Tab 7,
24 there's a discussion and the answers about the canned
25 testimony, talking about -- this is shortly after he arrived

1 at the Commission, before he had any training or any
2 experience in ever using a DCF modeling in the world.
3 Somebody at some point gave you the standard testimony,
4 right? And did someone explain to you when you first got
5 there that this is the standard testimony that we use for
6 each of the rate cases that come before the Commission? The
7 answer yes.

8 And there's some portion of this testimony
9 that you used back in 2001, right? Yes. And there's some
10 portions of this testimony that you know, based on prior
11 depositions, came from years ago from other witnesses.
12 Answer: Yes. He says he got his primary guidance on how to
13 do the DCF modeling from one person, his boss, Ron Bible.

14 I asked him did Mr. Bible tell you that prior
15 to joining the Missouri Commission he had no experience with
16 regulated industries? The answer: No. Then showed him
17 Mr. Bible's testimony under oath from November of 2000.

18 Question to Mr. Bible: Prior to joining the Missouri
19 Commission in August of 1997, did you have any regulatory
20 experience? No. Had you worked for any companies that have
21 been regulated by the Missouri Commission prior to '97?

22 Answer: No.

23 Did Mr. Bible ever explain to you how he came
24 to obtain the canned testimony that's been submitted by the
25 Staff for several years? I don't recall if he did or not.

1 Have you ever tested the methodologies that you are using to
2 make sure that they comply with the Supreme Court precedence
3 as it relates to expert testimony? No, I have not.

4 JUDGE WOODRUFF: Now, Mr. Herschmann, if I can
5 interrupt now, I'm sorry to have to do this, but we are
6 running into a time constraint here. I would ask you to wrap
7 up your presentation by 4 o'clock so we have a chance to give
8 everybody else a chance to respond and questions from the
9 Commissioners.

10 MR. HERSCHMANN: Thank you.

11 Under Tab 8, you will see some of the rebuttal
12 testimony from Professor Morin, which this witness has
13 acknowledged is one of the leading authoritative figures,
14 says Mr. Murray's opinion as to an ROE for MGE is
15 fundamentally unsupported and unreliable. I do not believe
16 that Mr. Murray's testimony can be credited with providing
17 the Commission with any expert analysis that can give it
18 insight and responsibility addressing the ROE issue in this
19 case.

20 More importantly, Professor Morin looks at
21 what are the authorized returns on equity for the comparable
22 companies he says he analyzed. And this witness'
23 recommendation is 8.52 to 9.52 percent. But Professor Morin
24 says the number is 11 percent, or 11.1 percent, and that the
25 average allowed return in the gas utility industry for 2002

1 and 2003 and 2004 have all been at that level.

2 He says there's serious problems with the
3 methodology, inclusion of negative growth rates, an issue I
4 addressed beforehand. Not the expectation. Mr. Murray uses
5 two-year-old growth rates. He takes the historical growth
6 rates and averages them in and compounds them again.

7 Then he says in a concluding statement, and
8 this is from the leading authority in the country as to how
9 Mr. Murray submitted his testimony, that his recommended ROE
10 is well outside the zone of currently authorized rates of
11 return for energy utilities in the United States for his own
12 sample of comparable risk utilities. It would be among the
13 lowest, if not the lowest in the country ever adopted.

14 And Professor Morin and in our moving papers,
15 we address the different uses of the improper methodologies
16 that he refused to make adjustments, and this is after the
17 Supreme Court says estimates for tomorrow cannot ignore
18 prices of today. When he had the 2003 data available to him
19 that would have changed his calculations from 1.7 to 7.4
20 percent, he refused to even consider it.

21 Staff proposes a capital structure for MGE,
22 and they include Panhandle, the subsidiary of Southern Union.
23 And they include Panhandle even before they came before this
24 Commission and said you need to segregate Panhandle from
25 Missouri ratepayers. You need to insulate them. You need to

1 make sure the debt is non-recourse, and this Commission was
2 under a stipulation by OPC, and Staff went ahead and ordered
3 that it be segregated.

4 This witness submitted testimony in that case
5 for the segregation, and yet in this case, he does away with
6 the Order of the Commission, he does away with the
7 stipulation for one reason. He read an article from S&P
8 where it says cash will flow freely between Southern Union
9 and Panhandle. And that was the basis for which he says we
10 use a consolidated capital structure, because S&P said this.

11 We asked him you're party to an agreement,
12 you're party to an Order that says that won't happen. We
13 asked him do you believe Southern Union's violated any
14 agreements or orders? Do you have any evidence of it? He
15 said no. And yet the basis alone for deciding to do it is an
16 article that he read in Standard and Poors.

17 Under Tab 12 provided to you a chart of the
18 return on equity comparison between the Staff, the OPC, what
19 the actual 2003 ROE numbers are, return on equity numbers
20 are, and what the current authorized return on equities are
21 for the companies. And you will see that those numbers are
22 completely inconsistent with the recommendation of
23 Mr. Murray.

24 The Supreme Court and what this witness
25 acknowledges is a controlling precedent, Bluefield and Hope,

1 has said that there has to be a balancing, a balancing of the
2 interest of the ratepayers and interesting of the
3 shareholders, and that balancing has applied to the facts of
4 this case by this purported expert have not been met. And
5 because of that, his testimony needs to be stricken.

6 If there are any questions.

7 JUDGE WOODRUFF: Thank you. Commissioner Gaw.

8 CHAIRMAN GAW: I'll wait until after we finish
9 with the presentations.

10 JUDGE WOODRUFF: Commissioner Murray, do you
11 have any questions of this time?

12 COMMISSIONER MURRAY: I'll pass now also.

13 JUDGE WOODRUFF: Commissioner Clayton.

14 COMMISSIONER CLAYTON: Wait.

15 JUDGE WOODRUFF: Commissioner Davis.

16 COMMISSIONER DAVIS: Not at this time.

17 JUDGE WOODRUFF: Commissioner Appling.

18 COMMISSIONER APPLING: I hold tight.

19 JUDGE WOODRUFF: All right. Thank you.

20 MR. HERSCHMANN: Thank you.

21 JUDGE WOODRUFF: Then for responses, we'll
22 begin with Staff.

23 MR. BERLIN: Good afternoon, Commissioners.

24 And Commissioner Davis, welcome to the Commission. I have
25 not had the opportunity to meet you. I am Bob Berlin, I'm an

1 attorney for Staff representing Staff in this proceeding and
2 staff witness David Murray.

3 I'm here to present Staff's argument against
4 MGE's motion to exclude Mr. Murray's testimony on what
5 constitutes an appropriate capital structure and rate of
6 return for MGE to collect from its Missouri ratepayers. I
7 will explain why staff witness David Murray is indeed a
8 qualified expert on the matter of capital structure and rate
9 of return and why the pre-filed testimony on capital
10 structure and rate of return that Mr. Murray submitted is
11 admissible as evidence under Missouri Statute 490.065.

12 I will also discuss the case cited by MGE, a
13 case that was handed down by the Missouri Supreme Court on
14 December 23rd, 2003, that is State Board for the Healing Arts
15 versus Edward W. McDonagh, Doctor of Osteopathy, cited at 123
16 S.W. 3d 146. Throughout my presentation, I will discuss the
17 McDonagh case at length and in detail.

18 Now, Staff agrees that McDonagh is a case that
19 makes Section 490.065 the controlling standard on expert
20 witness -- expert witnesses and the admissibility of expert
21 witness opinion testimony in both civil and administrative
22 proceedings. However, the staff disagrees with MGE's
23 characterization and premise that because the Supreme Court
24 struck Dr. McDonagh's expert witness testimony, therefore
25 staff witness Murray's testimony must also be struck. I will

1 discuss this and distinguish these two fact situations later.

2 But first, I wish to remind the Commission
3 that this hearing today addresses the admissability of Staff
4 witness Murray's testimony into evidence. This hearing is
5 not an advance hearing for the purpose of MGE to try the
6 merits of the ultimate issue, that issue being what is an
7 appropriate rate of return for MGE to collect from its
8 Missouri ratepayers.

9 This hearing is about allowing Staff witness
10 Murray's testimony into evidence for the purpose of assisting
11 the trier of fact, and that is the Commission, in the job of
12 critically weighing the evidence presented by the parties and
13 assessing the credibility of the expert witnesses and the
14 testimony that they proffer.

15 Now, in getting to the controlling standard,
16 the Missouri law on expert witnesses and their opinion
17 testimony, I would first like to quote Judge Wolff in the
18 McDonagh case. Now, Judge Wolff in his concurring opinion in
19 this case writes what he terms advice for lawyers on expert
20 witnesses. And I will quote Judge Wolff.

21 Forget Frye. Forget Daubert. Read the
22 statute. Section 490.065 is written, conveniently, in
23 English. It has 204 words. Those straightforward statutory
24 words are all you really need to know about the admissibility
25 of expert testimony in civil proceedings. Section 490.065

1 allows expert opinion testimony where "scientific, technical
2 or other specialized knowledge will assist the trier of
3 fact..."

4 Now, MGE in its motion to strike Mr. Murray's
5 testimony and in its supporting memorandum asserts that
6 Mr. Murray and his testimony failed to meet the requirements
7 of Subsections 1 and 3 of 490.065. Let me first start with
8 Subsection 1. And I will read it.

9 "In any civil action, if scientific, technical
10 or other specialized knowledge will assist the trier of fact
11 to understand the evidence or to determine a fact in issue, a
12 witness qualified as an expert by knowledge, skill,
13 experience, training, or education may testify thereto in the
14 form of an opinion or otherwise."

15 This is the law today in Missouri. All
16 parties would agree that this subject of capital structure
17 and rate of return is one where expert testimony will help
18 the trier of fact to determine an appropriate rate of return.
19 Staff witness Murray is an expert witness on the subject of
20 capital structure and rate of return. Mr. Murray is now
21 employed by the Commission as a Utility Regulatory Auditor
22 III.

23 On Staff's response, Exhibit No. 1, attached
24 is a job description of the Utility Regulatory Auditor III
25 position, and on -- under the essential functions of that job

1 description, Page 2 of 5 states, and I quote, this is one of
2 the duties that I quote, to prepare and present expert
3 testimony in proceedings before the Commission.

4 Now, I will discuss how and why staff witness
5 Murray is, indeed, a qualified expert by knowledge, skill,
6 experience, training, or education. Staff witness Murray in
7 1995 was awarded a Bachelor of Science degree in Business
8 Administration with a major in Finance and Real Estate at the
9 University of Missouri in Columbia. Mr. Murray worked for
10 the Missouri Department of Insurance before hiring on to the
11 Public Service Commission in 2000 as a Public Utility
12 Financial Analyst.

13 He later earned a Master's in Business
14 Administration from Lincoln University in 2003. Mr. Murray
15 has prepared testimony on 35 separate occasions on the
16 subject of capital structure and rate of return. On Exhibit
17 1 of Staff's response is provided a comprehensive list of
18 Mr. Murray's work in capital structure and rate of return.

19 Indeed, the Commission has accepted into
20 evidence Mr. Murray's capital structure and rate of return
21 testimony in five separate utility cases. I will name those
22 cases where the Commission has accepted Mr. Murray's capital
23 structure and rate of return testimony into evidence:
24 Northeast Missouri Rural Telephone Company, Case No.
25 TR-2001-2402; Missouri American Water Company, Case No.

1 WC-2004-0168; Missouri American Water Company, Case No.
2 WR-2003-0500; Aquila, Incorporated, Case No. ER 2004-0034;
3 and Aquila, Incorporated, Case No. HR-2004-0024.

4 And in MGE's reply memorandum, MGE asserts
5 that Staff, and I want to quote their Footnote No. 3, in a
6 true non sequitur, the Staff attaches a job description for
7 Murray's position and then suggests that since Murray is
8 supposed to be qualified for his job, he must be.

9 Now, looking up the word non sequitur in the
10 dictionary, that means an inference that does not follow from
11 the premise. Now, if you go to Mr. Murray's job description,
12 and based upon his qualifications already presented, you will
13 note that Mr. Murray has the experience and has the education
14 necessary to perform one of his essential job functions and
15 that is to provide expert witness testimony.

16 MGE further asserts that Staff is relying on
17 what they call ipse dixit, which means he himself said or
18 something not proven. I believe that Staff has proven
19 Mr. Murray's qualifications and his expertise, his training,
20 his education, and his knowledge. However, MGE has not
21 presented evidence that Mr. Murray did not earn a degree in
22 Business Administration in 1995 with a major in Finance and
23 Real Estate from the University of Missouri at Columbia.

24 MGE has not presented evidence that Mr. Murray
25 did not earn an MBA from Lincoln University. MGE has not

1 presented evidence that Mr. Murray did not prepare capital
2 structure and rate of return testimony on 35 separate
3 occasions since his employment with this Commission in year
4 2000. And MGE has not provided any contradictory evidence
5 that Mr. Murray did not have his capital structure and rate
6 of return testimony accepted into evidence by this Commission
7 in the five cases that I previously cited. Mr. Murray, in
8 the cases that I cited, has used consistent common
9 methodologies, approaches, techniques and analysis. I will
10 go into that a little later.

