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STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

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TRANSCRIPT OF PROCEEDINGS  
HEARING  
July 10, 1997  
Jefferson City, Missouri  
Volume III

—

In the matter of The Empire District       )  
Electric Company of Joplin, Missouri,       )  
for authority to file tariffs increasing    )  
rates for electric service provided to     )Case No.  
customers in the Missouri service area    )ER-97-81  
of the company.                               )

—

JOSEPH A. DERQUE, III, Presiding,  
ADMINISTRATIVE LAW JUDGE.  
M. DIANNE DRAINER  
SHEILA LUMPE  
CONNIE MURRAY  
COMMISSIONERS.

—

REPORTED BY:  
TRACY L. THORPE, CSR  
ASSOCIATED COURT REPORTERS, INC.

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A P P E A R A N C E S

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P R O C E E D I N G S

ALJ DERQUE: We're on the record in Case No. ER-97-81 in the matter of Empire District Electric Company. This hearing is for the purpose of determining whether, according to the terms of the second unanimous Stipulation and Agreement as it effects the first unanimous Stipulation and Agreement, as to whether state line combustion turbine No. 2 was placed in service in accordance of the terms of that agreement by the cut-off date of June 21st, 1997. Is that correct, Mr. Duffy?

MR. DUFFY: I would have worded it a little differently, but that's the general --

ALJ DERQUE: I'll give you the chance to do that here in a little bit. Mr. Steiner?

MR. STEINER: That's correct. Again, I may have worded it probably differently from you and certainly differently from Mr. Duffy, but I will accept that.

ALJ DERQUE: Okay. We will proceed and you may reword that in your opening statement, Mr. Mills and Mr. Duffy. We'll proceed with opening statements. Mr. Duffy?

MR. DUFFY: Thank you, your Honor. Good morning. I'm Gary Duffy. I'm here representing the

1 Empire District Electric Company. I'm going to make a  
2 brief opening statement and then after the other  
3 parties have made their opening statements we're  
4 prepared to put Mr. Robert Fancher on the stand.  
5 Mr. Fancher has previously submitted a verified  
6 statement describing the events surrounding the  
7 criteria. He'll be available for your questions or  
8 questions of others.

9 Empire believes that the parties to this  
10 case are faced with a perplexing situation. We have  
11 all worked very hard to arrive at a stipulated  
12 agreement to this case. This agreement if enacted at  
13 the higher level of increase, would have avoided  
14 Empire filing another immediate rate case. All  
15 parties presumably thought this was a worthwhile goal.  
16 This possibility appears doomed today through an  
17 overly strict adherence to the letter of the  
18 stipulation rather than the spirit of what we have  
19 tried to accomplish.

20 How did we get where we are today? The  
21 difficulties revolve around the construction of a  
22 combustion turbine that was scheduled to burn natural  
23 gas with oil as a back-up fuel when natural gas is not  
24 available. Westinghouse was scheduled to complete the  
25 plant by May 31, 1997. The failure of a hydrogen seal

1 ring caused a 17-day delay in May, and this deadline  
2 of May 31st became impossible to meet.

3 All the parties cooperated and agreed to a  
4 second chance deadline of June 21st. A water  
5 injection pump used only when the unit is burning oil  
6 failed on June 19th while attempting an automatic  
7 transfer from natural gas to fuel oil. This pump  
8 outage resulted in it failing to accomplish a transfer  
9 from gas to oil and also the ability to remote start  
10 on oil. Both criteria related to operating on oil  
11 only failed due to this water injection pump outage.  
12 The unit had successfully operated on oil for several  
13 hours prior to the water injection pump failure.

14 The statutory requirement here is that the  
15 plant be, quote, fully operational and used for  
16 service, unquote. This plant began serving the needs  
17 of Empire's customers on June 18th, 1997. It  
18 continues to do so. Between June 18 and June 21 the  
19 unit provided almost twice the amount of energy to  
20 Empire's customers than minimum testing would have  
21 required. Empire's customers are currently benefiting  
22 from this unit being economically dispatched along  
23 with all of its other units. The unit is fully  
24 accredited in the MOKAN Power Pool and the Southwest  
25 Power Pool. The unit ran yesterday between noon and

1 eight p.m.

2 Empire agreed to meet the in-service  
3 criteria of the Staff and has spared no effort to do  
4 so. Empire believed the criteria of the Staff would  
5 be used to assist in determining that the statutory  
6 requirement had been met. Parts of two criteria, both  
7 related to back-up fuel, have not been met.

8 The water pump warranty repair is estimated  
9 to cost about \$20,000. It's also expected to be  
10 accomplished within about 30 days. At the agreed to  
11 increase rate increase level of \$13,941,377, over \$8  
12 million of the cost of this unit are not included in  
13 the rate level. Eight million dollars are not  
14 included in the cost of the rate level at 13.9.  
15 Empire has already foregone over \$1 million in revenue  
16 in this case due to Westinghouse not meeting the  
17 May 31st deadline.

18 It seems to Empire that the parties have  
19 four options at this point. We can agree and the  
20 Commission can find that the two criteria points  
21 regarding back-up fuel operation were not critical and  
22 that the plant is used and useful, that it's fully  
23 operational and used for service and that the  
24 13,941,377 rate level should become effective on  
25 July 28th. That's number one.

1           Number two, we can agree to a two-part  
2   increase in this case. The first part would be the  
3   other revenue level of 10,589,364; that that could  
4   become effective July 28th. The second part to raise  
5   it up to the -- to the other level of 13,941,000 could  
6   be effective when the water pump is repaired and those  
7   other two partial criteria are fulfilled. That's the  
8   second option.

9           The third option is something of a variant  
10  on the second option. And that is that all of the  
11  parties could agree to Empire making a 30-day tariff  
12  filing to raise the rates to an annualized level of  
13  13,941,000 on a 30-day tariff filing, and that the  
14  parties would work to implement that increase on that  
15  30-day filing. Again, assuming that the warranty  
16  repairs for the pump have been made.

17          The fourth option that we see is simply to  
18  increase rates by the 10,589,000 in this case and do  
19  nothing else. The result of that option is that  
20  Empire would need to file immediately a new full rate  
21  case to recover any and all costs of state line  
22  Unit 2. This would be a full rate case, would not be  
23  limited to recovery of this plant or in any other way  
24  and would presumably seek to recover the \$8 million in  
25  cost of unit 2 that are not reflected in the 13.9

1 level that I talked about before.

2 In closing, the Empire District Electric  
3 Company feels that the parties would be foolish to  
4 abandon all the work that they have put into this case  
5 thus far. It seems wisest to us that we agree that  
6 the plant is in service, it is fully operational and  
7 used for service and that an increase of 13,941,377  
8 should be approved. Thank you.

9 ALJ DERQUE: Thank you, Mr. Duffy.

10 Mr. Steiner?

11 MR. STEINER: Good morning. We are here  
12 today to determine whether state line combustion  
13 turbine unit 2 should be included in Empire's rate  
14 base and thus increase the company's rate for service.  
15 Now, the criteria for making this determination  
16 whether Empire can increase its rates to reflect unit  
17 2 are not new, are not a -- not a surprise to Empire.

18 These in-service criteria were first  
19 proposed by Staff witness Deering in his direct  
20 testimony. The in-service criteria consists of nine  
21 separate tests and are essentially the same criteria  
22 that were used to determine the in-service status of  
23 state line unit No. 1 in Empire's last rate case.  
24 Unit No. 1 shares the same site as unit No. 2.

25 The nine criteria were adopted by all the



1 parties to this case in the unanimous Stipulation and  
2 Agreement filed on April 4th, 1997. That agreement  
3 said that the plant would be put in service if the  
4 criteria were met by the May 31st, 1997, deadline.  
5 That May 31st deadline was not met.

6 Empire drafted a first amendment to the  
7 Stipulation and Agreement and again adopted the  
8 in-service -- Mr. Deering's in-service criteria. The  
9 first amendment to the stipulation provides that if  
10 unit 2 met Mr. Deering's in-service criteria by  
11 June 21st, Empire would receive a \$13.9 million  
12 increase. If unit 2 did not meet all the criteria,  
13 unit 2 would not be put into rate base and Empire  
14 would receive a \$10.5 million increase.

15 As was stated by Mr. Duffy in his opening,  
16 unit 2 did not meet all of Staff's in-service  
17 criteria. The failure appears to be primarily a  
18 mechanical failure. And apparently there was not  
19 sufficient time to make repairs and complete the  
20 testing by June 21st.

21 Empire simply did not allow enough time to  
22 get unit 2 into rates. Had the company filed its  
23 application for a rate increase only one month later,  
24 there would be no need for today's hearing. It is  
25 important to recognize that the date for filing a rate

1 case is completely within Empire's discretion.

2 Now, even though Empire filed too early, the  
3 Staff recognized it was not necessarily in anyone's  
4 interest to have Empire file another rate case to  
5 bring the state line unit into rates. In light of  
6 that belief, Staff tried to balance the following  
7 goals and its recommendations for processing the case.

8 The goals were to reflect the new state line  
9 unit in rates, but only in a manner consistent with  
10 proper matching of all revenue requirement items. The  
11 other goal was to allow the Commission time to  
12 deliberate on this case, including the potential  
13 in-service issues that we have here today. And that  
14 is called for by the Commission's order concerning  
15 test years which was issued last December.

16 Now, as Mr. Duffy eluded to, circumstances  
17 have changed and the Staff has continued to be  
18 flexible. This flexibility is shown by we agreed to a  
19 true-up procedure which would allow the new state line  
20 unit to be included in a rate at a point that was two  
21 months beyond what other revenue requirements were cut  
22 off for true-up purposes. This is unusual. Staff  
23 would have ordinarily insisted on a better matching of  
24 revenue requirement components, but this was an  
25 acceptable result for the circumstances we had here.

1 Our flexibility was also shown by our agreement to  
2 extend the in-service date to June 21st once it was  
3 clear that Empire could not meet the May 31st  
4 deadline.

5 Notwithstanding the in-service date -- this  
6 in-service date extension, Empire is back before the  
7 Commission today, this time asking for a waiver of the  
8 previously stipulated in-service criteria. The  
9 Commission could remember when considering this  
10 request that never in the course of these proceedings  
11 did Empire indicate that Staff's in-service criteria  
12 as they were written were inappropriate for  
13 determining whether the state line unit should be put  
14 in service or should be put in rates. Empire waits to  
15 make its contention after the fact until it was shown  
16 that the new unit could not meet the criteria. The  
17 time for Empire to argue about the appropriateness of  
18 the criteria was months ago, not 18 days from the  
19 operation of law date. Empire agreed to the criteria  
20 in a Stipulation and Agreement.

21 You're likely to hear today from Empire  
22 about what it calls minor equipment failures which led  
23 to the new state line unit failing to meet some of the  
24 in-service criteria. You should keep in mind that if  
25 it accepted that these failures were minor, the

1 problem is not with the criteria themselves, but with  
2 Empire's failure to meet in-service deadlines. If  
3 Empire had allowed itself more time, it should have  
4 been able to resolve these allegedly minor problems  
5 and got the state line units in rates in this case.

6 In its verified statement Empire witness  
7 Fancher maintains that substantial compliance with the  
8 in-service criteria is sufficient. Nowhere in the  
9 first amendment to the stipulation agreement, a  
10 document that Empire drafted, does it contain any  
11 provision for waiver of any of the criteria.

12 Empire is essentially saying to you today  
13 Hey, we're close, let us slide this time. If we would  
14 have known you meant that we had to meet all the  
15 criteria, we never would have agreed to it. The  
16 Commission should not adopt Empire's cavalier approach  
17 to agreements, should not allow the company to  
18 unilaterally change the deal.

