

BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

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TRANSCRIPT OF PROCEEDINGS

Oral Argument

September 20, 2010

Jefferson City, Missouri

Volume 2

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In The Matter of KCP&L Greater Missouri	)	
Operations Company for Authority to	)	File No.
Implement Rate Adjustments Required by	)	EO-2008-0216
4 CSR 240-20.090(4) and the Company's	)	
Approved Fuel and Purchased Power Cost	)	
Recovery Mechanism.	)	

NANCY M. DIPPELL, Presiding  
DEPUTY REGULATORY LAW JUDGE

ROBERT M. CLAYTON III, Chairman,  
JEFF DAVIS,  
TERRY M. JARRETT,  
KEVIN GUNN,  
ROBERT S. KENNEY,  
COMMISSIONERS

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1 JUDGE DIPPELL: Let's go ahead and go on  
 2 record. This is Case No. EO-2008-0216 in the matter  
 3 of KCP&L Greater Missouri Operations Company, formerly  
 4 known as Aquila, Inc. for authority to implement rate  
 5 adjustments required by 4 CSR 240-20.090(4) and the  
 6 company's approved fuel and purchased power cost  
 7 recovery mechanism.

8 This case is on remand to the Commission  
 9 from an earlier Western District -- Missouri Western  
 10 District Court of Appeals opinion. My name is Nancy  
 11 Dippell. I'm the Regulatory Law Judge assigned to  
 12 this case. And we are in Jefferson City and we're  
 13 also going to have some participation of Commissioners  
 14 from our St. Louis office by teleconference.

15 So we've come here today for oral  
 16 arguments in this matter about how to proceed from  
 17 here and what issues are at stake. The parties have  
 18 previously submitted briefs and reply briefs on some  
 19 of the issues and I'm going to begin by asking for  
 20 entries of appearance. If you've given written  
 21 entries of appearance to the court reporter, you can  
 22 simply state your name and what parties you're  
 23 representing.

24 KCP&L Greater Missouri Operations  
 25 Company?

1 MR. ZOBRIST: Karl Zobrist and Roger W.  
2 Steiner. And Mr. Tim Rush is also present if  
3 Commissioners have any questions.

4 JUDGE DIPPELL: Office of Public Counsel?

5 MR. MILLS: On behalf of the Office of  
6 Public Counsel and the public, my name is Lewis Mills.  
7 My address is Post Office Box 2230, Jefferson City,  
8 Missouri 65102.

9 JUDGE DIPPELL: Staff?

10 MR. WILLIAMS: Nathan Williams.

11 JUDGE DIPPELL: Sedalia Industrial Users  
12 Association?

13 MR. WOODSMALL: Sedalia Industrial Energy  
14 Users' Association and Ag Processing, David Woodsmall  
15 appearing.

16 JUDGE DIPPELL: Mr. Comley?

17 MR. COMLEY: Yes. Mark Comley with  
18 Newman, Comley and Ruth on behalf of the City of  
19 Kansas City.

20 JUDGE DIPPELL: Is there any other party  
21 present that needs to make an entry of appearance?

22 Not seeing any, we had several parties  
23 participating in the original part of the case. Only  
24 the parties present have really participated in  
25 this -- in this on remand procedure to this point. So

1 I'll just let the record reflect that those are the  
2 parties that are present today.

3 All right then. We are going to begin  
4 with sort of oral arguments. And I had a conversation  
5 with the counsel before we went on the record and no  
6 one seems to have a preference for what order we go in  
7 so I'm just going to begin then with the company.

8 Mr. Zobrist, if you'd like to give some  
9 opening remarks. And then as we go, if there are  
10 Commission questions, I would just ask the  
11 Commissioners to interrupt if they'd like and ask  
12 those questions or we can hold questions until  
13 everyone's -- or each speaker has had a chance or  
14 everyone, but I think the important thing is to get  
15 questions answered. So go ahead, Mr. Zobrist.

16 MR. ZOBRIST: Okay. Thank you, Judge.  
17 And I would just urge Commissioners if they have  
18 questions, feel free to interrupt me because this is  
19 not a formal presentation, but I would like to address  
20 a couple of points.

21 I think that a proper analysis of what  
22 the Court of Appeals did cannot simply stop with their  
23 statement that the Commission engaged in retroactive  
24 rate-making. There has to be a second part to the  
25 analysis, and that is what rate was changed by virtue

1 of the Commission's orders.

2           what the Court of Appeals focused on was  
3 the June 29, 2007 order that became effective  
4 July 5th, 2007. Although it had an effective date of  
5 July 5, it permitted the accumulation or the  
6 calculation of costs as of June 1st, 2007. And it's  
7 those 34 days that led the Court of Appeals to find  
8 that the Commission engaged in retroactive  
9 rate-making.

10           But what we did not focus on in our  
11 briefs and what the Court of Appeals did not focus on  
12 in their opinion is what rate was changed. The -- the  
13 debriefing and the argument in the Court of Appeals  
14 opinion focused on the Commission's Report and Order  
15 in the last Aquila general rate case, which was  
16 decided in May. And I believe that the Report and  
17 Order was dated May 17.

18           And when this Commission issued its first  
19 FAC order eight, nine months ahead in February 2008,  
20 when I believe it was the Industrials and perhaps  
21 Mr. Mills sought rehearing, what the Commission  
22 focused on was the fact that it made -- I think it  
23 called the difficult policy decisions back in that  
24 May 17 Report and Order.

25           And that's what we were litigating at the

1 Court of Appeals, whether the Commission's Report and  
2 Order gave consumers sufficient information to make  
3 prospective decisions about what should they do about  
4 their electricity costs; should they stick with  
5 Aquila; should they, you know, switch to natural gas,  
6 should they do something else.

7           And because we were focusing on the  
8 Report and Order, we didn't focus on the fact that the  
9 tariff sheets that were supposedly made retroactive  
10 from July 5 to June 1 contained nothing but zeros. We  
11 didn't really talk about what the tariff sheets  
12 themselves contained until rehearing.

13           And at that point, we simply got a denial  
14 of rehearing from the Court of Appeals and the Supreme  
15 Court denied transfer. And of course, those  
16 decisions -- the decision to deny transfer by the  
17 Supreme Court doesn't mean anything and the decision  
18 by the Court of Appeals not to rehear means that their  
19 opinion stands.

20           But it's critical in looking at what the  
21 Court of Appeals decided to focus on not just the  
22 retroactive effect, because clearly June 1st is  
23 34 days before July 5. The question is what rate was  
24 changed? And the evidence is there was no rate  
25 change. There was a proforma tariff that was filed

1 that contained nothing but zeros.

2 when did the rate change? The rate  
3 changed in 2008. That is when the zeros were filled  
4 in. And that is the first time that customers would  
5 have had an opportunity to make a decision about what  
6 to do with regard to the utility services. And if I  
7 could approach the Bench, I have something I'd like to  
8 provide to the Commissioners.

9 JUDGE DIPPELL: Do you have --

10 MR. ZOBRIST: Yes.

11 JUDGE DIPPELL: -- copies for counsel as  
12 well?

13 MR. ZOBRIST: I do. And all this is,  
14 Judge, is the West Law report. This is the West Law  
15 report of the decision. And if you look to the  
16 holdings, I mean the first -- there are three  
17 paragraphs under the word "holdings." The first one  
18 says, The PSC's orders approving tariffs constituted  
19 impermissible, retroactive rate-making.

20 But then points 2 and points 3, which  
21 explain the holding of the courts -- of the court,  
22 state very clearly that the PSC order was not specific  
23 enough to allow a customer to calculate how much he or  
24 she would be paying as a result of the fuel adjustment  
25 clause. And then in point 3, again they say, The PSC



1 orders rejecting electric utility provider's proposed  
2 fuel adjustment tariffs did not reference a start date  
3 for fuel adjustments to begin left consumers with no  
4 means of calculating how much, if anything, electrical  
5 use would cost them.

6           And so although the Court of Appeals  
7 stated they felt that the Commission engaged in  
8 retroactive rate-making, they never decided and never  
9 expressed an opinion on what rate was changed and by  
10 how much. And when you look at the tariff sheets that  
11 were filed -- and the first one is tab 4 to our  
12 initial brief -- there are nothing but zeros in that  
13 initial May 18 filing. And I have copies here for the  
14 Bench should they wish to see them.

15           When Aquila came back with its next  
16 proposed tariff changes on May 25, and these were  
17 rejected by the Commission in June, they contained  
18 nothing but zeros. And then in the June 29th order,  
19 which is under -- I'm sorry, the June 29th tariff  
20 sheets, which are under tab 6, they contained nothing  
21 but zeros.

22           So there was no rate that was changed.  
23 There was no ability for a customer to calculate how  
24 many costs he or she would be paying. There was no  
25 ability for them to decide how much, if anything,

1 electrical use would cost them by way of the  
2 theoretical fuel adjustment clause. And I think the  
3 Court of Appeals, when they talked about that  
4 theoretical fuel adjustment clause, they were talking  
5 about what the Commission ordered in the Report and  
6 Order back in May of 2007.