11 But first, I want to go back to the
12 controlling standard on expert witness testimony 490.065, and
13 state for the record that based on Subsection 1 that states
14 in relevant part, a witness qualified as an expert by
15 knowledge, skill, experience, training, or education may
16 testify thereto in the form of an opinion or otherwise.

17 There can be no doubt that Mr. Murray more
18 than meets the threshold requirement as an expert witness on
19 the subjects of capital structure and rate of return analysis
20 under 490.065.1. Now I go to Subsection 3 of 490.065, and I
21 believe it would be important to read it first.

22 Subsection 3 states the facts or data in a
23 particular case upon which an expert bases an opinion or
24 inference may be those perceived by or made known to him at
25 or before the hearing and must be of a type reasonably relied

1 upon by experts in the field in forming opinions or
2 inferences upon the subject and must be otherwise reasonably
3 reliable. You might note that in Subsection 3, the word
4 reasonable appears two times. It appears to govern what that
5 statute is about.

6 Now, I would like to address why Mr. Murray's
7 testimony as an expert witness on the subjects of capital
8 structure and rate of return meet the Subsection 3 criteria
9 under 490.065. First I will review the commonality of the
10 approach and methodologies and analysis that is employed by
11 staff witness Murray, MGE witness John Dunn, and OPC witness
12 Travis Allen. After that, I will go back to the McDonagh
13 case.

14 Much has been said about the Discounted Cash
15 Flow model. The DCF model has been widely used, widely
16 accepted for a long period of time by both this Commission
17 and Commissions elsewhere. In fact, Staff witness Murray,
18 MGE witness Dunn, OPC witness Allen, all employ the DCF
19 model. Staff witness Murray and OPC witness Allen even use
20 the Cap M model.

21 Now, curiously, when one would read the
22 rebuttal testimony supplied by Professor Morin on behalf of
23 MGE, Professor Morin says it would be wrong to not rely on
24 multiple models. But even curiouser still is that MGE relies
25 solely on the DCF model. And that is to determine the

1 estimated cost of common equity.

2 All three expert witnesses use what is termed
3 a proxy group of comparable companies for their analysis.
4 These are companies that resemble an LDC business similar to
5 Missouri Gas Energy. Now, Staff witness Murray uses eight
6 comparable companies that are indeed natural gas distribution
7 companies in his analysis, MGE witness Dunn uses 15 different
8 companies, OPC witness Allen uses eight company for his proxy
9 group analysis.

10 All three Staff -- excuseme, all three expert
11 witnesses use similar sources for the information that they
12 gather on their proxy companies. Staff witness Murray uses
13 Edward Jones, and to some extent Value Line, MGE witness Dunn
14 uses Value Line for his information, and OPC witness Allen
15 uses Value Line.

16 Staff witness Murray uses Value Line to narrow
17 down the information that he acquired from Edward Jones in
18 his analysis. With regard to the development of historical
19 growth rates that are looked at in this particular testimony,
20 staff witness Murray uses Value Line, MGE witness Dunn uses
21 Value Line, and OPC witness Allen uses Value Line for
22 information on the historical growth rates of his proxy
23 companies.

24 For projected growth rates, again, Staff
25 witness Murray uses Value Line, he uses Standard & Poors and

1 IBES, MGE witness Dunn uses Value Line and Thompsons, and OPC
2 witness Allen uses Value Line.

3 With regard to the capital structure, this is
4 the foundation upon which a rate of return recommendation is
5 developed. Staff witness Murray uses a consolidated capital
6 structure of Southern Union as of 12/31/03, which is the end
7 of the update period for this proceeding. Staff witness
8 Murray's consolidated capital structure includes Panhandle.
9 MGE witness Dunn uses a consolidated Southern Union capital
10 structure, but he excludes only the long-term debt portion of
11 the Panhandle acquisition. OPC witness Allen uses a
12 consolidated Southern Union capital structure.

13 Now with regard to data, Staff witness Murray
14 filed direct testimony on April 15. He used historical 2002
15 data. Five days later, Value Line sent out the 2003 data on
16 April 20th. OPC used Value Line data from a CD that was able
17 to access online resources and to provide some '03 data. MGE
18 filed their testimony in November of '03 and used some Value
19 Line source data from September 19th of 2003, but would have
20 had to use the historical growth rates current through 2002
21 at that point in time.

22 With regard to cost of common equity, it is
23 estimated by all three witnesses through the use of a DCF
24 model that uses estimates of stock price growth. With regard
25 to the overall rate of return, that is based upon what is

1 called the weighted cost, weighted average cost of capital.
2 All three employ the weighted average cost of capital, which
3 consists of the common four elements; long-term debt,
4 short-term debt, common equity, and preferred stock.

5 Frequently, reasonable persons may differ on
6 how you arrive at an overall rate of return recommendation.
7 But the approach, the methodology, the techniques, the
8 analysis, the sources of information, are essentially the
9 same.

10 Now, I'd like to shift gears a little bit here
11 and go back to the McDonagh case. And the reason I'm going
12 back to McDonagh is because MGE would have you believe that
13 there's some great burden that this Commission bears with
14 regard to expert witness testimony. MGE would have you
15 believe that the Missouri Supreme Court struck McDonagh's
16 expert witness testimony, and that for the very same reason,
17 this Commission must strike Staff witness Murray's testimony
18 on capital structure and rate of return.

19 I know that four of you sitting on the bench
20 today as Commissioners are attorneys, and I believe it's
21 quite important to discuss the McDonagh case. First of all,
22 Dr. McDonagh was an Osteopathic Surgeon. The State Board of
23 Registration for the Healing Arts initiated a disciplinary
24 action against Dr. McDonagh. They charged that he violated
25 Section 334.100 of the Missouri Statutes regarding his use of

1 what is termed chelation therapy for the treatment of
2 patients with vascular disease.

3 This is a medical negligence case and a
4 disciplinary case. The Administrative Hearing Commission
5 heard the case and found no cause to discipline Dr.
6 McDonagh's medical license. The Board was not satisfied and
7 appealed to the Cole County Circuit Court, the Cole County
8 Circuit Court then affirmed the Commission's decision.

9 The Board again not satisfied appealed to the
10 Western Court of Appeals, and this case was transferred from
11 the Court of Appeals to the Missouri Supreme Court in order
12 to address the standards for admission of expert witness
13 testimony in civil and administrative cases.

14 Now, at issue in this case is did the
15 Administrative Hearing Commission err by failing to apply the
16 standard for admission of expert testimony set out in Frye v.
17 US, and should Dr. McDonagh's testimony -- expert witness
18 testimony, should that have been excluded?

19 The Supreme Court held that the standard for
20 admission of expert witness testimony is set forth in 490.065
21 for civil and administrative cases. However, the Court also
22 held that the Administrative Hearing Commission failed to
23 properly apply the proper standard reasonably relied upon by
24 experts in the relevant field.

25 Now let me explain what the relevant field

1 here is. The Court held that the relevant field was
2 physicians who are treating persons with vascular disease.
3 Dr. McDonagh, as an Osteopathic Surgeon, was practicing
4 chelation therapy. Chelation therapy is what's called an
5 alternative therapy. It is not approved by any major medical
6 association or organization.

7 In fact, the FDA has not approved it, but the
8 drug therapy involved in chelation therapy is permissible,
9 because in chelation therapy there is the added side benefit
10 that this removes heavy metals from the veins and this is a
11 good thing, from what I understand. However, Dr. McDonagh
12 brought in expert witnesses who are practitioners of
13 chelation therapy.

14 There were no expert witnesses in the relevant
15 field. The expert witnesses in the relevant field were
16 physicians who were treating persons with vascular disease.
17 And again, chelation therapy is not viewed by any major
18 medical association to be an acceptable treatment.
19 Therefore, and as I mentioned earlier, involved with Statute
20 334.100, which set forth a black line letter or standard of
21 care that had to be met, because this involved negligence
22 charges, and indeed, there was a burden.

23 Well, the Missouri Supreme Court reversed the
24 Circuit Court and remanded the case back to Administrative
25 Hearing Commission for reconsideration.

1 JUDGE WOODRUFF: I'm going to interrupt again,
2 I'm sorry, we are running short of time, if you would wrap it
3 up by 4:30, I would appreciate it. That gives you about
4 seven more minutes.

5 MR. BERLIN: Sure. So in discussing at length
6 the McDonagh case, one might reasonably ask what does
7 chelation therapy and physicians treating vascular disease
8 have to do with a rate proceeding brought by Missouri Gas
9 Energy and the issue of capital structure and rate of return
10 testimony? The facts do not relate.

11 McDonagh is a different case. It involved a
12 standard of care that expert witness testimony had to be
13 provided for as guided by Missouri Statute 334.100. What we
14 have in this proceeding are testimonies on capital structure
15 and rate of return that have far more in common in their use
16 of common methodology and their use of a DCF model in the
17 common use of techniques and common sources of data than they
18 do have in differences. Of course, there is a difference in
19 the ultimate recommendation. And I submit that that is why
20 we are here today.

21 As I indicated earlier, this is a case
22 regarding the admissibility of expert witness testimony.
23 This is not the forum in which we are trying the ultimate
24 issue, and that is the capital structure rate of return
25 recommendation for MGE to collect from the Missouri

1 ratepayers.

2 I would like to just make mention of some
3 areas that were brought up by MGE and counsel in talk of
4 canned testimony. Canned testimony is not an issue in this
5 case. Clearly, the analysis, the methods, and the data are
6 understood and provided by Staff witness Murray and are,
7 indeed, very similar to MGE witness Dunn and OPC witness
8 Allen.

9 What we are looking for, and I would like to
10 go to one of the quotes and point it out to you, the statute
11 requires that to be admissible, expert opinion must be based
12 on facts or data, and I'm going to highlight of a type
13 reasonably relied upon by experts in the field. That is what
14 we have here today with the testimony of Staff witness
15 Murray.

16 Staff witness Murray's testimony is intended
17 to help the Commission as the ultimate trier of fact in this
18 proceeding to understand, to analyze the evidence related to
19 this issue. And that is why Staff witness Murray's
20 testimony, and for the reasons stated, that indeed he is
21 qualified under 490.065, and that he meets the threshold
22 requirements of Subsection 1 and Subsection 3, and that the
23 testimony of Staff witness Murray should be admitted and
24 should -- and that the Commission should be given the
25 opportunity to analyze the reasons and the rationale stated

1 in Staff witness Murray's testimony so that the ultimate
2 prior of fact, the Commission, may better understand, better
3 analyze, the capital structure of MGE so that an appropriate
4 rate of return may be selected by the Commission, and that
5 MGE may collect it from Missouri ratepayers.

6 That concludes my presentation. Thank you.

7 JUDGE WOODRUFF: Thank you. And as we did for
8 attorney for MGE, we'll wait until after all the parties have
9 had an opportunity to speak before we go to questions. And
10 for Public Counsel.

11 MR. DANDINO: May it please the Commission.
12 My name is Michael Dandino, I'm with the Office of Public
13 Counsel. I'm representing our point of view in this motion
14 hearing, and we support the Staff. This is not our witness,
15 Mr. Murray is not our witness, but we strongly support the
16 Staff. We believe that they have made a case for
17 admissability of his testimony.

18 After sitting here for 90 minutes, I kind of
19 got the idea that I came to something different than these
20 gentlemen came to. I feel like I wore a tuxedo to a
21 barbecue. I was prepared, and I'm still prepared, and think
22 the real menu here is a nice, neat, tight discussion of the
23 law of admissability.

24 Mr. Herschmann and Mr. Berlin discussed really
25 -- it was a carving up of expert witnesses. Those are

1 credibility issues. Those are not issues that this
2 Commission needs to decide right now. And the law says
3 exactly that.

4 The standard for admission of expert testimony
5 in civil cases is set forth in Section 490.065 as discussed
6 herein. And also the standard applied in administrative
7 cases. Section 90 -- 490.065 provides the standards for
8 admission of expert testimony in civil cases.

9 It's very clear. I mean, I don't know as
10 Justice Wolff said. This statute is written in English, and
11 I think McDonagh is written in English, too. And I find it
12 very easy to read English, and the English that I read says
13 that this statute is what applies. This statute is what
14 applies and not a discussion of the federal Daubert
15 decisions. They don't apply here.

16 As Justice Wolff said, look at the statute.
17 Read the statute. And I think that's what this Commission
18 should do. And if you look at the statute, and if you look
19 at Mr. Murray's testimony and give it a fair reading, this is
20 what you're supposed to judge, whether it meets the criteria
21 of the statute. Public Counsel laid out in our motion, in
22 our suggestions in opposition to the company's motion, a
23 point -- a very specific discussion of how this testimony met
24 those requirements.

25 Mr. Berlin discussed those in his point. I'm

1 not going to go back through it and reiterate them. But it
2 is clear, if you read, and Mr. -- Mr. Murray's testimony is
3 in English, too. It's a little difficult in some places, but
4 it is in English, and you read that and you will know and you
5 will see that it meets the standard. He is -- he is -- has
6 been qualified as an expert.

