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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

March 3, 2004
Jefferson City, Missouri
Volume 1

In the Matter of the Application of Union)
Electric Company d/b/a AmerenUE for a Metering) Case No.
Variance to Serve Brentwood at Oaktree) EE-2004-0267

DALE HARDY ROBERTS, Presiding,
Chief Regulatory Law Judge

REPORTED BY:
Jennifer L. Leibach
ASSOCIATED COURT REPORTERS

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1 PROCEEDINGS

2 JUDGE ROBERTS: Good morning, ladies and
3 gentlemen. My name is Dale Roberts. I am not the Judge to
4 whom this case is assigned. This case is assigned to Judge
5 Nancy Dippell, who is unavoidably out of the office today,
6 and I'm sitting in in her place.

7 We're here on a prehearing conference on two
8 cases, EE-2004-0027 and EE-2004-0268. I have read through
9 both case files. It does not appear that these cases have
10 been consolidated, but we are certainly consolidating them
11 for the purpose of the prehearing conference this morning.
12 The issues are virtually identical and many of the parties
13 are the same, so with that, I'd like to take entries of
14 appearance first starting with the Applicant, if I may, which
15 would be Union Electric.

16 MR. FITZHENRY: Yes, your Honor. Here on
17 behalf of Union Electric Company doing business as AmerenUE.
18 My business address is 1901 Chouteau Avenue, St. Louis,
19 Missouri, 63103. My telephone number (314) 554-3533.

20 JUDGE ROBERTS: Thank you. Public Counsel.

21 MR. COFFMAN: Yes, John B. Coffman on behalf
22 of the Office of the Public Counsel, PO Box 2230, Jefferson
23 City, Missouri, 65102.

24 JUDGE ROBERTS: Since we're headed that
25 direction.

1 MS. VUYLSTEKE: On behalf of River's Edge,
2 Diana Vuylsteke of the firm Bryan Cave, 211 North Broadway,
3 Suite 3600, St. Louis, Missouri, 65102.

4 JUDGE ROBERTS: Ms. Vuylsteke, let me ask you,
5 you're appearing on behalf of Rivers Edge Property.

6 MS. VUYLSTEKE: Correct.

7 JUDGE ROBERTS: And which case is that 268 or
8 267?

9 MS. VUYLSTEKE: This is 268.

10 MR. ZIMBALIST: I'm Stuart Zimbalist. I'm
11 here on behalf of St. Catherine Retirement Community, LLC,
12 and DeSmet Retirement Community, LLC, the owner of Brentwood
13 and Oak Tree Village, and my phone number is (314) 727-7676,
14 address is 7733 Forsyth Boulevard, St. Louis, Missouri,
15 63105, and the matter we're here for is 0268.

16 JUDGE ROBERTS: Thank you, sir. If you want
17 to go ahead and have a seat at the table.

18 MR. FREY: Thank you, your Honor.
19 Representing the Staff of the Missouri Public Service
20 Commission, Dennis L. Frey and Nathan Williams, PO Box 360,
21 Jefferson City, Missouri, 65102.

22 JUDGE ROBERTS: Have we missed anyone? Okay.
23 I -- first question that I have is on Case No. EE-2004-0267,
24 and I don't want the answer to this now. I'm going to ask
25 you all to file some documents, and you can add this to your

1 list. In Case No. 2004-267, there was some confusion in
2 Judge Dippell's mind, she left me a note regarding the
3 address and the ownership of the interveners, and I -- I'm
4 not saying this for Judge Dippell, but I will tell you in any
5 case in which I sit, I always tell the people, the parties,
6 don't overestimate the intelligence of the bench.

7 Draw me a picture, show me a family tree,
8 whatever you have to do to make it very clear who owns what
9 property, how the properties are related and things of that
10 sort, so anyone who can provide that on 267, her confusion,
11 based upon how I read that note, is as to the interveners.
12 UE may be able to provide that information or the intervenor.
13 It really doesn't matter.

14 The next matter is the way I look at these
15 files, it appears there are some pending motions; is that
16 correct? Nobody wants to own up to having any.

17 MS. VUYLSTEKE: Your Honor, I have a Motion
18 for Rehearing by the variance committee on the record that I
19 believe has not yet been ruled upon, but it's my impression
20 by talking informally with some of the people represented
21 here, that that might not be appropriate.