19 Empire also makes a statutory argument that  
20 unit 2 is fully operational and used for service under  
21 the statutes. This statute does not require that  
22 equipment that is fully operational and used for  
23 service must be placed in rate base, nor does the  
24 statute define what fully operational and used for  
25 service means. Their argument is irrelevant. The

1 stipulation only allows unit 2 into rates if all of  
2 the in-service criteria are met. That statute does  
3 not change the agreement of the parties.

4 Just finally, I would just like the  
5 Commission to consider what if Empire had met all of  
6 the criteria, all the Staff's nine criteria. Let's  
7 say they had done it by May 31st. Let's say that  
8 Staff then said, No, Commission, shouldn't be in rate  
9 base, those criteria are not strict enough. What do  
10 you think Empire would be saying today? We've got an  
11 agreement. We've got an agreement that spells out how  
12 it goes into rate base. You can't deviate from that  
13 agreement. That's exactly what they'd be saying.

14 I submit to you the reverse is also true.  
15 Since unit 2 did not meet the criteria, Empire is not  
16 entitled to have the new unit included in rate base  
17 under the clear terms of the agreement.

18 Staff will be putting on two witnesses  
19 today. Staff witness Deering will testify on the nine  
20 stipulated in-service criteria and its finding on  
21 Empire's compliance with them. Staff witness  
22 Oligschlaeger will testify on the overall in-service  
23 status of the new state line unit and the stipulated  
24 rate increase amount that should be granted to Empire.  
25 We're also available for any questions the Commission

1       might have.  Thanks.

2               ALJ DERQUE:  Thank you, Mr. Steiner.

3               Mr. Conrad?  Mr. Conrad?

4               MR. CONRAD:  Yes, sir

5               ALJ DERQUE:  Do you wish to make an opening  
6       statement and sit up here with the rest of the --

7               MR. CONRAD:  Yeah.  And I apologize.  I  
8       thought we had ten o'clock, but be that as it may --

9               ALJ DERQUE:  Well, I apologize because I  
10      didn't realize you had a position in this particular  
11      issue, but if you do, please have your seat and I  
12      will --

13              MR. CONRAD:  Sure.

14              ALJ DERQUE:  -- I will give you the  
15      opportunity to make your opening statements after  
16      Mr. Mills.

17              MR. CONRAD:  Oh, okay.  Thank you.

18              ALJ DERQUE:  Is there anything else you were  
19      going to say?

20              MR. CONRAD:  No.  That's what you were --

21              ALJ DERQUE:  Okay.  For the Office of Public  
22      Counsel, Mr. Mills?

23              MR. MILLS:  Thank you.  May it please the  
24      Commission.  My name is Lewis Mills.  I'm here  
25      representing the Office of the Public Counsel in this

1 matter.

2 First of all, let me state our position  
3 although I think it's fairly clearly reflected in the  
4 pleadings in the case. We don't believe that the  
5 state line unit 2 met the in-service criteria and so  
6 we don't believe that according to the clear terms of  
7 the Stipulation and Agreement as amended that Empire  
8 is entitled to the 13.9 million, but instead are  
9 entitled to the 10.5 million. That is our position.

10 Having said that, let me refer to the  
11 opening statements of Mr. Duffy and Mr. Steiner, and  
12 say that I think they've explained the factual  
13 situation quite well. That it met essentially six out  
14 of nine of the in-service criteria. Empire believes  
15 that's enough. The Staff doesn't believe that's  
16 enough and I don't believe that's enough.

17 And let me depart from what they've said in  
18 that area and talk about really where that leaves the  
19 Commission in terms of its options. As I see it, the  
20 Commission can find that the terms of the Stipulation  
21 and Agreement as amended apply on their face and that  
22 Empire is entitled to the 10.5 million.

23 In the alternative, the Commission could  
24 find that the Stipulation and Agreement should not be  
25 construed literally and that Empire has complied with

1 the terms of the Stipulation and Agreement well enough  
2 and find that the Stipulation and Agreement holds. I  
3 don't believe that that would be evidentially --  
4 evidentu-- sound based on the evidence, but certainly  
5 the Commission could find that to be the case.

6 The third option would be that the  
7 Commission could find that regardless of the  
8 in-service criteria that the parties agreed to, that  
9 the Commission believes that based on the evidence  
10 before it that the plant is actually in service  
11 pursuant to statute and that it should be recovered in  
12 rates.

13 However, if the Commission does that, I  
14 believe that would void the Stipulation and Agreement  
15 in this case and that according to the terms of that  
16 Stipulation and Agreement, of course as amended, all  
17 of the terms of it are inter-dependent. And as a  
18 result, if the Commission decides to find that the  
19 plant is in service according to its own standards  
20 rather than according to the standards of the  
21 Stipulation and Agreement, it would void the  
22 Stipulation and Agreement, in which case all of the  
23 issues in this case would be up in the air and we  
24 would have to somehow allow for due process and the  
25 opportunity to try those issues and try for you all to



1 reach a decision by the operation of law date.

2           So with that in mind, I would urge that the  
3 Commission find that the terms of the Stipulation and  
4 Agreement do apply on their face, that Empire did  
5 agree to them, not once but twice and, in fact, in the  
6 second instance Empire -- as Mr. Steiner pointed out  
7 several times, Empire drafted the amendments to the  
8 Stipulation and Agreement.

9           And to the best of my recollection, that  
10 amendment went through at least seven drafts and  
11 probably more, in any one of which Empire would have  
12 had the opportunity to insert the word substantial had  
13 they felt that was necessary at that point. So I  
14 believe that the Commission should find that the terms  
15 of the Stipulation and Agreement apply on their face  
16 and that Empire, according to that agreement which is  
17 freely entered into, is entitled to \$10.5 million as  
18 an increase. Thank you.

19           ALJ DERQUE: Thank you, Mr. Mills.

20           Mr. Conrad, I have one housekeeping chore.  
21 Would you please give a written entry of appearance  
22 before you leave?

23           MR. CONRAD: Your Honor, I'll be happy to do  
24 that. Mr. Mills has provided a blank form for me.  
25 Thank you.

1           Your Honor, I'm going to be -- I'll be  
2   hopefully mercifully brief on this, having heard only  
3   the last portion of Mr. Steiner's argument, but the  
4   issue before the Commission today is somewhat  
5   troubling to us. It obviously has financial  
6   implications to my two clients here.

7           And I guess the troubling aspect of it to me  
8   is that very like what Mr. Mills has said, the parties  
9   to this case have agreed to specific language in a  
10   stipulation. It's troubling because it seems that  
11   maybe the unit came fairly close, but apparently based  
12   on what we've seen -- perhaps what we've yet seen  
13   today, has not met the criteria that were agreed on by  
14   the parties.

15          Mr. Mills points out the thing that I think  
16   I would have had he not done so, which is if the  
17   Commission modifies the stipulation, then it seems by  
18   its own terms to void it. And that puts, I think, all  
19   of us, including the Commission and the parties in  
20   something of a difficult position. There being  
21   inadequate time, I guess, before the proposed  
22   operation of law date would trigger -- and to go from  
23   that for just 15 seconds, it would seem that if the  
24   Commission did not enter an order rejecting the  
25   tariffs as originally filed by Empire, then they would

1 go into effect by operation of law.

2 And since they contest the case as being  
3 called, an order rejecting those tariffs would have to  
4 be supported by competent and substantial evidence on  
5 the whole record of the Constitution. And it's not  
6 clear without the undergirding of the stipulation, or  
7 as Mr. Mills points out some kind of hearing, that  
8 that record will be there. So that -- it just creates  
9 a very difficult problem for us.

10 ALJ DERQUE: Thank you, Mr. Conrad.

11 Commissioner Drainer?

12 COMMISSIONER DRAINER: Yes. I have a couple  
13 questions that I would like to ask now.

14 COMMISSIONER DRAINER: Mr. Duffy, on behalf  
15 of Empire -- Chairman Zobrist wanted me to ask you on  
16 behalf of Empire why did you not in your Stipulation  
17 and Agreement put in any language for potential  
18 waivers or in lay terms some wiggle room?

19 MR. DUFFY: Let me answer that in two  
20 levels. One, our position is that we have always  
21 thought that the criteria was to aid the Commission in  
22 determining the statutory language as I said. You  
23 weren't here. That the statutory test, it's fully  
24 operational and in use for service. And it's our  
25 position that the Staff's criteria has a lot of

1 arbitrary time limits in it, and we didn't want to get  
2 into a big debate about whether it ought to run for  
3 eight hours or six and a half hours or three and a  
4 half hours, because we had no reason to suspect that  
5 it wouldn't meet the criteria.

6 And so it really didn't seem worthwhile for  
7 us to intentionally inject a word like substantially  
8 into the stipulation and then have the other parties  
9 say well, what does that mean? And we're not going to  
10 agree to that, so you have to take that out. And so  
11 it really didn't seem to us to be worthwhile to, you  
12 know, inject that debate at that level.

13 We had every expectation that Westinghouse  
14 would meet its contractual obligations and have the  
15 plant ready on line by May 31st. And as indicated, it  
16 has been two mechanical failures that have prevented  
17 us from doing that, not -- you know, not negligence on  
18 the part of company or anything like that. I hope  
19 that answers your question.

20 COMMISSIONER DRAINER: But you had assumed  
21 that it would meet the criteria in May and then you  
22 assumed it would meet all the criteria by June 21st?

23 MR. DUFFY: Right. And but for these  
24 mechanical failures that were unanticipated, acts of  
25 God, whatever, it would have met the criteria.

1                   COMMISSIONER DRAINER: Well, but it  
2     didn't -- you do agree that it met only six of the  
3     nine criteria as of June 21st?

4                   MR. DUFFY: Our position is that it met  
5     seven of the nine criteria completely, and that two of  
6     the nine criteria it met substantially. We do not  
7     believe that the one second or the less than one  
8     second when it dropped below 40 megawatts to 39.7  
9     megawatts or something like that for less than a  
10    second, that that really was a violation of that  
11    criteria.

12                  COMMISSIONER DRAINER: Kind of like horse  
13    shoes? You got close enough? I'm trying to --

14                  MR. DUFFY: -- It seems to me that if the  
15    criteria said it had to run so many hours and then in  
16    less than an eye blink, because of a thunderstorm, a  
17    lightning strike, it dipped below that for something  
18    like less than a second for less than a megawatt --

19                  COMMISSIONER DRAINER: Was there a  
20    thunderstorm?

21                  MR. DUFFY: Yes, ma'am.

22                  COMMISSIONER DRAINER: And a lightning bolt?

23                  MR. DUFFY: Yes, ma'am. That's why it  
24    happened. As you well know and from your experience,  
25    when your lights dim a little bit when a big

1       thunderstorm goes through sometimes, that's the  
2       protective mechanism in the system that operate in a  
3       fashion to protect the equipment so the whole thing  
4       doesn't go black.

5               COMMISSIONER DRAINER: All right. Thank  
6       you. Then I would like to ask both -- all three of  
7       the other parties, Mr. Conrad's here, he happened to  
8       be a little bit later than me. Thank you.

9               If it was, in fact, just because of a  
10       thunderstorm or for a bazillionth of a second that  
11       caused them not to meet all nine criteria, why is it  
12       significant enough to the other parties to ask at this  
13       point that we go with the 10 million versus 3 million  
14       and put yourself in a position of another rate case  
15       and all the expense and time that are dedicated to  
16       that? Mr. Mills, would you mind?

17              MR. MILLS: I would be eager to answer that.

18              COMMISSIONER DRAINER: You looked like you  
19       might be.

20              MR. MILLS: The alleged lightning strike  
21       really had only to do with one of the in-service  
22       criteria. When the other parties -- or at least when  
23       I say that it met only six of the nine criteria,  
24       that's one of the three that it did not meet. The  
25       other two have to do with the ability to use a back-up

1 fuel, which at this point it is unable to do.

