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STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

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TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

March 28, 2002  
Jefferson City, Missouri  
Volume 19

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In the Matter of Missouri-American)  
Water Company's Tariff Sheets )  
Designed to Implement General Rate) Case No.  
Increases for Water and Sewer ) WR-200-281  
Service Provided to Customers in )  
the Missouri Service Area of the )  
Company. )

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KEVIN A. THOMPSON, Presiding,  
DEPUTY CHIEF REGULATORY LAW JUDGE.

REPORTED BY:  
  
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1 P R O C E E D I N G S

2 JUDGE THOMPSON: Good morning. We're here  
3 In the Matter of Missouri-American Water Company's  
4 Tariff Sheets Designed to Implement General Rate  
5 Increases for Water and Sewer Services Provided to  
6 Customers in the Missouri Service of the Company.  
7 This is Case Number WR-2000-281. My name is Kevin  
8 Thompson, and I am the Regulatory Law Judge  
9 assigned to preside over this matter.

10 We'll go ahead and take oral entries of  
11 appearance at this time. Why don't we begin with  
12 the Company?

13 MR. COOPER: Dean L. Cooper, law firm of  
14 Brydon, Swearingen and England, P.C., P.O. Box 456,  
15 Jefferson City, Missouri 65102, and David Abernathy  
16 of the Missouri-American Water Company, 535 North  
17 New Ballas Road, St. Louis, Missouri 63141,  
18 appearing on behalf of Missouri-American Water  
19 Company.

20 JUDGE THOMPSON: Thank you.

21 Staff?

22 MR. KRUEGER: Keith R. Krueger and Robert  
23 Franson, for the Staff of the Missouri Public  
24 Service Commission. Our address is P.O. Box 360,  
25 Jefferson City, Missouri 65102.

1 JUDGE THOMPSON: Thank you.  
2 Public Counsel?  
3 MS. O'NEILL: Yes. Ruth O'Neill, on  
4 behalf of the Office of the Public Counsel and the  
5 Public. Our address is P.O. Box 7800, Jefferson  
6 City, Missouri 65102.  
7 JUDGE THOMPSON: We have many, many  
8 intervenors in this case, and I hardly know what  
9 order to take them in, but I think right of place  
10 must be given to the City of Joplin. Mr. Deutsch?  
11 MR. DEUTSCH: James B. Deutsch, for the  
12 City of Joplin, 308 E. High Street, Suite 301,  
13 Jefferson City, Missouri, 65101.  
14 JUDGE THOMPSON: Thank you, sir.  
15 Mr. Curtis?  
16 MR. CURTIS: Yes.  
17 MR. CURTIS: Leland B. Curtis, with the  
18 law firm of Curtis, Oetting, Heinz, Garrett and  
19 Soule, 130 South Bemiston, Suite 200, St. Louis,  
20 Missouri 63105, appearing on behalf of the cities  
21 of Warrensburg, St. Peters, O'Fallon, Weldon  
22 Springs, St. Charles County, Central Missouri State  
23 University, and three Warrensburg Industrial  
24 Intervenor.  
25 JUDGE THOMPSON: Thank you, Mr. Curtis.

1                   Mr. Dority?

2                   MR. DORITY: Good morning, Judge. Larry  
3 Dority and James Fischer, Fischer and Dority, P.C.,  
4 appearing on behalf of the St. Joseph Area Public  
5 Water Supply Districts. Our address is 101  
6 Madison, Suite 400, Jefferson City, Missouri 65101.

7                   JUDGE THOMPSON: Thank you.

8                   Mr. Conrad?

9                   MR. CONRAD: On behalf of St. Joseph  
10 Industrial Intervenors and Gilsber-Mary Lee, which  
11 it has not actually entered to intervene in this  
12 proceeding, but I want to mention their name here,  
13 Stuart W. Conrad, 1209 Penntower Office Center,  
14 3100 Broadway, Kansas City, Missouri.

15                  JUDGE THOMPSON: Thank you, sir.

16                  Mr. Finnegan?

17                  MR. FINNEGAN: Appearing on behalf of City  
18 of Riverside, Jeremiah D. Finnegan, 3100 Broadway,  
19 Suite 1209 Kansas City, Missouri 64111.