7 Now, I did want to bring up one point that
8 Mr. Berlin had talked about a number of cases, but he
9 overlooked one case. I'd like to point that out to the
10 Commission, and it's GR-2001-292. This is a case called in
11 the matter of the tariff revisions of Missouri Gas Energy, a
12 division of the Southern Union Company designed to increase
13 rates for natural gas services to customers in the Missouri
14 service area of the company.

15 Well, this is the last MGE rate case. And in
16 that case, Mr. Murray's -- David Murray's direct testimony
17 and rebuttal testimony was labeled and marked as Exhibit No.
18 7 and No. 8 in that testimony. And if you look at, we have
19 copies of it here, and I think the Commission could look at
20 it. That it is, you know, it's very similar to what -- to
21 what he testified in this, the grounds.

22 You know, MGE didn't object to his credentials
23 at that point. They didn't have any problem with his
24 qualifications at that point. And in fact, they settled the
25 case, and at the hearing for the stipulation and agreement,

1 Mr. Hack, who was counsel for MGE, and this was on a hearing
2 on June 28th, 2001.

3 Says, Mr. Hack, do we need to waive the
4 evidence in? I know we marked all the exhibits, I don't know
5 that we ever. Judge Woodruff, was that addressed in the
6 stipulation agreement? Mr. Hack, it was not. I think all
7 the parties are willing to make the representation to accept
8 the admission of the testimony, but I thought we ought to do
9 that on the record. Judge Woodruff. Any parties have any
10 objection to that? Your Honor. Mr. Conrad. Your Honor,
11 subject to the Commission's acceptance of the stipulation, we
12 have no objection. Judge Woodruff. Okay. I was handed an
13 exhibit list on Monday that listed all the parties exhibits.
14 I'm not going through this individually. At this point,
15 they've all been offered into evidence. Anyone have any
16 objection to the receipt? No response. Hearing none, all
17 the exhibits will be received in evidence.

18 That case was on point. Now, there's also
19 another case on point. Mr. Herschmann brought up the point
20 -- or issue that Mr. Murray had said in his deposition that,
21 well, he really wasn't an expert or he didn't have the
22 qualifications -- have the qualifications. But I think
23 there's another case that, I think, I'd like to bring to the
24 Commission's attention, if I can find it.

25 Well, this is a case, an NOS -- NOS

1 Communications case. And I'll have to provide the citation
2 for the Commission later. I don't seem to have it with me at
3 this point. But in this case, this was in 19 -- I believe in
4 1996 case before the Commission. And in the case,
5 Mr. Zorillo was a witness for the Staff, and he had only been
6 on the staff for, oh, approximately seven months, and he
7 provided expert opinion testimony in that case.

8 In fact, Mr. Hack may remember this because he
9 tried the case for the Commission when he was General
10 Counsel. And during the cross-examination of the -- of
11 Mr. Zorillo, the Staff's witness, he said that, well, I'm no
12 expert in telecommunications. Well, of course, the company
13 immediately moved to exclude and strike his testimony on the
14 basis that the witness admitted he wasn't an expert.

15 Well, this Commission said that's not up for
16 the witness to determine. We look at all the facts and we
17 decide who's an expert and who isn't an expert. So I think
18 that's the point I'd like to make on expert testimony.
19 On the admission of expert testimony.

20 Now, most of the discussion you heard today
21 wasn't about admission of testimony, because it was about the
22 credibility and weight to be assigned to Mr. Murray's
23 testimony. And the problem is there's no evidence in this
24 case. Mr. Murray's testimony hasn't even been offered. The
25 evidence in this case hasn't even been completely filed. The

1 surrebuttal testimony is still due in this case.

2 What this process, what we're going through
3 here today, is a prehearing review of the evidence to
4 determine the credibility of the witnesses. And this is
5 something -- this is a path this Commission should not go
6 down. And the reason is is that you are required to consider
7 all relevant factors on -- that are of evidence in the
8 record. And all relevant factors include the credibility and
9 weight of the witnesses and the credibility and weight of the
10 expert witness opinions that has been presented in the case.

11 I think you should wait until all of it -- all
12 of the evidence is in to make that judgment, so you consider
13 all of the relevant factors where you can balance every
14 expert witness' testimony against the other.

15 But more important, you don't decide it on the
16 pleading situation and representations of counsel and
17 conclusions and things are in aberration and unsupported and
18 are predestined. No. You decide it based on evidence in the
19 record, and you also decide it when you listen to the
20 cross-examination and see these witnesses have their opinions
21 and the facts on which they relied tested by the
22 cross-examinations.

23 You see how they react to the questions. You
24 see their demeanor. You see how they respond to your
25 questions. That's what you're here for. That's -- that is

1 why the law requires or puts such discretion in the
2 Commission and any trier of fact, whether it's a judge in a
3 bench trial case or a jury or a Commission, that you have the
4 opportunity to see and observe that witness.

5 And because of that, the court's are not going
6 to disturb your discretion unless it's completely arbitrary
7 and unreasonable. And why is that? You should eyeball these
8 witnesses. The expression seeing is believing really means
9 it. And I think it would be a bad mistake and a -- and a --
10 I -- just a poor procedure, and I think an unlawful procedure
11 for this Commission to decide the -- really, the credibility
12 of Mr. Murray's testimony based on what we have here today.
13 This isn't evidence, and the arguments raised by the company
14 go to the weight and credibility of his testimony.

15 Now, I think there's one other thing that you
16 should consider, too. Is that if you're going to decide
17 credibility based on -- in this type of a format, you're
18 going to start deciding the admissibility of expert opinion
19 testimony based upon the thickness of resumes, the number of
20 articles referred to in the -- in the testimony, how many
21 degrees the person has, what school they went to, and other
22 factors which really go to the weight and credibility rather
23 than to the admissibility. This isn't a checklist where you
24 just go down and decide. It is -- there are certain factors
25 that you have to listen and consider and weigh.

1 Also, in final point, is if we go through this
2 process that the company's trying to get where we're going to
3 pre-examine all the credibility issues and all these
4 admissibility issues long before they've even become ripe by
5 someone offering the exhibit into evidence or even having the
6 hearing or approaching it, we're going to spend a lot of
7 resources, not only by this Commission, but the Staff and
8 Public Counsel.

9 And once again, it will be the people with the
10 deep pockets who can afford to -- to stretch out the process
11 and outgun the other side with numerous hearings and
12 procedures that will put a strain on the little guy, the
13 customer.

14 And once more, in the end, the most tragic
15 part of this is that MGE, and as most companies probably will
16 or do, ask for recover of fees and expenses for bringing this
17 motion. And I think that's unconscionable in this situation
18 where it's not really a -- a legal question, but they're
19 trying to get an advanced ruling on credibility.

20 Thank you, your Honor.

21 JUDGE WOODRUFF: Thank you, Mr. Dandino.

22 Mr. Conrad for Midwest Gas Users.

23 MR. CONRAD: I'll be brief, Judge.

24 JUDGE WOODRUFF: Thank you.

25 MR. CONRAD: I hadn't really intended, your

1 Honors, to address you on the substantive matter today. I
2 was here this morning for another proceeding, and I became
3 aware that Mr. Herschmann's firm had charged MGE, for just
4 the month of March alone, \$83,819.87. And I thought that by
5 my calculation, somebody that charged \$672 an hour might be
6 worth coming by and hearing.

7 Now, my question still remains, and perhaps
8 Judge Roberts can arrange COE credit, but I am reminded after
9 listening to this of the old story that you could take all
10 the economists in the world and line them up head to foot and
11 they still would not reach a conclusion. I think that is
12 probably true with respect to financial experts also, which
13 is why I pulled this up.

14 The very first statement here from Hope, the
15 fixing of just and reasonable rates involves a balancing of
16 the investor and consumer interests. If you lined up all of
17 the financial experts in the world, and certainly in this
18 case, you probably would not find at the end of that line a
19 point of balance. That is because the five of you bring to
20 the table the ability to draw that balance based on every
21 piece of evidence and every piece of opinion that you can
22 possibly lay your hands on. Harry Truman used to get every
23 piece of advice he could get, and then he made a decision,
24 and then he went to bed.

25 I am not afraid, my clients are not afraid, to

1 have you five, and I don't mean, Judge Woodruff, to exclude
2 you. Maybe five and a half.

3 JUDGE WOODRUFF: I think I'm a little bit
4 bigger than that.

5 MR. CONRAD: All right. Six and a half then.
6 I am not afraid and my clients are not afraid to have you
7 five or six and a half draw that balance. My question that
8 I'll just leave hanging in the air is why are others.

9 JUDGE WOODRUFF: Thank you. I'm going to
10 allow the company about five minutes to reply, and then we'll
11 take a short break to give the Court Reporter a chance to
12 rest a little bit, and then we'll come back with questions
13 from the Commissioners. So go ahead.

14 MR. HERSCHMANN: Thank you. After listening
15 to both the OPC, Staff counsel being entertained by the last
16 argument, it seems abundantly clear that one thing hasn't
17 been addressed, whether they like it or not, the Missouri
18 Supreme Court has set a standard. It's not to be ignored,
19 it's not to be given short shift, and it's not something that
20 you say we hear all evidence. Because right now you don't
21 hear all evidence.

22 You don't hear hearsay. No court in this land
23 hears all evidence. When I was a prosecutor, I would have
24 loved to have put in all the evidence. Let's everybody hear
25 everything. That's not how it works.

1 In McDonagh case, there's a reason for that.
2 Because you're only to base your decision on credible,
3 reliable, admissible evidence. That's the only issue. It's
4 great to say let's hear it. It's almost a concession, we
5 don't make the standards. Okay. But you should hear it
6 anyway and then we'll work it out later on.

7 That's the standard, and no matter what they
8 say doesn't change what the Missouri Supreme Court has
9 dictated applies to this Commission, applies to MGE, applies
10 to the Staff, applies to the Counsel, and applies to every
11 other administrative proceeding in this state.

12 It's not a question of the facts of the case.
13 When I was in law school, a law professor told me when your
14 opposing counsel starts citing concurring opinions and
15 ignoring the majority, you're in good shape. And that's
16 exactly what's happening here.

17 They want to say ignore what the majority of
18 the Missouri Supreme Court has said applies and just read the
19 statute, and then figure it out yourself. But that's not the
20 what the decision says. The decision says you are to take
21 guidance from the federal statutes and from the federal cases
22 because that's the foundation for which the statute was
23 created.

24 And the issue of saying I have a college
25 degree and I got an MBA a few months before I submitted this

1 canned testimony, therefore I'm able to opine as an expert in
2 a regulated utility rate of return case, there's not one drop
3 of evidence.

4 And I know that four -- or have now been told
5 that four of the Commissioners are lawyers, I've been an
6 attorney for some years. I will tell you that I don't think
7 there's a court in the land that would let me come in and say
8 I'm a lawyer, I've never done intellectual property before in
9 my life, but I'll give you an expert opinion on that because
10 I went to law school and practice law.

11 Well, you all know that's not how it works.
12 And he doesn't say, even under oath, that I went to college,
13 I learned all about rate of return, I learned how to apply
14 it, I use the DCF models, I trained in it, and now I'm giving
15 you my opinion. He swears to just the opposite. I never did
16 it. I didn't know how to do it. No one ever taught me how
17 to do it. I showed up one day and someone gave me this
18 testimony, said this is the way we submit it, this is what we
19 do, and this is how we calculate things.

20 The question is not the use of the DCF model.
21 The DCF model is recognized. If we were talking about a
22 medical malpractice case, which is where a lot of the expert
23 case law comes from, and the issue was a heart transplant,
24 people may not question that the heart transplant was
25 necessary, but the issue would be did you do the heart

1 transplant correctly.

2 As an expert, can you say you used the
3 reliable methodologies. You had the training and experience.
4 You had the education, and you independently established a
5 reliability. What they're asking you to do today is
6 prohibited by law.

7 The Missouri Supreme Court says you must make
8 the determination. There's not a question here as to whether
9 or not the Staff intends to offer Mr. Murray's testimony.
10 That's the process. And it's not a question of what happened
11 previously. McDonagh has created new responsibilities for
12 this Commission with respect to expert testimony.

13 It makes it clear that you need to weigh the
14 evidence before it's admitted into the record. McDonagh
15 didn't apply in 2001. The Supreme Court didn't come down
16 with the decision until six months ago. And the prior
17 conduct and the prior information before McDonagh doesn't
18 apply. The Court has now told you this is the standard by
19 which you need to operate. And they do it for a reason.
20 It's to keep unreliable evidence out of the mix. You need to
21 make the first determination.

22 As far as the concept that this witness did a
23 Cap M risk analysis for comparable companies, the key is
24 this. It's not the question of whether he used the DCF model
25 or used the general terms as to what applied. The question

1 is did he have the expertise and training, and did he apply
2 it in a reasonable. What you have to determine based on the
3 record that they've given you, is there evidence that it's
4 reasonable.

5 And whether he submitted testimony previously,
6 whether it's objected to previously, is irrelevant
7 pre-McDonagh. What you'll see in the testimony is that he
8 looked at the Cap M risk premium, and he ignored it when it
9 was contrary to what he found. And the comparable companies,
10 he doesn't make an adjustment to say they're not comparable.
11 Okay. The Supreme Court tells me I need to do it, I need to
12 look at comparable companies. My comparable companies that
13 I'm picking aren't comparable. Does he make an adjustment?
14 No. Then he ignores the 2003 data.