2 COMMISSIONER DRAINER: Is that the oil?

3 MR. MILLS: That's the oil, right. And to  
4 my mind, that's much more significant. The mere fact  
5 that it's hypothicated that there was a lightning  
6 strike that caused it to dip below its rated output  
7 for less than a second is certainly a lot less severe.  
8 And, you know, I'd hate to second guess, but I would  
9 suspect that we would not be here had that been the  
10 only criteria it didn't meet. If it merely dipped  
11 below because there was a possibility that the circuit  
12 breakers tripped because of a lightning strike, you  
13 know, we probably wouldn't quibble about that. I  
14 think it's much more serious that the plant is now  
15 incapable of burning a back-up fuel.

16 COMMISSIONER DRAINER: The oil firing and  
17 the emission issue?

18 MR. MILLS: Exactly.

19 COMMISSIONER DRAINER: To answer the other  
20 part of my question to the three parties here, that is  
21 significant enough to you to say we ought to go with  
22 the 10 million and put resources possibly towards  
23 another rate case for looking at this plant when it is  
24 in full service and meets the nine criteria?

25 MR. MILLS: That's the end result. The way

1 I look at is that it's in good conscience according to  
2 the statute and the stipulation. I don't think that I  
3 can say that that plant is in-service. And since it's  
4 not in-service, the law does not allow it to be  
5 included in rate base. And the natural consequence of  
6 that is that we're likely faced with another rate  
7 case.

8 COMMISSIONER DRAINER: Does this get to that  
9 used and useful standard we have?

10 MR. MILLS: Actually, yes. The statute  
11 we're all taking about -- and I'm sorry I can't  
12 remember the cite off the top of my head -- is really  
13 a cogitation of the used and useful standard for  
14 electrical plant in this state.

15 COMMISSIONER DRAINER: If you wouldn't mind  
16 giving us that cite or if someone could give us that  
17 cite, I'd appreciate it. Excuse me. I have it right  
18 here, I think. 393.135?

19 MR. MILLS: That sounds right. Yeah.  
20 That's the one.

21 COMMISSIONER DRAINER: Okay. Thank you. Do  
22 you have anything else to add to your statement?

23 MR. MILLS: I don't believe so. Thank you.

24 COMMISSIONER DRAINER: Mr. Steiner?

25 MR. STEINER: Yes. Thank you. I don't want



1 the Commission to think that the only reason we're  
2 here is because of this lightning strike one-second  
3 delay. That problem had nothing to do with the  
4 failure to be able to convert -- while burning natural  
5 gas to convert to oil. So I don't want anyone to be  
6 misinformed in that aspect.

7 What we're talking about here is -- again, I  
8 don't think we'd be here if the only problem was that  
9 lightning strike and the one-second variation. Why  
10 we're here is because the criteria says that the unit  
11 must be remotely started while burning oil and the  
12 unit must, while burning natural gas, be converted to  
13 burning oil and run for eight hours. That -- those  
14 tests were not met.

15 Another test that we believe was not met was  
16 the emissions test. We did not believe that proper  
17 emissions testing was done to this date. We believe  
18 all three of those are significant and we would also  
19 like to, you know, avoid another rate case if we  
20 could, but we feel we had no choice. We had to deal  
21 and we've bent enough on the deal and we didn't want  
22 to bend any further.

23 COMMISSIONER DRAINER: Thank you.

24 Mr. Conrad, do you have anything?

25 MR. CONRAD: Your Honor, we didn't, both by

1 design and by budgetary limitations, try to get into  
2 questions about whether, you know, the unit was  
3 operational. We've essentially referred to Staff I  
4 think primarily and to the other parties on that.

5 COMMISSIONER DRAINER: Well, I think my  
6 question is more to assuming that the position is  
7 that, you know, they did not meet the criteria and you  
8 were accepting that, is it important enough if you  
9 were to accept Staff and Public Counsel's position on  
10 the degree that the criteria is met, is it important  
11 enough that there ought to be putting resources to a  
12 possible future rate case?

13 MR. CONRAD: Your Honor, I appreciate very  
14 much your question, and it goes primarily to the heart  
15 of what I said a moment ago about the aspect of the  
16 case to us is troubling. One side of our -- of our  
17 thinking and our working with Empire and the other  
18 parties, say that this is -- you'd like to avoid going  
19 through the process of the rate case again. And the  
20 money has been -- has been spent and the utility is in  
21 a position of having -- having that money spent out  
22 there and at this point it is stockholding money.

23 And then on the other hand how much do --  
24 what do stipulations mean? And that's the troubling  
25 aspect of it. I mean, you'd like to find that the

1 parties had built some slack into it. Here it does  
2 not appear that at least -- maybe an argument today  
3 can be made to that effect, but it doesn't appear like  
4 that's there and that puts us all in -- in a fix.

5 The problem, I think, for the Commission is  
6 if you -- if you starting varying from the terms of  
7 the agreement, where does it stop? Does it stop here?  
8 Does it stop with -- with other -- for example, what  
9 Staff does in a memo? Does it stop -- I mean, if  
10 substantially done is enough, then I mean, is 10  
11 million substantially 10.5? Is 12 million  
12 substantially 13.9? Where does it -- where does that  
13 all end? And that's the troubling aspect of it for  
14 us, your Honor. I wish I had a -- a nice concrete  
15 answer for you.

16 COMMISSIONER DRAINER: I think you've  
17 answered me very well. Thank you. I appreciate it.  
18 I have no other questions at this time.

19 ALJ DERQUE: Commissioner Murray?

20 COMMISSIONER MURRAY: Thank you.

21 In Mr. Duffy's opening statements he  
22 outlined four options that the Commission could  
23 consider. Obviously his client would like us to take  
24 option No. 1. I would like the counsel for the other  
25 parties to comment on whether option No. 2 or option

1 No. 3 that Mr. Duffy outlined would be acceptable.  
2 And if you don't recall, I can reiterate what they  
3 were.

4 Correct me, Mr. Duffy, if I misstate, but  
5 the second option was to agree to a two-part increase,  
6 the 10 million plus July 28 and the remainder after  
7 the repairs are made. The third option was that the  
8 parties agree to Empire filing a 30-day tariff to  
9 raise the level to 13 million.

10 MR. DUFFY: And that the Commission act  
11 within that short time period to raise the rates to  
12 that level.

13 COMMISSIONER MURRAY: And the fourth option  
14 I'm not asking you to consider, because it's my  
15 understanding that that was the option that you have  
16 argued for today, which would be to increase the rates  
17 by the 10 million figure only and then Empire would  
18 have to file a full rate case to recover the  
19 additional.

20 MR. STEINER: Do you want me to begin? I am  
21 not sure exactly how the two-part increase would work.  
22 Staff's preference would be with the 30-day tariff  
23 filing option that Mr. Duffy outlined, option No. 3,  
24 where they would get 10.5 now and they would get the  
25 difference between 10.5 and 13.9 in some sort of

1 expedited tariff filing basis. I think Staff would be  
2 willing to work with the parties on that option. We  
3 could have some serious discussion on that option.

4 COMMISSIONER MURRAY: Mr. Mills?

5 MR. MILLS: Well, like Mr. Steiner, I'm a  
6 little -- the first I've heard of these options was  
7 this morning so I obviously haven't given them a whole  
8 lot of thought.

9 I'm a little unclear as to how the two-part  
10 increase would work. I would assume there would  
11 simply be a statement by the company verified by the  
12 Staff and the other parties that the plant actually  
13 had at whatever point met the criteria at which point  
14 the parties would agree that there would automatically  
15 be an increase.

16 The problem I have with that is that I  
17 believe it's probably illegal. I don't think the  
18 Commission at that point would be setting rates based  
19 on all relevant factors. I think they would simply  
20 be -- I'm not sure exactly what factors it would be  
21 based upon, but it certainly wouldn't be based upon  
22 all relevant factors as the law requires.

23 And similarly, with the 30-day tariff,  
24 there's some very clear statutory and regulatory  
25 language about how rate increases are to come about.

1 And one of the requirements is that the Commission  
2 look at all relevant factors. And I think if we did  
3 it on either of those -- either option two or three,  
4 we'd be taking one factor that occurs as much as four  
5 or five or six months after all other factors have  
6 been looked at, which was the cut-off date for the  
7 true-up, which, correct me if I'm wrong, was  
8 March 31st.

9 So you'd be looking at one set of factors as  
10 of the context of the true-up, and then you'd be  
11 looking at this single plant six months later. And I  
12 don't believe that that complies with the statute  
13 either. I mean, as much I would like to try to, you  
14 know, save everyone the time, the expense and the  
15 trouble of going through another rate case, I honestly  
16 don't believe that either of those two options are  
17 workable.

18 COMMISSIONER MURRAY: Mr. Conrad?

19 MR. CONRAD: Commissioner Murray, I find  
20 myself at least in one regard very like Mr. Mills in  
21 that I hadn't heard of the two or three options, but  
22 focusing on the two or three -- or No. 2 and No. 3 as  
23 you have identified them -- and I'm sorry that I  
24 didn't hear all of Mr. Duffy's presentation. I would  
25 certainly, from our perspective, be willing to take

1     either or both of those to my clients, which I've  
2     obviously not been able to do, and reflect on either  
3     or both options with them.

4             I do -- I do have to tell you, I'm not sure  
5     that they're unaddressable or they are unresolvable,  
6     but the concerns that Mr. Mills identifies in the  
7     sense of the legalities would need to be dealt with in  
8     whatever we could come up with, but we could certainly  
9     for our part be willing to explore solutions to the  
10    problem which would, I think, get all of us off the  
11    hook and be perhaps helpful to Empire and to the other  
12    parties and to the Commission. We're certainly  
13    willing to look at those.

14            COMMISSIONER MURRAY: Thank you, very much.  
15    I have no other questions.

16            ALJ DERQUE: Mr. Duffy, you may proceed.

17            MR. DUFFY: At this point we'd be glad to  
18    put Mr. Fancher on the stand for questions from the  
19    Commission if that is acceptable. Call Robert  
20    Fancher. Would you like to go off --

21            ALJ DERQUE: Do you have an exhibit?

22            MR. DUFFY: Yes. We have his -- a verified  
23    statement which was previously filed with the  
24    Commission. And if you'd like to go off the record,  
25    we can mark that as an exhibit and put that in the

1 record.

2 ALJ DERQUE: That will be No. 1, the  
3 verified statement of Mr. Fancher.

4 MR. DUFFY: I have a few extras.

5 (Witness sworn.)

6

7 ALJ DERQUE: Thank you, sir. Please have a  
8 seat. We're off the record.

9 (EXHIBIT NO. 35 WAS MARKED FOR  
10 IDENTIFICATION.)

11 ALJ DERQUE: We're back on the record. I  
12 have what is now marked Exhibit No. 35, the verified  
13 statement of Mr. Robert B. Fancher.

14 Mr. Duffy?

15 MR. DUFFY: Thank you, your Honor.

16 ROBERT B. FANCHER, testified as follows:

17 DIRECT EXAMINATION BY MR. DUFFY:

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

20 A. Robert B. Fancher.

21 Q. Mr. Fancher, do you have in front of you a  
22 document that has been marked for purposes of  
23 identification as Exhibit 35 and is entitled Verified  
24 Statement of Robert B. Fancher?

25 A. Yes. I have that.



1           Q.     Is that the same document that you caused to  
2     be prepared and filed in this proceeding?

3           A.     Yes, it is.

4           Q.     And you attached an affidavit on the 1st of  
5     July 1997 that those -- that the material in there was  
6     true and correct to the best of your information,  
7     knowledge and belief; is that correct?

8           A.     That's correct.

9           Q.     Is that information still correct to the  
10    best of your knowledge, information and belief?

11          A.     Yes, it is.

12          Q.     Have there been any factual changes since  
13    July 1st that would cause you to change anything in  
14    this document?

15          A.     No, there have not.

16                 MR. DUFFY:   Okay.  I would tender  
17    Mr. Fancher for cross-examination or questions from  
18    the Commission, and would offer Exhibit 35 into  
19    evidence.