20                  JUDGE THOMPSON: Thank you, sir.

21                  Mr. Conrad, the Commission denied your  
22 order requesting rehearing this morning at the  
23 agenda session. And before we go any further, I  
24 want to ask you if you or Mr. Finnegan happens to  
25 have a writ on your person, if so, I don't want

1 to -- at my peril --

2 MR. CONRAD: If you would like to adjourn  
3 for a couple of hours, I would be happy to arrange  
4 one.

5 JUDGE THOMPSON: No. I think we'll  
6 continue as long as you don't have the writ with  
7 you.

8 The purpose of our prehearing conference  
9 today is to give the parties an opportunity to give  
10 the Commission advice on how to proceed with the  
11 issues that have been remanded to the Commission.  
12 I've reviewed the orders of the Circuit Court and  
13 the order of the Court of Appeals, it's my  
14 understanding that the Commission was reversed on  
15 the merits on one issue, and that three issues have  
16 been remanded for additional findings of fact and  
17 conclusions of law.

18 The reason why I wanted to convene the  
19 parties in this way, was that there was a great  
20 deal of attention in the trial of this case devoted  
21 to certain issues such as the prudence of the new  
22 St. Joseph plant and the question of rate design,  
23 whether there would be single-tariff pricing or  
24 district-specific pricing. And in view of those  
25 large issues involving a great deal of money, there

1     was, perhaps, less attention paid to certain other  
2     issues involved in the case.

3             One of the ones remanded, for example,  
4     involves mains of ten inches and eight inches, I  
5     think, that personally I, at least at this point,  
6     can't recall having been discussed here during our  
7     many days of hearing. So I wanted to make sure  
8     that the parties were comfortable that the record  
9     includes sufficient testimony in other evidence  
10    from which sufficient findings of fact and  
11    conclusions of law can be made.

12            If not, then the record, I think, can be  
13    reopened and an additional hearing can be conducted  
14    in order to put on additional evidence with respect  
15    to those points. So that's why we're here, and  
16    I'll be happy to hear from anyone who has anything  
17    to say with respect to those points. I think Staff  
18    had a procedural suggestion, so why don't we start  
19    with you, Mr. Krueger?

20            MR. KRUEGER: With regard to the three  
21    issues that were remanded for, additional findings  
22    of fact, we don't think that any additional  
23    proceedings are necessary. The record was  
24    extensive. Everybody had a full opportunity to  
25    present the evidence that they wanted to present on



1     those issues and it has been presented. I think  
2     it's just a matter of the Commission finding the  
3     evidentiary support for the findings of fact that  
4     it has made or will make in an amended order.

5             With regard to the other issue, the one  
6     that was -- the premature retirement issue, it is  
7     possible that additional proceedings may be  
8     necessary. It's possible that the Commission may  
9     be able to resolve that just by reference to the  
10    record, but there were a couple of unresolved  
11    issues on that, I think. As I understand the  
12    decision of the Circuit Court, they remanded on the  
13    basis that the Company could not be required to  
14    write off the unamortized -- or undepreciated  
15    balance of the old plant.

16            But there has not yet been a decision on a  
17    couple of other matters, like how many years the  
18    Company would have to recover that or possibly how  
19    that would be spread among the various districts of  
20    the Company. It would be Staff's position,  
21    consistent with the position that we maintained in  
22    the original hearing, that this should be allocated  
23    on a district-specific basis. But this does amount  
24    to an additional approximately \$3 million that  
25    would have to be recovered, and it being a fairly

1 significant issue, it may be necessary to have  
2 additional proceedings.

3 JUDGE THOMPSON: Okay.

4 MR. DORITY: Your Honor?

5 JUDGE THOMPSON: Mr. DORITY?

6 MR. CONRAD: You didn't ask for  
7 preliminary matters, but I'll give you one.

8 JUDGE THOMPSON: Yes, sir.

9 MR. CONRAD: Just on the record, on behalf  
10 of my clients, not only do we object to that  
11 statement, but we object to any further proceedings  
12 herein today on the basis stated in our application  
13 for rehearing and under the Statute 536.083.

