

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION

3
4 PREHEARING CONFERENCE

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6 Jefferson City, Missouri
7 Volume 3
8

9
10 In the Matter of the Tariff)
11 Filing of Missouri Public)
12 Service (MPS), a Division of)
13 UtiliCorp United Inc., to) Case No. ER-2001-672
14 Implement a General Rate) Tariff No. 200101173
15 Increase for Retail Electric)
16 Service Provided to Customers)
17 in the Missouri Service Area)
18 of MPS)
19

20
21 BEFORE:

22 KEVIN A. THOMPSON, Presiding,
23 DEPUTY CHIEF REGULATORY LAW JUDGE.
24
25

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

2 (Written Entries of Appearance filed.)

3 JUDGE THOMPSON: Good morning everyone.

4 My name is Kevin Thompson. I'm the
5 Regulatory Law Judge assigned to preside over this
6 matter which is in the matter of the tariff filing of
7 Missouri Public Service, a division of UtiliCorp
8 United, Inc., to implement a general rate increase for
9 retail electric service provided to customers in the
10 Missouri service area of MPS, Case No. ER-2001-672.

11 We'll go ahead and take oral entries of
12 appearance at this time. Please do not bother to give
13 your address unless you have not done so already.
14 We'll begin with the Company.

15 MR. SWEARENGEN: Yes, your Honor.
16 James C. Swearngen, Brydon, Swearngen &
17 England, appearing on behalf of Missouri Public
18 Service.

19 JUDGE THOMPSON: Thank you.
20 Staff?

21 MR. WILLIAMS: Nathan Williams and Steven
22 Dottheim, appearing on behalf of the Staff of the
23 Missouri Public Service Commission.

24 JUDGE THOMPSON: And let's begin with the
25 interveners. Just start on that side of the room and

1 work our way across.

2 MR. COMLEY: Let the record reflect the
3 entry of Mark W. Comley, Newman, Comely & Ruth, on
4 behalf of the City of Kansas City.

5 JUDGE THOMPSON: Thank you, sir.

6 MR. KINCHELOE: The Missouri Joint Municipal
7 Electric Utility Commission, Duncan E. Kincheloe.

8 JUDGE THOMPSON: Thank you, sir.

9 Public Counsel?

10 MR. COFFMAN: John B. Coffman, appearing on
11 behalf of the Office of the Public Counsel and the
12 rate-paying public.

13 JUDGE THOMPSON: Thank you, sir.

14 Mr. Finnegan?

15 MR. FINNEGAN: Jeremiah Finnegan, appearing
16 on behalf of Jackson County, Missouri.

17 JUDGE THOMPSON: Mr. Conrad?

18 MR. CONRAD: Stuart W. Conrad on behalf of
19 Sedalia Industrial Energy Invention Group. SIEUA, I
20 believe we've called it in the application.

21 JUDGE THOMPSON: Thank you, sir.

22 Any other counsel present?

23 (No response.)

24 JUDGE THOMPSON: Okay. We are here to
25 discuss a discovery dispute which has arisen between

1 the Staff of the Commission and the Company. Staff
2 has filed a motion -- an extensive motion, and has
3 also filed testimony in support of its motion, so --
4 and this was filed, I think, six days ago; is that
5 correct?

6 MR. WILLIAMS: It was filed last Friday.

7 JUDGE THOMPSON: Last Friday. Well, the
8 Company has not had any opportunity to respond to
9 this, and I want to make it abundantly clear that we
10 are certainly not going to take up the detailed
11 allegations and supporting testimony and those sorts
12 of things at this time because that's simply not fair.

13 What I would like to hear from you, however,
14 is an oral summary of what sort of problems Staff has
15 encountered and just exactly what Staff would like the
16 Commission to do about it, and then we will allow
17 Company to respond to that, and then you can have a
18 few minutes to respond or rebut, reply, to what
19 Mr. Swearngen has to say.

20 So, Mr. Williams, if you would proceed.

21 MR. WILLIAMS: Your Honor, in this case, the
22 Staff has been issued DRs back in June seeking
23 information from the Company. A number of those DRs
24 still are outstanding even as of this date.

25 The information sought in some of those DRs

1 is very fundamental information that should be
2 contained in the Company's books and records that
3 should be readily available to the Company and easily
4 responded to in the DR requests.

5 Because of the lateness -- and also the
6 Company has provided late responses to DRs. Because
7 of the lateness in those responses and in some cases
8 the lack of responses at this time, the Staff has not
9 had the opportunity to follow up on those DRs with
10 subsequent DRs that request more detailed information.

11 The Company is aware of the issues the Staff
12 has and has agreed in this case to the proposed change
13 in the procedural schedule that the Staff has
14 requested in its motion.

15 Additionally, because of the issues with the
16 DR request responses, the Staff is asking for an order
17 from the Commission that requires the Company to
18 provide responses by a date certain, next Monday, to
19 DR requests that were outstanding as of the date of
20 the motion, or the date stated. I believe it may have
21 been this Monday.