22 The variance committee might not be at its
23 decision, at least I think that's a topic that might be good
24 for discussion today at the prehearing is to whether
25 procedurally that would be appropriate. You know, I think

1 it's pretty clear that there might be some things that need
2 to go to that committee's attention, and so in some ways,
3 procedurally, it would make sense, but I'm not sure under the
4 Commission's rules, so I believe that Motion is pending
5 before you.

6 JUDGE ROBERTS: Thank you. And that is your
7 Motion on behalf of your client?

8 MS. VUYLSTEKE: Rivers Edge.

9 JUDGE ROBERTS: Thank you, Mr. Coffman. Did
10 you have a response?

11 MR. COFFMAN: Yes, I could state my opinion of
12 the procedural status, and I don't know what everyone else's
13 position is, and I don't think the issue has ever --
14 4CSR240-20.050 is rather unique, and I think that this
15 variance committee was probably promulgated into the rule
16 because of some attempt to comply with the federal statute.

17 I don't know all the history, but my opinion,
18 and it may not be the correct one, but the way I see it and
19 the way I've always understood it to be operated as far as
20 ex-officio member of this committee, is it's a procedural
21 step the company requests a variance and that the committee
22 consists of myself and some member of the General Counsel's
23 office, and a couple members of the Commission's own staff.

24 It's reviewed. A report is made either saying
25 yes or no that the variance committee's job is done, and then

1 if a request for a hearing is then made, that we go to the
2 normal situation where we have various parties, Public
3 Counsel, Commission Staff, and so forth, so that's my
4 opinion, although there may be a different interpretation out
5 there.

6 JUDGE ROBERTS: And you've laid the groundwork
7 for several questions I have, but first let me ask are there
8 any other responses to Ms. Vuylsteke's Motion?

9 The questions -- well, first of all, I'm going
10 to grant her Motion and direct the variance committee to
11 reconsider its recommendation to the Commission, and ask that
12 that be filed not later than 4 p.m., Monday, March 15th, and
13 I would ask that the clarification that I asked for earlier
14 on the ownership and the address of the property of the
15 interveners in case 0267 be filed on that date or not later
16 than that date as well.

17 As to the variance committee, I guess -- I
18 hardly know where to start with this, but I'll start here.
19 Mr. Coffman, you were the last one to address this, so I'll
20 direct my questions to you first. No, I won't, because
21 you're -- I take it back, by rule, the General Counsel is
22 automatically on the committee, excuse me, the Public
23 Counsel, and I think you personally, I mean, the day Martha
24 Hogard retired, you personally became a member of the
25 committee, so let me ask the General Counsel.

1 Mr. Frey is here on behalf of the Staff, are
2 you -- can you tell me how the three Public Service
3 Commission members are appointed to the committee?

4 MR. FREY: Your Honor, I'm basically filling
5 in for Mr. Williams here, so I'm perhaps not as up to speed
6 in this matter as I should be, but my understanding is that
7 they're appointed by the Commission -- members of the
8 committee.

9 JUDGE ROBERTS: Okay. Then that raises
10 several issues.

11 First of all, I do not think you're here on
12 behalf of Mr. Williams. Second of all, I don't think you can
13 enter your appearance for someone who's not here. We
14 generally don't permit that because the purpose of the record
15 is to reflect who's here, and second of all, I have a very --
16 I have a concern with the fact, as I read the Pleadings in
17 this case, the members of the variance committee are the
18 Public Counsel as required by the rule, two members of the
19 Commission's utility division, and in this case, I believe
20 they were James Watkins and Jim Ketter, and the fourth
21 member, which is to be a member of the General Counsel's
22 staff, is Nathan Williams.

23 I may be getting ahead of everybody here, but
24 it seems that if this case were to go to hearing, the four
25 members of the committee would be called as witnesses or

1 certainly could be called as witnesses, and as I hope we all
2 know, you cannot be a witness and an attorney in the same
3 case, it's prompted by Supreme Court rule.