14 JUDGE THOMPSON: Thank you, Mr. Conrad.  
15 Mr. DORITY?

16 MR. DORITY: Thank you, your Honor. I  
17 believe all of the parties that are represented  
18 here today have filed pleadings in response to your  
19 order indicating their position on the issues as  
20 you addressed them this morning. I would just  
21 wonder from a procedural standpoint if we might be  
22 well served to give the parties that are  
23 represented here an opportunity this morning to  
24 discuss off the record these issues and possible  
25 procedural suggestions that we might want to

1 provide to the Judge after we've had a chance to  
2 visit informally.

3 I am afraid that since your order was  
4 issued, I know, we as a party, intervenors, have  
5 not had that chance to do that with these parties  
6 that are here. And before we go around and each  
7 give you our respective positions on the issues  
8 that you've laid out for us, I'm just wondering if  
9 we might be well served to afford the parties that  
10 opportunity. There may be an opportunity for some  
11 meeting of the minds here, I don't know. But I  
12 would at least like to request that opportunity  
13 before we go too much further.

14 JUDGE THOMPSON: I think that is a fine  
15 suggestion. Do I hear a second?

16 MR. CURTIS: Yes.

17 JUDGE THOMPSON: Any objections to  
18 proceeding in the suggested manner?

19 MS. O'NEILL: No.

20 JUDGE THOMPSON: Okay. In that case,  
21 we'll go ahead and adjourn --

22 MR. CONRAD: Excuse me.

23 JUDGE THOMPSON: Yes, sir?

24 MR. CONRAD: I would like to have as much  
25 as possible of this proceeding this morning placed

1 on the record. It's certainly within the scope of  
2 the case of any of the parties here to meet  
3 informally at any time today, tomorrow or two weeks  
4 ago. But at least until we conclude the formal  
5 process here, I'd like to have as much of it as  
6 possible on the record. Thank you.

7 JUDGE THOMPSON: Well, we're going to go  
8 ahead and adjourn, which means we will be off the  
9 record. And when the parties have completed their  
10 informal discussions, then let me know, and we will  
11 go back on the record at that time. So we'll have  
12 to have the reporter, I'm afraid, standing by for  
13 that. All right. So we will adjourn at this  
14 time. Thank you.

15 (A SHORT RECESS WAS TAKEN.)

16 JUDGE THOMPSON: Mr. Dority, do you have  
17 anything to report?

18 MR. DORITY: Judge, I just wanted to let  
19 you know I do appreciate the parties accommodating  
20 our request. And I think the discussions were  
21 fruitful in terms of gaining a better understanding  
22 of where the various parties are in this process.  
23 I think we probably do need to go ahead, though,  
24 and be responsive to your inquiries, if you want to  
25 continue that on a party-by-party basis or however

1     you were intending to proceed. We don't have  
2     anything to report from an agreed-upon process  
3     standpoint to present to you at this point.

4             JUDGE THOMPSON: Very good. Thank you,  
5     Mr. Dority.

6             I think we heard from Staff. Public  
7     Counsel?

8             MS. O'NEILL: Yes. As you know, the  
9     Circuit Court remanded four issues, but three of  
10    them are remanded for insufficient findings of fact  
11    or to find more facts. And it was because three of  
12    the four issues were determined not to be final  
13    decisions by the Court of Appeals that we're back  
14    here instead of going to the Court of Appeals.

15            And as you can probably tell from our  
16    pleadings, Public Counsel believes that the  
17    Commission correctly decided the issue that Judge  
18    Brown reversed on the merits, and we would happily  
19    continue with that position at the Court of Appeals  
20    once we are in the position with this case to move  
21    forward.

22            We do believe that there is sufficient  
23    findings of fact and conclusions of law in the  
24    record from which the Commission could make those  
25    additional findings on the record regarding those

1 other three issues. We had some discussions, and I  
2 think it could be appropriate if the Commission was  
3 so inclined for the parties to present some sort of  
4 an oral argument depending on what issues the  
5 Commission decides to take up to kind of clarify  
6 for the Commission, especially the two  
7 Commissioners who did not participate in the  
8 original hearing, the positions of the parties.

9 We believe that the Commission should do  
10 nothing but reaffirm its initial decision regarding  
11 the premature retirement issue. It should make  
12 further findings of fact and come to some  
13 conclusion regarding the other three issues so that  
14 they can be finally determined on review, if that  
15 becomes necessary, and then we have a complete  
16 record with final orders if we need to continue on  
17 to the Court of Appeals again.