7           The order that gave consumers the ability  
8 to calculate what they should do about their  
9 electricity rates, we didn't even know what that rate  
10 might be until December. And that was when Aquila  
11 made its initial filing.

12           And in our reply brief, we attached as  
13 Exhibit A, the fact that Aquila had filed a rate  
14 increase and had estimated that the changes might be  
15 as high as \$2 for the MPS Aquila division or \$1.50 a  
16 month for the L&P division.

17           And similarly, when the Commission  
18 ultimately approved the tariff in late February,  
19 effective March 1, it issued its release stating that  
20 the L&P increase would be approximately \$1.50 per  
21 month and \$2 for the Missouri Public Service  
22 Commission. That was the time when consumers had the  
23 opportunity to decide what to do about their electric  
24 costs. And that -- that's -- that's the holding of  
25 the Court of Appeals.

1 But the Court of Appeals did not -- and  
2 left room, we believe, for the Commission to go back  
3 and explain itself. Because clearly, you know,  
4 whether -- whether you were a Commissioner that voted  
5 in favor or against the fuel adjustment clause, the  
6 Commission did not intend to engage in retroactive  
7 rate-making. All of that -- all of the rate-making  
8 that actually occurred in terms of dollars did not  
9 occur until 2008.

10 And so, therefore, we believe that there  
11 is room for the Commission to explain in an order why  
12 this was not retroactive rate-making in the sense that  
13 a rate or a charge was not assessed by virtue of what  
14 it did in 2007. That decision occurred in 2008 and  
15 that is the time at which consumers would have had an  
16 opportunity to make decisions. Those are all -- those  
17 are all the remarks that I have right now, Judge.

18 JUDGE DIPPELL: Thank you. Mr. Chairman,  
19 did you want to ask questions now?

20 CHAIRMAN CLAYTON: I had just a couple of  
21 real quick questions and then I want to let all the  
22 other parties offer their opening.

23 Mr. Zobrist, can you give me -- or  
24 quantify what the 34 days difference in time actually  
25 means? Is there a dollar amount that has been

1 identified up to this point of what that would mean  
2 either to the company or to the ratepayers?

3 MR. ZOBRIST: Not formally, but I can  
4 give you an idea, Commissioner and Mr. Chairman. And  
5 Mr. Rush is here if you've got any other additional  
6 questions. But my understanding is that the 34 days,  
7 the cost would be \$2.93 million.

8 CHAIRMAN CLAYTON: And that would be the  
9 difference in that time -- in that 34-day period, the  
10 difference between the base rates and the fuel during  
11 that time cost an additional 2.93 million?

12 MR. ZOBRIST: That's correct. And for  
13 the full 60 days, it's \$9.25 million.

14 CHAIRMAN CLAYTON: 9.25?

15 MR. ZOBRIST: Correct

16 CHAIRMAN CLAYTON: That's total for the  
17 90 days? That's not in addition to the 34 days.

18 MR. ZOBRIST: Sixty days.

19 CHAIRMAN CLAYTON: Excuse me.

20 MR. ZOBRIST: 9.25 million for June and  
21 July 2007, \$2.93 million from June 1 through July 5,  
22 2007.

23 CHAIRMAN CLAYTON: That's all I wanted to  
24 ask for right now and I'll wait for the other  
25 openings. Thanks.

1 JUDGE DIPPELL: And is --

2 MR. ZOBRIST: And if I could say one more  
3 thing, that's interest through May of -- yeah, May  
4 through 2010. So that does include interest charges.

5 JUDGE DIPPELL: Commissioners in  
6 St. Louis, Commissioner Kenney, Commissioner Gunn, can  
7 you all hear me?

8 COMMISSIONER GUNN: We can hear you very  
9 well and we can also see you.

10 JUDGE DIPPELL: Great. Well, right now I  
11 have my monitor turned so that the counsel tables can  
12 see you all, but Commissioner Clayton and I cannot  
13 currently see you. So if --

14 MR. ZOBRIST: I might just say we --  
15 there is an open drape behind one of the Commissioners  
16 and we see nothing but shadows.

17 JUDGE DIPPELL: Yeah. Can you all pull  
18 that -- those curtains behind you closed? It might  
19 let us see you better. You're a little backlit.

20 And then if you all -- do either --  
21 Commissioner Gunn, do you have any questions at this  
22 point?

23 COMMISSIONER GUNN: I do not have any  
24 questions. I would also like to mention that we  
25 are -- we have two observers from the Moldovan

1 delegation here as well. You can't see them but  
2 they're sitting in the room as well, so everybody be  
3 on your best behavior. And that's all -- that's the  
4 best I can do with the drapes, Karl. It's still a  
5 State building after all.

6 JUDGE DIPPELL: And Commissioner Kenney,  
7 did you have any questions at this point?

8 COMMISSIONER KENNEY: I just have one.  
9 And let me apologize first for being tardy. We are  
10 engaged in a simultaneous meeting so we're a few  
11 minutes late. And this may have been asked and  
12 answered already, so I apologize if it's redundant.

13 And for Mr. Zobrist, if there is  
14 additional evidence -- well, first of all, do you  
15 think we're permitted to take additional evidence to  
16 explain that what we did doesn't constitute  
17 retroactive rate-making; and if so, what would that  
18 additional evidence be?

19 MR. ZOBRIST: Yes, Commissioner. I  
20 believe that you are. What the Court of Appeals did  
21 is remanded for proceedings consistent with their  
22 decision. They did not order a refund. They did not  
23 say what you could not do. They just said for further  
24 proceedings.

25 And I think when a proceeding is remanded

1 back to the Commission, it can conduct such  
2 proceedings as it thinks would be helpful. The  
3 company believes it would be helpful to have a full  
4 record and -- and testimony with regard to the effect  
5 of the proforma tariffs in 2007 and then the tariffs  
6 that came into effect in 2008.

7           As I was telling the Chairman here, our  
8 focus -- the focus of the briefs at the time was on  
9 what the Commission did in 2007, the June 29 order,  
10 and then the effect of the Commission's Report and  
11 Order in the general rate case.

12           And the Commission -- pardon me, the  
13 Court of Appeals focused on what it felt was an  
14 inadequate explanation by the Commission about what it  
15 did. And at least I know the company argued that --  
16 that consumers did have notice of the fuel adjustment  
17 clause coming down the track back in May.

18           We didn't spend any time, as I recall,  
19 focusing on the zeros in the tariff sheets. And  
20 although they were in the record, the company only  
21 really argued the effect of the zeros on rehearing  
22 and -- and I just don't think it caught anyone's  
23 attention. And the Court of Appeals, of course, never  
24 mentions anything about what is in the tariff sheets,  
25 so I think it would be helpful to have testimony on

1 that.

2 we believe clearly with regard to dollars  
3 and cents, the form of any potential refund or other  
4 adjustment proceeding from this point on, we think  
5 that that does require testimony as well.

6 COMMISSIONER KENNEY: Thank you.

7 JUDGE DIPPELL: Is there anything else,  
8 Commissioner Kenney?

9 COMMISSIONER KENNEY: No. Thank you.  
10 Not yet.

11 JUDGE DIPPELL: All right. Let's go  
12 ahead then and -- I'm getting motions from  
13 Mr. Woodsmall, but are you telling me you are next,  
14 Mr. Woodsmall, or are you saying --

15 MR. WOODSMALL: I was just saying I'll go  
16 before Mr. Mills is how we decided it. I don't know  
17 how you want to work Staff in here, but if you want me  
18 to go next, I'm prepared.

19 JUDGE DIPPELL: Mr. Williams, would you  
20 rather wait until last or go next?

21 MR. WILLIAMS: Doesn't matter to me.  
22 whatever your pleasure is.

23 JUDGE DIPPELL: All right then. We'll go  
24 ahead with Mr. Woodsmall.

25 MR. WOODSMALL: Thank you. Good morning.



1 There appears to be three issues for the Commission's  
2 consideration in this case. First, can the Commission  
3 order any refunds? I list this first because if the  
4 Commission can't order refunds of the amounts  
5 unlawfully collected by GMO, then this becomes purely  
6 an academic exercise.

7 I believe that the statutes and  
8 regulations make it abundantly clear that the  
9 Commission can order refunds. Staff mistakenly  
10 asserts that the Commission can't order refunds  
11 because the Commission can't typically order refunds  
12 of amounts collected under permanent rate tariffs.  
13 Staff's analogy is incorrect.

14 The statute clearly contemplates that the  
15 Commission will order -- will correct any  
16 over-collections through refunds or subsequent  
17 adjustments. The statute also requires that refunds  
18 include interests at the utility's short-term debt  
19 cost. Given the specific direction in the statute, I  
20 believe that it is unquestionable that the Commission  
21 can order refunds in this case.