22 In any event, the Staff has also requested
23 that the Commission order the Company to respond in
24 shortened time frames to subsequent DRs in order to
25 give the Staff an opportunity to put in its direct

1 case information that -- a filing that's based on
2 current information. The test year in this case is
3 December 30th of 2001 updated through June 30th of --
4 I'm sorry. It's December 31st of the year 2000
5 updated for changes through June 30th of 2001.

6 As part of the selection of the proposed
7 dates for the change in the procedural schedule, the
8 Staff took into consideration the shortened response
9 times it's asking for the discovery requests, and if
10 those discovery requests are not responded to within
11 those time frames, the Staff is still unsure that it
12 would be able to file the type of case it would like
13 to by the December 6 time frame.

14 In particular, the Staff has not received
15 copies of advertisements that were requested that are
16 outstanding and overdue. It has not received
17 information on incentive compensation plans. It
18 recently learned that there is an issue regarding
19 income tax and the treatment of straight line -- or
20 depreciation, and, currently, there is an outstanding
21 DR that would -- that's overdue that would provide
22 information that would allow the Staff to calculate a
23 ratio that's necessary for the Staff to put on its
24 direct case on income tax.

25 The Staff has also reviewed the books of the

1 Company and learned that there is an issue about
2 interchange sales in that for the test year
3 December 31st, 2000 the Company showing in a
4 particular account approximately 19,000; whereas,
5 whenever the test year is updated through June 30th of
6 2001, for that test year, the Company is showing
7 \$13 million in that account. The Staff has not had --
8 at this point been able to find out the reason for
9 that change and be able to address that in its case.

10 JUDGE THOMPSON: Let me make sure I
11 understand you.

12 The difference is between 19,000 and 13
13 million?

14 MR. WILLIAMS: Yes, your Honor.

15 JUDGE THOMPSON: Okay. Please proceed.

16 MR. WILLIAMS: Additionally, the Staff has
17 not received historical gas costs for St. Joseph Light
18 and Power that are necessary for it to do its fuel
19 calculation -- fuel cost annualizations. That's
20 because in this case the Staff is working under a
21 joint dispatch assumption, and in order to find out
22 the -- determine a fuel cost annualization for
23 Missouri Public Service, it also needs the information
24 for the other Missouri division of UtiliCorp, which is
25 St. Joseph Light and Power.

1 JUDGE THOMPSON: Anything else?

2 MR. WILLIAMS: Additionally, there has
3 been -- Staff has had difficulty in performing its
4 depreciation analysis because of the lateness in the
5 Company's responses and an issue about the format in
6 which those responses have been supplied. Basically,
7 had the responses been responded to in a timely
8 manner, the Staff would have had an opportunity at
9 least to put the information in the format in which it
10 requires it.

11 Because of the lateness in which the
12 responses were made, the Staff has been severely
13 limited in its opportunity to put that data in the
14 format that it requires in order to do its
15 depreciation analysis.

16 I think that covers it.

17 JUDGE THOMPSON: If I could ask you one
18 question right now, Mr. Williams.

19 Is it your belief, or is it the Staff's
20 position that it's been -- its ability to prepare its
21 case has been irretrievably compromised as of this
22 date?

23 MR. WILLIAMS: The Staff will be able to put
24 on a case even under the current filing date, but it
25 will not be of the quality that the Staff would

1 normally put before the Commission.

2 JUDGE THOMPSON: And there is nothing that
3 can be done to cure that?

4 MR. WILLIAMS: If the Commission slides the
5 schedule as the Staff has requested and orders the
6 Company to provide the data responses in the time
7 frames that the Staff set out, that may cure it.

8 JUDGE THOMPSON: Okay. Thank you.

9 Mr. Swearengen?

10 MR. SWEARENGEN: Yes. Thank you, your
11 Honor.

12 I think, generally speaking, Mr. Williams
13 has fairly accurately provided you with a summary
14 history of why we're here today. I have had several
15 discussions with Mr. Williams and other members of the
16 Staff, Commission Staff, over the last several weeks
17 concerning the situation. And without either side
18 during the course of those conversations trying to
19 point the finger at the other to say who was
20 responsible, I think we both came to a realization
21 that there was a problem.

22 And the Company asked the Staff, How do you
23 propose to -- or how would you propose to resolve this
24 problem? And the Staff was kind enough to provide us
25 with their request which ultimately has turned up in

1 their motion which has been filed with the Commission.

2 If you have that in front of you, Judge --

3 JUDGE THOMPSON: Yes, I do.

4 MR. SWEARENGEN: -- Paragraph 1 sets out the
5 requested new dates that the Staff desires.

6 Mr. Williams was kind enough to provide me, prior to
7 filing, with a proposal that had a little different
8 schedule than is contained in this motion, and the
9 Company reviewed it immediately and got back to him
10 and said, If you would make certain changes to your
11 proposed schedule, we can agree to that. And the
12 Staff, in fact, did.