18 JUDGE THOMPSON: Thank you, Ms. O'Neill.

19 Mr. Deutsch?

20 MR. DEUTSCH: On behalf of the good people  
21 in the City of Joplin, we believe the record is  
22 sufficient. There's no need to reopen for any  
23 further evidence. That is true of the issues that  
24 have been remanded for further findings of  
25 conclusions. Those findings of conclusions should

1 be based on the record that we have and not on any  
2 further information or evidence or rethinking. I  
3 think that we object to the Staff taking a change  
4 of position now on the phase-in question, as well  
5 as objecting to the fact that they are utilizing  
6 the opportunity that was granted to advise the  
7 Commission on how next to proceed to provide the  
8 Commission with proposed findings of fact and  
9 conclusions of law.

10 We would like to have an opportunity to  
11 respond to that, if possible. But I would concur  
12 with Ms. O'Neill, that I think it would be helpful,  
13 especially in light of the fact that we have two  
14 new Commissioners, if we could schedule an  
15 opportunity for oral arguments so that each party  
16 can have at least some opportunity to address the  
17 Commission personally in order to let them know  
18 what their position on the matter is.

19 Other than that, I don't think we have any  
20 particular position to take on any of the issues  
21 themselves other than the one that addresses the  
22 City of Joplin. And that basically is a question  
23 as to whether the Commission would allow us to  
24 respond to what the Staff has provided by way of  
25 findings of fact in order to address those.

1 JUDGE THOMPSON: Thank you, Mr. Deutsch.  
2 Mr. Curtis?  
3 MR. CURTIS: Yes. On behalf of my  
4 clients, I think we concur that the record is  
5 adequate as it stands now. The issues on remand  
6 can be addressed by the Commission within the body  
7 of the record made already before the Commission.  
8 Suggestions had been made that the parties would be  
9 free to offer new findings of fact in draft form  
10 for the Commission, and we would not object to  
11 that. I'm a little concerned with the idea of  
12 doing an oral argument setting, because I think  
13 that some of these issues may spill over on the  
14 issues that concern by clients, primarily which is  
15 the district-specific pricing rate design that was  
16 ordered by this Commission. I think there are some  
17 who have not given up on that, and I think that  
18 might find its way back into oral argument on these  
19 other issues.  
20 Therefore, I would like to caution and  
21 maybe speak against an oral argument session.  
22 Thank you.  
23 JUDGE THOMPSON: Very well. Thank you,  
24 Mr. Curtis.  
25 Mr. Dority or Mr. Fischer, which of you?



1                   MR. DORITY: Your Honor, I will respond.  
2       On behalf of our clients, we believe that with the  
3       reversal and remand of the premature retirement  
4       issue and the resulting revenue impact that may  
5       well result from that, that the Commission should,  
6       in fact, reopen the record to receive evidence on  
7       what the possible impacts would be on the various  
8       districts and more particular, the various customer  
9       classes within those districts.

10                  We would also concur in those that have  
11       suggested that an oral argument would be  
12       appropriate as well on some of the other remaining  
13       issues. And on the one rate design issue that was  
14       remanded, the size of mains issue, again, how the  
15       Commission addresses that issue would directly  
16       result in terms of impacts on the customer  
17       classes. We would think that the Commission may  
18       well want to take additional evidence to be able to  
19       resolve that issue as well.

20                  JUDGE THOMPSON: Very well. Thank you,  
21       Mr. Dority.

22                  Mr. Conrad?

23                  MR. CONRAD: Subject to our earlier  
24       objection, we have provided you, I believe, with a  
25       written statement of position which I don't think

1 is necessary to add to or subtract from at this  
2 point in time. In response to the proceeding  
3 comments of counsel, I don't think we would have an  
4 objection to a re-briefing that was limited to  
5 those issues. I share to some extent Mr. Curtis's  
6 concern about a free-wheeling argument, but I do  
7 think that one or the other would probably be  
8 useful. I'm not sure that findings of -- findings  
9 of fact, we did that once, and they are still out  
10 there. I'm not sure that another round of findings  
11 of fact, but I think, perhaps, re-briefing just  
12 simply to acquaint the Commission.