22 The second issue then is the effect of  
23 the Western District's decision. GMO appears to argue  
24 that the decision was merely guidance and that the  
25 Commission can reach the exact same decision in this

1 case that it reached previously. And in support of  
2 that, GMO provided you the cit-- or part of the case  
3 from West Law. What's interesting though is GMO  
4 didn't provide you the opinion. GMO merely provided  
5 you the holdings that some attorney, possibly maybe  
6 not even an attorney, gave.

7               So I'd ask you to throw this away and go  
8 and look at the actual opinion. And that's where  
9 you'll get your real guidance. Courts do not merely  
10 provide guidance. Instead, courts decide cases and  
11 controversies. In this case, the court provided a  
12 very clear decision that GMO cannot begin accumulating  
13 under an FAC for a period prior to the date that the  
14 FAC went into effect.

15               At page 7 of the court's decision, the  
16 court holds, quote, Only costs incurred after the  
17 effective date of an appropriate tariff may be  
18 recovered under a fuel adjustment clause, unquote.  
19 This is not guidance. This is not dicta. This is  
20 law. And the Commission is bound to follow it.

21               The final question then becomes when did  
22 GMO's fuel adjustment clause become effective? In  
23 this case, GMO argues that the FAC did not become  
24 effective -- that the FAC became effective on  
25 July 5th, 2007. I assert that GMO's position is done

1 merely to minimize the amount of refunds that it must  
2 return. GMO's position is undermined by Commission  
3 rules, by Commission precedent in previous cases and  
4 by GMO's own prior interpretations.

5           First, Section 386.266 requires that all  
6 amounts be collected subject to a true-up. Commission  
7 rule then requires that a true-up begin on the first  
8 day of a calendar month. By necessity then, an FAC  
9 cannot begin until the first day of a calendar month;  
10 otherwise, you have a situation in which the FAC  
11 begins but will not be subject to a true-up. This  
12 would violate the statute. Therefore, the FAC must  
13 begin on the first day of a calendar month.

14           The Commission previously recognized this  
15 when it implemented fuel adjustment clauses for Empire  
16 and AmerenUE. In the Empire case, ER-2008-0093, the  
17 Commission implemented Empire's rate tariffs in the  
18 middle of the month. The fuel adjustment tariffs,  
19 however, waited until the first day of the next  
20 calendar month. Similarly, AmerenUE's fuel adjustment  
21 tariffs also didn't become effective until the first  
22 day of the calendar month. It would be arbitrary and  
23 capricious for the Commission to suddenly retreat from  
24 its rule and allow GMO to implement its fuel  
25 adjustment clause in the middle of a month.

1 CHAIRMAN CLAYTON: Judge, can I ask -- I  
 2 hate to interrupt you, Mr. Woodsmall, but just using  
 3 those examples just for clarity, do you know the  
 4 timing between the Report and Order being approved --  
 5 let's pick Empire as an example. Let's just pick one.  
 6 Empire's Report and Order being approved and then when  
 7 the tariffs are approved? And then I need -- then I'd  
 8 like to know if you know, were the tariffs approved  
 9 implementing the base rates as well as the RAM at the  
 10 same time or were there any problems and how does the  
 11 timing compare with this circumstance? And if you  
 12 don't know, we can come back to it. And I didn't mean  
 13 to interrupt your train of thought.

14 MR. WOODSMALL: That's okay. I  
 15 appreciate you jumping in when you have a question. I  
 16 don't know if I have the exact dates. I can tell you  
 17 on the Empire case that the Commission issued its  
 18 order approving tariffs. The tariffs had -- the rate  
 19 tariffs had one effective date and they went into  
 20 effect in the beginning -- in the middle of a month.

21 CHAIRMAN CLAYTON: So you're talking  
 22 about the order approving the tariffs --

23 MR. WOODSMALL: Right.

24 CHAIRMAN CLAYTON: -- not the Report and  
 25 order setting the mechanism and the design?

1 MR. WOODSMALL: The Report and Order in  
2 the Empire case rejected all tariffs and it ordered  
3 them to file compliance tariffs.

4 CHAIRMAN CLAYTON: Do you know the  
5 date --

6 MR. WOODSMALL: No.

7 CHAIRMAN CLAYTON: -- approximate date?

8 MR. WOODSMALL: And I can provide those,  
9 but I don't have it.

10 CHAIRMAN CLAYTON: What was the  
11 difference in date between the Empire Report and Order  
12 and the date for approval -- the date for approval of  
13 the tariff order?

14 MR. WOODSMALL: I don't know. It's  
15 typically 20 days, something like that, but I can  
16 provide all those dates to you. What I can tell you  
17 for certain is on the Empire case, the order approving  
18 tariffs provided that the rate tariffs would go into  
19 effect in the middle of the month and the fuel  
20 adjustment clause tariffs waited --

21 CHAIRMAN CLAYTON: Would move forward and  
22 start on the first day of the next calendar month?

23 MR. WOODSMALL: Correct. And I can  
24 provide those dates to you.

25 CHAIRMAN CLAYTON: Go ahead and finish

1 your statement. We can come back to that. I  
2 apologize.

3 MR. WOODSMALL: That's okay. So that is  
4 Commission precedent. Interestingly, the  
5 applicability of the Commission rules has been  
6 previously recognized by GMO itself. At pages 9  
7 through 11 of the Industrial Intervenors' brief, I  
8 detailed several instances in which GMO tried to rush  
9 the Commission to its -- to approve its fuel  
10 adjustment clause because any delay would mean that  
11 the FAC would have to wait an entire month to the  
12 beginning of the next calendar month to become  
13 effective. Only now when faced with the possibility  
14 of refunds does GMO suddenly change its position.

15 The reason underlying the Commission's  
16 rule is very logical. Utilities keep books on a  
17 monthly basis. Utilities don't close their books  
18 every single day. Therefore, it would be a pure guess  
19 as to the amount of fuel and purchased power expense  
20 that was actually incurred prior to July 5th and the  
21 amount that was incurred after July 5th. It would be  
22 a complete guess.

23 Rather than engage in such speculation,  
24 the Commission in its initial proposed rule required  
25 that fuel adjustment clauses become effective on the

1 first day of a calendar month. None of the utilities,  
2 including GMO, asked the Commission to modify its rule  
3 and, in fact, the logic of the Commission's reasoning  
4 became part of the final rule. Please don't modify  
5 your rule now simply because a single utility does not  
6 like the result of the rule. Thank you.

7 JUDGE DIPPELL: Thank you. Mr. Chairman,  
8 did you have other questions?

9 CHAIRMAN CLAYTON: Well, while the  
10 openings are going in, I was wondering -- and this may  
11 be in the initial brief attachment -- I apologize.  
12 I'm looking for a copy of the actual tariff that was  
13 approved on July 5th. And I'm assuming that's one of  
14 the attachments to the initial brief of GMO.

15 MR. ZOBRIST: Right. It's attachment 6.

16 CHAIRMAN CLAYTON: Attachment 6. Okay.  
17 Thank you. And I'll let the parties go ahead.

18 JUDGE DIPPELL: Commissioner Gunn, did  
19 you have any questions?

20 COMMISSIONER GUNN: I don't have anything  
21 at this time. Thank you.

22 JUDGE DIPPELL: Commissioner Kenney?

23 COMMISSIONER KENNEY: No, thank you.

24 JUDGE DIPPELL: All right then.

25 MR. WOODSMALL: Just real quickly, I

1 found part of the answer to Chairman Clayton's  
2 question. At page 11 of my initial brief, talks about  
3 the Empire rate tariffs. The Empire permanent rate  
4 tariffs became effective on August 23rd and the fuel  
5 adjustment tariffs became effective nine days later on  
6 September 1 of 2008.

7 CHAIRMAN CLAYTON: And what was the date  
8 of the Report and Order approving the revenue  
9 requirement calculations?

10 MR. WOODSMALL: I'll have to get that. I  
11 don't have that here.

12 CHAIRMAN CLAYTON: Okay.

13 JUDGE DIPPELL: All right then.  
14 Mr. Mills?

15 MR. MILLS: Thank you. Judge, this  
16 morning I just want to focus in on one question and  
17 that's the question of the applicability of the  
18 20.090(1)(I) to the definition of an accumulation  
19 period.

20 And I want to point out that until Public  
21 Counsel and the Industrials won this case on appeal,  
22 everyone was in agreement that that particular rule  
23 section governed not only true-ups but governed the  
24 beginning of the accumulation period.

25 Let me explain what I mean by "everyone."



1 First, OPC and the Industrials. You've seen this in  
2 our briefs, you've seen it in our motions for  
3 rehearing going back to 2007. It's pretty obvious  
4 that we believe that and, in fact, that's one of the  
5 reasons we're here today.

6           GMO, or Aquila as it was known then,  
7 also believed that that was the case. If you look at  
8 the Court of Appeals opinion, specifically at  
9 Footnote 6, they cite to some of the pleadings that  
10 Mr. Woodsmall just referred to in which GMO took that  
11 same position at the time that the Commission was --  
12 was approving the tariffs.