15 And under those circumstances, when you have
16 no justification for ignoring what the Supreme Court tells
17 you is the most relevant information for looking towards the
18 future, what the evidence was of that day, has no basis for
19 saying it.

20 In concluding, this Commission has no choice.
21 It can't ignore McDonagh. As much as OPC and Staff will like
22 you to do it, as of December 23rd of last year, you are
23 prohibited. The Court has made it clear you need to meet the
24 standards, and you have to evaluate it for one reason only.

25 this is not sitting in someone's living room

1 and it's not sitting at a bar discussing let's talk about
2 everything that happens in the world. It is only admissible
3 evidence that comes into the record. That's why we're
4 lawyers, that's why we practice law, that's why we had to
5 take evidence in school, and that's why it applies now.

6 If there was any doubt about that, on December
7 23rd, it all ended. Thank you.

8 JUDGE WOODRUFF: Thank you. With that, then,
9 we'll take a break until 5 o'clock and we'll come back with
10 questions from the Commissioners.

11 (A BREAK WAS HAD.)

12 JUDGE WOODRUFF: Let's go back on the record.
13 Let's go ahead, then, with questions from the Commission.
14 And I'm going to ask the Commissioners that we'll try and ask
15 all questions of each attorney, so we don't have attorneys
16 popping back and forth. Commissioner Gaw, do you have any
17 questions?

18 CHAIRMAN GAW: Yes, I do, Judge, and I
19 probably won't follow your directive.

20 JUDGE WOODRUFF: Okay.

21 CHAIRMAN GAW: First, I want to ask counsel,
22 if I can pull my statutory reference back, in -- under
23 Subdivision 1 of 490.065, what guidance should the Commission
24 look toward in determining what minimum requirements should
25 be necessary for testimony of a kind that has been given by

1 Meyer (sic) in order to qualify him as an expert in that
2 area? What minimum requirements should there be?

3 MR. HERSCHMANN: Is that directed to me?

4 CHAIRMAN GAW: Yes, sir.

5 MR. HERSCHMANN: I think the guidance on that
6 has to be based on the record that has been put before you.
7 Which means this witness in this record has to be able to
8 provide the basis for which he would qualify as an expert.

9 And it's not simply saying that I have
10 something that may help you, because if you're not qualified
11 you don't get to that stage, and what the Missouri Supreme
12 Court has said is you look to some of the federal cases as it
13 relates to guidance on the admissibility. And one of the
14 factors that Daubert actually provides for non-exclusive
15 factors is you consider, and then there's subsequent to
16 Daubert, you know, and its progeny that address that
17 standard.

18 CHAIRMAN GAW: Okay. Help me for a moment,
19 we're talking this case, but you may be talking about other
20 cases in the process of this in the future as far as
21 Commission policy is concerned.

22 What is a minimum requirement, in your
23 opinion, to satisfy Subdivision 1 for testimony of the kind
24 that has been presented in Meyer's (sic) testimony? What
25 would be satisfactory?

1 MR. HERSCHMANN: Sure, I think that is really
2 a practical issue that the Commission needs to address and
3 that is this witness, or any witness on behalf of the Staff
4 who wants to come forward and submit an expert testimony on
5 rate of return or return on equity, needs to do one of
6 several things.

7 CHAIRMAN GAW: Okay.

8 MR. HERSCHMANN: One is go get the training,
9 and you get the training by working with recognized experts
10 like Professor Morin, attending courses, getting certified,
11 and focusing on this specific issue. And it requires going
12 outside of this is how the Staff has always done it, so
13 therefore we should do it. You have to send them out and get
14 trained.

15 The other possibility that the Commission
16 should consider is retaining a consultant to work on return
17 on equity and rates of return, and that consultant can then
18 work and train the Staff members. But you have to -- they
19 need that step, because they need to get the basic training
20 to provide the methodologies.

21 And once you get the training, then you can,
22 as an expert, opine on how do you make the adjustments, what
23 is reasonable, what issues do you have to exclude or not
24 exclude. But they have to go out and get the training. They
25 can't just be getting the canned testimony.

1 CHAIRMAN GAW: Okay. From the standpoint of
2 minimum requirements of education, you don't see that as
3 being something that requires a Doctorate, necessarily, or
4 Master's, or even in some cases maybe a Bachelor's might be
5 sufficient. You think it's about the specific training in
6 that particular area and whether or not that training has
7 been done by reputable individuals that have expertise in the
8 area? I'm trying to follow you here.

9 MR. HERSCHMANN: I understand, and there is an
10 issue as to education.

11 CHAIRMAN GAW: Okay.

12 MR. HERSCHMANN: And I don't think that -- it
13 may take me, as an attorney, years to get to the point,
14 whether I work on cases like this over and over again, and
15 lawyers tend to feel we do a case and we put on an expert, we
16 become the expert. It would probably take me years to do it,
17 but the education is critical.

18 If you look at Professor Morin, and one of the
19 things I asked this witness is he has a Ph.D, he lectures at
20 Wharton and Dartmouth. He gives lectures throughout the
21 entire country. He's written textbooks and articles. The
22 way to get the education is to make sure you're in the arena
23 working with the people who everyone says are the experts.

24 It's not -- I don't think you graduate and you
25 have a degree in finance, because maybe there is something

1 that mentioned a DCF when you're in college in some textbook,
2 but that's not going to get you the qualifications to do it.
3 And I think the problem you're going to be faced with on a
4 practical basis is the witnesses have to come before you and
5 lay it out.

6 One of the arguments was you're going to have
7 to start looking at CV's. That's exactly right. That's
8 exactly what the courts do. The courts absolutely weigh who
9 are you, what are your qualifications, have you been
10 recognized as an expert previously. Have you written
11 articles, are there peer reviews about you, are you quoted
12 anywhere, and then they weigh stuff.

13 And you can have two conflicting experts, but
14 you have to get qualified. If you don't get the
15 qualifications and meet the standards, you don't come in.

16 CHAIRMAN GAW: What cases -- have you cited
17 the cases that we need to look at in your briefing --

18 MR. HERSCHMANN: I think we've cited some of
19 the cases.

20 CHAIRMAN GAW: -- that go to that particular
21 point on Subdivision 1?

22 MR. HERSCHMANN: I think we've cited some of
23 the cases. If necessary, we can file supplementary briefs
24 that would address more of that.

25 CHAIRMAN GAW: All right. Go to Subdivision 3

1 for me.

2 MR. HERSCHMANN: Sure.

3 CHAIRMAN GAW: And I'll come back to some of
4 the other counsel. I'm trying, Judge, but you know it's very
5 difficult for me.

6 The -- when you're looking at Subdivision 3,
7 is your criticism in regard to -- let's see. It says opinion
8 based on that we perceive or made known to him at or before
9 the hearing and must be a type reasonably relied upon by
10 experts in the field.

11 You made some challenges to that in your
12 earlier arguments. I'm trying to understand the specifics of
13 what you're saying were not -- should not be relied upon, and
14 cannot be relied upon because no one else relies upon them.
15 Are those specific items set forth, also, in your briefing?

16 MR. HERSCHMANN: I believe it's in the briefs,
17 and in the rebuttal testimony by Professor Morin.

18 CHAIRMAN GAW: You're not disagreeing with
19 using the DCF model as a recognized model, that's not your --

20 MR. HERSCHMANN: Right, I think there's a
21 general recognition that, well, there are different DCF
22 models.

23 CHAIRMAN GAW: Yes.

24 MR. HERSCHMANN: The DCF model is something
25 that, in conjunction with other tests, many Commissions look

1 at.

2 CHAIRMAN GAW: There are specifics within his
3 testimony that you say no one else -- there is no expert out
4 there that says you should do it this way, for lack of better
5 wording. I'm trying to understand what you're saying.

6 MR. HERSCHMANN: Let me see if I can clarify
7 it.

8 CHAIRMAN GAW: Thank you.

9 MR. HERSCHMANN: The requirements under
10 490.065.3 fall to the witness to say that he has the
11 expertise and he is using a methodology that is reasonably
12 relied upon by experts in the field in forming the opinions.
13 So he needs to cite to you these are the experts that say you
14 use this methodology, and here's how you use the methodology,
15 and we all rely upon it this way.

16 The testimony and the prepared testimony, the
17 deposition and the briefing is devoid of that. So you
18 haven't reached that prong. But the issue on providing the
19 opinion, loops, in essence, back to Section 1. You need to
20 be able to say I've done this, I'm qualified in this, I'm
21 trained in this. Now, on top of that, this is the area for
22 which I'm providing you expertise and here's how we all do
23 it.

24 CHAIRMAN GAW: Right.

25 MR. HERSCHMANN: So I mean, taking -- if it

1 was a simple algebraic formula and we just plug the numbers
2 in, there would be nothing to talk about. We would all come
3 out with the same numbers and it would be a very simple
4 process.

5 The problem is it doesn't work that way, so
6 it's the adjustments and the methods for which you pick
7 comparable companies, whether you average in things or don't
8 average in things, whether you look at historical growth, if
9 it's negative, is it something you should be excluding or not
10 excluding. That is the area for which we don't see any
11 support in this record to say that's the basis for doing it.
12 And I think a lot of it is addressed in greater detail in
13 Professor Morin's rebuttal, who addresses 15 different basis
14 in detail as to applying it in a reasonable, acceptable
15 manner.

16 CHAIRMAN GAW: If you were -- there was --
17 there were several arguments made that suggested that what
18 you're referring to in your argument really goes to the
19 credibility of the witness and not to the admissibility of
20 the evidence itself. Where's the line there --

21 MR. HERSCHMANN: I think the law --

22 CHAIRMAN GAW: -- in your opinion?

23 MR. HERSCHMANN: I think the line is drawn by
24 McDonagh in the statute. I don't think it's drawn by the
25 company. And the issue is simply this.

1 CHAIRMAN GAW: I agree with you, but I want to
2 know what your opinion is.

3 MR. HERSCHMANN: The opinion is this. That
4 the testimony, before you can receive it into evidence,
5 before you can hear it, and this is how it's done in the
6 court system. It's done throughout the country the same way.

7 The party submits purported expert testimony.
8 There is then -- there's a challenge, the challenge is done
9 by what we've submitted to you. Briefing identified sources
10 that we cite to, cases that we cite to, and say you need to
11 look at those cases. You need to make the assessment, not
12 hearing from the witness, and almost -- I will say in any
13 case that I've done, I haven't seen had a court sit down and
14 listen to the expert's testimony to decide whether or not
15 they think the witness is credible. The courts look at the
16 filings.

17 And if you talk about judicial resources, they
18 would be doing it every single day forever to hear every
19 single witness' testimony. But the process is you got to
20 look at what's submitted to you, and then you need to make
21 the independent determination. It's not a credibility issue.

22 If I got up there and said this is what I
23 think the rate of return should be, and you say, wow, he
24 seems pretty credible, you couldn't admit it. That's not the
25 credibility issue. It's a reasonably objective, reliable

1 standard. You have to have the basis to say it. You have to
2 have the background and information in the record to support
3 what you're claiming. And then if you get over that hurdle,
4 then you make a question -- then it's accepted. And like in
5 any other case where you have competing witnesses, then the
6 credibility issue comes in.

7 CHAIRMAN GAW: So you're saying there's a
8 minimum threshold and then you get into the credibility
9 question.

10 MR. HERSCHMANN: That's exactly right.

11 CHAIRMAN GAW: All right. Thank you. Staff,
12 I would like for you to go back to Subdivision No. 1. Where
13 in the -- in the testimony is it established that -- are the
14 minimum requirements in 065.1 established? You guys are
15 changing counsel on me.

16 MR. SCHWARZ: Well, I would first like to note
17 that although Mr. Herschmann spoke eloquently, he didn't
18 answer your question.

19 CHAIRMAN GAW: Well, I don't know.

20 MR. SCHWARZ: And I'm not going to answer your
21 question either.

22 CHAIRMAN GAW: Maybe it will have to be me.

23 MR. SCHWARZ: I think that it does have to be
24 you. I think that it's safe to say that there is no
25 requirement that you have published peer reviewed articles.

1 There is no requirement that you have taught at a university
2 level or a graduate school level or a high school level.

3 I think that the statute itself says that the
4 witness is qualified by knowledge, skill, experience,
5 training, or education. And they do that specifically
6 because it's hard to get your hands around. If you're
7 talking about a case where auto mechanics plays an important
8 role, obviously you have a different set of criteria than you
9 do in a case like this where financial analysis is required.

10 I can tell you that the Staff has not offered
11 a witness on this issue who has a degree in aeronautical
12 engineering and has -- has studied something that's not
13 necessarily applicable to financial analysis.

14 CHAIRMAN GAW: That's fair. What's in your
15 testimony that establishes Meyer (sic) as an expert?

16 MR. SCHWARZ: Mr. Murray's Curriculum Vitae.

17 CHAIRMAN GAW: Murray, did I say Meyer? I
18 apologize.

19 MR. SCHWARZ: I think that Mr. Murray's list
20 of his educational experience and his experience here at the
21 Commission is sufficient and adequate to satisfy the criteria
22 under 490.065.1.