4 It's an ethics violation, and I am amazed that
5 Mr. Williams thinks he can do that, and Staff should know
6 better, and for him to be filing Pleadings in a case as the
7 attorney at the same time that he's a witness and a member of
8 the committee is just not acceptable, so if any party wants
9 to address that in their Pleadings for the 15th, I mean, I
10 don't know that that voids the Pleadings he's filed so far,
11 but it certainly calls him into question and is certainly
12 part of my decision to grant the Motion to ask the committee
13 to refile -- to reconsider its opinion and refile it, and I
14 think it needs to be clear that Nathan Williams cannot appear
15 as an attorney in this case if he's going to be a witness in
16 this case.

17 Yes, sir, go ahead.

18 MR. FREY: I apologize if I entered Mr.
19 Williams' appearance incorrectly, but my understanding was
20 that he was -- he was otherwise disposed, your Honor, and
21 that he intended to appear here.

22 JUDGE ROBERTS: And had he appeared here, I
23 would have directed those comments to him, that I think he
24 needs to look at Supreme Court Rule 4-3.7.

25 I -- after we started this discussion, one of

1 the attorneys came in, Mr. Byrd, I don't know if you want to
2 enter your appearance. One of your associates is here and
3 has already entered his appearance on the record. I'll give
4 you the opportunity to do so, if you choose.

5 MR. BYRD: Thank you, your Honor. Richard
6 Byrd on behalf of the intervenor. I believe that my
7 appearance had been entered also --

8 JUDGE ROBERTS: Okay.

9 MR. BYRD: -- in the pleadings as co-counsel,
10 along with Stuart Zimbalist. Thank you very much.

11 JUDGE ROBERTS: Thank you, sir. So in the
12 Pleadings that need to come in not later than the 15th, in
13 addition to asking the variance committee to reconsider its
14 position, I would like to know, and in fact, I've discussed
15 this with the Commissioners, would like to know what the
16 process is for appointing members to this variance committee.
17 You know, when were these individuals appointed and what is
18 their term and anything else you can tell us, I'm sure would
19 be helpful.

20 And lastly on the subject, Mr. Coffman, I know
21 it somewhat makes an interesting and perhaps awkward
22 situation for you, since by rule you are a member of the
23 committee, and by statute, you are a party to the case. I
24 would suggest that you look at that Supreme Court rule. It
25 might just, you know, an abundance of caution might be easier

1 if you had one of your other attorneys -- well, I'll leave
2 that decision to you, but you're caught between a rule and a
3 statute, and I'll let you figure out how you want to handle
4 that.

5 MR. COFFMAN: Your Honor.

6 JUDGE ROBERTS: Yes, sir.

7 MR. COFFMAN: Having granted the Motion to
8 send this issue back to the variance committee also raises, I
9 guess, a procedural issue about whether it's proper for us to
10 continue here today, and, you know, I certainly came here
11 with an open mind about what our position will be in this
12 case. And I probably feel like I probably received limited
13 information about exactly what is going on with these two
14 properties, and you know, facts may impact that and facts may
15 be different between the two cases, but perhaps this is even
16 a separate thorny issue with this arcane rule.

17 If the matter is back to the variance
18 committee, is it properly before the parties here to discuss.
19 It seemed to me that the best way to read the rule would be
20 to simply view the variance committee as a procedural step
21 that does this job before it comes before the Commission in a
22 hearing or prehearing state, and then once the committee's
23 job is done, then the parties go back to their respective
24 positions and consider it, but -- so I guess the question
25 that I would have of the bench is are we -- is it proper for

1 us to then engage in settlement discussions and, you know,
2 discovery and information collection here today if the matter
3 is now back before the variance committee?

4 JUDGE ROBERTS: Please do.

5 MS. VUYLSTEKE: I would like to respond that,
6 your Honor. I think that until the Motion for Rehearing was
7 granted, I think that it was proper to have a prehearing
8 conference so the parties could come together to discuss
9 preliminary matters, the Motions before you, and procedure,
10 and now that you have granted this Motion, I think it's up to
11 the parties to come up with a new recommendation, and since
12 we have everyone here in the room today, I don't see any
13 reason not to -- you can only benefit the record and benefit
14 the process to have everyone get together and talk about what
15 the facts really are, how the facts are perhaps different
16 than requested in the original variance, see if we can
17 develop a new recommendation, and give the Staff, the
18 variance committee, the facts it needs, and then again go
19 forward with whatever procedure we need to go with.