13           And, in fact, as recently as after the  
14 Commission issued its order approving tariffs to be  
15 effective on July 5th, 2007, GMO filed a request for  
16 reconsideration in which it says -- and this is at  
17 paragraph 5, Unless the order approving the FAC tariff  
18 sheets bear an effective date of Sunday, July 1, 2007  
19 or an earlier date, Aquila risks losing the ability to  
20 recover its fuel costs for the month of July.

21           They're not talking about the period of  
22 July 1 through July 5th. They're talking about the  
23 entire month of July and they cite to that rule  
24 provision. There's actually a typo in their pleading  
25 because they cite to 4 CSR 240-20.090(2)(I), but there

1 is not a subsection I in 2, so it's clear that they  
2 mean 1 I.

3           So as recently as after the Commission  
4 issued its order, GMO was still of the opinion that  
5 its orders as issued would prevent them from  
6 recovering fuel costs before August 1 for the entire  
7 month of July.

8           The Commission itself was of that  
9 opinion. If you read the Commission's order approving  
10 tariff to establish rate schedules for fuel adjustment  
11 clause, and this is cited in my reply brief at page 3,  
12 the Commission itself said, As previously indicated,  
13 the key regulatory provision is the definition of  
14 true-up year, which states that the true-up year,  
15 comma, meaning the period for which the company can  
16 accumulate costs, comma, begins on the first day of  
17 the first month following the effective date of the  
18 Commission order that approves the FAC. So the  
19 Commission recognized that this rule, which on its  
20 face defines the true-up period, also defines the  
21 accumulation period.

22           Finally, the Staff appeared to be of that  
23 opinion as well because when Staff filed its  
24 recommendation in Case No. ER-2007-004, the Commission  
25 Staff recommended that the Commission approve the

1 tariff sheets to be effective on June 30th, 2007,  
2 which would have been only a matter of three or four  
3 days after the Commission would have approved its  
4 report -- would have issued its order approving those  
5 tariffs, much less than the typical ten-day effective  
6 date and well in advance of the date that was  
7 imprinted on the tariffs themselves. So Staff at that  
8 time clearly recognized there was an implication that  
9 would flow from approving the tariffs at some point  
10 beyond June 30th of 2007.

11               So back when all this was going on,  
12 everyone recognized that the rule that sets the  
13 true-up period beginning the first day of a calendar  
14 month following the approval of an FAC controlled when  
15 the FAC itself began, when the accumulation period  
16 began. And the Court of Appeals recognized that as  
17 well.

18               And that's -- that's my opening. At some  
19 point I would like to respond to the opening remarks  
20 of Mr. Zobrist, but I don't know if this is the  
21 appropriate time to go into that.

22               JUDGE DIPPELL: You can go ahead and  
23 address that if you'd like Mr. Mills. I'm going to  
24 give everyone sort of another round.

25               MR. MILLS: With respect to -- to

1 Mr. Zobrist's point about how the Commission had not  
2 really explained itself very well, I think that's a  
3 misreading of the court's opinion. The court's  
4 opinion makes clear that the filed rate doctrine is  
5 nearly absolute and that the Commission cannot start  
6 an FAC before the effective date of an order approving  
7 the FAC.

8               Regardless of what newspaper articles  
9 say, regardless of the fact that in the Report and  
10 Order it said generally we're going to allow a fuel  
11 adjustment clause at some point when tariffs are  
12 approved, none of that stuff matters. You can't start  
13 an FAC before the effective date of an order approving  
14 the tariff sheets.

15              And so to take additional evidence at  
16 this point to try and justify that action that took  
17 place three years ago simply won't satisfy the court's  
18 opinion. It would be in excess of what the court  
19 ordered the Commission to do.

20              And with respect to that point, GMO has  
21 raised on several points the fact that the court did  
22 not order the Commission to implement a refund. well,  
23 that's beyond the scope of review of a -- of a  
24 Commission order. When the courts review Commission  
25 orders -- and you've seen these in all of our briefs

1 when we talk about the standard of review, the court  
2 reviews the Commission's actions for lawfulness and  
3 reasonableness. They don't say, You've got to go back  
4 and you've got to change this number to that number  
5 you've got to do this, you've got to do that. They  
6 simply say, the Commission's order was unreasonable in  
7 these respects or the Commission's order is unlawful  
8 in these respects.

9           In this case, the Commission's -- the  
10 court's order said the Commission's order was unlawful  
11 because it engaged in retroactive rate-making. It  
12 could not and would not have taken the next step and  
13 said -- you know, with a direct remand as though you  
14 would get on a normal appeal, that here's what the  
15 Commission must do. That's simply not the way the  
16 process of appeals works on administrative decisions.

17           And finally, with respect to the question  
18 of whether the tariffs that were approved have zeros  
19 in them or something else, you know, the Court of  
20 Appeals heard all of those arguments when we argued at  
21 the Court of Appeals. They discounted them. They  
22 don't need any more information on what was in the  
23 court -- what was in the tariffs themselves. They're  
24 in the record. The Court of Appeals considered that.  
25 And, in fact, they considered it again in the

1 applications for rehearing and the motions for  
2 transfer and they were not convinced.

3           It's not at this point in the process  
4 appropriate for the Commission to try and bolster its  
5 record to try and convince the Court of Appeals that  
6 it was wrong. That avenue is closed. It's  
7 appropriate at this point for the Commission to fix  
8 the things that the Court of Appeals said was wrong,  
9 not to try and convince the Court of Appeals that it  
10 was wrong. Thank you.

11           JUDGE DIPPELL: Thank you. Mr. Chairman,  
12 do you have questions?

13           CHAIRMAN CLAYTON: Yeah. Mr. Mills, I'm  
14 just -- I'm looking through the Report and Order  
15 dated -- effective date of May 27, 2007. Was the --  
16 was the actual one-year period designated in any way  
17 in the underlying Report and Order?

18           MR. MILLS: The true-up period?

19           CHAIRMAN CLAYTON: The 12-month period

20           MR. MILLS: I don't recall. I don't  
21 think it was, but I can't say that for sure. I can --  
22 I mean I can certainly go back and find that out and  
23 file something, but I don't recall off the top of my  
24 head.

25           CHAIRMAN CLAYTON: I'll keep looking at

1 it. And let me just -- just be clear with you,  
2 Mr. Mills. What -- specifically what relief are you  
3 asking in this case of the Commission?

4 MR. MILLS: In this case, I think in the  
5 next Aquila FAC filing, the Commission should order  
6 Aquila to put in a refund of all the amounts collected  
7 from June 1 through July 31, 2007, plus interest at  
8 the short-term borrowing rate.

9 CHAIRMAN CLAYTON: Are you asking -- and  
10 we're using the term "refund," but I guess I've been  
11 thinking analogous to a PGA case, are we talking about  
12 like an ACA factor that would --

13 MR. MILLS: Exactly. You would change  
14 the FAC factor. You wouldn't cut a check or issue  
15 refunds to customers. You would flow it through the  
16 FAC just, as you said, you do with the ACA.

17 CHAIRMAN CLAYTON: Thank you.

18 JUDGE DIPPELL: Mr. Mills, let me follow  
19 up with for just a minute before we go to the other  
20 Commissioners. So are you saying though that there  
21 would still need to be evidence regarding that amount  
22 taken in this proceeding or would that be taken in the  
23 future FAC proceeding?

24 MR. MILLS: Actually it could be either  
25 one, but there has to be evidence at some point before

1 the Commission can come up with that number.

2 JUDGE DIPPELL: Thank you.

3 Commissioner Gunn, do you have questions  
4 for Mr. Mills?

5 COMMISSIONER GUNN: I don't. I think  
6 Mr. Mills was very clear. But can I go back to  
7 Mr. Woodsmall for a second and see --

8 JUDGE DIPPELL: Yes. Certainly.

9 COMMISSIONER GUNN: And does he concur  
10 with Mr. Mills' characterization of the relief that  
11 would be granted, that it would not be direct refunds,  
12 that it would go through the ACA process as well?

13 MR. WOODSMALL: Yeah. We have no  
14 problems with that. I would point out Section  
15 386.266.4(2) specifically talks about the true-up.  
16 And it says through subsequent rate adjustments or  
17 refunds. So it appears under the statute that the  
18 Commission has authority to do either. While I'd like  
19 to see refunds because they would get back to the  
20 customers quicker, I think it's cleaner to just do it  
21 through the subsequent FAC adjustment as Mr. Mills  
22 indicated.

23 COMMISSIONER GUNN: Great. Thank you. I  
24 don't have anything else.

25 JUDGE DIPPELL: Commissioner Kenney, did



1 you have any questions at this time?