13 So what appears in Paragraph 1 of this
14 motion in terms of the schedule is acceptable to the
15 Company. We had indicated that to the Staff, and I
16 think Mr. Williams indicated his understanding --

17 JUDGE THOMPSON: If I could stop you for a
18 moment, in the motion that I have, the new schedule is
19 in Paragraph 16.

20 MR. SWEARENGEN: Well, I'm looking at the
21 prayer of the motion. Excuse me.

22 JUDGE THOMPSON: Okay. Very well.

23 MR. SWEARENGEN: I'm working from the back
24 to the front.

25 JUDGE THOMPSON: Okay. Thank you.

1 I'm with you now.

2 MR. SWEARENGEN: So that paragraph is
3 acceptable to the Company.

4 Paragraph No. 2 of the prayer asks that we
5 provide responses to certain data requests listed
6 on the schedule no later than 3 p.m., Monday,
7 November 5th, 2001. And I think I can tell you today
8 that we will be able to do that with the possible
9 exception of maybe three or four data requests.

10 JUDGE THOMPSON: Okay.

11 MR. SWEARENGEN: So, for the most part, this
12 Paragraph No. 2 is something that is agreeable to the
13 Company.

14 Paragraph No. 3 would refer to any data
15 requests that are not overdue but have been submitted
16 to the Company and is essentially asking us to comply
17 with the Commission rule on that, object within ten
18 days or tell the Commission -- the Staff why we can't
19 answer it within ten days or answer within 20. And as
20 I've already indicated to Mr. Williams in our phone
21 conversations, that's acceptable. So there is no real
22 issue there.

23 JUDGE THOMPSON: Okay.

24 MR. SWEARENGEN: The last two paragraphs,
25 Paragraphs 4 and 5, concern the response time to

1 subsequent data requests. The motion says, Beginning
2 Monday, October 29 and ending January 8, we would try
3 to answer those within ten days, and anything that
4 came in after January 8th, which I think is the date
5 for the filing of Rebuttal Testimony, that we would
6 answer within seven days of the date being issued.

7 My response to Mr. Williams in our
8 conversations at that time was that we would be
9 willing to make a good faith best effort to answer
10 those data requests within the ten-day time period and
11 the seven-day time period, but we didn't want to make
12 a commitment that we would do that, because, quite
13 frankly, I'm reasonably certain based on past
14 experience that there would be some circumstances that
15 would come up that would prevent that from happening.

16 But in other cases, language of that sort
17 has seemed to be satisfactory to all parties
18 concerned, and all parties have acted in good faith
19 and attempted to answer data requests on a more
20 expedited basis.

21 Let me just give you one example of the
22 ten-day problem. Let's say, for example, on the
23 Wednesday before Thanksgiving we got 50 data requests
24 from the Staff, Thursday, Friday, Saturday, Sunday
25 four days are gone before we can probably get into

1 those data requests, and if we're talking about
2 calendar days, which I understand the Staff is
3 proposing as opposed to business days, that type of
4 circumstance would create a problem.

5 So we're willing to make our best effort to
6 answer those data requests within ten and within
7 seven, but we don't want to make a firm commitment
8 that we're going to do that in the event we don't, and
9 then they come back to the Commission and say we
10 haven't lived up to our agreement.

11 So before this motion was filed, in my mind,
12 the only real issue between us and the Staff was
13 whether or not this seven- and ten-day response time
14 was a best effort or had to be mandated by the
15 Commission, and I still think that's really the only
16 issue between us.

17 But what has the Company concerned and what
18 has me concerned is that along with this motion in the
19 body of it and then with the some 50 pages of verified
20 testimony is an effort which we think is designed to
21 cast all of the blame for this situation on the
22 Company.

23 And I think that when parties recognize that
24 there is a problem and try to come to some meeting of
25 the minds as to a way to solve that, that it is

1 certainly unnecessary and even inappropriate under
2 those circumstances for one party then to file a
3 pleading that accuses the other party of bad faith or
4 putting all of the blame there. That's sort of like
5 negotiating a cease fire and then when you show up
6 being ambushed, and that's sort of how we feel today.

7 I have a response to this drafted that I
8 could file today. I really don't want to. But it
9 tells the other side of the story. And I don't think
10 that the Staff is without blame for the circumstances
11 that it now finds itself in. But I don't want to have
12 to get into all of that.

13 I think that if the Staff would withdraw the
14 motion that they have filed and these affidavits that
15 they have filed and simply file a motion asking that
16 the relief they request in the motion be granted, the
17 five paragraphs that we've talked about, that this
18 thing could be resolved fairly quickly without having
19 to assess blame anywhere, and -- because I don't think
20 that's necessary or appropriate under the
21 circumstances.