13 And as you know, the two -- either two or  
14 three, I guess it's two new commissioners, are  
15 obligated by statute to either read the record, sit  
16 for the hearing, which is not possible, or read  
17 briefs prepared by the parties citing them to  
18 portions of the record. There is no provision in  
19 that statute for them to read proposed findings of  
20 fact or conclusions of law.

21 JUDGE THOMPSON: That is correct.

22 Mr. Finnegan?

23 MR. FINNEGAN: There's been a change by  
24 the Staff that concerns us, that before this, we  
25 didn't think there was a need for additional

1 testimony. But if the Commission is going to  
2 consider the Staff's change in their position or at  
3 least the position -- change of position as  
4 annunciated by Staff's attorneys, on the phase-in  
5 issue, then we think there may be a reason to  
6 reopen the record on that, because the Staff is  
7 saying phase-in is no longer necessary.

8           And the reason Riverside is still in this  
9 case is because of the concern that the rates were  
10 flash and cut even though the Commission said we're  
11 going to move to DSP. We wanted to go to DSP, but  
12 we didn't expect it to happen. And we do think  
13 that if the staff's withdrawing its position on the  
14 phase-in, there should be some evidence in the  
15 record on phase-in.

16           JUDGE THOMPSON: Okay. Thank you, sir.  
17           Company?

18           MR. CONRAD: Before they begin, let me  
19 just --

20           JUDGE THOMPSON: Yes, sir.

21           MR. CONRAD: -- add, if I might.  
22 Mr. Finnegan's comment reminds me of one other  
23 concern. The pleading that is filed on behalf of  
24 the Staff seems to indicate a change of position.  
25 The evidence on that issue, however, stating what

1 Staff's position is, was admitted into the record  
2 and subjected to cross-examination and certified to  
3 the Court as a part of the record in this case.  
4 And that has been previously discussed, this is a  
5 limited brief.

6           So I have not seen from any party any kind  
7 of a motion to somehow pull that and tell Judge  
8 Brown or any other Court, Oh, we didn't mean it.  
9 We know we said that, but we didn't really mean  
10 it. And absent that, there really is no basis for  
11 anybody's position to change. That's locked in and  
12 frozen. I'm not even sure, Judge Thompson, that  
13 given the state of facts procedurally, that Judge  
14 Brown would not have to be involved in some  
15 adjustment of the record, if something had been  
16 filed incorrectly, but I think I would have a  
17 problem in somebody coming back in at this point  
18 mid-appeal and yanking things out of the record or  
19 sticking things in them. That record is before the  
20 Court.

21           JUDGE THOMPSON: Thank you, Mr. Conrad.  
22           Company?

23           MR. COOPER: Your Honor, the Company takes  
24 the position that because of the posture of this  
25 case is currently in, the Commission is required to

1 follow the Circuit Court's instructions. Those  
2 instructions do not include the taking of  
3 additional evidence, and therefore, the Commission  
4 should not or shall not take additional evidence in  
5 this matter.

6           Setting that aside, the Company also  
7 believes that the record is sufficient for the  
8 Commission to make findings on the four issues that  
9 are before it. In regard to premature retirement,  
10 I understand Ms. O'Neill's point that in a  
11 different case, in a different circumstance,  
12 premature retirement might not be before the  
13 Commission at this time, however, it is. We are  
14 here. We do have a decision in our favor on that  
15 issue. I think that issue is back before the  
16 Commission, and we would like the Commission to  
17 address it while the case is back before it.

18           It's possible on a different day, the  
19 Court of Appeals may tell us that we're wrong on  
20 that issue, but that day is not today and probably  
21 not in the foreseeable future. So we would like  
22 the Commission to address the premature retirement  
23 issue at this time.

24           I think our position is clearly defined in  
25 our filing that we made two days ago. We would be

1 comfortable in the Commission decision on how to  
2 proceed based upon that pleading. However, if the  
3 Commission were to decide that additional briefing  
4 was necessary, we would be certainly amenable to do  
5 that.

6 JUDGE THOMPSON: Okay. With respect to  
7 the premature retirement issue only, now that is  
8 the only issue that has been reversed on the merits  
9 that I'm aware of. Other issues were affirmed on  
10 the merits, and three issues were sent back by the  
11 Circuit Court, and certainly the Court of Appeals  
12 did not disagree for additional findings of fact  
13 and conclusions of law. So it's pretty clear what  
14 needs to be done with respect to the three issues  
15 where additional findings and conclusions were  
16 requested.