2 COMMISSIONER KENNEY: Not yet. Thank  
3 you.

4 JUDGE DIPPELL: All right. Mr. Mills, I  
5 had one other question for you. Since the court  
6 remanded this for further proceedings, what would an  
7 order -- under your theory, what would an order of the  
8 Commission look like when it -- in response to the  
9 remand?

10 MR. MILLS: I think -- I think the order  
11 would simply say, The Commission recognizes that its  
12 actions in the June 27th, 2007 order were unlawful.  
13 Accordingly, the collection -- the accumulation of  
14 costs and subsequent collection of costs from the  
15 period of June 1, 2007 through July 31, 2007 was also  
16 unlawful. Aquila, now GMO, is hereby ordered to  
17 implement a credit back of those costs in the  
18 calculation of its next FAC adjustment.

19 JUDGE DIPPELL: And if the court, as you  
20 argued in your brief, vacated that original order,  
21 what happens then to the remaining months of that  
22 tariff order?

23 MR. MILLS: Judge, that's -- that's a  
24 thorny question. No one, I don't believe, is arguing  
25 that the rest of that FAC accumulation period should

1 be thrown out. I think we're all willing to agree  
2 that the FAC accumulation period could begin on the  
3 first calendar month following approval even though  
4 that order, as you pointed out, was vacated.

5 JUDGE DIPPELL: Okay. All right.  
6 Mr. Williams for Staff.

7 MR. WILLIAMS: Thank you, Judge. Well,  
8 first of all, the Staff is of the view that the Court  
9 of Appeals was pretty clear about the result as to the  
10 language that Mr. Woodsmall cited to in the opinion,  
11 only costs incurred after the effective date of an  
12 appropriate tariff may be recovered under a fuel  
13 adjustment clause.

14 The fuel adjustment clause tariff wasn't  
15 approved until June 29th and made effective July 5th.  
16 That appears later in the opinion where the court  
17 recites those facts. The applicable tariffs  
18 containing the fuel adjustment clause were not  
19 approved by the Commission until June 29th, it did not  
20 become effective per the Commission's order until  
21 July 5th.

22 And whenever the Court discusses its  
23 opinion, it refers to the Commission disregarding  
24 applicable statutory language, filed rate doctrine and  
25 prohibition on retroactive rate-making. We think that

1 based on the statutory construction alone, July 5th is  
2 the date -- the earliest date that the tariffs could  
3 be effective and that the accumulation period costs  
4 could be considered.

5           And if you'll look at Aquila's tariff,  
6 the accumulation period in the tariff is set out as to  
7 be June through November. So at the time that tariff  
8 was being reviewed in advance of June 1st, the Staff  
9 was recommending that the tariff be made effective by  
10 June 1st because of the provisions in the tariff  
11 itself.

12           what you end up with is a truncated -- or  
13 arguably a truncated accumulation period or at least  
14 the time within which you're going to be comparing  
15 costs is shortened from what's set out in the tariff  
16 for the accumulation period.

17           In contrast to what Mr. Mills and what  
18 Mr. Woodsmall have argued regarding Staff's position  
19 on true-up year, the Staff's never acknowledged that  
20 the definition of true-up year as set out in the rules  
21 governs when an accumulation period may start. For  
22 convince certainly, I think for the utilities it's  
23 easier if you have the true-up year start on the first  
24 of the month. The question is whether the rule  
25 requires that. And it's Staff's position it doesn't

1 mandate it.

2           Now, if the Commission determines its --  
3 who is the body that gets to decide what its rules  
4 mean in the first instance at least, decides that it  
5 means an accumulation period where the accounting  
6 start has to begin on the first day of the month, then  
7 it's certainly free to do so, but there's -- Staff  
8 doesn't believe there's anything in the language of  
9 the rule itself that mandates that result.

10           As to the Commission's authority to issue  
11 refunds, the court was very clear back in State ex rel  
12 Utility Consumers Council of Missouri versus Public  
13 Service Commission, which is cited at 585 S.W. 2d 41,  
14 that the Commission didn't have any general authority  
15 to do fuel adjustment clauses, at least with respect  
16 to residential customers.

17           And as a part of that, it also means that  
18 there would be no reason for the Commission to have  
19 had any authority to issue any kind of a refund. In  
20 fact, the prohibition against retroactive rate-making  
21 prohibited such. So the authority of the Commission  
22 has -- and now to issue refunds for fuel clauses is  
23 what it has by the Statute 386.266.

24           And the only place rate adjustments or  
25 refunds are referred to in that statute regarding fuel

1 adjustment clauses appear in sub 4; 2, 3 and 4. Two  
2 talks about annual true-ups, which Staff believes is  
3 the reason for the language that talks about true-up  
4 years. And what Staff believes a true-up year is  
5 under the rule is it sets time frames like a calendar  
6 year within which certain events are to occur, but it  
7 doesn't mandate the start of any particular event  
8 starting with the true-up year.

9               So 4 sub 2 deals with true-ups. Sub 3  
10 refers to if there's a shortening or adjustment that's  
11 required definitely by a court and perhaps by someone  
12 else, but if the authority goes beyond a court, it's  
13 not clear. The last sentence says, In the event a  
14 court determines that the adjustment mechanism is  
15 unlawful and all monies collected thereunder are fully  
16 refunded, the utility shall be relieved of any  
17 obligation under that adjustment mechanism to file a  
18 rate case.

19               And sub 3 is referring to the timing when  
20 a utility is required to come back in with a rate case  
21 whenever it's given authority to implement a fuel  
22 adjustment clause.

23               And then the 4 sub 4 deals with prudence  
24 reviews and authorizes the Commission to require  
25 refund of any imprudently incurred costs plus interest

1 at the short-term borrowing rate. Staff believes  
2 that's the scope of what the authority the Commission  
3 has for doing adjustments and doing refunds. And  
4 what's happened here doesn't fall within those.

5 Now, the Staff's not asserting there is  
6 no remedy. Certainly the courts can order refunds,  
7 but the issue is whether the Commission has that  
8 authority.

9 what the Staff believes the Commission  
10 should do in this case is to determine what the amount  
11 was that the courts now said was improperly collected.  
12 And at the time it was collected, there were valid  
13 rates in place.

14 I'm available for questions and I do have  
15 copies of the -- what's commonly called to -- referred  
16 to as the UCCM decision if anyone wants those.

17 JUDGE DIPPELL: All right. Mr. Chairman,  
18 do you have questions for Staff?

19 CHAIRMAN CLAYTON: Not right now. I'll  
20 wait.

21 JUDGE DIPPELL: Commissioner Gunn, do you  
22 have any questions?

23 COMMISSIONER GUNN: I just have one.  
24 Mr. Williams, do you want to comment on the argument  
25 that Mr. Mills made that GMO, Staff, as well as Public

1 Counsel, Industrial Intervenors at least had a tacit  
2 recognition that the accumulation period should or  
3 does start on the first day of a calendar year? I  
4 know your argument is that the rule doesn't mandate  
5 it, but do you want to comment on the fact that it may  
6 be the case that all the parties agreed -- or at least  
7 tacitly recognized that -- that that was a reality?

8 MR. WILLIAMS: My recollection -- I know  
9 that Aquila -- at that time it was going under the  
10 name of Aquila -- its accumulation period, the first  
11 one, was going to be June through November. So at the  
12 time Staff was concerned with -- or recommending the  
13 Commission get the fuel clause tariffs in place before  
14 June, but it was because of the tariff language, not  
15 because of the rule language.

16 And then whenever there was an issue  
17 regarding accumulation periods later on, the Staff  
18 always argued for the June 1 date. And it never, to  
19 my recollection, conceded that the rule controlled  
20 anything. I think it set out what the parties'  
21 positions were.

22 MR. MILLS: Commissioner, can I address  
23 that a little more fully?

24 JUDGE DIPPELL: Sure. Go ahead.

25 COMMISSIONER GUNN: Sure. Please.

1 MR. MILLS: I think we need to go back to  
2 2007 and what was going on at that time to really  
3 understand more fully I think the way the parties were  
4 behaving. At the time that Staff filed its  
5 recommendation to approve the tariff sheets, that was  
6 on July 25th and 26th because there was -- I mean  
7 June 25th and 26th because there was a correction  
8 filed the following day of 2007.

9 This followed four or five pleadings by  
10 Aquila in which Aquila urged the Commission to approve  
11 the tariffs before July 1 so that Aquila did not lose  
12 the July accumulation period. At that point Aquila  
13 had already given up on June. Aquila was hoping to  
14 get July in. So they were vehemently urging the  
15 Commission to approve the tariffs before July 1.

16 In the context of that, Staff filed a  
17 recommendation on June 25th and 26th recommending that  
18 the Commission approve the tariffs effective June 30th  
19 before the July 1 date.

20 So I think because they recommended that  
21 approval date rather than the July 25th effective date  
22 that the tariffs bore, I think that indicates that the  
23 Staff recognized the significance to the approval  
24 before July 1. They never said you have to do it  
25 before July 1 because if you don't, Aquila will



1 move -- will lose the July accumulation period, but  
 2 Aquila had made that argument and Staff argued for the  
 3 same date. So I think that sort of lays out my reason  
 4 for believing that Staff was also at least tacitly of  
 5 the same understanding that all the rest of us were.