22 So that's our druthers. We don't want to
23 have to file the response that I'm prepared to file
24 because it's not going to do anybody any good. I
25 would rather have this withdrawn and the affidavits

1 withdrawn and, hopefully, we could file something
2 together that solves the problem and takes care of the
3 interests of all concerned.

4 Thank you.

5 JUDGE THOMPSON: Thank you, Mr. Swearengen.
6 Mr. Williams?

7 MR. WILLIAMS: May I have a moment, your
8 Honor?

9 JUDGE THOMPSON: You may.

10 And we will hear from the interveners and
11 Public Counsel after we hear from Mr. Williams.

12 MR. WILLIAMS: Your Honor, I think that
13 Mr. Swearengen has fairly accurately described what
14 the situation is currently. The Staff is not going to
15 withdraw its motion as he suggested.

16 We're in agreement about, I think, the
17 relief that should be granted by the Commission in
18 this case.

19 As to Paragraphs 4 and 5 and the "wherefore"
20 clause the Staff has had representations about when
21 information would be provided and, therefore, requests
22 the Commission order on those time frames that have
23 been requested.

24 The Staff would not be unreasonable in
25 making accommodations if those time frames were not

1 met for valid reasons, as it has done in the past with
2 the Commission's rule time frame.

3 We certainly have no problem with the
4 Company filing its responsive pleading before the
5 Commission makes its decision.

6 JUDGE THOMPSON: Is that it?

7 MR. WILLIAMS: That's it.

8 JUDGE THOMPSON: Thank you, Mr. Williams.
9 Mr. Coffman?

10 MR. COFFMAN: Thank you.

11 We have reviewed the filings of the Staff
12 and have in our auditing encountered similar
13 experiences and similar problems, and I guess I might
14 just say, initially, I think that in a lot of these --
15 even though we've had several late responses,
16 UtiliCorp has been cordial and cooperative in
17 answering -- answering some of them and following up
18 on our requests.

19 Responses have been very late, and we are
20 finding ourselves in a very difficult situation going
21 back primarily to the general ledger. We have a
22 situation with this company and its -- what it calls a
23 general ledger that is unlike anything we have ever
24 seen in our accounting department auditing any public
25 regulated utility.

1 JUDGE THOMPSON: It sounds like it looks
2 like my checkbook.

3 MR. COFFMAN: Yeah. It is, let me say,
4 unusual enough that we -- we actually believe it does
5 not comply with the Commission's rule regarding
6 Uniform System of Accounts, Rule 4 CSR 240-20.030(1).

7 What UtiliCorp apparently has done a couple
8 of years ago is put its general ledger in the format
9 of a functionalized account, not the FERC accounts
10 required by the Commission rule. We were told back in
11 July when we asked for a general ledger that it would
12 fill a room or it wasn't exactly what we would
13 normally see.

14 There have been attempts to derive a FERC
15 account-based formula, but from what we've seen, it's
16 still not in a format that we know how to audit.

17 And we are preparing motions ourselves that
18 we plan to file with the Commission, but I think we
19 would agree with Staff that the current schedule is
20 not adequate to even know whether we can perform an
21 audit at this time. It seems unlikely even that
22 Staff's proposed schedule will be adequate enough.

23 We have -- when I say my accounting team, I
24 mean my one accountant assigned to this case. We have
25 just recently retained a consultant to help us, but

1 the task is -- at this point seems impossible. And
2 from reading the affidavits of Staff, we're quite
3 concerned that even with the resources Staff has that
4 they would not be able to prepare a case.

5 Of course, I know the Commission's mind is
6 that the utility bears the burden of proof in this
7 matter, but it's an unusual situation that we've not
8 been in before, and I believe Staff's -- Staff's
9 remedy of the situation doesn't seem to go far enough.

10 JUDGE THOMPSON: Okay. Do you have
11 alternative remedies that you're ready to suggest?

12 MR. COFFMAN: We plan to file soon another
13 Motion to Dismiss in this case.

14 JUDGE THOMPSON: Okay. I will look forward
15 to your filing.

16 MR. COFFMAN: And then, of course, this
17 issue is even apart from the problem we believe in
18 defining exactly what is the regulated entity in the
19 case --

20 JUDGE THOMPSON: I understand.

21 MR. COFFMAN: -- in auditing the St. Joseph
22 Light and Power area.

23 JUDGE THOMPSON: Okay. I understand. Very
24 good.

25 Thank you, Mr. Coffman.

1 Mr. Comley.

2 MR. COMLEY: I have no comments. Thank you.

3 Mr. Kincheloe?

4 MR. KINCHELOE: No comments.

5 JUDGE THOMPSON: Mr. Finnegan?

6 MR. FINNEGAN: Yes, your Honor.

7 We came down here today because we're quite
8 concerned that what the Staff has requested in this
9 further relief is not adequate. Mr. Featherstone on
10 Page 7 of his verified statement made it pretty clear
11 that the Staff is greatly impaired in its ability to
12 complete its audit of Missouri Public Service, and if
13 the Staff is impaired, then all of the parties in this
14 case are impaired. In fact, all of the ratepayers in
15 the state of Missouri are impaired because they all
16 rely on the Staff's audit. Without the Staff having
17 the full ability to do an audit properly, the
18 ratepayers are going to suffer.