20 We may end up with a recommendation that
21 everyone can jointly present to the Commission or we may end
22 up back at square one, but at least we'll have a better
23 record.

24 JUDGE ROBERTS: Okay. Mr. Byrd.

25 MR. BYRD: On behalf of our client, we would

1 agree with Ms. Vuylsteke on this point.

2 JUDGE ROBERTS: Thank you, sir. Anyone else.

3 MR. FITZHENRY: Your Honor, on behalf of the
4 company, I think her position has a lot of merit, too. I'm
5 not all too familiar with the rule, but it does seem to be
6 that the purpose of the variance committee to consider all
7 relevant facts in making a recommendation to the Commission,
8 it's clear that there are new and different facts based on
9 the intervenor's applications, and maybe this is one time
10 where we put form aside for the benefit of substance, and I
11 think there is merit to this matter going back to the
12 variance committee, letting them look at what the intervenors
13 have had to say about their properties, and why they believe
14 a variance is warranted before we proceed forward.

15 Thank you.

16 JUDGE ROBERTS: I think we're dealing with an
17 issue that hasn't come up before, and I can appreciate Public
18 Counsel's position on this, but it seems to make sense for
19 several reasons to ask the parties to go forward this
20 morning.

21 First of all, I look at this, it seems to me
22 similar to the process in which Staff engages when a company
23 files something, the Staff of the Commission at some point
24 files a recommendation to the Commission, which the
25 Commission may -- well, the Staff files a position, and I

1 would hope that Staff is working with the parties in all of
2 those cases before it files its recommendation, and following
3 that example, it seems logical here that the variance
4 committee can work with the parties before it files its
5 recommendation.

6 The recommendation may not change at all. I'm
7 not suggesting what the outcome should be, but it seems like
8 you're here, there's a lot of information, some of which may
9 not have been available initially that needs to be
10 considered, and we always -- I think the Commission always
11 encourages negotiation and settlement, and in fact in this
12 case, I think -- well, I'm not the judge assigned to the
13 case, which means I, you know, the Commission uses settlement
14 offers -- settlement officers from time to time.

15 If you want me to be involved in that, you
16 know, I'll be available because I won't hear the case if it
17 goes to hearing, which means anything you tell me will not be
18 shared with the Commissioners or the Judge that's going to
19 hear the case if it goes to hearing, but anyway, I would
20 suggest that you wouldn't hurt anything to go ahead and
21 negotiate while you're here this morning. I certainly can't
22 order that but I would encourage you to do so.

23 Any other issues?

24 MR. ZIMBALIST: Judge Roberts, for the record,
25 the other intervenor, St. Kathryn, et cetera, also has the

1 same request for reconsideration, and I wouldn't want you to
2 end up not knowing that as well, so.

3 JUDGE ROBERTS: Thank you, and I would enter
4 the same Order on your Motion as on Ms. Vuylsteke's Motion in
5 terms of asking the variance committee or directing the
6 variance committee to reconsider and issue another
7 recommendation not later than Monday, March 15th, at 4 p.m.

8 As I said, these cases have not been
9 consolidated formally, and I appreciate your calling to that
10 to my attention. They're not consolidated, they're nearly
11 identical issues in the situation. And I looked at this, I
12 have read and reread the rule 4CSR240-20.050, and went back
13 and looked at Title 16, Section 2601, which evidently is the
14 reason for the rule, and had some initial discussion with the
15 Commissioners about their policy in terms of what drives
16 these issues, and I -- I would encourage the parties to look
17 at that again and see if -- what public policy is served by
18 the position taken in this case, so.

19 Yes, sir.

20 MR. FITZHENRY: Yes, your Honor, I have two
21 other matters. The Order directs the parties to submit a
22 procedural schedule on or before March 10th, I recall.

23 JUDGE ROBERTS: Thank you.

24 MR. FITZHENRY: And in -- my second question
25 is somewhat dependent upon how the first question is

1 answered, that is given your rulings on the Motions for
2 Reconsideration and so forth, should the parties still submit
3 to the Commissioners and yourself a schedule by March 10th,
4 and if so, then I have another question that goes to the
5 burden of proof.