17 But with respect to the premature  
18 retirement issue, the Circuit Court gave its  
19 judgment on that issue. And I believe that  
20 judgment was appealed to the Court of Appeals; is  
21 that correct?

22 MS. O'NEILL: Yes, that's correct, your  
23 Honor. And the whole appeal was dismissed because  
24 the Court of Appeals took the position, and the  
25 Supreme Court refused to address it, I believe.

1 They took the position they were not going to  
2 address any issues until everything was a final  
3 order. So right now there's not anything before  
4 the Court of Appeals, and we can't get to the Court  
5 of Appeals on that issue until the other three are  
6 resolved.

7 JUDGE THOMPSON: Well, I understand that.  
8 But I wonder if the Commission then really has the  
9 premature retirement issue in front of it at this  
10 time or whether that is pending the perfection by  
11 the Commission of the three issues that lacks  
12 sufficient findings, so that then the Court of  
13 Appeals can review what the Commission originally  
14 did that with. That's kind of the question that's  
15 in my mind.

16 And I know the Company takes the view that  
17 that one is in front of the Commission now to  
18 proceed on the Circuit Court's remand and following  
19 the Circuit Court's instructions there, but that  
20 seems to, perhaps, deny the opponents of the  
21 Company's position on that point, a chance for  
22 appellate review at the Court of Appeals level. So  
23 I'm a little perplexed, then, as to the procedural  
24 stands of the case on that one issue. And I'd like  
25 guidance from learned counsel so that I can go to

1 the Commissioners and tell them what I think they  
2 ought to do, which is obviously what this is all  
3 leading up to.

4 MR. COOPER: Your Honor, I think -- I  
5 recognize, as I said before, that it's a unique  
6 situation. And in a different circumstance, it  
7 might not be back, but that's not the case. The  
8 order of the Circuit Court reversed or remanded as  
9 to that issue. I believe that's exactly the same  
10 language that was used as to the three issues that  
11 you believe are properly back before the  
12 Commission. I don't see anything in the order that  
13 sets it apart.

14 And I guess beyond that, I don't know that  
15 the Commission acting on that issue at this time  
16 necessarily forecloses review. Because if the  
17 Commission issues a decision, that decision will  
18 also be appealable and can continue back up to the  
19 appellate process.

20 JUDGE THOMPSON: Well, that's true. But  
21 the reason that I'm trying to figure this out in  
22 addition to having to write whatever it is the  
23 Commission is going to do, unless, of course, they  
24 yield to Mr. Conrad and Mr. Finnegan and replace me  
25 with one of my colleagues, is that, you know, the



1 Commission's decision on a point is considered to  
2 be correct, and the burden is on the opponent of it  
3 to come forward and show that it's wrong.

4           So if the Commission writes a new order  
5 reversing its position on premature retirement and  
6 going in the opposite direction, then that's  
7 presumed to be right, and then the burden is on the  
8 opponents of that have to come up with persuasive  
9 reasons to change it back to what the Commission  
10 originally did. So I'm a little bit concerned with  
11 those things.

12           Mr. Deutsch?

13           MR. DEUTSCH: It just seems to me that we  
14 have some obligation to try to remain consistent in  
15 terms of, you know, short corners here for just the  
16 purposes of the policy of the law. To the extent  
17 that the Court has ruled issues on the merits, it  
18 has remanded the whole case, as far as I can tell.  
19 But it is very clear that there is a difference  
20 between, for instance, its remand after having  
21 affirmed the issue of STP, which no one has  
22 suggested us reopen, and I don't think it is. This  
23 is simply the counterpart, you can win or you can  
24 lose.

25           In that case, they reversed the Commission

1 on the merits. It is different where the reversal  
2 was made upon a failure to make findings of fact  
3 and conclusions of law. That goes to the finality  
4 of the decision, not to the issues that Dean is  
5 presenting here. And I think that this attempt to  
6 kind of round off the corners is inappropriate to  
7 any kind of a procedure. I don't -- you know  
8 explain to me what the difference would be to  
9 reopen the issue of the SP versus STP. That's back  
10 here, too. It's a simple fact that it's back here,  
11 that it got remanded. I mean, then it becomes a  
12 question, Well, you can only reconsider things that  
13 you got reversed on and not things you got affirmed  
14 on?