19 And I think what we have here is an
20 opportunity -- is Company has been gaming the system.
21 They filed the case before it was ready to get an
22 operation of law date fixed, and then four months
23 later they said, Well, here is our case, where in the
24 normal situation is when they file their case, they're
25 ready to go.

1 We've lost four months. The Staff has lost
2 four months in its ability to audit. I think what the
3 Commission ought to do is to issue sanctions in this
4 case on the Company, give them ten days to respond to
5 all outstanding data requests, give them the same ten
6 days to agree to extend the effective date by 135 days
7 because that's how late they were from the time when
8 they filed the case on June 8th to the date that they
9 actually provided the Staff with this testimony that
10 they were able to audit, and if they don't do that,
11 dismiss the case and let them file again with the case
12 now that they've got the testimony ready to do it.

13 Thank you, your Honor.

14 JUDGE THOMPSON: Thank you very much,
15 Mr. Finnegan.

16 Mr. Conrad.

17 MR. CONRAD: Your Honor, I will be brief.

18 The materials from the Staff raise the same
19 concerns that I think you've heard from Mr. Coffman
20 and Mr. Finnegan. As interveners we depend on the
21 Staff's, shall we say, revenue filing. We often don't
22 depend on their class cost of service materials, and
23 that's another issue for another day.

24 But one thing that appears to be happening
25 here is there is some suggestion, if not outright

1 statement, that the Company has at some point in time
2 in the past adopted some type of an accounting system
3 that does not comply with this Commission's rules, and
4 if it does not comply with the standard of the FERC
5 accounting system and track expenditures and revenues
6 according to that, then it's also possibly in
7 violation of the FERC's requirements, which at least
8 part of this Company is subject to.

9 The -- when things like this, Judge, have
10 come up in the past, in my limited remembrance, and I
11 think although the case is certainly not precisely
12 analogous, the Wolf Creek case that we had with KCP&L
13 where they filed understandably at a date that was
14 calculated by them -- excuse me -- to -- I'll just
15 turn it off. I thought I had it turned off.

16 JUDGE THOMPSON: Do you need a minute?

17 MR. SWEARENGEN: I'd asked my secretary to
18 call him.

19 MR. CONRAD: I guarantee you, it won't work
20 without --

21 JUDGE THOMPSON: Now, that's gaming the
22 system.

23 MR. CONRAD: But in that case, the Company
24 had understandably filed, as it turned out,
25 prematurely, but I think all of us understood why

1 because of the size and magnitude of the Wolf Creek
2 Station and their desire to get it in instantly
3 contemporaneously with its booking into plant and
4 service.

5 And what we did in that case in order to
6 avoid the parties having wasted the testimony that had
7 gone before, the discovery that had gone before, and
8 the work that had gone before, was the company in that
9 case did agree to just extend the operation of law
10 date. We built another case and really rolled, if you
11 will, the first -- the first docket into the second
12 one, and that perhaps seems like a reasonable thing to
13 do here, at least it would be saving a lot of work
14 that has already gone before.

15 And that's been -- that's been suggested. I
16 don't know, 135 days, 120 days, but, clearly, the
17 Commission's leverage just to say, You have not
18 complied with our requirements as to discovery, you
19 haven't complied with the rest of the parties'
20 requests -- and in that context let me briefly lift
21 up, this is not, although it sometimes seems that way,
22 necessarily a battle between Staff and Company.

23 There are other parties involved here, and
24 when we start adjusting the schedules, the adjustment
25 may fit one party's scenario, but what happens if you

1 were to look at the proposed schedule, we are cut back
2 to less than 20 days on the responsive testimony
3 filing that we have to make, and, typically, we are
4 not able to get responses that are right on point
5 every time even though we could instantly obtain,
6 read, analyze and develop responses and get them to
7 the other party even the next day after the testimony
8 is in if you stay with the 20-day deal.

9 The other thing that I guess I would suggest
10 here, and the Commission might want to consider doing
11 this on its own motion, if there is some counterable
12 suggestion because I have to feel both of the Staff
13 witnesses, Mr. Featherstone and Mr. Traxler who have
14 substantial combined experience, as well as individual
15 substantial experience with operations before the
16 Commission, are suggesting, if the Company is out of
17 compliance with the Commission's rules on Uniform
18 System of Accounts, it would seem to me that that
19 might be something that would be sanctionable, and
20 every day that it is out of compliance is a separate
21 offense. Moreover, if it is out of compliance, Judge,
22 with FERC rules, a very similar situation may arise.