6 Certainly the company being the party that
7 filed the application, we understand that we would have the
8 burden of justifying the variance from the master meter
9 requirements; however, given the posture of the intervenors,
10 as well, they too are seeking a variance of the master meter.
11 It seems to me they should also be parties coming forward and
12 making their case as it were to the Commission, and that if
13 we get to the point this time where we're talking about a
14 procedural schedule, I think some direction from the bench as
15 to yes, it would be the right thing for the company as well
16 as the intervenors to submit their case in chief at the same
17 time.

18 JUDGE ROBERTS: Thank you for calling that to
19 my attention, and the first thing I need to respond to is
20 that I will vacate the Order Requiring a Procedural Schedule
21 by March 10th. If the parties are aware, I mean, if you've
22 been able to work with the committee enough to have an idea
23 of what their recommendation is going to be when it's filed
24 on the 15th, then I would say that's a good time to file a
25 procedural schedule, if it's necessary, but I'm not going to

1 order that.

2 Judge Dippell, I think, will be back in the
3 office within a few days, and I would rather not monkey with
4 another judge's case anymore than I have to. But I would say
5 that if -- if a procedural schedule is required, I would
6 expect that she will order it on an expedited basis after the
7 15th, so you might be prepared for it.

8 In other words, if the committee says, no, we
9 recommend the Commission not grant the request, then I would
10 anticipate Judge Dippell immediately after the 15th issuing
11 an order saying we still need a procedural schedule and now
12 you only have a few days to do it or something to that
13 affect.

14 I did look at our hearing schedule and
15 although we've been doing hearings night and day for the last
16 several months, all of a sudden the calendar tends to open up
17 in March, April, and I think this is -- if it has to go to
18 hearing, something that could be expedited, I wouldn't think
19 -- well, as a matter of fact, let me ask that.

20 I'll start with the Staff. If this case went
21 to an evidentiary hearing, how many witnesses would you
22 anticipate calling or presenting? And I'll be asking you all
23 the same question, so.

24 Well, Staff, while you're considering that,
25 Union Electric --

1 MR. FITZHENRY: One witness, your Honor.

2 JUDGE ROBERTS: Go ahead,

3 MR. FREY: One, your Honor.

4 JUDGE ROBERTS: Excuse me. Yes, sir.

5 MR. ZIMBALIST: Possibly two.

6 JUDGE ROBERTS: For the interveners, two.

7 Ms. Vuylsteke.

8 MS. VUYLSTEKE: I'm sorry.

9 JUDGE ROBERTS: Yes, if this case goes to

10 evidentiary hearing, how many witnesses would you anticipate

11 calling?

12 MS. VUYLSTEKE: I would -- I'm not sure, your

13 Honor. I would expect we may have as many as four witnesses.

14 JUDGE ROBERTS: Is that the Committee?

15 MS. VUYLSTEKE: That would be both of the

16 owners of Rivers Edge Property, as well as several experts.

17 JUDGE ROBERTS: All right. And Mr. Coffman.

18 MR. COFFMAN: Potentially one, but probably

19 not even likely one, given the demands over the next two

20 months.

21 JUDGE ROBERTS: All right.

22 MR. COFFMAN: And need for the experts in my

23 office to appear in other cases.

24 JUDGE ROBERTS: Okay. Let's see, is it Mr.

25 Fitzhenry?

1 MR. FITZHENRY: Yes, sir.

2 JUDGE ROBERTS: I'm trying to think if I
3 answered all of your questions regarding the Motion, the
4 pending Motion -- the burden of proof.

5 MR. FITZHENRY: Yes, sir.

6 JUDGE ROBERTS: I would expect, and I must
7 admit I hadn't thought that far ahead, and this is an unusual
8 case. If this went to hearing, it would seem that the burden
9 should be jointly offered by the Applicant and the
10 intervenors, and I would assume it's in their mutual
11 interest, and at the same time, the variance committee is
12 going to have to offer some evidence to support its position
13 and away we go. I shouldn't think this would take more than
14 two days to hear if that's necessary, I would hope.

15 MR. FITZHENRY: Would you anticipate both
16 cases being tried at the same time?

17 JUDGE ROBERTS: You know, I will leave that --
18 I would have to leave that decision to Judge Dippell and the
19 Commissioners together. It would seem to make sense that
20 that could be done, but I say that unencumbered by much
21 research.