15 I think that the Commission probably  
16 believed it was right whenever it ruled on the  
17 matter. And until an appellate court reverses  
18 that, and that means going through the appellate  
19 process, it just seems to me entirely inappropriate  
20 for that to be addressed at all. So I do not  
21 believe that it's necessary for the Commission to  
22 make any further findings or conclusions or do  
23 anything with its decision concerning premature  
24 retirement, and then it ought to address the other  
25 three issues that are procedurally defective under

1 536.090.

2 MS. O'NEILL: I would agree with  
3 Mr. Deutsch, Judge. The Western District did not  
4 decide anything on the merits. It just said we  
5 don't have a final decision on all the issues, and  
6 that's why we're not proceeding. And we agree with  
7 you when you say -- you know, regarding -- we  
8 certainly would rather be the proponent of the  
9 Commission's decision at the Western District as  
10 opposed to the opponent of it because of those  
11 presumptions shifting.

12 You know, there are other -- that is also  
13 the one issue that would change the revenue  
14 requirement. There are some issues that depending  
15 on the findings of fact and the Commission's  
16 decision back here that may shift revenue around,  
17 but that one would be the only one that changes  
18 revenue requirement. And that opens a whole other  
19 set of issues some of which, as  
20 Mr. Deutsch says, have been affirmed.

21 JUDGE THOMPSON: Anyone else want to be  
22 heard on this point?

23 MR. CONRAD: I agree with my friend from  
24 Joplin.

25 JUDGE THOMPSON: Thank you, Mr. Conrad.

1 MR. DEUTSCH: That would be me.

2 JUDGE THOMPSON: Mr. Cooper?

3 MR. COOPER: The one thing I would like to  
4 respond to is that the difference between those  
5 other issues and premature retirement is that the  
6 order we're dealing with expressly states that  
7 premature retirement has been reversed and remanded  
8 to the Commission. While that may not be a Court  
9 of Appeals decision, it's the current decision  
10 we're working under. It's in our favor on that  
11 decision, and I think the Commission needs to  
12 address it in some fashion.

13 MS. O'NEILL: The problem with that, your  
14 Honor, is that to do that could effectively deny  
15 due process to those parties who are -- have a  
16 different position than the Company has, because we  
17 will not have had our right to appeal the decision  
18 as rendered by the Commission after the hearing.

19 MR. DEUTSCH: I think that decision that  
20 the Circuit Court rendered being as appeal -- on  
21 appeal, that's the decision of the Commission that  
22 will be reviewed -- should be viewed as  
23 interlocutory. It's the equivalent of a partial  
24 summary judgment. It is not final for purposes of  
25 appeal until everything else is final for purposes

1 of appeal. That's what the Court of Appeals said.  
2 And as I read their decision, they are not making  
3 any comment about anything else, and they have not  
4 said go back and reconsider the whole case. They  
5 simply said go back and reconsider it for the first  
6 time, actually, your findings with regard to  
7 certain issues, so we've got a whole decision to  
8 review. And I think we should proceed post haste  
9 and get a full decision out of the Commission so we  
10 can take it back up to the Court of Appeals without  
11 having it should the Commission reverse itself to  
12 go back to the Circuit Court then and reargue that  
13 question as to what that was.

14 MR. COOPER: We're going back to the  
15 Circuit Court anyway, though, aren't we?

16 MR. DEUTSCH: No.

17 MR. COOPER: Yeah, we are. Once the  
18 Commission, on those three issues, makes additional  
19 findings of fact and conclusions of law, we've got  
20 to go back to the Circuit Court --

21 MR. DEUTSCH: That's true. I stand to be  
22 corrected. However, it would not be on the issue  
23 that you're regarding because the Court has already  
24 decided it.

25 MR. COOPER: No. My weight would continue

1 to stand.

2 MR. DEUTSCH: You should be grateful.

3 MR. COOPER: And yet the Commission still  
4 may not react to it.

5 MR. DEUTSCH: You should be grateful for  
6 that.

7 JUDGE THOMPSON: Well, and that's exactly  
8 the question. I mean, like I say, it's not hard to  
9 know what to do with the three that need additional  
10 findings, because the two Courts agreed that on  
11 that point.