23 Now, I have -- I have no strong desire to
24 cause the Company to be sanctioned, but it is also
25 true that when a company wants to adopt some new type

1 of accounting system, it seems to me as a regulated
2 entity it is obligated to do that in such a way that
3 the ability of the regulators and those who have to
4 work with the data that that accounting system
5 produces is not thereby compromised.

6 If that gains for them some efficiency, some
7 ability to manage, to look into how their company is
8 operating in a new and different way at a different
9 level, that's all fine, but we should not be put in a
10 vice where we have to say, Well, go do that and go
11 operate your company like you're unregulated, and then
12 on the other hand want to claim the benefits of filing
13 tariffs, having those tariffs approved and becoming,
14 in effect, black statutes in the statute book. My
15 people have to pay them and cannot challenge them. So
16 that may be something, your Honor, that the Commission
17 wants to look at on its own.

18 I think, frankly, the way to solve this is
19 basically to tell the Company, We're going to dismiss
20 your case unless you give us the time at the end, and
21 I would point out the Commission needs time. You need
22 time.

23 JUDGE THOMPSON: I am well aware of that.

24 MR. CONRAD: You need time to look at the
25 record. We're chopping -- as a result of this

1 recommendation, we're chopping about three or four
2 days off the hearing, as well as responsive times.

3 I would simply point out that at least in
4 the proposal that's made, and I'll refer to
5 Paragraph 16, if you note there in the original
6 proposal, Judge, the Statement of Issues was due --
7 the date's particularly meaningless, but it was due on
8 January 11th, and then four days later Position
9 Statements.

10 It's very difficult for me to put together
11 Position Statements simultaneously with what parties
12 are putting together as what their issues are. I
13 mean, it's -- that just -- that just doesn't work even
14 in electronic days, and that's why that time interval
15 was built in there. That's forfeited here.

16 Now, that may be a small issue, and there
17 may be a way to work around that, and I don't have a
18 specific proposal on that, but I just lift that up.
19 We've got all three of those things due on the 23rd of
20 January. The reconciliation is typically not
21 something that we do but others do. The Position
22 Statement, though, is something, I think, you probably
23 will want from us, and I need to know what the other
24 parties' issues are, as well as ours, in order to
25 respond to them in a Position Statement.

1 So the way this proposal goes, and let me
2 conclude by making clear, my clients want, Judge, the
3 Staff to have time to do an adequate audit, not just
4 an adequate audit, but an audit that is up to their
5 standards.

6 Now, you asked that question, and you got
7 something --

8 JUDGE THOMPSON: I got a waffle.

9 MR. CONRAD: -- something of a waffle from
10 counsel. And I -- I'm sympathetic to the counsel's
11 problem, but it may be that this is a problem -- this
12 overall issue goes deeper than just a discovery
13 dispute that we can solve by shortening the response
14 times.

15 Thank you, Judge.

16 JUDGE THOMPSON: Thank you, Mr. Conrad.

17 Mr. Swearengen, I think it's only fair that
18 you have an opportunity to respond to the statements
19 of the interveners.

20 MR. SWEARENGEN: Thank you.

21 Mr. Conrad, Mr. Finnegan, and Public Counsel
22 are always a tough act to follow.

23 They have raised, of course, issues that for
24 the most part are outside the scope of the Staff's
25 pleading, so I'm not really prepared now, nor will I

1 be later today, to respond to that. We are prepared
2 to go ahead and respond to the only pleading that's
3 before the Commission, and that's the Staff's motion.

4 I will say that Mr. Conrad makes a good
5 point about the Statement of the Issues, and I, for
6 one, have always argued over the years that that
7 document ought to show up shortly after the prehearing
8 conference, after the parties have sat down, looked at
9 the first round of testimony, decide what the issues
10 are, so that when you write the Rebuttal Testimony and
11 the Surrebuttal Testimony, you know what the issues
12 here. So, to me, Stu makes a good point.

13 I know the Commission hasn't been doing it
14 that way, and one way that we have always managed to
15 work around that in cases that I have been involved in
16 is we've always had a gentlemen's understanding that
17 at the conclusion of the prehearing conference, we
18 would set out a list of bullet point issues so we sort
19 of had a passive understanding as to what those issues
20 are so we know what we're writing testimony on.

21 But other than that response, I'll have to
22 wait and see what Mr. Coffman files and Mr. Finnegan
23 and Mr. Conrad.

24 JUDGE THOMPSON: Thank you, Mr. Swearengen.

25 Mr. Williams, I'll give you the final word.

1 MR. WILLIAMS: Well, as is evident from the
2 motion, the Staff has not taken a position that the
3 Company's books are noncompliant with the Commission's
4 rules.

5 And I'd just add that Staff has been
6 interfacing with the Company and trying to work things
7 out, and we've ended up here.

8 JUDGE THOMPSON: Okay. Let me say I
9 appreciate all of you coming today for this on very,
10 very short notice, and I appreciate the learned
11 offerings that I've received from counsel.