23 CHAIRMAN GAW: Well, what is he not an expert
24 in in regard to his general -- general field of education?
25 Is he qualified, in Staff's opinion, to testify on anything

1 that he might -- that might be under the general heading of
2 his degrees? Is that the minimum requirement?

3 Is there some -- I'm looking for some guidance
4 here about where this line is on what allows you to be
5 qualified as an expert. Is it a moving line? Is it
6 something that each body can determine independently within a
7 range? What is -- what is he qualified to come and testify
8 in front of this Commission about?

9 MR. SCHWARZ: Well, and the only way I can
10 answer that is, at present, Staff is only offering him in the
11 area of financial analysis, capital structure, and that sort
12 of thing. And his education and his experience and his
13 training here at the Commission do qualify him under that.
14 If he has other hidden areas of expertise that we haven't
15 uncovered yet, we may uncover those in the future, but we
16 haven't offered him for that.

17 CHAIRMAN GAW: Well, how much training has he
18 had in doing the -- in working in the area that he's
19 testifying about in this case.

20 MR. SCHWARZ: Well, he has certainly had more
21 experience here at the Commission than Mr. Zorillo had when
22 Mr. Hack qualified him in the telephone case. It's -- I
23 can't tell you that he's been to this narrative course or
24 that --

25 CHAIRMAN GAW: Should I ask Mr. Hack based

1 upon his knowledge of our staff and who he knows and doesn't
2 know who should we qualify as an expert and who we shouldn't?
3 Because it might help us out in future cases.

4 MR. HERSCHMANN: We'll stipulate.

5 CHAIRMAN GAW: Sorry, go ahead.

6 MR. SCHWARZ: No, I cannot tell you right now
7 what additional training other than his formal educational
8 training, the Bachelor's degree and MBA.

9 CHAIRMAN GAW: All right. What are the cases
10 that you cite to that would give us guidance about qualifying
11 what is necessary to qualify someone as an expert under
12 subdivision -- under Subdivision 1 of 065?

13 MR. SCHWARZ: I don't know that there's -- I
14 don't know that there's any case that's going to be
15 specifically on point to indicate to you what a particular --
16 what is sufficient to qualify a person as an expert.

17 CHAIRMAN GAW: There's tons of case law that
18 have been -- that have been all over this -- all over this
19 issue that may not be interpreting this particular statute,
20 but certainly have some bearing on it, that goes back in many
21 different fields over many, many years. There's been -- I
22 don't know how many cases that I've seen over the -- and I
23 remember reading about that have to do with that issue.

24 What's necessary to make someone an expert.
25 And I'm looking for guidance there in cases that are relevant

1 to this issue. That's -- because that is a threshold issue
2 in this case to me. What is the minimum requirement that's
3 necessary to get somebody in a position to be qualified as an
4 expert, testify on the things that you have in Mr. Murray's
5 testimony.

6 If you don't know the answer right now, I
7 understand. I need that guidance. I don't know where we are
8 on that -- on that particular --

9 MR. SCHWARZ: But the answer to the question,
10 at least in my mind is, that it's what you collectively as a
11 Commission deem appropriate.

12 CHAIRMAN GAW: I don't know that that's the
13 only guidance that we have. There's got to be more
14 objective, more of an objective standard. I'm not saying
15 that there's not subjectivity involved in it and that it
16 can't be something that we look at that it is of assistance,
17 but I want to know what the standard is.

18 And I don't think -- I don't disagree that you
19 can look at this and read it and it's in plain English and
20 easy to understand. But you know I've read a lot of things
21 that are in plain English and seen courts that had a whole
22 different idea about what it means than I did when I read it.
23 So I need some guidance on this particular matter about what
24 is the minimum threshold to first qualify somebody as an
25 expert.

1 Okay. Let me go to Subdivision 3. Are there
2 citations in the testimony that support that the facts or
3 data in a particular case upon which an expert bases their
4 opinion, in this case Mr. Murray, or inference may be those
5 perceived by or made known to him at or before the hearing,
6 and this is the part I'm looking for. And must be a type
7 reasonably relied upon by experts in the field in forming
8 opinions or influences on -- inferences upon the subject and
9 must -- must be otherwise reliable.

10 Is there testimony that supports that part of
11 that section in Mr. Murray's testimony?

12 MR. SCHWARZ: I don't recall if he -- if he
13 specifically says these are data and facts that are generally
14 relied on. I think Mr. Berlin, however, amply illustrated
15 that fact when you compare the three experts who are
16 providing testimony in this case, the type of facts and the
17 source of facts are the same for all three witnesses. They
18 pick and choose the data that they choose to use differently,
19 but the type of data that they rely on is all pretty much the
20 same.

21 CHAIRMAN GAW: Well, do companies witnesses on
22 this subject refer to or make statements in their testimony
23 about that it's -- it's the type reasonably relied upon by
24 experts in the field in making those determinations? Are you
25 missing something in your testimony, Mr. Schwarz in -- that

1 fulfills the requirement of Subdivision 3?

2 MR. SCHWARZ: I don't know if it is positively
3 stated. I don't believe that any of the parties in this case
4 can challenge any of the other parties based on the type and
5 source of data because it's the same kind. And I think that
6 all of them, if voir dired before their testimony is offered,
7 would say yes, I rely on data from Value Line, other
8 financial analysts rely on data from Value Line. We each use
9 it a little bit differently, but that's the kind of stuff
10 that we look at when we're doing our work.

11 CHAIRMAN GAW: When he's going through his
12 methodology, though, does he support that his methodology is
13 -- how he makes his calculation and the data that there are
14 places that you can go that say this is the right way to do
15 this, this is recognized as the way to make these
16 calculations, this is the kind of data that you plug in, does
17 he make reference to those in his testimony?

18 MR. SCHWARZ: I haven't looked at his --
19 certainly as to the data that he uses, it's all sourced.

20 CHAIRMAN GAW: Okay.

21 MR. SCHWARZ: As to the methodology, I can't
22 recall from memory now if he cites textbooks and that sort of
23 thing. But certainly that would be provided, again, at voir
24 dire if -- since it now appears to be an issue. It did not
25 necessarily appear to be an issue historically.

1 CHAIRMAN GAW: I think this issue is raised in
2 a way that we have not -- we have not looked at this issue in
3 this fashion in the past hardly because we hadn't had a case
4 before, so if we -- with the case, I think we have to -- we
5 have to examine what we've been doing in light of that
6 development. So if you can assist in that, that would be
7 helpful.

8 MR. SCHWARZ: That's certainly something that
9 can be addressed before hearing.

10 CHAIRMAN GAW: Okay. Thank you. Public
11 Counsel, do you want to venture down any of those areas that
12 I brought up?

13 MR. DANDINO: Yes, your Honor, do you want me
14 to come up to the podium?

15 JUDGE WOODRUFF: You can stay there,
16 Mr. Dandino.

17 MR. DANDINO: I certainly do, Mr. Gaw. Let me
18 refer you to Page 6 and 7 of our memorandum where it does
19 cite the cases that we're talking about, what are the tests
20 of expert qualifications.

21 Let me first preference it by McDonagh didn't
22 set up anything new. All -- it reiterated, in fact, the
23 Court even specifies that we decided this back in '97, you
24 know, and that -- you should have taken it that -- taken that
25 to heart. But when you start talking about -- when you start

1 looking at 490.065.1, start with that analysis.

2 CHAIRMAN GAW: Okay.

3 MR. DANDINO: When you look at that, first of
4 all is the subject matter the type where you should have
5 specialized knowledge, technological. Well, about anything
6 in the realm of public utilities, finance, business, those
7 type of subject matters are all relevant to providing you
8 information.

9 And degrees in economics and finance and
10 advanced degrees in business or even degrees in -- are
11 minimal qualifications, show a baseline for that you're
12 giving these people to say one way, they've earned their
13 license, and they can drive a lot of different vehicles based
14 on that license. You know, and they learn how -- you know,
15 maybe they know the technique, they know all the aspects to
16 it, and but as far as setting -- you say -- you have to have
17 a minimum point.

18 It depends on the circumstances, but I'm
19 trying to tie it directly to public utilities, and I think
20 going back to the cases that we cite in there, it says if the
21 expert witness possesses some qualifications. Some
22 qualifications. It doesn't say, you know, a great deal or
23 the highest amount. It's some qualifications.

24 And this is the Whitnell versus State case.
25 It's a 2004 Eastern District case, which specifically

1 discusses McDonagh, and it doesn't talk about McDonagh adding
2 anything new to this -- to this analysis.

3 And further, you get the test of an expert
4 qualification is whether the knowledge -- he has knowledge
5 from education or experience which will aide the trier of
6 fact. You know, in some -- it doesn't have to be a
7 significant amount. When we're talking about admissibility,
8 because I think the cases go back to, and I want to go back
9 to the Whitnell case, and it cites another Missouri Court of
10 Appeals case in 2003.

11 It says any weakness in the factual
12 underopinions of the expert opinion or the expert knowledge
13 goes to the weight that testimony should be given and not to
14 its admissibility. In general, the expert's opinion will be
15 admissible. And now here's the key to it, unless the
16 expert's information is so slight as to render the opinion
17 fundamentally unsupported.

18 Now, I think, you know, that's really not a
19 very high standard, but at least you're going to have to have
20 some facts and reliable facts. Now, if I may go onto the
21 reliable facts in Subdivision 3.

22 CHAIRMAN GAW: Sure. Could you?

23 MR. DANDINO: And that analysis, I think it's
24 not necessarily that the financial advisor here, the witness,
25 has to detail every -- every -- by every source he cites say

1 give all the reasons why this is authoritative or why he
2 relied upon it.

3 This Commission has some expertise in
4 understanding. It's not a blank slate like a jury. They
5 understand what is a reliable source through this
6 Commission's own information, education, and expertise.
7 That's why you're an administrative body. You have an
8 expertise. The same way the State Tax Commission understands
9 that comparable sales is an indication of value without the
10 appraiser having to say as an appraiser this is the most
11 reliable and we always rely on this in citing text to it.

12 I think the company is trying to draft -- is
13 trying to put all these details in this thing and make it a
14 -- when you make the initial analysis on admissibility,
15 you're deciding all the questions. And I think if you --
16 looking at the statute, those reliability questions and the
17 -- and the educational questions, you just have to have some
18 -- a general basis for it.

19 I've seen cases and I can't remember offhand,
20 but -- well, let's put it this way. A doctor, a medical
21 doctor can testify as to the standard of care for any doctor,
22 any specialist. It will have more weight if he's a
23 specialist in that field.

24 CHAIRMAN GAW: Who's Public Counsel's witness
25 on this issue?

1 MR. DANDINO: Travis Allen.

2 CHAIRMAN GAW: What's his educational
3 background?

4 MR. MICHEEL: Mr. Allen has an undergraduate
5 degree in both economics and finance from Southern Illinois
6 University at Edwardsville. And he also has a Master's
7 degree in economics and finance from that same institution.

8 CHAIRMAN GAW: All right. And what kind of
9 additional background did you cite as far as qualifications
10 as an expert in the testimony in general?

11 MR. MICHEEL: Generally, we discussed the
12 specific analyses that he did, the factors that he looked at.
13 I know in his testimony has cited some treatises that he
14 read, specifically the Cost of Equity Capital for a Public
15 Utility by Dr. Myron Gordon. I know that is cited in his
16 testimony.

17 And, you know, specifically he set out all of
18 his analysis, why he did what he did, why he determined, for
19 example, what growth rate he used. What processes he went
20 through to determine that that was the appropriate growth
21 rate and he looked at a broad range of different growth rates
22 before he came to his opinion about what the appropriate
23 growth rate was.

24 He also had a screen that he developed to
25 determine whether or not certain companies were comparable to

1 the -- were comparable for purposes of his discounted cash
2 flow analysis. And if my memory serves me, I believe he has
3 seven or eight different screens.

4 I don't have his testimony here, but seven or
5 eight different screens that he developed. I think one was
6 if they have investment grade bond rating, which is Triple B
7 or above. I believe they had to be pure clay natural gas
8 utilities, in other words had to have a significant amount of
9 their revenues from regulated LDC, and I'm sure in his
10 testimony, Commissioner Gaw, there are the other ones. Those
11 are the two that come to my mind.

12 CHAIRMAN GAW: Is he -- did you all do more in
13 your -- does he have more expertise or more background in
14 this area than Staff's witness?

15 MR. MICHEEL: He -- this is his first time
16 testifying before this Commission, Commissioner, but you
17 know, without going into, you know --

18 CHAIRMAN GAW: I'm putting you in a tough --

19 MR. MICHEEL: You're giving away -- you know,
20 these guys were supposed to be taking his deposition today.

21 CHAIRMAN GAW: Oh, I see.

22 MR. MICHEEL: But I can tell you that, yes, I
23 firmly believe that Mr. Allen prepared properly, has the
24 proper educational background, read the proper treatises,
25 applied his use of the DCF method, and you hear a lot about

1 this Dr. Morin, you know, the pre-imminent scholar, and he's
2 got 15 criticisms. Not one of those criticisms in the
3 rebuttal testimony that I've read are leveled at Mr. Allen.
4 I don't know.