12 Mr. Conrad?

13 MR. CONRAD: Well, there is a way on that  
14 particular issue. There will be parties who are,  
15 in the first instance, aggrieved by the  
16 Commission's initial decision on that issue. That  
17 would, I guess at this point in time, include  
18 solely the Company. They are now overjoyed with  
19 Judge Brown's decision, but everybody else is  
20 aggrieved by Judge Brown's decision on that. And  
21 my recollection is that most who had the right to  
22 do so, and that they had reserved that issue in an  
23 application for rehearing or somewhere along the  
24 line had joined in that issue and had perfected  
25 appeals of Judge Brown's decision on up as Ms.

1 O'Neill correctly points out.

2 Now, if all of those parties who are  
3 aggrieved by Judge Brown's decision and would be  
4 aggrieved by leaving it where it is, and letting  
5 that be in effect the law of the case on that  
6 particular issue, would stipulate that they will  
7 waive their appeal. It would seem to me that that  
8 would be back at the Commission, and it will effect  
9 Judge Brown's decision on that issue and that issue  
10 alone will be final.

11 However, that possibility seems somewhat  
12 elusive, if not impossible for the very reason that  
13 Mr. Deutsch has pointed out, and that I think  
14 Ms. O'Neill has pointed out, that other parties,  
15 when the Circuit Court -- excuse me -- when the  
16 Court of Appeals finally gets the whole package,  
17 they will, in theory, and under their precedent,  
18 review not the decision of Judge Brown, but they  
19 will again review -- it's not de novo certainly --  
20 but they will review the Commission's decision, as  
21 I understand what the law is.

22 Now, I guess we can all flap our eyes and  
23 cough and say that it does not matter what Judge  
24 Brown did. I think, in fact, the Court of Appeals,  
25 in my experience, often takes some instruction from

1     what the trial court has found after their review  
2     of the record. But I just don't -- I disagree with  
3     learned counsel for the Company on this point. I  
4     agreed with him on his point about this not being a  
5     general remand that he covered in his brief, but I  
6     think the very point that he made eloquently and  
7     well there, undercuts the argument that he is now  
8     attempting to make here with respect to this  
9     issue.

10             Judge Deutsch, if you will, is correct.  
11     This is an interlocutory matter. We are kind of in  
12     the middle of a proceeding, and Judge Brown has had  
13     how many issues that were, eight or nine or seven,  
14     and he's taken a firm -- a firm reversal on these,  
15     You didn't give me enough facts that I could  
16     review. So I'm sending it back to you and tell me  
17     what your facts are, and then I'll complete my  
18     review, then I will be done with this case and it  
19     will move on to the Court of Appeals.

20             So it seems to me the only way you can  
21     jump around that square corner is if those parties  
22     who are aggrieved by Judge Brown's decision,  
23     leaving it where it is, waive an appeal. And the  
24     Commission apparently would be aggrieved by that.  
25     And unfortunately, we don't have counsel for the



1 Commission present here. We have counsel for the  
2 Staff present here based on their entry of  
3 appearance.

4 JUDGE THOMPSON: Thank you. I think if  
5 anyone has anything else or if no one has anything  
6 else, in that case we will go ahead and adjourn. I  
7 will present this somewhat thorny question to the  
8 Commission.

9 MR. DEUTSCH: Will the Commission be  
10 issuing an order now directing us based upon this  
11 prehearing conference of what they want us to do?

12 JUDGE THOMPSON: The Commission will  
13 indeed. But let me preface that by saying,  
14 Mr. Deutsch, you in particular wanted an  
15 opportunity to respond to Staff's written filing.  
16 And you may do that within 10 days of the date that  
17 that was filed. And anyone else who would like to  
18 file anything else, has that same 10-day window  
19 within which to do so. And in following that, the  
20 Commission will then decide exactly how to proceed  
21 in the premises. Okay. And we will indeed alert  
22 you to that decision by an order.

23 MR. DEUTSCH: Thanks.

24 JUDGE THOMPSON: You're very, very  
25 welcome. We'll go off the record and adjourn at

1       this time.

2               WHEREUPON, the on-the-record portion of  
3       the prehearing conference was concluded.

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