12 Let me ask you, Mr. Williams, you stated in
13 your initial statement that there were data requests
14 that had been served in June that are still
15 unanswered; is that correct?

16 MR. WILLIAMS: That is correct.

17 JUDGE THOMPSON: What was the original due
18 date of those data requests?

19 MR. WILLIAMS: Well, 20 days -- some of
20 those would have been -- I'm informed that August 5th
21 would have been the first due date.

22 JUDGE THOMPSON: Okay. So they really must
23 have been filed in July then, isn't that correct,
24 given the 20-day response period?

25 MR. SWEARENGEN: There were data requests

1 filed in June I think. The 18th of June, I think, we
2 got the first hundred or so.

3 JUDGE THOMPSON: But those have all been
4 responded to?

5 MR. SWEARENGEN: Well --

6 JUDGE THOMPSON: As far as we know. Okay.

7 The reason I ask that question is a
8 preliminary to saying I don't understand why if data
9 requests that were due in the summer were not filed,
10 responses were not provided, why it is that it's not
11 until October 26 that a Motion to Compel appears in
12 front of the Commission.

13 The Commission has only limited ability to
14 really rectify matters in a rate case where we are
15 hamstrung by the eleven-month statutory period in
16 which we can suspend the tariffs. There is not a lot
17 of time there to play around with.

18 And so it would strike me that if you're not
19 getting your data requests responded to that you would
20 want to file a Motion to Compel immediately rather
21 than five months later. That's just the first thing
22 that occurs to me on the top of my head.

23 At this time point we're now faced with
24 trying to compress the rest of this case into the
25 remaining time, which is difficult to do. It's

1 difficult to do one of these cases in eleven months
2 anyway, much less when you've got to try to compress
3 it into a shorter period.

4 We've got two interveners now asking for
5 four-month extensions of the -- of the operation of
6 law date, which, of course, the Company can agree to
7 if the Company chooses to, but the Company cannot be
8 compelled to agree to.

9 For the Commission to dismiss this case and
10 tell the Company, No, you're not going to get your
11 tariffs approved. You're going to have to come back
12 with a new filing, that's a very, very, very serious
13 and grave step, and I can't imagine the Commission
14 doing that without being persuaded of outrageous
15 misconduct on the part of the Company.

16 You-all know far better than I that a rate
17 case is a balancing act. The Commission's duty is to
18 be fair to the Company and fair to the ratepayers,
19 both, and that's a difficult proposition to achieve at
20 any time, particularly in these days when the cost of
21 energy and the cost of utility services are simply
22 increasing by leaps and bounds.

23 Now, you also mentioned that recently some
24 issues had arisen about income tax, straight line
25 depreciation, calculation of a tax ratio that you

1 need.

2 How recently do you mean?

3 MR. WILLIAMS: Just this past week.

4 JUDGE THOMPSON: Okay. So we're really not
5 looking at a failure to respond timely on those things
6 if they only just arose; isn't that correct?

7 MR. SWEARENGEN: And this is the first I've
8 heard about those matters.

9 JUDGE THOMPSON: Okay.

10 MR. WILLIAMS: Judge --

11 JUDGE THOMPSON: Sir?

12 MR. WILLIAMS: -- the information to
13 calculate the ratio is something that's been
14 outstanding for some time. The fact that there is an
15 issue with the Company about the treatment of income
16 tax has newly arisen. There were representations by
17 the Company that there was not going to be an issue
18 with Staff on that.

19 JUDGE THOMPSON: Okay. With respect to what
20 Public Counsel and a couple of interveners have
21 referred to as to the state of the Company's books, I
22 mean, if someone believes that the Company is not
23 maintaining their books in accordance with the
24 Commission's regulation, then that's matter for a
25 complaint. And if you believe you have facts

1 available to support that sort of allegation or
2 charge, then I urge you to file a complaint.

3 But that's not something that can be
4 addressed on the fly in resolving a discovery dispute
5 in the context of this major rate case. That needs to
6 be the subject of a complaint, a separate proceeding,
7 I think.

8 Now, if it's your position that the rate
9 case is -- is fatally injured, you simply cannot
10 proceed because of the state of the Company's books,
11 then, again, I urge you to file an appropriate motion
12 with all of the factual support you can muster,
13 because the kind of relief you're asking for in
14 response to that is very serious, and the Commission
15 is not going to take it without being satisfied that
16 that's what's required, that that's the only step that
17 can be taken.

18 Finally, I'd like to respond to
19 Mr. Swearingen's comment about Issue Statements.

20 As you-all know, I'm sure, this is -- the
21 Issue Statement is part of the Commission's
22 continuing -- really, the Law Judges' continuing
23 effort to improve the pleading of Commission cases.
24 You know, in a civil case you've got a Complaint;
25 you've got an Answer; you've got Replies; you've got

1 numbered allegations. You can match them up. They
2 are either admitted, they're denied, or, heck, I don't
3 know, and you go from there.