5 CHAIRMAN GAW: I'm just curious about, you
6 know, company knows I'm coming back over there to ask them
7 how come they haven't moved to disqualify this Public
8 Counsel's witness and what the difference is and so I'll let
9 you.

10 MR. MICHEEL: Let me just say this now. If
11 this were our witness, maybe I would, you know, we may have
12 done some things differently than the Staff, but this is a
13 policy issue that, you know, we think is important, and I
14 think Mr. Dandino expressed the general overarching things.
15 I really choose not to expose my case on how, if, and when
16 they decide to do that to my witness exactly what we're going
17 to say, because I just don't think it's really fair to give a
18 preview. But it might be different.

19 CHAIRMAN GAW: I was just going to ask whether
20 or not -- I'm going to see whether they're going to expose
21 their case anymore, and if company intended to make similar
22 motion on Public Counsel's witness on this issue.

23 MR. HERSCHMANN: I think Mr. Micheel got it
24 right. We're supposed to be doing his deposition today.

25 CHAIRMAN GAW: So you don't know the answer to

1 that?

2 MR. HERSCHMANN: I honestly don't know the
3 answer to that. All I know is he started at the Commission
4 -- at the OPC about a month before he filed his testimony,
5 and we've compared the testimony to prior OPC witnesses and
6 they're almost identical. So I may start with that premise.

7 CHAIRMAN GAW: So you may be going down a
8 similar path?

9 MR. HERSCHMANN: Right.

10 CHAIRMAN GAW: I was trying to find guidance
11 in the distinction between these two.

12 MR. MICHEEL: And I completely disagree with
13 that characterization that Mr. Allen's testimony is
14 identical. I think Mr. Allen's analysis is completely his
15 own and different and I'm not going to let that get on the
16 record, this whole idea of canned testimony and I, for the
17 record, we disagree even with that.

18 CHAIRMAN GAW: That's fair.

19 MR. SCHWARZ: I would like to make the same
20 point as well. The canned nature of testimony is absolutely
21 not an issue. I will tell you that the basis of the Hope
22 case is not changed since it was issued. The history --

23 CHAIRMAN GAW: Time out. I'm not going down
24 this road right now. We've got other things to talk about
25 and this is not one of the issues that we need to argue about

1 right now. But you've already my question too, I think, so I
2 don't need any more there, but thank you. And I'll go back
3 here. Sorry to bring you up.

4 MR. HERSCHMANN: Sure.

5 CHAIRMAN GAW: I think you dealt with my
6 question.

7 MR. CONRAD: Hey, there.

8 CHAIRMAN GAW: Did you get your CLE credit?

9 MR. CONRAD: In fact, he's disappeared now, so
10 hopefully he's gone up to apply. I don't know. I've kind of
11 tried to void this -- this issue, but I do think it seems
12 like, Judge, having not, you know, gone studiously into these
13 cases, it does seem like a number of the things that we have
14 discussed and heard discussed really go to the question of
15 credibility of the witnesses rather than the admissibility.

16 CHAIRMAN GAW: Okay. Well, as I said earlier,
17 I think there's a lot of case law out there on this subject
18 and how it ties into this statute and whether the statute has
19 changed any of that old case law that I recall, but maybe you
20 all can shed some light on. I'll pass, Judge, thank you.

21 JUDGE WOODRUFF: Commissioner Murray.

22 COMMISSIONER MURRAY: I just have a few
23 questions. First, I would ask OPC and Staff how, if at all,
24 do you think McDonagh changed the standard that we must apply
25 for expert witnesses?

1 MR. DANDINO: I don't think it does. I think
2 it reiterated that you look at the statute and that
3 basically, other than to say that don't get confused and
4 reply Daubert and Frye in that. It says look at the statute.
5 COMMISSIONER MURRAY: That's what a concurring
6 opinion said.
7 MR. DANDINO: I think that's what the majority
8 opinion says, too. I think it makes it fairly clear. I
9 think the concurring opinion just made it very simple and
10 direct. The -- McDonagh isn't asking the -- it's not giving
11 any -- says that you should rely upon all these -- on the
12 federal cases. It says that you're following the standard,
13 the statute keeps coming back to it. The standard you shall
14 follow is the statute, and talks about the cases, the federal
15 cases, are only illustrative. They're not binding on it.
16 COMMISSIONER MURRAY: What did Daubert mean by
17 the non-exclusive list of factors for consideration?
18 MR. DANDINO: I don't recall that.
19 COMMISSIONER MURRAY: And I don't have exactly
20 the cite in the opinion because I'm looking at --
21 MR. HERSCHMANN: Commissioner Murray, I'm
22 sorry, maybe it's in Tab 3.
23 COMMISSIONER MURRAY: Tab 3, yes.
24 MR. HERSCHMANN: Page 1, it's the fourth
25 bullet.

1 COMMISSIONER MURRAY: Where does that appear
2 in the opinion?

3 MR. HERSCHMANN: That appears on -- under --
4 it should be on the bottom of the page that says Roman
5 Numeral III, Standard for Admissibility of Expert Testimony.
6 It's at the bottom of the page, it begins Daubert. I may be
7 looking at the slip opinion, but you'll find it under Section
8 III(c) comparison of Section 490.065, the Federal Rule of
9 Evidence, 702, 703, and Daubert.

10 COMMISSIONER MURRAY: Well, go ahead.
11 Considering that, what is Staff's response to my question?

12 MR. SCHWARZ: Commissioner Murray, it's
13 Staff's view that what the McDonagh case does is that it
14 firms up from previous case law and they cite in the case,
15 Pulaski case that applied, 490.065 in civil proceeding. So
16 what McDonagh does is it very firmly applies and sets as the
17 controlling standard in administrative proceedings 490.065 as
18 the standard.

19 And I have to agree with Public Counsel that
20 with regard to the quote that you were looking at where few
21 cases have, and I'll read it, few cases have interpreted
22 Section 490.065 to the extent that Section 490.065 mirrors
23 FRE 702 and FRE 703 as interpreted and applied in Daubert and
24 its progeny, the case is interpreting those federal rules,
25 providing relevant and useful guidance in interpreting and

1 applying Section 490.065.

2 And remember that's only insofar as 490.065
3 mirrors the federal rules that have not been adopted in
4 Missouri. However, I think that what this case does is it
5 sets 490.065 as the controlling standard and that we are to
6 follow the plain language of that statute.

7 COMMISSIONER MURRAY: So you don't think it
8 established any new standards for us to apply?

9 MR. SCHWARZ: I don't.

10 COMMISSIONER MURRAY: Did you have anything
11 else to add?

12 MR. DANDINO: Other than I especially don't
13 think in this -- necessarily in this situation that it
14 applies new standards because the standard -- the criterion
15 in the statute, in the statute is -- it -- you don't need to
16 go into the Daubert analysis.

17 COMMISSIONER MURRAY: Question for Mr. Berlin
18 or Mr. Schwarz. Did Mr. Murray actually prepare the
19 testimony he submitted himself?

20 MR. SCHWARZ: Yes, Commissioner Murray, he did
21 prepare some testimony.

22 COMMISSIONER MURRAY: Did he -- in applying
23 the DCF model, for example, did he use a particular theory in
24 how he applied?

25 MR. SCHWARZ: I don't have his direct

1 testimony in front of me, Commissioner Murray, but he used
2 the Discounted Cash Flow model, and in his testimony, he
3 explains his rationale.

4 COMMISSIONER MURRAY: Was that his rationale
5 or did he explain where he came up with that rationale?

6 MR. SCHWARZ: Without looking at it directly,
7 I can only say that he lists the reasons, and I can't site to
8 his rationale without looking at his testimony for you.

9 COMMISSIONER MURRAY: Did he site any experts
10 in listing those reasons?

11 MR. SCHWARZ: I can't recall.

12 COMMISSIONER MURRAY: Do you think that's
13 relevant to this issue?

14 MR. SCHWARZ: I think what's -- what may be
15 relevant is it goes to the credibility of the testimony, the
16 weighing of the evidence, and in his testimony --

17 COMMISSIONER MURRAY: You don't think it goes
18 to whether or not he's an expert?

19 MR. SCHWARZ: No.

20 COMMISSIONER MURRAY: Do you know whether the
21 particular theory or technique that he used in his Cap M
22 analysis, for example, has been subjected to peer review?

23 MR. SCHWARZ: I'm not certain I know what you
24 mean by peer review. But I do know that from reading
25 Professor Morin's rebuttal testimony for MGE, that he agrees

1 that it is a good thing to use multiple models.

2 COMMISSIONER MURRAY: But there, aren't we
3 talking about DCM, Cap M, the proxy group, using those things
4 in some sort of a combination?

5 MR. SCHWARZ: I think that the models that
6 you're referring to have certainly been subjects to peer
7 review.

8 COMMISSIONER MURRAY: But has his application
9 of those models, Mr. Murray's application of those models?

10 MR. SCHWARZ: I'm not sure I really quite
11 understand how, in his direct testimony, the application of
12 his models would be, you know, subjected to a peer review as
13 it's --

14 COMMISSIONER MURRAY: Can you site any -- any
15 experts, any publications, any other State Commission's
16 opinions in which his application of those models has been
17 used?

18 MR. SCHWARZ: I can't cite that.

19 COMMISSIONER MURRAY: Did he in his testimony?

20 MR. SCHWARZ: I'm not aware of any.

21 COMMISSIONER MURRAY: Do you think that's
22 relevant?

23 MR. SCHWARZ: No.

24 COMMISSIONER MURRAY: And he had to rely on
25 certain facts and data in applying his methodology to the

1 various models; is that right?

2 MR. SCHWARZ: That is correct. And in his

3 testimony, he explains the data that he relied upon.

4 COMMISSIONER MURRAY: And part of that was the

5 -- for example, the use of, let's see, Value Line, Edward

6 Jones, those references that you made in your opening?

7 MR. SCHWARZ: Yes, that is part of his

8 sources.

9 COMMISSIONER MURRAY: But then he took those

10 figures and he applied them in a unique fashion, did he not?

11 He combined all of these numbers that he received from the

12 sources that he looked at and combined them in a way to

13 arrive at his final numbers. Did he give some indication of

14 why we should accept his combination or his application of

15 all of these numbers in the unique way that he applied them?

16 MR. SCHWARZ: Yes, Commissioner, that's the

17 basis of his testimony, and he does explain his reasons

18 behind his application of the appropriate data.

19 COMMISSIONER MURRAY: Is that where he said

20 because that's the way Staff has done it for years?

21 MR. SCHWARZ: I think you're looking at an

22 isolated question, perhaps taken out of context, from his

23 deposition, not from his testimony.

24 COMMISSIONER MURRAY: Well, how did he support

25 -- did he support those -- his position or his use of his

1 particular methodology by citing any authority?

2 MR. SCHWARZ: To answer your question, I would
3 have to do a review of his testimony to look for cites of
4 authorities.

5 COMMISSIONER MURRAY: You don't know that?

6 MR. SCHWARZ: I can't off the top of my head.

7 COMMISSIONER MURRAY: So can I assume that you
8 don't think that's relevant to this issue?

9 MR. SCHWARZ: I don't think it's relevant to
10 the admissibility at all.

11 COMMISSIONER MURRAY: I think that's all I
12 have. Just let me check.

13 Well, I was going to ask the company if -- and
14 you may not have an answer to this question, but are there
15 any witnesses who have offered expert testimony in this case
16 that you have reviewed and have determined that you are
17 willing to accept their testimony as expert testimony?

18 MR. HERSCHMANN: Your Honor, I think without
19 Robert Hack hitting me in the head, stepping outside of why
20 I'm here, but I think it's safe to say we're not going to
21 challenge every single witness' testimony, and that may be
22 for the simple reason that the witness may do something
23 really not an expert, but you make the financial and judgment
24 call that the information that's being provided is really not
25 in dispute, so you don't make a challenge.

1 COMMISSIONER MURRAY: The reason I'm asking
2 the question is I'm wondering if you have evaluated that you
3 think there is a particular expert offered in this case who
4 does meet the new standards as you have outlined them after
5 Daubert?

6 MR. HERSCHMANN: One second, your Honor.
7 Mr. Hack actually explained it well to me, and that is we
8 really haven't gone through the analysis to see who does fit
9 within it. What we've looked at is who doesn't. And the
10 question as to whether or not this is a new standard or an
11 old standard, I can direct your attention to what the courts
12 say was the disputes amongst the different lower courts as to
13 what standards applied.

14 The various decisions of Missouri's Courts of
15 Appeal 490.065 was enacted in 1999, have expressed confusion
16 as to whether it is the statute Frye or Daubert for admission
17 of expert testimony. And then the Court clarifies what the
18 standard is, and I think this is the first case that we've
19 seen where the Court makes it abundantly clear that this
20 section is now applicable to contested administrative
21 proceedings. So I don't know if we've done the analysis to
22 say who does meet the standard. I think the analysis is does
23 this person qualify under the standard that currently exists.