20                 ALJ DERQUE:  Is there any objection to the  
21    admission into evidence of Exhibit 35?

22                 MR. STEINER:  Yes, your Honor.  I have an  
23    objection.  To the extent that Empire objects to the  
24    verified statement of Mr. Oligschlaeger when I try to  
25    offer that, I would offer the same objection that

1 Mr. Duffy makes at that time.

2 MR. DUFFY: Is likely to make or --

3 MR. STEINER: Both -- what I'm getting at  
4 is --

5 ALJ DERQUE: For your objection,  
6 Mr. Steiner, you probably need to --

7 MR. STEINER: Both of these verified  
8 statements were filed after the June 30 cut-off date.  
9 To the extent that Mr. Duffy has a problem with us  
10 filing one after June 30, I also have a problem with  
11 them filing one after June 30. That's my objection.

12 MR. DUFFY: Do you want me to respond to  
13 that?

14 ALJ DERQUE: Yes.

15 MR. DUFFY: I think we should admit  
16 Mr. Fancher's statement and we would admit  
17 Mr. Oligschlaeger's statement. I will have no  
18 objection to Mr. Oligschlaeger's statement.

19 MR. STEINER: Then I do not have an  
20 objection.

21 ALJ DERQUE: Mr. Mills?

22 MR. MILLS: Let me just say that I have no  
23 objection to the admission of Mr. Fancher's verified  
24 statement.

25 ALJ DERQUE: Okay. Thank you. Mr. Conrad?

1 MR. CONRAD: I have no objection.

2 ALJ DERQUE: Frankly, at this point I'd  
3 rather be trying O.J.

4 Exhibit No. 35 will be admitted into  
5 evidence.

6 (EXHIBIT NO. 35 WAS RECEIVED IN EVIDENCE.)

7 ALJ DERQUE: I'm going to go for purposes of  
8 cross of Mr. Fancher, if there is any, of Staff, also  
9 Office of Public Counsel, then Mr. Conrad. Is there  
10 any objection to that?

11 MR. MILLS: No.

12 ALJ DERQUE: Mr. Steiner?

13 MR. STEINER: Your Honor, Mr. Hosford will  
14 be conducting cross.

15 ALJ DERQUE: Oh, Mr. Hosford? Pardon me.

16 MR. HOSFORD: Yes, sir. I'll be doing  
17 cross.

18 CROSS-EXAMINATION BY MR. HOSFORD:

19 Q. Mr. Fancher, before I get started, I wanted  
20 to ask you about a comment that your attorney made, I  
21 think, in answer to a question from the Commission.  
22 He referred to Staff's criteria as arbitrary time  
23 limits. Empire wasn't forced to sign this agreement  
24 at all, was it?

25 A. No, it was not.

1           Q.     And you agreed to all of these of your own  
2     free will, didn't you?

3           A.     We agreed to the stipulation of our own free  
4     will, that's correct.

5           Q.     When he says arbitrary, in other words, it  
6     wasn't forced upon you in any way?

7           A.     No, it was not.

8           Q.     Okay. Thank you. Going on to your verified  
9     statement, you mention several times in the statement  
10    the in-service criteria proposed by the Commission  
11    Staff. And I guess the same question I have, you  
12    agreed fully with that criteria at the time it was  
13    presented, did you not?

14          A.     I'm not sure what you mean by "fully." Did  
15    we agree with every point in the criteria?

16          Q.     Did you register any objection of any kind  
17    to that criteria?

18          A.     We did not.

19          Q.     So you had no objection and you had many  
20    opportunities if you had had an objection to have  
21    raised it?

22          A.     We had opportunity, yes.

23          Q.     Okay. Thank you. As a matter of fact, your  
24    counselor for the company proposed to use -- or  
25    proposed in the first amendment to the stipulation you

1 included Mr. Deering's criteria as the criteria to be  
2 utilized for purposes of declaring in-service; isn't  
3 that correct?

4 A. That's correct. I think the phrase is to  
5 meet the in-service criteria.

6 Q. Okay. Thank you. Now, are you familiar  
7 with the details of the first amendment to the  
8 Stipulation and Agreement which was agreed upon  
9 between the Staff Public Counsel and Empire and I  
10 believe acquiesced in by the Intervenors?

11 A. I am somewhat familiar with that. I don't  
12 have it memorized.

13 Q. Do you have a copy of it there with you?

14 A. I have it here.

15 Q. Okay. Let me ask you this: Does the  
16 agreement when you signed it or it was signed on  
17 behalf of Empire accurately represent the commission  
18 of the Empire District Electric Company on the matters  
19 addressed in the amendment?

20 A. Did you say does it represent the position?

21 Q. Yes. Did that accurately represent the  
22 commission of the company on the matters addressed in  
23 that amendment?

24 MR. DUFFY: Objection to the form of the  
25 question with regard to the phrase commission of the

1 company.

2 MR. STEINER: Position.

3 THE WITNESS: I think he said -- I had the  
4 same question. Yes. We agreed to that.

5 BY MR. HOSFORD:

6 Q. Okay. If you could take the copy of the  
7 first amendment you have there --

8 A. Okay.

9 Q. -- and if you could turn on page 3 and look  
10 at paragraph 8 of the first amendment, which I believe  
11 is an amendment to paragraph -- it's actually 3A --  
12 would be an amendment to 3A. I'm sorry. It's  
13 paragraph 8 of the amended stipulation, but it was  
14 referencing paragraph 3 of the stipulation. Would you  
15 mind reading basically that article 8 and primarily  
16 the part 3A that it's amending?

17 A. The entire paragraph?

18 Q. Yes. Starting out with -- just read  
19 basically A there about midway down the page where it  
20 starts authorized increase.

21 A. Okay. A -- paragraph A is titled Authorized  
22 Increase. The increase in overall Missouri  
23 jurisdictional revenues referred to paragraph 1 hereof  
24 shall be determined as follows: If on or before  
25 midnight on June 21, 1997, state line unit 2, the

1 plant, meets the in-service criteria contained in the  
2 prepared direct testimony of C. Bruce Deering, the  
3 increase shall be \$13,941,377, which is the revenue  
4 requirement shown on schedule 2 of David Witter's  
5 supplemental true-up testimony, Exhibit TU2.

6 The \$13,941,777 is subject to downward  
7 adjustment based on the items in paragraph 6, 7 and 8  
8 of schedule 1HC to Mr. Deering's testimony. If the  
9 plant does not meet the in-service criteria as may be  
10 adjusted and set out above, the increase shall be  
11 \$10,589,364, which is the amount shown on schedule 1  
12 of Exhibit TU2.

13 Q. Okay. Thank you. That provision in there,  
14 it specifically relates to Mr. Deering's in-service  
15 criteria, doesn't it?

16 A. Yes, it does.

17 Q. And it says very plainly in the last  
18 sentence that if the plant does not meet the  
19 in-service criteria, the increase shall be  
20 \$10,589,364, doesn't it?

21 A. That's correct.

22 Q. Okay. Now, in your verified statement I  
23 believe you referenced the term, quote, fully  
24 operational and used for service; is that correct?

25 A. That's correct.

1           Q.     Can you show me anywhere in that first  
2     amendment to the stipulation that that term  
3     applies -- or appears?  
4           A.     No.    I think that's in the statute.  
5           Q.     But it is not anywhere in the Stipulation  
6     and Agreement?  
7           A.     If it is, I don't remember where it is.  
8           Q.     Okay.  I believe you also talked about  
9     achieving substantial compliance --  
10          A.     Yes.  
11          Q.     -- with Mr. Deering's criteria?  
12                 Can you show me anywhere in paragraph 3A  
13     that the word substantial appears?  
14          A.     I cannot.  
15          Q.     You cannot.  Okay.  Now, let me then go  
16     through since we've got that and ask you a little bit  
17     about the specific criteria that were contained in  
18     Mr. Deering's criteria and then in -- I believe you  
19     also referenced that in your particular verified  
20     statement.  Criteria 2, I believe, states that the  
21     generating unit shall demonstrate its ability to start  
22     when prompted only by a signal from a remotely located  
23     control center once burning natural gas and once  
24     burning distillate oil; isn't that correct?  
25          A.     That's correct.



1           Q.     Okay.  And I think in your response, tell me  
2     here if I'm wrong, you mentioned that the remote start  
3     on oil was not completed; is that correct?

4           A.     That is correct.

5           Q.     Okay.  Now, in regard to Criteria No. 9, I  
6     think one of the criteria there -- and again you can  
7     tell me if I'm wrong -- but I believe that one of the  
8     criteria there is that sometime during the 72-hour  
9     test run the unit must demonstrate the load at or  
10    above 40 megawatts and during that time, it must make  
11    a transition to distillate oil and continue to burn  
12    distillate oil for an eight-hour period; is that  
13    correct?

14          A.     That is correct.

15          Q.     Did the unit attempt to do this?

16          A.     Well, it didn't because of the water pump  
17    being out.

18          Q.     So I guess it's a two-part question.  My  
19    first question is, I guess, was it attempted even to  
20    make that change or that test?

21          A.     No.

22          Q.     So obviously the second answer is if it  
23    didn't do it, the answer would be no also?

24          A.     That's correct.

25          Q.     Okay.  Thank you.  Regarding the current

1 status of the unit, has the unit since June 21  
2 demonstrated the ability to remote start on distillate  
3 oil?

4 A. No. The water pump is still out.

5 Q. And since June 21 it has not made -- then I  
6 assume it has not made the test to switch from gas to  
7 oil and run the eight hours?

8 A. That's correct.

9 Q. Okay. Do you have at this point in time any  
10 scheduled time to demonstrate that criteria prior to  
11 the operation of law date in this case?

12 A. We do not have a schedule, no.

13 Q. No. Do you have any intention at this time  
14 of attempting that test prior to the operation of law  
15 date?

16 A. Well, it depends on the receipt of the water  
17 pump. So when that comes in -- which could be before  
18 that date, but we don't know for sure.

19 Q. You may or may not then?

20 A. Right.

21 Q. Okay. Let's look at the NOx testing because  
22 there seems to be some question regarding whether or  
23 not the unit actually did the NOx testing. You  
24 mentioned in, I believe, your verified statement that  
25 the NOx emissions testing was completed at a base load

1 condition on June 17th, 1997?

2 A. The testing was completed, yes. It did not  
3 meet the 25 parts per million, but the testing was  
4 done, yes.

5 Q. Correct. Now, was that testing -- that NOx  
6 testing, was that test conducted under any type of  
7 test protocol approved by the Missouri Department of  
8 Natural Resources?

9 A. I can't answer that. I don't know.  
10 Whatever the standard test would be to meet this  
11 point.

12 Q. Okay. Was the testing run at any other load  
13 other than base load?

14 A. That I don't know. The testing was in  
15 relation to this criteria. This criteria is not a  
16 pass/fail. It's a bonus/penalty situation. It can be  
17 higher than 25 parts per million and a company's  
18 penalized financially for it being at that point.  
19 It's not if you don't get 25 parts per million, the  
20 unit is failed. It's a different criteria.

21 Q. Right. And I understand that. I think the  
22 question I'm trying to get at is, was the extent of  
23 the test that was performed.

24 A. The test was performed with the operation as  
25 it was then. There was no attempt to tune the

1 emission, to do things to the unit to lower the  
2 emissions because of the other problem.

3 Q. Can you maybe give me the details of how  
4 that test was performed?

5 A. I cannot.

6 Q. Okay. So you don't know then whether or not  
7 the test was in accordance with any type of MDNR,  
8 Missouri Department of Natural Resources requirements?

9 A. I don't know that.

10 Q. Do you intend to submit the results of that  
11 test to the Missouri Department of Natural Resources  
12 for purposes of establishing compliance of the unit  
13 with its -- I believe that one would have to have a  
14 prevention of significant deterioration permit?