22 MR. FITZHENRY: Okay.

23 JUDGE ROBERTS: I don't know the cases that
24 intimately and I really would have to leave that to the judge
25 to whom it's -- to which it's assigned and the Commissioners.

1 Yes, sir.

2 MR. BYRD: Your Honor, we seem to be making a
3 -- since this is a somewhat novel issue, we seem to be making
4 an assumption, and I would agree with that assumption, but I
5 just want to clarify that this would be a de novo review.

6 JUDGE ROBERTS: Oh, yes, the hearing -- the
7 hearing goes -- the -- no decision is made. The variance
8 committee makes a recommendation, and as with all cases, the
9 Commissioners will take that recommendation as the position
10 of one party, and if this has to go to an evidentiary
11 hearing, all the parties will present their position and the
12 witnesses, and the Commission will make the final
13 determination -- the Commissioners will make the final
14 determination on whether to grant the variance or not.

15 You know, I looked briefly at the -- and let
16 me ask does that address your question?

17 MR. BYRD: That does. I'm assuming that --
18 this is kind of a broader brush question. Judge Brown's
19 issue as to the Chinese wall within the staffing, have all of
20 those issues eventually be resolved as to advisory staff
21 versus advocacy staff?

22 JUDGE ROBERTS: In this case, the -- the Staff
23 is a party -- purely a party and not serving any advisory
24 purpose to the Commissioners. The Judges -- on this case,
25 absolutely the Judges and the Commissioners are behind the

1 Chinese wall and are having no -- should be and are having no
2 off-the-record discussion with Staff or any other party about
3 the merits of the case, and that's -- I mean, and that's what
4 I said I feel free that if you want me to sit in as a
5 settlement officer, I can do that, because I'm not going to
6 sit on the case, but I'm not trying to butt in, I'm sure you
7 all can settle this without me, but Judge Dippell and
8 Commissioners are behind the wall absolutely.

9 MR. BYRD: Thank you very much.

10 JUDGE ROBERTS: Yes, sir. Oh, what I started
11 to say, as I was looking through the Pleadings late yesterday
12 and last night and this morning, there was some references to
13 obviously I think this application comes in after the fact
14 and says, you know what, we realize we should have gotten a
15 variance when we did this.

16 Now that we're aware of it, we're asking, and
17 in one of the Pleadings that we referred to, a portion of the
18 rule, it says know the construction starts when the footings
19 are poured or something to that affect, and I have to ask if
20 someone can tell me was there an approval process of the
21 initial metering or is that -- is that just done? I mean,
22 did the Commission approve the way this was metered in the
23 first place?

24 MR. FITZHENRY: Your Honor, the answer to that
25 question, I believe, is no. There was nothing brought before

1 the Commission with regard to the metering that was installed
2 a couple years back with regard to the one property, and even
3 the more recent property, again, I don't believe there's
4 anything formally brought before the Commission.

5 MS. VUYLSTEKE: But your Honor, our property
6 is still under construction, so we're distinguished, this is
7 not after the fact.

8 JUDGE ROBERTS: Okay. One of them is though.

9 MR. FITZHENRY: Yes, sir.

10 JUDGE ROBERTS: Like I said, I'm trying to
11 catch up to somebody else's case, because if that's the case,
12 and it's been out there two years.

13 MR. FITZHENRY: Yes, sir, two years or so.

14 JUDGE ROBERTS: I -- we've recently, as it
15 happens, had some discussions regarding latches and the fact
16 that latches applies to administrative agency as well as the
17 parties. I don't know if the Staff has had any awareness of
18 the metering prior to this point, but that's an issue that --
19 that the bench will want to know about.

20 JUDGE ROBERTS: Yes, sir.

21 MR. FITZHENRY: Your Honor, we are the project
22 that exists and has existed for awhile. We assumed, because
23 other projects like ours without going through any variance
24 process, in fact, have single metering. That's the first
25 thing.