6 COMMISSIONER GUNN: Can I ask kind of a  
 7 quick follow-up question? Do you think that if  
 8 they -- if the Commission had approved the -- approved  
 9 it on July 1, that it would not be able to start until  
 10 August -- August 1? Or is that too close of a -- of a  
 11 question and that may be a separate question if -- or  
 12 there wouldn't be enough time to deal with an  
 13 effective date?

14 MR. MILLS: Well, there's two separate  
 15 questions. I think -- and maybe I misspoke. The  
 16 par-- the Staff recommended approval on June 30th,  
 17 Aquila recommended approval on June 30th. If I said  
 18 July 1, I misspoke. They were trying to get it  
 19 effective before --

20 COMMISSIONER GUNN: No, that was my  
 21 question.

22 MR. MILLS: -- before July 1, rather than  
 23 after --

24 COMMISSIONER GUNN: Right. But my  
 25 question is, is if the Commission had approved on

1 July 1 instead of June 30th -- because according to  
2 what you're saying is, is that -- is that -- that the  
3 approval took place on June 30th, then it would have  
4 been able to start on July 1. Any date past that  
5 would be required to start on August 1. Am I correct?

6 MR. MILLS: That's correct.

7 COMMISSIONER GUNN: So I guess my  
8 question is -- is irrelevant right now, but I just  
9 want to make sure. So even if we approved it on  
10 July 2nd, the position of the Industrial Intervenors  
11 and Public Counsel is, is that that would not have  
12 been able to be commenced until August 1?

13 MR. MILLS: That's OPC's position. I'm  
14 not going to speak for the Industrial Intervenors.

15 MR. WOODSMALL: That's correct.

16 COMMISSIONER GUNN: Okay. Thank you. I  
17 don't have anything further.

18 MR. WILLIAMS: If I may?

19 JUDGE DIPPELL: Yes, Mr. Williams.

20 MR. WILLIAMS: Commissioner Gunn, I think  
21 that arises from the definition of true-up year which  
22 defines it to be the date of -- as I recall, the date  
23 of an effective -- the effective date of an order if  
24 it's on the first of the month or the first day of the  
25 following month if it's not.

1 And I'll also point out, Mr. Woodsmall  
2 referred to Empire and AmerenUE. I don't know exactly  
3 the reasons why they chose to start those on the 1st  
4 of the month. I do know by doing so they avoided the  
5 argument that we're having here. And also it may be  
6 for bookkeeping reasons, it's more convenient and  
7 easier.

8 JUDGE DIPPELL: All right.

9 COMMISSIONER GUNN: well, did that go  
10 into -- did that go into any consideration of the rule  
11 about bookkeeping and being able to actually track  
12 some of these issues?

13 MR. WILLIAMS: I was not very involved in  
14 this rulemaking so I can't answer that question. I  
15 think there were probably discussions about it, but I  
16 can't speak personally.

17 COMMISSIONER GUNN: But we -- but the  
18 Commission made the determination that for at least  
19 true-up definition, that the first day of the calendar  
20 month had significance. And that was the beginning --  
21 that was the definition -- clear definition of a  
22 true-up year. Correct?

23 MR. WILLIAMS: Yes. And the statute  
24 requires that there be annual true-ups.

25 COMMISSIONER GUNN: Right. Okay. Thank

1 you, Mr. Williams. I don't have anything further.

2 JUDGE DIPPELL: Commissioner Kenney, did  
3 you have anything?

4 COMMISSIONER KENNEY: Just so we're  
5 clearly, I mean, we're talking -- the rule that we're  
6 talking about is 4 CSR 240-20.090(1)(I). Correct?

7 MR. MILLS: That's correct.

8 COMMISSIONER KENNEY: Okay.

9 MR. WOODSMALL: Actually, Commissioner,  
10 it's contained in two places; both Chapter 20, but  
11 it's also contained in Chapter 3 at 4 CSR  
12 240-3.161(1)(G). So it's in two places in two  
13 different chapters.

14 COMMISSIONER KENNEY: Is it Staff's  
15 position that that governs or not?

16 MR. WILLIAMS: It's Staff's position that  
17 governs what certain events are to occur. It's  
18 Staff's position it doesn't govern when an  
19 accumulation period -- when I say "accumulation  
20 period," I'm talking about the actual time period that  
21 you compare the costs betw-- to the base as opposed to  
22 what may be in the tariff.

23 For example, in -- I know in Ameren's  
24 tariff their accumulation period started in February,  
25 but they didn't do the cost comparisons until starting

1 March because their tariff wasn't effective until then  
 2 and that was the effective dates of the tariff that  
 3 they requested. And that's similar to here except the  
 4 argument is whether we're starting -- originally the  
 5 argument was whether or not we started in June because  
 6 it was a June through November accumulation period.  
 7 Other parties argue that you couldn't actually start  
 8 doing the cost for comparison -- collecting those  
 9 until August.

10 And the Court of Appeals has now said, I  
 11 think clearly, that you can't start that comparison  
 12 period before July 5th. So what Staff thinks you're  
 13 faced with is do you start July 5th or do you start  
 14 with August 1st and then after that, what do you do?

15 COMMISSIONER KENNEY: Well, and if the  
 16 accumulation period is as defined in that rule, then  
 17 it would have to be August 1. Right? If the July 5th  
 18 date is the date on which the tariff was approved and  
 19 if we determined that the -- that what does govern is  
 20 the definition of true-up, then it would -- then the  
 21 date would be August 1. Right?

22 MR. WILLIAMS: Yes. If you accept the  
 23 other -- Public Counsel and the Industrial's argument,  
 24 that would be the date you would use.

25 COMMISSIONER KENNEY: And was that ever

1 Staff's position and understanding --

2 MR. WILLIAMS: No.

3 COMMISSIONER KENNEY: -- that the true-up  
4 definition period would apply?

5 MR. WILLIAMS: No.

6 COMMISSIONER KENNEY: Okay. All right.

7 Thank you.

8 JUDGE DIPPELL: All right. I had a  
9 question for you, Mr. Williams. And it's similar to  
10 what I asked Mr. Mills; and that is, what should the  
11 Commission's order on remand from the court look like?  
12 what should it contain from Staff's opinion?

13 MR. WILLIAMS: I would say that the order  
14 should -- I think you probably need to take some  
15 evidence and find out what the difference is between  
16 what was in the base and what the costs were during  
17 the period the Commission determines costs were  
18 unlawfully collected, which the shortest period's  
19 going to be June 1st through July 5th. Commission may  
20 determine that it's some other period.

21 Take evidence on what the actual costs  
22 were for comparison to what the base are and issue an  
23 order that states those.

24 JUDGE DIPPELL: All right. Are there any  
25 other questions for Mr. Williams? All right.

1 MR. MILLS: Judge, can I add something in  
2 response to Commissioner Kenney's question?

3 JUDGE DIPPELL: Go ahead.

4 MR. MILLS: This is in response to your  
5 question of whether Staff ever took this position.  
6 And I don't know that I can directly answer that, but  
7 if you look at the quote from the Commission's order  
8 approving tariff to establish rate schedules for fuel  
9 adjustment clause that's quoted at the top of page 3  
10 of my reply brief, the Commission apparently was under  
11 the impression that Staff and Aquila were arguing the  
12 same point, which was opposite of what Public Counsel  
13 and OPC was arguing.

14 And, in fact, the first sentence of that  
15 quote makes it clear that the Commission agreed that  
16 the definition of true-up period was also the  
17 definition of the accumulation period. But that's --  
18 that's the only -- the only indication that I found  
19 that -- what the Commission thought at the time of  
20 Staff's position.

21 COMMISSIONER KENNEY: Thank you,  
22 Mr. Mills.

23 JUDGE DIPPELL: All right. If there  
24 aren't any other Commission questions on those points  
25 right now, I can let Mr. Zobrist have sort of a chance

1 to respond to some of the responses to him.

2 MR. ZOBRIST: Great. Thank you, Judge.

3 I'll sort of go through it sequentially. I did not  
4 provide the West Law cite to attempt to substitute  
5 some anonymous person's judgment for that of the  
6 court. I certainly urge the Commission to read the  
7 opinion.

8 But it's very interesting how they focus  
9 on the language of consumer expectations, which is  
10 what Mr. Mills and what Mr. Woodsmall don't want you  
11 to focus on. If you focus on the language at 366, it  
12 says, The key information to customers concerns  
13 information which, quote, would allow them to  
14 calculate how much they would be paying as a result of  
15 the fuel adjustment clause.

16 And similarly on page 67, the court says,  
17 until the rate schedules were actually adopted by the  
18 Commission, Aquila's customers had no means of  
19 calculating how much, if anything, their electrical  
20 use would cost them by way of a fuel adjustment  
21 clause.