15 A. We'll do whatever is required by the  
16 regulations.

17 Q. Is it your opinion that this particular test  
18 would satisfy that requirement?

19 MR. DUFFY: Objection. Calls for a legal  
20 conclusion.

21 ALJ DERQUE: Sustained.

22 BY MR. HOSFORD:

23 Q. Okay. Let me lay a little foundation then.  
24 You're not aware then whether this test would or would  
25 not comply with any requirements --

1           A.     I am not.

2           Q.     -- of the MDNR?  Okay.

3           A.     I am aware that the testing is not complete  
4 because the tuning has not been done of the unit.

5           Q.     Okay.  Are the preliminary test results that  
6 you have submitted of 87.7 parts per million for the  
7 nitrogen oxide testing, is that a reasonable estimate,  
8 do you think, of the actual nitrogen oxide emissions  
9 from the unit on an ongoing basis?

10          A.     It's a reasonable estimate at the time of  
11 the testing that was made without any attempt made to  
12 lower that level.

13          Q.     Okay.  So basically there was -- basically  
14 you didn't attempt to at all to try to fine tune the  
15 unit or achieve any compliance with emissions  
16 criteria?

17          A.     Not at that point, no.

18          Q.     Okay.  I believe elsewhere in your verified  
19 statement you also reference -- again, now we're  
20 getting back to the in-service criteria and what could  
21 constitute in-service or used and useful.  You mention  
22 that the unit was fully accredited under the  
23 guidelines established by both the MOKAN and the  
24 Southwest Power Pools; is that correct?

25          A.     That's correct.

1 Q. Okay. To your knowledge, are the stipulated

2 in-service criteria contained in the agreement

3 identical to the guidelines of the two

4 organizations -- to those two organizations?

5 A. The Staff's in-service criteria?

6 Q. Yes.

7 A. My understanding is that they are not

8 identical.

9 Q. I'm sorry?

10 A. My understanding is that they are not

11 identical.

12 Q. So do they bear any relation to those

13 criteria at all?

14 A. I'm sure parts of it do.

15 Q. But they're not the same criteria?

16 A. They're not the same criteria.

17 Q. Were those criteria referenced anywhere in

18 the Stipulation and Agreement between the parties?

19 A. They were not.

20 Q. Okay. You mentioned, I believe, also

21 somewhere in your verified statement that whether the

22 plant can, quote, serve customers and can operate at

23 full capacity. Does that sound familiar?

24 A. Sounds reasonably familiar. I can't find it

25 right at this time, but --

1 Q. Okay. Are you aware what factors  
2 historically have been used by the Commission to  
3 determine whether a unit is determined to be  
4 in-service for purposes of section 393.135?  
5 A. This goes way back in history, but I don't  
6 believe prior to state line 2 we had criteria that was  
7 this specific in any units that Empire has placed  
8 in-service.  
9 Q. I'm sorry. Did you say before state line 2?  
10 A. Right. In cases prior to that I don't  
11 remember a specific criteria table like this.  
12 Q. Are you familiar with the in-service  
13 criteria for state line unit 1?  
14 A. I meant state line unit 1.  
15 Q. That's why I asked the question.  
16 A. I meant the first unit.  
17 Q. Strike that question.  
18 A. Yes.  
19 Q. Let me ask you this: Do you believe that  
20 the parties to the rate case can agree among  
21 themselves what the proper criteria would be whether a  
22 particular project or generating unit should be  
23 included in the rate base?  
24 A. Can they agree?  
25 Q. Yes.

1           A.     Yes.  I think they can.

2           Q.     And, in fact, isn't that what the parties  
3     did in this case when they signed the Stipulation and  
4     Agreement?

5           A.     I think that's where we have the question as  
6     to what that phrase meets the criteria means.

7           Q.     I'm not asking you what the criteria meant.  
8     I'm only asking you, didn't the parties, in fact,  
9     agree among themselves that those would be the  
10    criteria?

11          A.     Yes.  I believe that's correct.

12          Q.     Okay.  Thank you.  Okay.  Now, you mention  
13    in your verified statement that Empire always assumed  
14    that substantial cri-- compliance with the criteria as  
15    opposed to absolute compliance would be sufficient so  
16    long as the ultimate statutory criteria, fully  
17    operational and used for service are satisfied, I  
18    believe?

19          A.     That's correct.

20          Q.     What was the basis that you had for making  
21    that assumption?

22          A.     I guess the test of reasonableness.  If you  
23    take a class in college and you get a 90 percent  
24    grade, you still pass.  You don't have to have 100  
25    percent.  The point is that the plant is now running



1 and serving load and has done so since June the 18th.

2 And is that the ultimate criteria?

3 Q. That wasn't the question, Mr. Fancher. The  
4 question was, what was the basis for your assumption?  
5 Not what the plant's doing today, but what did you  
6 assume at the time?

7 A. I don't know that I can tell you the  
8 reasoning process that came up for that assumption,  
9 but that was the assumption.

10 Q. Okay. You deal in contracts, do you not?

11 A. Yes, I do.

12 Q. Do you assume in your contracts with  
13 everybody that when it says that you'll do something  
14 on a certain date, that if you come in close to that,  
15 that's okay?

16 A. That again depends on what it is.

17 Q. Okay. But if it says something particular  
18 is going to happen at a particular time, would you  
19 always assume that that meant if I got close, it would  
20 be okay?

21 A. I don't know that I can answer that for all  
22 situations. Again, it depends on what it is you're  
23 talking about.

24 Q. Okay. We'll work on this -- we'll work on  
25 our particular problem here today then. Let me ask

1     you, on your assumption that you said you made but  
2     you're not sure why you made it, did you communicate  
3     your assumption regarding this to any of the other  
4     parties to the Stipulation and Agreement at any time?

5           A.     It's hard for me to answer that, because I  
6     was not the person that did the discussions on that  
7     particular criteria with Mr. Deering. But I believe  
8     that there was probably that same assumption in the  
9     people that were discussing this --

10          Q.     But --

11          A.     -- the engineer on the plant, Mr. Deering,  
12     but I was not the one, so I can't answer that.

13          Q.     But as you sit here today testifying in  
14     front of the Commission, you have no knowledge that  
15     that was ever communicated?

16          A.     I do not.

17          Q.     Thank you. Let me ask you this then, and  
18     I'm referring to yourself now or what you have direct  
19     knowledge of. Did you at any time prior to the filing  
20     of your verified statement, which I believe was last  
21     week, express any reservations regarding the agreed  
22     upon criteria in that Stipulation and Agreement?

23          A.     Did I do that?

24          Q.     Yes, sir.

25          A.     No, I did not.

1           Q.     Okay. Did any of the parties involved in  
2     the Stipulation and Agreement provide you with any  
3     information that anything other than full compliance  
4     with the criteria would be required?

5           A.     I have to go back to the fact that some of  
6     the criteria is not that specific. It's a  
7     bonus/penalty situation where --

8           Q.     Correct.

9           A.     -- you're penalized for dollars if it's  
10    under --

11          Q.     Correct.

12          A.     -- and applied certain dollars if it's over.

13          Q.     Exactly. And I'm referring here to the  
14    criteria -- starting with the criteria that really are  
15    under -- the ones where we have the dispute about.

16          A.     Go back to your question again.

17          Q.     So what we're talking about then, did any of  
18    the parties provide you with any information that  
19    anything other than the full compliance with the  
20    criteria would be required?

21          A.     Not to me, no.

22          Q.     All right. Thank you. Let me ask it this  
23    way then, again getting back to your other one. When  
24    the company agreed to the in-service criteria included  
25    in the draft that was prepared by the company, if you

1 had a concern that it wasn't going to be applied  
2 across the board or literally, why wasn't language  
3 included in there that would have basically set forth  
4 that concern?

5 A. I agree with you that it should have been.

6 MR. HOSFORD: I have no further questions.

7 ALJ DERQUE: Mr. Mills?

8 MR. MILLS: Thank you. I have a few  
9 questions.

10 CROSS-EXAMINATION BY MR. MILLS:

11 Q. Mr. Fancher, are you familiar with state  
12 line unit 1?

13 A. Yes, I am.

14 Q. Is state line unit 1 designed to burn  
15 natural gas with oil as a back-up?

16 A. Yes.

17 Q. And at the time it was de-- it was going  
18 into service during your last rate case, did it meet  
19 essentially the same criteria which state line unit 2  
20 did not meet in this case?

21 A. It met the same criteria. It also at that  
22 time had an emission testing problem which was later  
23 resolved, and dollars were withheld on state line 1  
24 because of emission testing.

25 Q. But just focusing on the burning oil as a

1 back-up --

2 A. Yes.

3 Q. -- state line unit 1 was able to do that?

4 A. Right. The criteria that were failed in  
5 this case were not a problem in state line 1, because  
6 it did not have the failure of the water injection  
7 pump which has to be there to burn oil.

8 Q. Since you've brought up the injection water  
9 pump, let me ask you if you agree that the failure of  
10 a water pump is an act of God?

11 A. I do not.

12 Q. Thank you.

13 A. I don't believe we've contended that. We  
14 will blame the lightning on Him, but not the pump.

15 Q. We haven't got to the lightning. Now, state  
16 line unit 1 as well as state line unit 2 were designed  
17 to burn oil as a back-up to natural gas. Is that not  
18 correct?

19 A. Right. That's correct.

20 Q. Was that design criteria important to Empire  
21 when you were specifying the design of the two units?

22 A. It's important. It's probably not as  
23 important as some of the other things. I think here  
24 we've weighed all these criteria the same and in our  
25 mind they're not equal in importance.

1           Q.     Assuming right now that you're running state  
2     line unit 1 and there's a disruption in the oil  
3     supply, can you burn natural -- can you burn oil on  
4     that unit and start it remotely?

5           A.     I think you meant to go the other way.  If  
6     it's burning gas.  That was where we had the problem,  
7     burning gas and converting to oil.  Can I rephrase  
8     your question?

9           Q.     Let me start over.  I'll tell you what, I'll  
10    rephrase it for you.

11                  If you're burning -- in state line 1 if  
12    you're burning natural gas and there's a disruption to  
13    the oil -- and there's a disruption to the gas, can  
14    you remotely switch to oil?

15          A.     I believe that's correct.  I'd have to  
16    verify that.

17          Q.     But as of right now, you cannot do that with  
18    state line unit 2?

19          A.     It's not a problem with the signal.  It's a  
20    problem with the pump being out and you can't burn  
21    oil.  The remote start was made on gas.  And the  
22    signal is there to remotely start on oil, but because  
23    the pump is out, you cannot burn on oil so you can't  
24    complete that test.

25          Q.     So you can send the signal, but it just

1 won't happen?

2 A. Well, we're not going to go out and burn on  
3 oil without the water pump injection service.

4 Q. So my question --

5 ALJ DERQUE: Excuse me. Mr. Fancher, that  
6 is as we speak?

7 THE WITNESS: That is as we speak the water  
8 pump has not been repaired. We're waiting on parts  
9 for the pump.

10 ALJ DERQUE: And therefore you're not, as we  
11 speak, meeting Criteria No. 2?

12 THE WITNESS: The criteria that were not met  
13 on June 21st, the remote start on oil and the switch  
14 from gas to oil cannot be done until the water pump is  
15 replaced.

16 ALJ DERQUE: Okay.

17 THE WITNESS: So they are not -- they are  
18 not being met today, that's correct.

19 ALJ DERQUE: Thank you. Excuse me,  
20 Mr. Mills.

21 MR. MILLS: I obviously needed some  
22 clarification on that line of questioning.

23 BY MR. MILLS:

24 Q. In response to a question from Mr. Hosford,  
25 you noted that some of the criteria were explicitly

1 made not pass/fail; is that correct?

2 A. That's correct.

3 Q. But the criteria in terms of burning oil was

4 explicitly pass/fail; is that correct?

5 A. The remote signal is clearly stated that it

6 will start once remotely on gas and once remotely on

7 oil.