4 Here, particularly in a rate case, you know,
5 what's filed is a tariff, and nobody ever responds
6 except with testimony.

7 So the effort is to try to get some kind of
8 pleading there so that we know what's at issue so
9 that, in fact -- you know, all of the jurisprudence on
10 discovery, right, when you talk about scope, what's
11 the permissible scope of discovery, all of the
12 jurisprudence points back to the pleadings.

13 Well, how do you apply that in a case that
14 has no pleadings. Right? That becomes a matter of
15 difficulty.

16 We certainly would like to see Issue
17 Statements much earlier in the process. That's our
18 own preference, but where the parties supply an agreed
19 proposed procedural schedule that all of the parties
20 have agreed to and they set the Issue Statement late,
21 then we accept what the parties have agreed. So
22 that's why that happens that way.

23 Yes, we would like to see them sooner, but
24 if the parties agree they are not going to do them
25 until a week before the hearing or two weeks before

1 the hearing, then we've been accepting that.

2 What you have filed here with three pieces
3 of prefiled testimony, three affidavits each of
4 deposition size, constitutes a separate major
5 proceeding just on the issue of what should we do
6 about the discovery problems, and I would hate to see
7 everybody's energy sucked into an ancillary litigation
8 about that.

9 I mean, obviously, Company gets a chance to
10 file testimony in response. You get a chance to reply
11 to that. Then we have to have a hearing. We have to
12 have cross-examination. The Commission then has to
13 decide what they believe; what they don't believe.

14 Heck, by then the operation of law date will
15 have come and gone. I mean, I just don't think there
16 is time to undertake a separate major proceeding on
17 the issue of what has happened with the discovery in
18 this case.

19 So my personal preference is for
20 Mr. Swaengen's suggestion. Let's not point fingers.
21 Let's not worry about why. Let's worry about how we
22 can fix it.

23 So as far as I'm concerned, that's why we're
24 gathered here today, and this was the soonest that I
25 could get everyone together after receiving this

1 motion. This is our single opportunity, as I see it,
2 to put everyone together and come up with, How do we
3 fix it? Okay?

4 If we can't fix it, and if we have to point
5 fingers and assign blame, well, then they are going to
6 have to file testimony, they are going to have to file
7 a response, everyone else is going to want to file
8 things, and you'll see the rate case turn into a
9 proceeding about something entirely different than
10 what the rates should be. So if you guys have the
11 time and the energy for that, feel free.

12 I'm going to adjourn the recorded portion of
13 this prehearing conference, and I'm going to leave
14 you-all here to discuss these issues. I would like
15 your lodestar to be fixing this case. Okay?

16 I don't know whether Company is at all
17 interested in extending the operation of law date. I
18 hope you will consider it. Other than that, I can
19 simply urge you to work cooperatively with the time
20 that you have. I will certainly be here if you need
21 my presence or if there is in any way I can help you
22 achieve that goal of fixing this case so that it can
23 go forward.

24 If the case cannot be fixed and cannot go
25 forward, if that is the opinion of any of the parties

1 here, then you understand you will have to file
2 extensive factual support for any such motion, because
3 I don't think the Commission is going to derail this
4 case without being persuaded that that is the only
5 possible response. Okay?

6 And let me just leave you with, again, for
7 Staff, for everyone, in a rate case, if it's not
8 working, you have to tell us quickly. You have to
9 tell us soon. We do not have the luxury of unlimited
10 time. You know, if you don't get your responses on
11 the day they are due, you call them and you say, When
12 can I have them? Make them give you a date. If they
13 don't come by then, then you file. That's what you
14 have to do, because we just don't have the time.

15 Even if everyone cooperates in good faith
16 from this moment on, right, and I'm not saying anyone
17 has not in the past, but if you-all bring your best
18 efforts to it from here on, we're going to have a hard
19 time getting this case done in the time that remains,
20 you know, and that makes me cranky because what I see
21 for me is lots of sleepless nights surrounded with all
22 of the paper you guys are going to produce, trying to
23 come up with an order that can go out ten days before
24 the effective date, you know. That makes me very
25 cranky.

1 So have at it. Come up with a schedule.

2 I would like to see a list of every DR that
3 is outstanding with the date that that information --
4 a date certain that that information is going to be
5 provided. I mean, that's something tangible that I
6 can look at, that I can show the Commissioners so that
7 if a date is not met, we can say, Well, look, they
8 said they thought they could provide it by here. They
9 haven't done it. Right?

10 Other than that, file whatever you feel you
11 need to file, but I would like you to make an honest
12 effort now to try to work out the problems and come up
13 with the best schedule we can in the time that
14 remains, or if additional time is available, and let's
15 see if we can salvage this case. All right?

16 Thank you very much.

17 WHEREUPON, the on-the-record portion of the
18 prehearing conference was concluded.

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