22 So the key -- the anchor to the Court of  
23 Appeals opinion is what would consumers do if they  
24 knew their rates were going to go up? And they did  
25 not have that information. It's uncontested that they



1 did not have that information until 2008.

2           Let's go to the sentence that  
3 Mr. Woodsmall quotes. And it is a critical sentence.  
4 It says, Only costs incurred after the effective date  
5 of an appropriate tariff may be recovered under a fuel  
6 adjustment clause.

7           well, the first point is, after the  
8 effective date, July 5. So anything other than 34  
9 days is clearly not permitted by the court. We were  
10 at the Court of Appeals last week arguing another fuel  
11 adjustment clause and Judge Ahuja clearly told us he  
12 was focusing on what goes on after the 34 days after  
13 the effective date.

14           And for this Commission to redefine  
15 accumulation because of how the rule -- the regulation  
16 defined true-up would be a complete rewriting of that  
17 rule. If that's what the rule said, then we would be  
18 obligated to honor that definition of accumulation  
19 period. It is not a definition of accumulation  
20 period.

21           Now, let's take a look at that sentence  
22 once again. It says, Only costs incurred after the  
23 effective date of an appropriate tariff. Given the  
24 Court of Appeals emphasis on what would the consumer  
25 know, what would he or she know to make a decision

1 about electricity use, the term "appropriate tariff"  
2 cannot mean any of the tariffs that were approved in  
3 June or July. It has to mean the tariff that  
4 contained cost information, which were the tariffs  
5 that eventually went into effect in 2008.

6           This case is similar to that of an  
7 Accounting Authority Order. This Commission has, for  
8 decades, recognized that when a service area is  
9 affected by a severe thunderstorm, an ice storm, a  
10 tornado, that the utility can come in and ask for an  
11 Accounting Authority Order, which is typically, but  
12 not always, but has typically been granted by the  
13 Commission to accumulate costs from a preceding date  
14 to be the subject of a future proceeding. That's  
15 exactly what we have here.

16           And if this Commission were to take and  
17 prevent the proper calculation of historical data and  
18 then prevent its recovery under all circumstances in  
19 the future, that would take the Accounting Authority  
20 Order law of the Commission and essentially throw it  
21 out.

22           It's not a perfect analogy, but it's a  
23 very good analogy. Because when utilities come in,  
24 they can't come in before the earthquake or the storm  
25 or tornado, but they've got to come in after the fact.

1 And the Commission says, Okay, fine. Collect the data  
2 and then show us the cost data later. That's exactly  
3 what happened in this case and we believe that's  
4 exactly what is permitted by 386.266.

5 JUDGE DIPPELL: Let me interrupt you just  
6 a moment with regard to that analogy. But in an AAO,  
7 is there a rule which has this same type of definition  
8 that is under contention here with regard to true-up  
9 versus accumulation period?

10 MR. ZOBRIST: No, it does not. And  
11 that's, Judge, why I say it's not a perfect analogy.  
12 But in terms of the running of the clock, it is a  
13 perfect analogy there because the utility would come  
14 in after the tornado, after the hurricane, you know,  
15 after the earthquake and say, you know, we started  
16 spending money the day the tornado hit ground and we  
17 want to be able to collect that information and then  
18 come back to you at a later time. That is what is  
19 permitted by 386.266.

20 Now, I would say that once the utility  
21 comes in, you know, a similar rate-making process does  
22 come in whereby those costs are, you know, reviewed  
23 and tested by Staff and Public Counsel and any of the  
24 intervenors. So that's really the point I was making  
25 there.

1 JUDGE DIPPELL: And were those arguments  
2 made to the Court of Appeals, the analogy between the  
3 AAO and the --

4 MR. ZOBRIST: I believe that we did cite  
5 it, but, you know, it wasn't discussed in any of the  
6 Commission orders. And I don't think -- I know it's  
7 not discussed in the Court of Appeals opinion itself.

8 JUDGE DIPPELL: Okay. Thank you.

9 MR. ZOBRIST: Now, Mr. Mills was saying  
10 we -- that the Commission ought to take in -- ought to  
11 recognize that the Court of Appeals could not have  
12 ordered or typically does not order a refund. And the  
13 company believes it's very significant that the Court  
14 of Appeals did not order a refund.

15 The UCCM case that Mr. Williams cited,  
16 the Supreme Court there did order a refund. Now they  
17 called it restitution, but just look at the last  
18 paragraph of that case. The Court says, By virtue of  
19 our inherent authority to address redress -- to afford  
20 redress to the parties, we order the utilities that  
21 were parties to this proceeding to restore those  
22 benefits.

23 And they remanded to the circuit court  
24 for a determination by it of the amounts due as a  
25 result of the surcharge and to whom the proper method

1 of restitution should occur. So clearly if the court  
2 wanted to order a refund, a restitution, a process to  
3 calculate what should be flowed back to the ratepayers  
4 they could have done that and they did not.

5 And finally what I would say is the  
6 significance of this case really goes beyond the  
7 34 days or the 60 days. I mean, what if the shoe were  
8 on the other foot? I mean what if the utility had  
9 been over-collecting its costs and it either came in  
10 and said, what do we do with this extra money or if  
11 staff or someone had filed a complaint and said, You  
12 need to see a decrease of over-collection, I mean  
13 would -- would this Commission count against the  
14 utility and say, well, gosh, you know, because this  
15 tariff didn't come to effect on July 5, you really  
16 can't go back and compel us to refund those  
17 over-collection of costs because that would be  
18 retroactive rate-making? Particularly when there was  
19 nothing but zeros there. So this is a two-way street.

20 At this point in time, you know, it  
21 happens to be that the utility under-collected and was  
22 seeking an adjustment by virtue of costs that had been  
23 paid, but it clearly could have been the other way.  
24 And if it had been the other way, I don't think that  
25 this Commission would have said, no, that is

1 retroactive rate-making and utility, you get to keep  
2 the \$2.9 million that you really owe back by virtue of  
3 the fuel adjustment clause mechanism. That's all I  
4 have, Judge, unless there are any other questions.

5 JUDGE DIPPELL: All right. Let me ask  
6 you one more, Mr. Zobrist, the same as I've asked  
7 Staff and Public Counsel; and that is, what does the  
8 company believe that an order from the Commission on  
9 the remand -- what will it look like, in your opinion?

10 MR. ZOBRIST: I would say that what the  
11 Commission should do is go back and describe the  
12 tariffs that it was considering at this time in 2007  
13 and advise the public as well as any reviewing courts  
14 that these were proforma tariffs; that no rate had  
15 been charged, there was nothing but zeros; that the  
16 issues that were of concern to the Commission at that  
17 time did not deal specifically with fuel costs, they  
18 dealt with things like sulfur dioxide charges and how  
19 interest rates would be charged.

20 And it was simply an accumulation of cost  
21 data; that no rate-making effect, no dollars and cents  
22 effect had occurred until the Commission took up the  
23 application submitted by Aquila in 2008.

24 And I also think that the Commission  
25 should explain to any reviewing authority in detail

1 what it was going through as it was implementing that  
2 fuel adjustment clause at the time. I also think it  
3 would be very helpful for the Commission to cite to  
4 the well-known precedence that it has implemented  
5 over time for Accounting Authority Orders. And as the  
6 Commission pointed out, while that's not a perfect  
7 analogy, in terms of the chronology, the  
8 retroactiveness, it is a perfect analogy.

9           And then I would also say that in terms  
10 of the 34-day versus the 60-month [sic], although I  
11 don't think we need to go that far because of that --  
12 that's what the company's position is, if it were to  
13 go in that direction, clearly they have to read their  
14 regulations appropriately and the company in that  
15 context agrees with Staff that accumulation period is  
16 not defined, it is true-up that is defined and given  
17 the literal language of the court, anything that was  
18 effective on July 5 or afterward is appropriate for  
19 inclusion in the fuel adjustment clause.

20           JUDGE DIPPELL: Thank you. Mr. Chairman,  
21 do you have any additional questions at this time?

22           CHAIRMAN CLAYTON: Mr. Zobrist, I just  
23 want to ask you a couple of questions. And I'm trying  
24 to get a handle on the difference of the Commission  
25 making a decision prior to the appellate opinion and

1 the decision that we have to make today.

2           As one of the Commissioners who dissented  
3 to the underlying Report and Order in this case and I  
4 think I opposed the approval of tariffs as this case  
5 worked its way through and I'm a little fuzzy on some  
6 of the information because it has been a long time,  
7 we've had a lot of cases that have occurred, there  
8 were several appeals, it does get quite complicated.

9           But the Court of Appeals has made a  
10 statement and we can't just go back and say what we --  
11 what the Commission did in 2007, 2008 was right and  
12 here's some more reasons why. I think the Commission  
13 chose to side with GMO at the time on this  
14 accumulation period. It was an issue that came up I  
15 believe for quite a bit of discussion over the last  
16 couple of years. And your -- your last comments about  
17 what you're asking us to do was helpful, but I'd like  
18 you to elaborate on it.