8 Q. Right.

9 A. The other criteria is in the hours run

10 testing. It's one of the things that is in that

11 entire paragraph. And I believe it's worded such that

12 it will be burning on gas and will be switched to oil

13 and will run eight hours after that point.

14 Q. Okay.

15 A. That's the two criteria.

16 Q. And those two criteria are explicitly

17 pass/fail?

18 A. That's correct.

19 Q. Where some of the other criteria are

20 explicitly not pass/fail?

21 A. That's correct.

22 Q. Now, do you know whether you have seized

23 booking as UBC on state line unit 2?

24 A. I believe we did that June the 21st. I'd

25 have to verify that. That was our intent.



1 MR. MILLS: That's all the questions I have.

2 ALJ DERQUE: Thank you.

3 Mr. Conrad?

4 MR. CONRAD: Just a very short series of  
5 questions.

6 CROSS-EXAMINATION BY MR. CONRAD:

7 Q. Mr. Fancher, I don't want to get into all  
8 the technicalities of the thing because neither of us  
9 are engineers and --

10 A. Unfortunately, I am.

11 Q. You are. Forgive me. I'm sorry. That's  
12 right.

13 A. My previous career I was an engineer.

14 Q. I was half right then, wasn't I?

15 The basic reason on the switch over to oil  
16 is the pump. I understand that.

17 A. Yes.

18 Q. This question probably wraps up a whole  
19 bunch of things within it, but let me just ask it any  
20 way and see where it goes. Whose fault is that?

21 A. We believe it's Westinghouse, yes. It's --  
22 it's the impeller in the water injection pump that  
23 actually failed. And they're looking at not only  
24 replacing it, but maybe changing the design of it  
25 slightly.

1           Q.     And I want you to make an assumption with me  
2     here.  Let's assume for purposes of this question that  
3     the outcome of this proceeding is for the Commission  
4     to say we're going to go with the 10.5.  I think that  
5     was option four.

6           A.     It's way down the list.  I know that.

7           Q.     Okay.  Make that assumption with me for just  
8     a second.

9           A.     It was option four, I believe.

10          Q.     Given what you just testified a moment ago,  
11     does Empire have any, in your opinion, remedy against  
12     Westinghouse?

13          A.     The only remedy called out in the contract  
14     is if they go past May the 31st and we have to buy  
15     power to replace what unit 2 would have generated,  
16     then they will pay for that.  So in the current  
17     situation since it is producing power on an economic  
18     dispatch basis today and future days as long as it's  
19     running, there will be no penalty.

20          Q.     And yet the position, if I understood in  
21     your earlier question, was that Westinghouse had  
22     somehow failed -- and I'm not trying to substitute  
23     words for you, but they somehow failed in their  
24     obligation under its contract with Empire?

25          A.     Right.  But the question then is what harm

1 has that done the company? And the harm would be that  
2 you buy more expensive power to replace what that  
3 would have generated, and that's why that's in the  
4 contract. If the unit is running, as it currently is,  
5 and you're producing that power, then you can't claim  
6 that you have bought more expensive purchase power to  
7 replace it.

8 Q. Is there harm to Empire which would occur,  
9 again in your opinion, in the sense of lost revenue?

10 A. Yes. But it's not called out in the  
11 contract that we can recover that.

12 Q. And in that contract the terms there, I  
13 guess, would limit whatever the remedies are?

14 MR. DUFFY: I'm going to object. That  
15 contract will speak for itself.

16 ALJ DERQUE: Sustained. You can rephrase  
17 it, Mr. Conrad.

18 BY MR. CONRAD:

19 Q. In your opinion, is the contract that you've  
20 referenced with Westinghouse a limitation on the  
21 recovery of that aspect of your company's loss?

22 A. The contract does not cover recovery of that  
23 type of loss. You would have to go to court to  
24 recover that.

25 Q. Okay. Would it be your testimony that

1 Westinghouse has substantially complied with its  
2 contract with Empire?

3 A. Yes.

4 Q. Last question, Mr. Fancher. When you were  
5 in engineering school, did they grade on a modified  
6 curve or a straight curve?

7 A. Every teacher was different. And we serve  
8 in four states and all the teachers are different.

9 MR. CONRAD: Thank you, sir. That's all.

10 ALJ DERQUE: Commissioner Lumpe?

11 QUESTIONS BY COMMISSIONER LUMPE:

12 Q. I have a few here. On the options that were  
13 presented by Mr. Duffy, the four of them, there was  
14 some suggestions that while some might be appealing,  
15 they might have legal problems. Would you care to  
16 address that as an engineer?

17 A. As an engineer, I never hesitate to give a  
18 legal opinion. And I honestly don't know the statute  
19 well enough to address that, but as far as the second  
20 option, which was a two-step increase, my opinion  
21 would be since that would be issued based on the  
22 evidence on the record here the dollar amounts that  
23 would be limited to the 13,941, it's just a matter of  
24 timing. That the Commission could issue an order that  
25 says when it meets the criteria, you go to that

1 additional level.

2           The third option, which was a 30-day filing,  
3 again, I think that takes concurrence of the parties  
4 that are a party to this case, that that is a better  
5 option than going to a full rate case. Again, the  
6 amount of the increase would be up to the 13,941,  
7 which is based on dollar amounts that have already  
8 been audited and discussed and talked about in  
9 hearings extensively.

10           So on that basis, I still think you have to  
11 have concurrence of the parties to go and make a  
12 30-day filing and not suspend it -- in advance,  
13 because if it one party, as Mr. Mills has indicated,  
14 disagrees and files an objection during that 30 days,  
15 obviously that option is not going to work. So unless  
16 all the parties agree, that probably is not a  
17 realistic option.

18           Q.    If we could get all the parties to agree,  
19 would that be the preferred option or --

20           A.    That would be my third choice.

21           Q.    Your third choice. So they were in  
22 descending order?

23           A.    Those are listed in order of preference, but  
24 it certainly to me is preferable to do that rather  
25 than go through another full case and do all the

1 things that we've done during this case to get this  
2 plant in rate base. And it's less dollars than we'd  
3 be filing for for a rate case also.

4 Q. And then let me just ask again, anywhere in  
5 the agreement were the words waiver or substantial or  
6 the statute citation?

7 A. They were not in there, no, ma'am.

8 COMMISSIONER LUMPE: Thank you.

9 ALJ DERQUE: Recross based on Commission  
10 questions, Mr. Steiner?

11 MR. STEINER: No.

12 ALJ DERQUE: Mr. Mills?

13 MR. MILLS: No questions.

14 ALJ DERQUE: Redirect, Mr. Duffy?

15 MR. DUFFY: Thank you.

16 REDIRECT EXAMINATION BY MR. DUFFY:

17 Q. In one of your answers that you gave in  
18 cross-examination you indicated that we were weighing  
19 all of the criteria the same and your view was that  
20 they were not all equally important. Can you describe  
21 which criteria, if any, are more important than other  
22 criteria?

23 A. That would be in my opinion. I don't know  
24 how other people would feel, but if you look at the  
25 different criteria, obviously No. 1, construction of

1 pre-operational testing shall have been completed and  
2 so on and so forth is one of the key things. None of  
3 the other is met unless that's done. So that's  
4 obviously the most important.

5           You go to No. 2, which is the ability to  
6 start by remote signal, clearly is not as important as  
7 some of the others because you can go out to the plant  
8 and start it running. If the remote signal doesn't  
9 work, it will still run. The other criteria that was  
10 not met, by switching directly from gas to oil you can  
11 take it down to completely zero if it's running on  
12 gas, start it back up on oil from zero running time in  
13 less than 30 minutes. So clearly that is not as  
14 important to me as some of the other criteria. That  
15 it can run continuously on gas is a very important  
16 criteria.

17           So I could go through the whole list, but  
18 clearly to me some of them are not as critical to  
19 determine this plant can serve customers as the  
20 others. And if you say any one of these knocks the  
21 whole thing out -- it doesn't seem reasonable to me  
22 that all of those are afforded the same weight. That  
23 any one knocks the whole thing out when clearly it's  
24 serving load today.

25           Q.   Is it true that the plant ran for something

1       like seven hours on oil?

2           A.     I was thinking it had run eight, but it's  
3       seven or eight it had run on oil before.

4           Q.     What is the criteria to run on oil? Is it  
5       eight hours?

6           A.     After the conversion -- after the switch  
7       from gas to oil it was to run eight hours, yes.

8           Q.     So is it true that the plant ran seven of  
9       the eight hours in the criteria?

10           MR. STEINER: I'm going to object. I  
11       believe we're beyond the scope of --

12           ALJ DERQUE: Sustained. That's sustained.

13           Let me interject, Mr. Duffy, a question.

14       QUESTIONS BY ALJ DERQUE:

15           Q.     Mr. Fancher, I have understood so far that  
16       by and -- on or by the June 21st cut-off date this  
17       plant did not meet the criteria as set out in the  
18       agreement; is that correct?

19           A.     Yes. It does not meet --

20           Q.     Criteria No. 2 and one other criteria  
21       involving operation on gas and oil; is that correct?

22           A.     Yes. It's a part of Criteria No. 9. It's  
23       not the entire criteria, but a part of Criteria No. 9.

24           ALJ DERQUE: Thank you. Based on that, does  
25       anyone have any other recross or redirect based on my



1 question? No. Are you done with your redirect,  
2 Mr. Duffy?

3 MR. DUFFY: I guess I am.

4 ALJ DERQUE: No. Go right ahead. I'm here  
5 for due process all day.

6 MR. DUFFY: I would like to correct what I  
7 believe is an erroneous statement where Mr. Fancher  
8 was testifying as to what the legal aspects were in  
9 response to Commissioner Lumpe's question.

10 MR. MILLS: Excuse me. I think I'm going to  
11 object if this is not in the nature of redirect  
12 examination. I thought he was here to redirect.

13 ALJ DERQUE: Are you going to ask him a  
14 question? If you want to testify, Mr. Duffy, and be a  
15 legal expert, you're going to have to take the stand.

16 MR. DUFFY: No other questions.

17 ALJ DERQUE: What, sir?

18 MR. DUFFY: No other questions.

19 (Witness excused.)

20

21 ALJ DERQUE: I think we'll recess. Let's go  
22 off the record.

23 (A recess was taken.)

24 ALJ DERQUE: We're back on the record. Does  
25 Empire have any more witnesses they wish to call?

1 MR. DUFFY: No, your Honor.  
2 ALJ DERQUE: Staff's Mr. Steiner?  
3 MR. STEINER: Call Mr. Bruce Deering.  
4 ALJ DERQUE: Do you have an exhibit?  
5 MR. STEINER: Yes. The verified statement  
6 of Bruce Deering, both NP and HC version.  
7 ALJ DERQUE: Okay. That will be No. 36  
8 verified statement of Deering. And No. 36HC is it?  
9 MR. STEINER: There's HC and NP.  
10 ALJ DERQUE: So 36P [sic] and No. 36HC.  
11 Off the record.  
12 (Discussion off the record.)  
13 (EXHIBIT NOS. 36NP AND 36HC WERE MARKED FOR  
14 IDENTIFICATION.)  
15 ALJ DERQUE: We're back on the record.  
16 Mr. Steiner?  
17 C. BRUCE DEERING, testified as follows:  
18 DIRECT EXAMINATION BY MR. STEINER:  
19 Q. Would you state your name for the record,  
20 please?  
21 A. Name is C. Bruce Deering.  
22 Q. Mr. Deering, where do you work?  
23 A. Missouri Public Service Commission.  
24 Q. Did you cause to be filed a verified  
25 statement in this case?

1           A.     Yes, I did.

2           Q.     That verified statement has been marked as  
3     Exhibit 36NP and 36HC. Do you have a copy of that in  
4     front of you today?

5           A.     Yes, I do.

6           Q.     Do you have any changes that you need to  
7     make to that testimony -- to that verified statement?