24 COMMISSIONER MURRAY: And I want to apologize
25 if I've been using Daubert and McDonagh interchangeably here.

1 I don't know which case I have actually said from time to
2 time, but I probably miss -- made a mistake as I've been
3 citing a case. But I think the parties have interpreted what
4 I was intending to ask.

5 But I believe Mr. -- no, I guess it was one of
6 OPC's counsel earlier was cited Court of Appeals case, I
7 believe, and I'm assuming that's your opinion that that is
8 still in law.

9 MR. DANDINO: Well, it came after McDonagh.
10 I'm following your lead, Commissioner.

11 COMMISSIONER MURRAY: Okay.

12 MR. DANDINO: After McDonagh, and it's a 2004
13 case, and I'm -- as far as I know, that is the most recent
14 decision of that. I didn't see any of their history
15 afterwards.

16 COMMISSIONER MURRAY: Thank you, Judge.
17 That's all I have right now.

18 JUDGE WOODRUFF: Commissioner Clayton.

19 COMMISSIONER CLAYTON: Mr. Herschmann, if I
20 can ask you a few questions, if you're still taking the
21 questions for the company. And I made a lot of notes during
22 your presentation, and something that my colleagues who are
23 able to ask questions after me will learn that a lot of
24 things get asked before you actually get a chance, so I have
25 to go through these, because I know that each of my -- the

1 prior Commissioners asked some of these questions.

2 The objections raised by MGE on this witness,
3 are they primarily based on the person and his lack of
4 qualifications or are they primarily based on the words, the
5 actual testimony that he is offering?

6 MR. HERSCHMANN: The answer is both.

7 COMMISSIONER CLAYTON: Both. Is the standard
8 on the qualifications for the expert and the actual
9 legitimacy of the words that he offers as testimony? Are
10 they one in the same under McDonagh? Does that make sense?

11 MR. HERSCHMANN: I'm not sure I understand.

12 COMMISSIONER CLAYTON: Well, I wrote down some
13 of the things that you were challenging in his
14 qualifications, his perhaps inadequate education, perhaps his
15 lack of expertise. Those go to him as a person and his
16 qualifications in terms of offering testimony as an expert,
17 do they not?

18 MR. HERSCHMANN: That's correct.

19 COMMISSIONER CLAYTON: You also made
20 statements or allegations or suggestions that his method of
21 using the Discounted Cash Flow model were incorrect, that the
22 data that he used was incorrect, that his interpretation of
23 law in the State of Missouri in providing the testimony was
24 incorrect.

25 And I guess my question is you object to each

1 of those, and it is your claim that -- that under Missouri
2 law with regard to expert witnesses, all of that makes the
3 testimony inadmissible.

4 MR. HERSCHMANN: That's correct.

5 COMMISSIONER CLAYTON: So in that analysis, I
6 guess my first question is if we actually change the person,
7 if, say, produces a different person that had more education
8 or went to Wharton or went to Harvard, or perhaps has been in
9 the business for 20 years and offered the same testimony,
10 would it be admissible?

11 MR. HERSCHMANN: I think the answer to that is
12 no.

13 COMMISSIONER CLAYTON: Okay. So if, perhaps,
14 the Director of the Division, who's been here for 20 years,
15 who contributes in setting policy for Staff of the Missouri
16 Public Service Commission determines that in setting this
17 position, he will come in and provide that testimony.

18 MR. HERSCHMANN: It would still be
19 inadmissible.

20 COMMISSIONER CLAYTON: Why is that?

21 MR. HERSCHMANN: Because I presume you're
22 referring to Mr. Shallenberg.

23 COMMISSIONER CLAYTON: I'm using him as an
24 example.

25 MR. HERSCHMANN: And I'll start with this. I

1 don't know what the expertise of Mr. Shallenberg would be for
2 rates of return or return on equity. I do know that the
3 witness conferred with him. I don't know whether he's been
4 qualified. I don't know if he's provided testimony. So it's
5 difficult to answer it in a vacuum.

6 The difficulty is this. The data that is used
7 in this submission of testimony, according to all the
8 objective expertise and textbooks is inherently unreliable.
9 And the reason, and one of the questions that Commissioner
10 Murray asked, is do they cite to anything as a basis. The
11 answer to that is no. The first page of the testimony is I
12 got my Master's, I've given testimony before, and here it is.
13 There's not a source to it and that's why.

14 COMMISSIONER CLAYTON: But that's different
15 than the actual method and calculations. You go back and
16 refer to his qualifications for offering the testimony, and
17 that's a separate issue. If you replace the person and offer
18 and have someone else in that position offer the method and
19 the data --

20 MR. HERSCHMANN: And this data, the answer
21 would be still not acceptable. Professor Morin, in the
22 briefing, would address the specific reasons as to why it's
23 not.

24 COMMISSIONER CLAYTON: Now, if one had a
25 dispute with the data that was used, but agreed with the

1 method, then that would just be a matter of credibility
2 rather than a matter of admissibility. If they, perhaps,
3 crunch the wrong numbers, that wouldn't disqualify that
4 person as being an expert, would they -- would it?

5 MR. HERSCHMANN: I think it's a question of
6 what is the objective -- what is the objective data that's
7 selected and then what's the data. If the, for example,
8 Mr. Murray testified that I backed out Panhandle's debt by
9 this mechanism, does the math work out correctly? The answer
10 to that is yes.

11 Does it comply with GAAP in accounting
12 principles in any market or any financial analysis for doing
13 it? The answer is unequivocally no. So the fact that he
14 took the numbers off of the balance sheet but he applied them
15 in a process that's incorrect doesn't make it admissible.

16 And the problem is this. It wouldn't make a
17 difference who cited this testimony. It wouldn't make any
18 difference whether who was testifying many years ago, you
19 know, all of a sudden showed up and signed it. This
20 testimony on the record with the transcript and submitted
21 testimony doesn't meet the standard of reasonable
22 reliability, because there's no basis to say, you know, we
23 use negative historical growth rates, this is the text, and
24 the authorities and the cases that we say are reasonable to
25 rely upon them, and therefore we should go ahead and use it

1 in this case. You need that built into the testimony, and
2 that's what you don't have.

3 COMMISSIONER CLAYTON: I'm going to ask a
4 question that I don't think has been asked and may not come
5 out right. But my question is this. Do we really need an
6 expert quote-unquote to provide an analysis under the
7 Discounted Cash Flow model? Isn't it a matter of number
8 crunching?

9 MR. HERSCHMANN: No, I think if the answer to
10 that was yes, then -- and Professor Morin probably wouldn't
11 be getting a chance to lecture all over the place and give
12 seminars. It is really something that it is not a robotic
13 mechanistic formula.

14 COMMISSIONER CLAYTON: Tell me why.

15 MR. HERSCHMANN: Because the analysis that has
16 to be done is you need to look at some data, and what you try
17 to do is predict the future, right? So one of the things you
18 need to look at and understand, for example, is what happened
19 in the immediate past? Is that indicative of what the future
20 is going to tell us?

21 You're going to need an expertise on analyzing
22 that information, you're going to need to know what the
23 comparable companies comparable to what I'm looking at.
24 You're going, for those companies, what the other
25 jurisdictions consider, and then you're going to have to make

1 the subjective determination this piece of information is not
2 relevant to this process, therefore I will ignore it.

3 If, for example, dividends per share and
4 earnings per share used to grow consistently and now it's
5 changed. Dividends are flat and the earnings per share grow
6 and the analyst you don't look at the dividends per share
7 because it's flat. That's something as a subjective expert
8 who's qualified, you need to make that determination.

9 If you don't have the ability or the training
10 to do it, then you never get to the next stages. If it was
11 just plugging numbers in, I think it would be an easy
12 formula. I think that Southern Union or MGE, I'm sorry,
13 would be satisfied with saying give us the average return on
14 equity that's being authorized for the comparable companies
15 that you've selected, which is over 11 percent, and we fit
16 into the mainstream with everybody else and that would be
17 acceptable.

18 COMMISSIONER CLAYTON: Do you have a
19 suggestion for a minimum level of experience for an expert?

20 MR. HERSCHMANN: I do not.

21 COMMISSIONER CLAYTON: Do you have a minimum
22 level of education that an expert should have?

23 MR. HERSCHMANN: I think that it's depending
24 on the field. You're talking about this specific field, I
25 think at the very least you're going to need a college

1 degree, you're probably going to need a graduate degree, and
2 then --

3 COMMISSIONER CLAYTON: In a particular
4 subject?

5 MR. HERSCHMANN: Well, a particular subject,
6 and it can be -- you can have a Master's degree in Finance,
7 and throughout your education, you took courses and training
8 and went to seminars that dealt with this specific issue.
9 And if you've done that, then you may very well qualify as an
10 expert, but those are on a case by case basis.

11 The question is how have things changed. When
12 Daubert came down, it changed how every lawyer who ever put a
13 witness into a case handled it. We all did everything
14 differently. All of a sudden there was a standard that no
15 one, and we made every single adjustment that you had to, and
16 many witnesses who we put previously as experts got stricken,
17 but the goal was to get you reliable evidence and strike
18 unreliable evidence.

19 COMMISSIONER CLAYTON: Thank you.

20 JUDGE WOODRUFF: Okay.

21 COMMISSIONER CLAYTON: Hold on. Judge is
22 ready to get out of here. For Staff, whoever wants to answer
23 the questions. From Staff's perspective, from general
24 counsel's perspective, does General Counsel play a role in
25 selecting experts who will testify or does Staff show up with

1 a prepared set of data or testimony and it is signed off on
2 by General Counsel?

3 MR. SCHWARZ: Well, the Staff Division
4 Director and Department Directors identify which of the Staff
5 members within their areas are going to be testifying in a
6 particular case. The testimony is developed by the
7 individual witnesses after their audit and examination of the
8 relevant material. And then depending on how the case is
9 running, ten days or so before the filing date, it's
10 submitted for review by the attorney who's going to be
11 handling the witness in the case as well as the lead
12 attorney.

13 COMMISSIONER CLAYTON: Does General Counsel's
14 Office, and I say that in general, I'm sure that there are
15 several attorneys working on a particular case, perhaps one
16 lead and I'm not sure how that's designated, but do you all
17 prepare the questions for Staff? Do you all try to frame the
18 issues? Do you explain the law to Staff in preparing that
19 testimony to make sure the testimony does not include hearsay
20 testimony or otherwise inadmissible testimony?

21 MR. SCHWARZ: Well, we certainly review it for
22 those purposes.

23 COMMISSIONER CLAYTON: After the fact?

24 MR. SCHWARZ: After the fact, after the
25 witness has -- we review the draft from the witness.

1 COMMISSIONER CLAYTON: Shouldn't it be the
2 other way around?

3 MR. SCHWARZ: It's hard to say.

4 COMMISSIONER CLAYTON: Is this a legal process
5 here or is this a forum for lawyers here or not?

6 MR. SCHWARZ: A forum for lawyers, I don't
7 follow the question.

8 COMMISSIONER CLAYTON: Well, the discussion
9 here today is whether or not we're bound to the laws of
10 evidence, whether we're bound to just technically follow the
11 rules of evidence. I believe this court case says that while
12 contested administrative proceedings are not required to
13 follow the, quote, technical rules of evidence, close quote,
14 are applicable in civil cases are applicable here.

15 My question is in preparation of Staff's
16 witnesses, is General Counsel's Office involved in making
17 decisions in determining what testimony is going to be
18 provided, that it complies with the Rules of Evidence, and
19 that the witness is prepared to answer questions with regard
20 to being an expert or not?

21 MR. SCHWARZ: Yes, General Counsel reviews
22 those. We will, if we see, for instance, that a question may
23 be leading as to form, you know, that's something that we
24 would, you know, certainly correct in the -- in the matter.
25 Certainly, though, the subject matter, expertise, lies in the

1 Operations and Services Divisions, and those folks prepare
2 the substance of the testimony, and that -- the substance of
3 the testimony is outside, I think, the purview of the General
4 Counsel's office.

5 COMMISSIONER CLAYTON: But certainly not
6 determining who's an expert and who is not an expert in
7 presenting the case.

8 MR. SCHWARZ: I'm not aware of any attorney
9 who has ever proffered a Staff witness that didn't believe
10 that that witness was properly qualified.

11 COMMISSIONER CLAYTON: Say that again. The
12 General Counsel has never questioned.

13 MR. SCHWARZ: No, General Counsel has never
14 proffered a witness as an expert that it did not believe was
15 qualified as an expert.

16 COMMISSIONER CLAYTON: Has General Counsel
17 ever told Staff that a witness is, perhaps, not an expert in
18 a given field? Do you have a screening process?

19 MR. SCHWARZ: I think the closest that we've
20 come, probably, is Mr. Hack with Mr. Zorillo. No. No. No.
21 I don't believe that Staff generally employs people to
22 testify who aren't qualified to testify, and I can't think of
23 any specific examples where that might have occurred.

24 COMMISSIONER CLAYTON: Does the Staff, in
25 complying with Chapter 490.065.3, submit testimony that is

1 reasonably relied upon by experts in the field, did Staff --
2 the Staff witness provide examples of other experts in the
3 field or in its analysis?