1 Second thing is that one day we discovered we
2 were getting these multiple electrical bills and we began the
3 process by basically paying those bills under protest,
4 thinking that Union Electric had made a mistake. When it got
5 far enough up the chain at Union electric, it was decided no,
6 the problem was that you needed a variance and that's
7 immediately thereafter, the variance was sought by Union
8 Electric.

9 JUDGE ROBERTS: Okay.

10 MR. FITZHENRY: And thereafter, as it has, we
11 decided we needed to intervene, so there's no untimeliness on
12 the part of the owner, the process never got to -- there's no
13 Commission approval process at all or involved in the
14 Commission until you deal first with Union Electric, and then
15 from there you can -- and with cooperation of the Union
16 Electric went for the variance.

17 JUDGE ROBERTS: And I guess the flip side, the
18 other side of that coin is was there any awareness on the
19 part of the Commission Staff that this -- I think I can call
20 it a violation, existed, and I, you don't have to answer that
21 now, but it will be an issue to be considered at some point,
22 so because as I said, that as we all know, latches is a
23 two-way street and does apply in administrative proceedings,
24 so.

25 Are there any other questions? Yes, sir, Mr.

1 Coffman.

2 MR. COFFMAN: I just felt that I probably
3 ought to point out the fact that even though I guess you made
4 a Motion that the variance committee would need to reconvene
5 at some point and consider again its recommendation and that
6 I'm a member of that committee, it is still, in my mind,
7 possible that there wouldn't be a -- that there wouldn't be a
8 unanimous decision out of that committee, and that it is, you
9 know, very likely in this case, as it often is, that the
10 Staff of the Commission in this case will take a different
11 position than the Office of the Public Counsel, and I've not
12 had any -- we've had limited experience with a variance
13 committee, but I suppose it's possible that it would be a
14 vote or a split of on that committee.

15 I am not sure how to really process the issue
16 you raise about the Supreme Court rule and my participation
17 here, but it is my intent to engage in settlement discussion
18 as soon as this prehearing is over and see if we can't wrap
19 it up and participate as such of the Public Counsel.

20 JUDGE ROBERTS: I'll leave that entirely up to
21 you.

22 MR. COFFMAN: Okay. Thank you.

23 JUDGE ROBERTS: It does raise an interesting
24 question, as I was reading this last night noting that there
25 are four members of the variance committee, and the rule is

1 silent as to a two to two -- in fact, the rule is silent
2 because when I looked at this, I was myself curious as to how
3 the vote, you know, what was the vote, you know, what were
4 the positions of the three -- excuse me, the four members.
5 And the rule is silent as to how that's recorded or any other
6 information, and with a four-member committee, that's an
7 invitation for some fun.

8 I don't see any reason when a committee makes
9 a recommendation that members can't attach -- it's been done
10 before that members can attach their -- I mean, I guess it
11 would be in the essence of a descent or concurrence, if you
12 do or don't support the position of the entire committee, say
13 so. I mean, that certainly goes to all the members.

14 MR. COFFMAN: I might have another question,
15 your Honor. If the parties here today, which of course
16 consist of Public Counsel and the Commission Staff, reach
17 some sort of an understanding or agreement that could settle
18 the case, would it still be, in your mind, necessary for the
19 variance committee to remeet and reconsider its decision?

20 JUDGE ROBERTS: Nope. I mean, I certainly
21 don't want to generate work for anybody.

22 MR. COFFMAN: Okay. It's just a very strange
23 procedural status.

24 JUDGE ROBERTS: This is an unusual -- cases
25 under this rule don't often come up, so we're all --

1 something new for all of us, but please settle it, and we
2 would all be delighted. I don't want to take up any more
3 time than I have to, any more of your time. Yes, Mr. Frey.

4 MR. FREY: Your Honor, will this room be
5 available?

6 JUDGE ROBERTS: This room is yours for the
7 day. As I said, for what it's worth, it's not often that
8 parties use -- ask to use a settlement officer, although it's
9 available under the rules, and since I won't be hearing the
10 case and I am available, if you need something, feel free to
11 call me. Otherwise, I'll leave you to your mischief.

12 Any other Motions or requests from any party?
13 Hearing none, unless something is filed to indicate that this
14 case has settled, then we will look forward to your filings
15 on the 15th, and with that we'll go off the record.

16 WHEREUPON, the recorded portion of the
17 prehearing conference was concluded.

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