8           A.     Yes. There are some numbers that need to be  
9     changed on page 3, line 11, 20.33 megawatts should be  
10    changed to 20.06 megawatts. And on page 6, line 205  
11    pm should be changed to 223 pm. And on line 21, 326  
12    pm should be changed to 329 pm.

13          Q.     Mr. Deering, with those changes are the  
14    statements contained in your verified statement true  
15    and correct to the best of your information, knowledge  
16    and belief?

17          A.     Yes, they are.

18                 MR. STEINER: I would move for the admission  
19    of Exhibit 36NP and HC into the record and offer  
20    Mr. Deering for cross-examination.

21                 ALJ DERQUE: Thank you. Is there any  
22    objection to the admission of the Exhibits 36NP and  
23    36HC? No objection. They will be admitted.

24                 (EXHIBIT NOS. 36NP AND 36HC RECEIVED IN  
25    EVIDENCE.)

1 ALJ DERQUE: Mr. Mills?

2 MR. MILLS: Thank you. Yes. I have a  
3 couple of questions.

4 CROSS-EXAMINATION BY MR. MILLS:

5 Q. Mr. Deering, is it correct that it's Staff's  
6 position that the company did not meet the in-service  
7 criteria?

8 MR. DUFFY: Objection. Friendly cross.

9 ALJ DERQUE: I'll overrule it for a moment.  
10 You can answer that one.

11 THE WITNESS: It is my opinion that that is  
12 correct from the Staff's standpoint.

13 BY MR. MILLS:

14 Q. And that -- I'll leave it at that.

15 Let me ask you one other question. On  
16 page 7, I believe, of your verified statement at  
17 line 2 you're discussing there the system disturbance?

18 A. Yes.

19 Q. Do you know for a fact that the disturbance  
20 was caused by lightning or a tree limb?

21 A. I do not know for a fact that it was caused  
22 by lightning or a tree limb. There was a lightning  
23 storm that moved through. The evidence that we have  
24 recorded by the computer is that the breakers opened  
25 and then we know what happened after that.

1 Q. Okay. So you think it was probably  
2 lightning or a tree limb, but you can't say for sure?

3 A. That's correct.

4 MR. MILLS: That's all the questions I have.

5 ALJ DERQUE: Thank you, Mr. Mills.

6 Mr. Conrad?

7 MR. CONRAD: No questions.

8 ALJ DERQUE: Mr. Duffy?

9 CROSS-EXAMINATION BY MR. DUFFY:

10 Q. Mr. Deering, I'm looking at your verified  
11 statement on the first page, lines 10 and 11 where you  
12 say the generating unit is in operation serving native  
13 load as well as providing power for off system sales  
14 to neighboring utility companies. That statement was  
15 correct when you made it, I assume?

16 A. Yes, it was.

17 Q. And it's still correct today?

18 A. Yes, it is.

19 Q. Do you believe that all of the criteria that  
20 we've talked about today are of equal importance?

21 A. No, I do not.

22 Q. Do you believe that the 72-hour continuous  
23 run on natural gas was a significant or more important  
24 criteria than some of the other criteria?

25 A. Showing consistency to hold a minimum load

1 is significant and important, in my opinion.

2 Q. Do you agree with your attorney's opening  
3 statement that the reason we're here is that the Staff  
4 has refused to bend any further on the criteria?

5 A. No. I cannot say that that's specifically  
6 the only reason we're here.

7 Q. Do you agree that the staff has refused to  
8 bend any further on the criteria?

9 A. At this stage, I guess I would have to say  
10 that otherwise we wouldn't be here perhaps.

11 Q. With regard to the lightning -- the assumed  
12 lightning situation, based on your experience, did the  
13 system operate the way it should have when that  
14 one-second occurrence occurred?

15 A. Yes, it did.

16 Q. And if it hadn't operated that way, would  
17 there have been a potential for damage to the system?

18 A. Not necessarily.

19 Q. But possibly?

20 A. Possibly.

21 Q. Do you believe that the one-second dip was a  
22 significant failure?

23 A. It was not a significant failure. In a  
24 strict literal application of the criteria the unit  
25 did not stay above 40 megawatts. And under a strict

1 literal interpretation, one has to say that it did not  
2 meet that criteria.

3 Q. You agree that the same remote mechanisms  
4 accomplished a remote start on both natural gas and  
5 oil?

6 A. Yes.

7 Q. And the unit accomplished a remote start on  
8 natural gas?

9 A. That's correct.

10 Q. So you would assume that the use of the same  
11 mechanisms to start on oil remotely would function in  
12 the same fashion as a remote start on natural gas?

13 A. Yes. I believe they would.

14 Q. Had the injection pump not failed, do you  
15 have an opinion as to whether the criteria would have  
16 been met?

17 A. I believe it would have been met had the  
18 water injection pump not failed.

19 MR. DUFFY: No other questions, your Honor.

20 ALJ DERQUE: Commissioner Lumpe?

21 QUESTIONS BY COMMISSIONER LUMPE:

22 Q. Mr. Deering, do you have any comment on the  
23 four proposed solutions -- preference or comments on  
24 whether there are difficulties with them?

25 A. Because of the nature of the question that

1 we're dealing with here, which seems to me as an  
2 engineer to be more of a semantics legal question than  
3 whether the unit is in-service or not, I cannot offer  
4 a -- a professional opinion on that. It would only be  
5 my own personal opinion. And if you want that, and I  
6 can give that, I would be happy to do that.

7 Q. Would you do that?

8 A. It is my opinion that the first option,  
9 recognizing the unit as being in-service and utilizing  
10 the \$13.9 million figure or increase in revenue is  
11 appropriate recognizing the physical, mechanical  
12 electrical aspects of the state of the plant and  
13 setting aside the semantics and the legal  
14 considerations that we are struggling with here today.

15 COMMISSIONER LUMPE: Thank you.

16 ALJ DERQUE: Thank you. Recross based on  
17 Commissioner Lumpe's question?

18 MR. MILLS: Who goes first?

19 ALJ DERQUE: Let me see. It would be you,  
20 Mr. Mills.

21 RECROSS-EXAMINATION BY MR. MILLS:

22 Q. Mr. Deering, that was a very interesting  
23 response you gave to Commissioner Lumpe. Why did that  
24 not appear in your verified statement?

25 A. There was a lot of discussion about what



1       could be included in the verified statement, and for  
2       that reason, it did not appear there.

3           Q.     And isn't what you have just described as  
4       your personal opinion that you gave to Commissioner  
5       Lumpe fairly squarely in opposition to the Staff's  
6       position in this case?

7           A.     It appears to be.

8           Q.     So are you not in support of the Staff's  
9       position?

10          A.     I am not in support of the position that  
11       excludes the unit from inclusion in rate base.

12                 MR. MILLS:  No further questions.

13                 ALJ DERQUE:  Mr. Conrad?

14                 MR. CONRAD:  I think I'll just pass the  
15       witness.  No questions.

16                 ALJ DERQUE:  Mr. Duffy?

17                 MR. DUFFY:  No other questions, your Honor.

18                 ALJ DERQUE:  Redirect, Mr. Steiner?

19                 MR. STEINER:  Yes.

20       REDIRECT EXAMINATION BY MR. STEINER:

21           Q.     Mr. Deering, when you were responding to  
22       Commissioner Lumpe's question, that was your personal  
23       opinion; is that correct?

24           A.     I am not a lawyer and cannot render a legal  
25       opinion.  It is my personal opinion, yes.

1           Q.     And is it your personal opinion or the  
2     opinion testifying as a member of Staff that the state  
3     line CT unit No. 2 did not meet all nine of your  
4     criteria?

5           A.     The unit did not meet all nine criteria if  
6     you apply a strict literal interpretation to the  
7     criteria.

8           Q.     What does your verified statement say as to  
9     whether the criteria were met?

10          A.     It says certain criteria were not met  
11     specifically for each of those that wasn't met.

12          Q.     And your statement -- in your verified  
13     statement that certain criteria were not met was made  
14     as a member of the Staff and not your personal  
15     opinion; is that correct?

16          A.     I am a Staff member and it was made as a  
17     member of the Staff.

18                 MR. STEINER:   Thank you.

19                 ALJ DERQUE:   Thank you, Mr. Deering.   You  
20     may step down.

21                 (Witness excused.)

22

23                 ALJ DERQUE:   Staff have any other witnesses?

24                 MR. STEINER:   Mark Oligschlaeger.   Do you  
25     want to go off?

1 (Witness sworn.)  
2 ALJ DERQUE: Thank you, sir.  
3 What do you have?  
4 MR. STEINER: Verified statement of Mark  
5 Oligschlaeger.  
6 ALJ DERQUE: That will be No. 37. We're off  
7 the record.  
8 (EXHIBIT NO. 37 WAS MARKED FOR  
9 IDENTIFICATION.)  
10 ALJ DERQUE: Mr. Steiner?  
11 MARK L. OLIGSCHLAEGER testified as follows:  
12 DIRECT EXAMINATION BY MR. STEINER:  
13 Q. Would you state your name for the record,  
14 please?  
15 A. Mark L. Oligschlaeger.  
16 Q. Where do you work?  
17 A. I work for the Missouri Public Service  
18 Commission.  
19 Q. Mr. Oligschlaeger, did you cause to be filed  
20 a verified statement which has been marked for  
21 purposes of identification as Exhibit 37?  
22 A. Yes, I did.  
23 Q. Do I have any changes to that verified  
24 statement?  
25 A. No, I do not.

1           Q.     Are the answers contained in the verified  
2     statement true and accurate to the best of your  
3     knowledge?

4           A.     They are.

5           MR. STEINER: I'd like to move for admission  
6     of Exhibit 37 into evidence and tender the witness for  
7     cross.

8           ALJ DERQUE: Thank you. Is there any  
9     objection to the admission of evidence of Exhibit 37?  
10    Seeing none it will be admitted.

11           (EXHIBIT NO. 37 WAS RECEIVED IN EVIDENCE.)

12           ALJ DERQUE: Mr. Mills?

13           MR. MILLS: I have no questions.

14           ALJ DERQUE: Mr. Conrad?

15    CROSS-EXAMINATION BY MR. CONRAD:

16           Q.     Mr. Oligschlaeger, Mr. Deering was just on  
17     the stand and indicated a personal position that's  
18     different from what is in Exhibit 37; is that correct?

19           A.     I believe that would be correct.

20           Q.     Which of you is here for the Staff?

21           A.     It's my understanding Mr. Deering was here  
22     to testify on behalf of the Staff in terms of the nine  
23     criteria that were stipulated and to what degree the  
24     company attained those criteria or not in regards to  
25     state line unit 2.

1           I am here to testify in terms of the Staff's  
2   view of the overall in-service status of state line  
3   unit 2 as well as the consequences of that status on  
4   the revenue requirement that should be granted by the  
5   Commission to Empire in this case.

6           MR. CONRAD: Okay. Thank you. That's all.

7           ALJ DERQUE: Mr. Duffy?

8   CROSS-EXAMINATION BY MR. DUFFY:

9           Q.   Mr. Oligschlaeger, do you disagree with the  
10   verified statement of Mr. Deering that the generating  
11   unit is in operation serving native load as well as  
12   providing power for off system sales to neighboring  
13   utility companies?

14          A.   No. I'm not aware of any information that  
15   would lead me to disagree with that.

16          Q.   You are an accountant and not an engineer;  
17   is that correct?

18          A.   That is correct.

19          Q.   Did you design any of the criteria that is  
20   referenced in Mr. Deering's statement?

21          A.   No, I did not.

22          Q.   Were you there during the testing of state  
23   line unit 2 to observe whether the unit met any of the  
24   criteria?

25          A.   No, I was not.

1           Q.     Was there something incomplete in  
2     Mr. Deering's testimony that caused you to file your  
3     verified statement?

4           A.     I believe the reason for my verified  
5     statement was the fact that Mr. Deering's verified  
6     statement did not address the questions of the overall  
7     in-service status as well as the revenue requirement  
8     recommendation in this case.