4 MR. SCHWARZ: I think that the -- certainly
5 that the Staff internally sees that the Staff members in each
6 of the functional operations of the Commission develops the
7 knowledge and skills and techniques that they need in order
8 to provide testimony, inspect, you know, electrical lines and
9 gas pipes and that sort of thing.

10 So I -- I know that Staff does, in fact, look
11 at industry standards and that sort of thing. As to the
12 specifics of doing it in testimony, I think that's typically
13 been by including the experience and so forth of the Staff in
14 the testimony. I'm not sure that I've answered your question
15 directly, but.

16 COMMISSIONER CLAYTON: I'm not sure.

17 MR. SCHWARZ: If you rephrase it, I'll give it
18 another shot.

19 COMMISSIONER CLAYTON: I don't remember the
20 question. Offhand, are you able to give me quickly what the
21 trainings, other than education, that this witness has had on
22 this subject outside of the Bachelor's and Master's degree?

23 MR. SCHWARZ: He's attended a utility finance
24 seminar given by Professor Morin, he's attended the NARUQ
25 annual regulatory studies, he's attended the basic utility

1 rates --

2 COMMISSIONER CLAYTON: How long has he been in
3 this business?

4 MR. SCHWARZ: Four years.

5 COMMISSIONER CLAYTON: And he's testified in,
6 what, five cases?

7 MR. SCHWARZ: Well, six, because at least six,
8 because -- that I know of.

9 COMMISSIONER CLAYTON: There were two American
10 Water, two Aquila,

11 MR. SCHWARZ: The prior MGE rate case, and
12 there may be others.

13 COMMISSIONER CLAYTON: And he was a witness on
14 this very subject in each of those cases?

15 MR. SCHWARZ: Yes.

16 COMMISSIONER CLAYTON: Was his testimony
17 identical in form? Are you aware?

18 MR. SCHWARZ: The attorney the -- the very
19 largely the same. The analysis is specific to each company,
20 but the history of interest rates between 1980 and 1995
21 hasn't changed since the last rate case. You have it
22 electronically, you reproduce it.

23 The Hope case, the implications of the Hope
24 case hasn't changed since he last testified. As far as I
25 know, he didn't even rekey it. I hope he didn't rekey it.

1 COMMISSIONER CLAYTON: Does everyone agree
2 here that the standard for this type of testimony will be
3 identical, whether it be before this administrative agency or
4 any civil court in Missouri? Does everyone agree that it's
5 identical or does anyone dispute that?

6 MR. SCHWARZ: Staff does, staff agrees.

7 MR. DANDINO: State court, yes.

8 COMMISSIONER CLAYTON: Does everyone agree
9 that an expert would be required for this type of testimony?
10 For example, could a party come in and say, well, the rate of
11 return ought to be what it is for a passbook savings account,
12 it ought to be one percent per year. Would that be possible
13 to offer that type of evidence or does it require expert
14 testimony?

15 MR. DANDINO: I think it requires expert
16 testimony.

17 MR. SCHWARZ: Staff does as well.

18 COMMISSIONER CLAYTON: I know you all do.

19 MR. CONRAD: But your question about what
20 would be -- what I read the case that's before us is the
21 statute is applicable for Supreme Court in courts as well as
22 administrative agencies. The -- what I heard in your
23 question was something different, and I'm not sure I come to
24 the same conclusion, because the Court, as you well know from
25 your practice, may serve both as the legal educator but also

1 the finder of fact. But I may in a given court case, have a
2 jury that's the finder of fact, and so I think while the
3 statute may be the same, how the judge, the circuit judge in
4 that particular case, may take a stopping distance case, you
5 know, an expert in that might be necessary to help the jury
6 understand the particular facts of the case. And in another
7 situation, you would not have an expert because the jury
8 themselves are the expert.

9 You wouldn't have an expert get up and say,
10 well, I don't think this prior witness was telling the truth.
11 That's the job of the jury. So I think how that -- the
12 statute gets applied is going to have to be determined here.
13 How that bears here, I think, is as somebody made reference
14 to earlier, you are the five of you, the six of you, are
15 experts.

16 I mean, the legislature tells us that the
17 courts have told us that you have developed an expertise, and
18 it seems to me that has to factor into this analysis somehow,
19 too, as to what you need to help you figure out how the
20 statute reads. I'm not sure if that's responsive to your
21 first question. I'm sorry to do the role back, but I didn't
22 push the button in time. I'm sorry.

23 COMMISSIONER CLAYTON: Well, are you saying
24 that since we are the trier of fact and of law, I suppose,
25 that the standard is different than perhaps in a civil court

1 with a jury? Is that what you're saying? I know that we are
2 the experts. I'm well aware of my position, but is there a
3 different -- is there more discretion there, more -- do we
4 have more of an ability to review this on a case by case
5 basis?

6 MR. CONRAD: It would seem to me that the
7 level of your expertise and your experience in adjudicating
8 cases of this type gives you greater insight into what
9 qualifications are necessary and what issues you need to have
10 help with, whether it's something that you bring to the table
11 by yourself that a jury, if, you know, five just off the
12 street panel -- impanel juries up there might very well need
13 a great deal of help on a topic like this. Where you all,
14 because of your experience and background, would not need the
15 same level of help.

16 Now, this is -- maybe we're focusing on this
17 example here, but you can see some things like an explosion
18 of a gas pipeline or something like that, where the level of
19 help that a jury is going to need is directed to negligence
20 in MAI, your standard may be entirely different and thus the
21 nature of the help you would need in determining that.

22 MR. HERSCHMANN: Can I comment on that for a
23 moment?

24 COMMISSIONER CLAYTON: Sure.

25 MR. HERSCHMANN: The McDonagh case is a case

1 in which it was before a medical board with the expertise.
2 It didn't change anything. I've never heard of a case where
3 it says if you have a bench trial, the rules of evidence are
4 going to apply. It's no different in this circumstance than
5 it was in McDonagh. There's no difference in any other case
6 in the circumstances.

7 The concept of, well, because you're a
8 Commission, therefore you don't need to hear what everyone
9 agrees has to be expert testimony, and it doesn't have to
10 meet the reliability standard because you're a Commission is
11 completely contrary to what McDonagh just told every
12 administrative agency in the state they have to follow.

13 MR. SCHWARZ: Commissioner Clayton, if I can
14 just clarify McDonagh a little bit. MGE counsel indicated
15 that it was tried before the Board of -- it was the Board
16 that actually brought the charges against Mr. McDonagh, and
17 it was tried before the administrative -- it's not a medical
18 board. It was a license discipline case.

19 COMMISSIONER CLAYTON: Okay. I don't have any
20 further questions. Thank you.

21 JUDGE WOODRUFF: All right. Commissioner
22 Davis.

23 COMMISSIONER DAVIS: My first question is for
24 counsel for MGE, I'm sorry, I can't remember your name.

25 MR. HERSCHMANN: Eric Herschmann.

1 COMMISSIONER DAVIS: Mr. Hermann, how would
2 you distinguish the Whitnell case, which is referenced on
3 Page 6 of the OPC's suggestions in opposition to MGE's motion
4 to exclude the testimony of David Murray?

5 MR. HERSCHMANN: If I could have one moment.
6 I don't have the case in front of me, your Honor. I have the
7 cite that they use, and I think the relevant point is this.
8 You have to possess some qualifications. There's no question
9 about that.

10 But each case -- and each is on a case by case
11 basis. It's not a generic thing to say in certain issues, it
12 may be a minor discrepancy. Some was not a question as to
13 whether or not it was a simulation of a car accident and
14 whether or not the simulation methodology was acceptable. It
15 was a question of how accurate was those qualifications.
16 They may be different than in a situation where you have to
17 look to what the court has told us is the guidelines as to
18 the parameters of the training experience and expertise.

19 And I'll come back to looking at the record in
20 this case. There is no testimony about any expertise. The
21 only testimony that exists in this record is I came to the
22 Commission. I was told this is the way we do it, and I've
23 never spoken to anybody else in any other jurisdiction, in
24 any other Commission is this the right way we're doing it.
25 That doesn't give you the qualifications.

1 COMMISSIONER DAVIS: So it's your opinion that
2 a college degree, a Master's degree, and four years of
3 employment at the Public Service Commission is not some
4 qualifications?

5 MR. HERSCHMANN: I don't believe it's some
6 qualifications to provide expert testimony on this case,
7 that's correct. Four years of -- and you're using the term
8 training.

9 COMMISSIONER DAVIS: Uh-huh. I think I used
10 the word employment.

11 MR. HERSCHMANN: I apologize. That's correct,
12 four years of employment in which you are given the witness'
13 testimony, his words, canned testimony, and you're told to
14 regurgitate the canned testimony. And you get deposed and
15 you don't know the first thing about it. You don't know what
16 the cases say, you've never read the books, you never looked
17 at anything, and you submit that testimony, and you continue
18 with the same flawed submission year in and year out.
19 Doesn't make it admissible.

20 The employment doesn't get you there simply by
21 repeating the same thing. You have to get the training. And
22 the experience is not just giving in someone else's
23 testimony. If that were true, we could all be experts. We
24 could all take the OPC's testimony, sign it, and submit it.

25 COMMISSIONER DAVIS: Can you refresh, for my

1 recollection, that reference of canned testimony, /.is that
2 in your handout?

3 MR. HERSCHMANN: It is in the handout and it's
4 directly out of -- I think it's Tab 7. And the witness
5 acknowledged that he received the standard testimony and
6 later acknowledges that on more than one occasion in the
7 deposition, that he's the one that handed you this canned
8 testimony, right, he handed me some of the testimony that
9 they had done in the previous MGE rate case, and he's the one
10 who explained to you, right?

11 That is the basis, and the transcript
12 obviously will be made part of the record of the deposition.
13 But on more than one occasion, he acknowledges that he
14 received the canned testimony and the testimony -- actually,
15 he learned had come from prior witnesses and then came from
16 years before that.

17 COMMISSIONER DAVIS: Okay. Thank you.
18 Question for the OPC. Whitnell was a criminal case.

19 MR. DANDINO: Yes, sir.

20 COMMISSIONER DAVIS: Now, my understanding is
21 the actual qualifications of the psychiatrist at issue in
22 Whitnell, they -- Whitnell didn't challenge the psychiatrist
23 as an expert -- psychiatrist standing as an expert at trial,
24 did he?

25 MR. DANDINO: I'd have to look at it again.

1 Well, let me back up. I think it's a civil commitment of a
2 sex offender.

3 COMMISSIONER DAVIS: Okay.

4 MR. DANDINO: Rather than a criminal case.

5 COMMISSIONER DAVIS: That is correct, I'm
6 sorry.

7 MR. DANDINO: And sorry, I don't --

8 COMMISSIONER DAVIS: I believe here⁰, we've
9 got both Subsections 1 and 3 of 490.65 at issue, whereas I'm
10 trying to ascertain in Whitnell, it was only really
11 Subsection 3 that was at issue, which is the portion that
12 deals with the facts or data in a particular case in which
13 the expert bases their testimony.

14 MR. DANDINO: It may be that specific section,
15 but the Court ended up discussing McDonagh, and it's holding
16 kind of going through the whole thing. It didn't necessarily
17 discuss the -- well, it just went through the various
18 standards that the court was going to apply in the whole
19 thing.

20 COMMISSIONER DAVIS: Thank you. Next question
21 is for PSC Staff. I believe you stated to Commissioner
22 Clayton that Mr. Murray had attended a couple of seminars.
23 Are those in the transcript anywhere or are those in the
24 record anywhere?

25 MR. SCHWARZ: Commissioner Davis, I'm not

1 aware if these particular seminars are referenced
2 specifically in his deposition transcript, and I can't say
3 for certain if they're referenced in the direct testimony
4 that he provided.

5 COMMISSIONER DAVIS: And you can't tell me why
6 they aren't?

7 MR. SCHWARZ: Mr. Murray supplied this
8 information to us at this hearing, but I can't tell you why.

9 COMMISSIONER DAVIS: Thank you.

10 MR. DANDINO: Commissioner Davis, just to more
11 fully respond to your question on that, at Page 415 of the
12 Whitnell decision, it talks -- it terms of the psychiatrist
13 possessing at least some qualifications that testify -- has
14 testified in court involving the mental state of various
15 persons a hundred times, had previously evaluated five
16 persons to determine whether or not they were sexual
17 predators, and then the finding of the court ruling was the
18 Court did not abuse its discretion in admitting the
19 psychiatrists' expert testimony.

20 COMMISSIONER DAVIS: Thank you.

21 JUDGE WOODRUFF: Commissioner Appling.

22 COMMISSIONER APPLING: Judge, I have no
23 questions.

24 JUDGE WOODRUFF: Okay. Thank you. With that,
25 then, we will be nearly ready to adjourn this. I would

1 intend to put this on the Commission's agenda for next
2 Tuesday. And to that end, I'm going to ask the Court
3 Reporter to expedite the transcript. We need to have it
4 filed by Monday. With that, then, we are adjourned. Thank
5 you.

6 WHEREUPON, the recorded portion of the oral
7 argument was concluded.

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