9           Q.     Do you agree with your attorney's  
10    statement -- opening statement that the Staff has  
11    refused to bend any further on the criteria?

12          A.     Well, I'd probably quibble a little bit with  
13    the form of the question, because I don't think there  
14    was any prior bending on the criteria themselves.  
15    There was perhaps bending, so to speak, on the  
16    in-service date, but given the movement of the  
17    in-service date, yes. I would say it's accurate that  
18    at least in regards to changing the criteria, we did  
19    not feel it was appropriate to deviate from what had  
20    previously been stipulated.

21          Q.     And you believe that the failure of a  
22    \$20,000 pump in an over \$40 million plant is  
23    significant?

24          A.     Apparently it was significant in causing the  
25    company to fail to meet the June 21st in-service

1 deadline, which is specified in the first amendment to  
2 the stipulation.

3 Q. That wasn't the my question,  
4 Mr. Oligschlaeger. I asked if you believe that it was  
5 significant?

6 A. That the failure of the pump itself was  
7 significant? Well, can you --

8 Q. I believe my -- I believe the question as I  
9 phrased it was, do you believe that the failure of a  
10 \$20,000 pump in a plant of over \$40 million was  
11 significant?

12 A. It is my belief that the failure of the pump  
13 led -- led to the significant impact of the company  
14 failing to meet in-service criteria by the stipulated  
15 in-service deadlines.

16 MR. DUFFY: No other questions, your Honor.

17 ALJ DERQUE: Commissioner Lumpe? Redirect  
18 Mr. Steiner?

19 MR. STEINER: I don't have any.

20 ALJ DERQUE: Thank you. You may step down,  
21 Mr. Oligschlaeger.

22 (Witness excused.)

23

24 ALJ DERQUE: Does the Staff have any more  
25 witnesses or evidence they wish to produce?

1 MR. STEINER: No.

2 ALJ DERQUE: Mr. Mills, Office the Public of  
3 Counsel?

4 MR. MILLS: We have no witnesses.

5 ALJ DERQUE: Mr. Conrad?

6 MR. CONRAD: Nor do we.

7 ALJ DERQUE: That being the case is there  
8 anything else the Commission needs to deal with on the  
9 on the record portion of this hearing?

10 MR. DUFFY: We have no other evidence to  
11 produce, your Honor.

12 ALJ DERQUE: If you want a brief closing  
13 statement -- any of the parties want a brief closing  
14 statement, I will allow that simply because I don't  
15 believe we have time for briefs in this matter. This  
16 is a matter that the Commission has to decide almost  
17 immediately.

18 MR. DUFFY: That would be fine with us.  
19 We'd be prepared to put on a brief closing argument.

20 ALJ DERQUE: Does anyone object to that?

21 MR. MILLS: No objection.

22 MR. STEINER: No.

23 ALJ DERQUE: Mr. Duffy, you will proceed  
24 then.

25 MR. DUFFY: Thank you. And understand this



1 is going to be off the top of my head here. I think  
2 the -- one of the most significant statements that  
3 were made in this proceeding was by Mr. Steiner  
4 obviously when he said the Staff refused to bend any  
5 further. I think that's what is going on here.

6 I think the Staff as we've indicated, is  
7 taking a hypercritical view of their criteria,  
8 attempting to elevate them above the overall purpose.  
9 I think the Staff is looking at the -- is mistaking  
10 the forest for the trees. I'm reminded of some old  
11 nursery rhyme about for want of a nail a shoe is lost  
12 and for want of a shoe the horse was lost and onto I  
13 think a country or empire was lost.

14 This \$20,000 pump is the nail in the horse  
15 shoe. And I think the Staff is -- and with its --  
16 with the Public Counsel is taking an unjustifiable  
17 hypercritical interpretation of the criteria and  
18 applying them in a hypercritical fashion. I think the  
19 Staff has indicated by the testimony of Mr. Deering,  
20 who filed a verified statement that said the company  
21 substantially met the criteria that was established.

22 As to the four options, I would like to  
23 clarify that I think the company's position is that on  
24 the 30-day filing if the Commission indicates that  
25 that is something that they would be amenable to, I

1 think the case law is that the company can make a  
2 tariff filing on 30 days notice and that tariff filing  
3 could have the effect of the 13,941,377. And that the  
4 Commission, I believe the case law indicates, can in  
5 its discretion determine that it does not want to  
6 suspend that tariff. I do not believe that it takes  
7 any agreement of other parties or anything like that  
8 for the Commission to so act.

9           So in other words, if the Commission  
10 determines that in this situation that they are going  
11 to apply the stipulation in a very, very, literal  
12 sense and say well, you did not meet all the criteria  
13 so all you get is 10.5, then I think the Commission  
14 can also indicate in their order that we think that  
15 this is a hypercritical interpretation, we think that  
16 the parties are crazy to force another full blown rate  
17 case because of the failure of a \$20,000 pump, and  
18 that we would certainly entertain a filing by the  
19 company as soon as the pump is replaced and the  
20 plant's operating with that, that the 13,941,377 would  
21 go into effect.

22           And I do not think -- you know, the other  
23 parties may certainly object to that tariff, but I  
24 think it's in the Commission's discretion that they  
25 can say we think that tariff is reasonable and we're

1 not going to suspend that tariff. And I think then  
2 you probably would not see Empire District Electric in  
3 here for another full blown rate case for a good  
4 while -- a good period of time, because that was -- as  
5 we have indicated, that was the intention of the  
6 stipulation in the first place.

7 That's all I have. And thank you for the  
8 opportunity to make that statement.

9 ALJ DERQUE: Mr. Steiner?

10 MR. STEINER: Yes. Staff is not taking a  
11 hypercritical view. It's been established today that  
12 all the parties when they signed the document believed  
13 that all the criteria could be met. Empire agrees  
14 that the first amendment to the Stipulation and  
15 Agreement says that they'll meet all nine criteria.  
16 They also admit they didn't meet all nine criteria. I  
17 mean, how is that being hypercritical to hold them to  
18 the letter of their agreement?

19 Staff could not have filed the statement  
20 that criteria were substantially met. That wasn't the  
21 agreement. I mean, we have to tell the Commission  
22 exactly what happened and that's what we did. We're  
23 bound by the Stipulation and Agreement to tell you  
24 whether the nine criteria were met, and they were not.

25 That's all I have to say. Thanks.

1           ALJ DERQUE: Thank you, Mr. Steiner.

2           Mr. Mills?

3           MR. MILLS: Thank you. I think I want to  
4 look at first the nursery rhyme that Mr. Duffy  
5 referred to, the want of a nail a shoe is lost and the  
6 end result was the Empire is lost. I think despite  
7 Mr. Duffy's citation of that nursery rhyme, I think it  
8 actually goes against him.

9           I think it points out the fact that because  
10 of fairly -- events that in themselves or parts that  
11 in themselves are not terribly impressive, some  
12 impressive consequences can come about.

13           I think what happened in this case is  
14 because this water pump does not work, the plant could  
15 not work as it's intended to. And the evidence  
16 adduced today shows that Empire does not know when it  
17 will be able to run as it should, has no current  
18 intentions of testing to see if it will run in that  
19 fashion before the operation of law date, and cannot  
20 say even when after the operation of law date it will  
21 run as it was intended to run.

22           I don't think that that's being  
23 hypercritical. I think it is critical that the plant  
24 run as it was designed to run as its sister plant does  
25 run. And, in fact, we had evidence that was adduced

1       today that not only is Empire thinking of replacing  
2       the part, but actually resigning some part of this  
3       plant.

4               I think it's almost impossible for the  
5       Commission to find that this plant is in service and  
6       in used and useful if parts of the plant that are  
7       crucial to its running properly are still in the  
8       design phase. I think there simply is no credible  
9       evidence that this plant is in service and there is  
10      unanimous evidence that it did not meet the criteria  
11      specified in the Stipulation and Agreement. And I  
12      think that it would be the wisest course if not the  
13      only course for the Commission to approve the  
14      Stipulation and Agreement as it is set out and find  
15      that Empire did not meet the nine criteria and award  
16      it the \$10.5 million. Thank you.

17             ALJ DERQUE: Thank you, Mr. Mills.  
18      Mr. Conrad?

19             MR. CONRAD: With some reluctance, your  
20      Honor, I would have to say that anything that I  
21      have -- would say I think has already been said by one  
22      of the other three parties and I don't think we would  
23      add anything to this brew by further expanding on it.  
24      So I will waive closing statement at this point

25             ALJ DERQUE: For purposes of clarity,

1 Mr. Conrad --

2 MR. CONRAD: Yes, sir.

3 ALJ DERQUE: -- which parties?

4 MR. CONRAD: One, two, three.

5 ALJ DERQUE: All of them?

6 MR. CONRAD: Well, the -- okay.

7 ALJ DERQUE: What I'm looking for is --

8 MR. CONRAD: Where we line up?

9 ALJ DERQUE: Yes.

10 MR. CONRAD: On the side of truth, justice

11 and good.

12 Your Honor, in all -- with all respect, I --

13 we remain very troubled by this process. And I don't

14 know that I have a solution to offer to you. I've

15 heard the same evidence that the others have and it

16 very definitely seems to be -- even for Mr. Fancher

17 acknowledging that on these criteria that it didn't

18 meet it. And I think your Honor's question and the

19 response confirms that the plant today would not run

20 if they went out and did the tests today, aside from

21 the 72-hour aspects of it.

22 I guess the concern that I have is two-fold.

23 One, I hate to crank through the process again for

24 this component of the plant. It's an expensive

25 process for the company, and for the parties it's an

1 expensive process for our clients.

2 And at the same time I struggle with the  
3 idea that we have an agreement that is acknowledged by  
4 all the parties and has been in place and sets up, in  
5 effect, a series of targets or one target and says  
6 these are -- these are the things you have to meet.  
7 And they seem to be more or less objective criteria  
8 and are listed as such. And that's the difficulty  
9 that I have.

10 If the Commission desires to move from the  
11 language of the stipulation, I'm just not sure where  
12 that stops. And it seems like if the parties agree to  
13 something that is in its terms, your Honor, ambiguous,  
14 then it would be okay to come in and say well,  
15 substantially this or nearly met that. These things  
16 don't seem to be ambiguous.

17 And I've got to presume since we didn't get  
18 involved in these issues, that the company and the  
19 Staff who are really the two main parties on this  
20 issue anyway as well as Public Counsel perhaps too. I  
21 don't know if Mr. Mills had one of his staff go out  
22 and review the test, but we certainly did not and so  
23 we just don't have any -- any real engineering stance  
24 as to whether there's been substantial compliance with  
25 whatever criteria are out there. But the problem is

1 the stip doesn't say substantial compliance and it  
2 doesn't say, you know, nearly there.

3 And we again would look for a solution for  
4 this. And perhaps one of these options is something  
5 we could look at, because I don't -- I would like for  
6 our clients not to crank through the process again.  
7 But I also recognize the concerns Mr. Mills has about  
8 the legality of either of those two options. And  
9 perhaps, you know, further reflection on that would  
10 convince us.

11 You talked me into making a closing  
12 statement, your Honor. I don't know if that answered  
13 your need. It's difficult, I think, for us to select  
14 a side here except to say that it seems like we have a  
15 stipulation here and that's -- that's really what's  
16 before us.

17 ALJ DERQUE: Thank you, Mr. Conrad. The  
18 Commission needs to know your client's position  
19 accurately.

20 MR. CONRAD: Thank you.

21 ALJ DERQUE: Is there anything else the  
22 Commission needs to deal with on this on the record  
23 part of this hearing?

24 MR. DUFFY: Not if all the exhibits have  
25 been admitted and --





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I N D E X

EMPIRE'S EVIDENCE:

ROBERT B. FANCHER

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C. BRUCE DEERING

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MARK L. OLIGSCHLAEGER

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