19           with this appellate opinion we have in  
20 front of us that has at least made a statement which  
21 suggests -- well, does more than suggest the  
22 Commission was wrong, that we should have done it an  
23 opposite way, exactly what does GMO expect to get out  
24 of this Commission? with this appellate opinion, we  
25 can -- we can do analysis or take some evidence on



1 what happened or how the Commission functions, that  
2 sort of thing, but can you elaborate more on what GMO  
3 is asking for from this Commission?

4 MR. ZOBRIST: I'd be glad to,  
5 Mr. Chairman. I mean, the -- I think what the -- what  
6 the Court of Appeals did not discuss and I think that  
7 the parties did not present to the Court of Appeals  
8 was what did these tariff sheets actually look like.

9 I think they were under the impression  
10 that the tariff sheet that was approved on June 29,  
11 effective July 5, had a rate -- had the effect of  
12 changing a rate and it did not. Now, it did approve a  
13 formula and a process, but there were nothing but  
14 zeros there.

15 CHAIRMAN CLAYTON: And that tariff sheet  
16 also approved the underlying base rates? Or were the  
17 base rates and the fuel adjustment mechanism separate  
18 in terms of tariff filings?

19 MR. ZOBRIST: Well, the tariff sheets  
20 that we're really talking about here I think are on  
21 pages 124 through 127 and that's all I'm really  
22 addressing in my remarks. You're correct, obviously  
23 the underlying rates were changed as a result of the  
24 Report and Order.

25 But I -- I don't think that the Court of

1 Appeals -- and their opinion does not deal with, you  
2 know, the actual effect of the dollars. I think the  
3 Court of Appeals was under the impression that your  
4 order that became effective July 5 changed rates and  
5 it did not. It initiated a process.

6 CHAIRMAN CLAYTON: Set the process, set  
7 the true-up period and that was the retroactive  
8 looking back?

9 MR. ZOBRIST: Right. I mean, clearly the  
10 order had a retroactive effect because it came into  
11 effect July 5 and went back to July 1, so we do have  
12 34 days that --

13 CHAIRMAN CLAYTON: And I -- I mean I -- I  
14 understand what you're saying. And I thought the  
15 Commission made that decision, agreed with GMO at the  
16 time. My question is, how do we go to the Court of  
17 Appeals -- say the Commission sides with GMO in this  
18 case, assume there's going to be an appeal. But how  
19 do we make a statement to the court, well, you all  
20 didn't look at the right tariff sheets and you didn't  
21 really understand it? Doesn't that put the Commission  
22 in a pretty odd circumstance?

23 MR. ZOBRIST: Well, it is an unusual  
24 circumstance. I will certainly, you know, concede  
25 that, Mr. Chairman. But the point is the -- the Court

1 of Appeals found it very important that we have  
2 informed consumers. Consumers were not informed as to  
3 what rates they would be paying until 2008. And the  
4 reason that we put in all these public relations  
5 materials about newspaper articles and the  
6 Commission's announcements and things like that is  
7 because none of them had cost data until 2008.

8           And if the Court of Appeals truly was  
9 looking out for the consumer, which I think that they  
10 were, there was no basis for a consumer to make any  
11 kind of an intelligent decision, which is the essence  
12 of retroactive rate-making, the ability to decide what  
13 are you going to do in the future, they didn't have  
14 that ability until 2008.

15           And so I think you can go back to the  
16 court and say, we understand that there was a  
17 retroactive effect and you wanted informed customers,  
18 but by the way, there was nothing but zero in those  
19 tariff sheets.

20           And, you know, these are very smart  
21 people, the Court of Appeals, but even they were  
22 confused to a degree last week when we were arguing  
23 about how fuel adjustment clause works because the  
24 tariffs are very complicated, the fuel adjustment  
25 clause is a very difficult process to understand.

1 And these very smart people were asking  
2 very basic questions, which I think between, you know,  
3 Mr. Woodsmall and me and Mr. Ritchie, we did a pretty  
4 good job of answering, but this is very detailed  
5 technical stuff. And I think that they would  
6 appreciate your coming back and saying, we understand  
7 your concerns and you think that we engaged in  
8 retroactive rate-making, but if you really wanted  
9 informed consumers, they weren't going to know  
10 anything in the summer of '07. They were going to  
11 know something in the summer of '08.

12 And, you know, I mean I think, you know,  
13 in part you want to defend your reputation as a -- as  
14 a body that takes these statutes seriously and that  
15 even though you decided, Mr. Chairman, I don't think  
16 anybody thought it was retroactive rate-making. You  
17 know, my understanding is the dissent just didn't  
18 think fuel adjustment clause was in the public  
19 interest.

20 well, you know, it was passed by the  
21 legislature, it has been implemented, but clearly  
22 these issues, as approved in these orders, didn't give  
23 people an opportunity to make the economic decisions  
24 the court thought were important.

25 CHAIRMAN CLAYTON: Procedurally let's say

1 the Commission -- let's say the Commission goes down  
2 the road of what GMO is asking. Let's say we take  
3 some evidence, that we -- we further discuss issues of  
4 public relations, public notice, public information,  
5 we look at the fact that they were zero dollars in the  
6 fuel adjustment mechanism, you had base rates that  
7 were set and basically the argument here is over an  
8 accounting period that would suggest a change in the  
9 future.

10 And if you set aside the argument that --  
11 if you set aside that, well, you have to set the rules  
12 of the game and the rules of the game have to start at  
13 a given time and can't look backwards, setting -- and  
14 I think they would argue that, procedurally what would  
15 happen with that decision? I assume it would be  
16 appealed to the circuit court and would we start the  
17 process again going on?

18 MR. ZOBRIST: well, most likely. I think  
19 that's probably true. I --

20 CHAIRMAN CLAYTON: If we could send a  
21 letter to the Court of Appeals and say, well,  
22 respectively we think -- I mean, I think we've already  
23 communicated with them and so now this thing is going  
24 to -- it's going to take a lot more time and basically  
25 our response would be, Respectively, we think you got

1 it wrong and here's why. I need your feedback on why  
2 that's not the case.

3 MR. ZOBRIST: Well, they clearly directed  
4 it back for proceedings consistent with this opinion.  
5 And -- do you want me keep going?

6 JUDGE DIPPELL: I started to say, could  
7 we take just a moment? I'm sorry. There seems to  
8 be --

9 COMMISSIONER GUNN: Can you still hear  
10 us, Judge?

11 JUDGE DIPPELL: We can still hear you.  
12 Can you still hear us?

13 COMMISSIONER GUNN: Yes.

14 JUDGE DIPPELL: I'm not sure that we are  
15 on with our recording anymore and I'm trying to get  
16 rid of a display here.

17 Go ahead, Mr. Zobrist. I think that at  
18 least the noise has stopped.

19 MR. ZOBRIST: Mr. Chairman, the last  
20 paragraph of the Court of Appeals order says, The case  
21 is remanded to the circuit court with directions to  
22 remand to the Commission for further proceedings  
23 consistent with this opinion.

24 And as I think Mr. Mills has pointed out,  
25 the circuit judge vacated your decision. So although

1 we certainly have a lot of record here, there is no  
 2 decision existing by the Commission at this time. So  
 3 I think you -- you have to issue a new opinion. You  
 4 have to tell us what to do. And, you know, we think  
 5 it would be helpful to supplement the record to show  
 6 what these tariff sheets did and what they didn't do  
 7 in 2007 and then what the tariff sheets did and what  
 8 they didn't do in 2008.

9 And -- and I think keying upon the Court  
 10 of Appeals emphasis on a knowledgeable consumer, it  
 11 would be very helpful for this Commission to say, you  
 12 know, we understand and we want, you know,  
 13 knowledgeable consumers. That's part of -- I mean  
 14 that's certainly been, you know, your legacy in terms  
 15 of expanding public hearings and public information  
 16 flow. And to be able to tell the Court that, you  
 17 know, a consumer would not have had any information to  
 18 make any kind of decision in June or July or August of  
 19 2007. They wouldn't have this had that information  
 20 until 2008.

21 CHAIRMAN CLAYTON: Mr. Zobrist, as I  
 22 recall, is this the first mechanism, the first fuel  
 23 adjustment clause?

24 MR. ZOBRIST: Yes.

25 CHAIRMAN CLAYTON: So basically this case

1 was the guinea pig that really required everyone to  
2 take closer looks at our rule, at Senate Bill 179. It  
3 was the first case that would actually implement this  
4 clause.

5 MR. ZOBRIST: Right. And that certainly  
6 is why Aquila at the time urged the Commission to act  
7 quickly so we wouldn't have to deal with these  
8 retroactive rate-making issues. and I understand the  
9 positions that Aquila took at the time and they've  
10 been quoted against GMO and we understand that.

11 But when you go back and really look at  
12 what these tariff sheets did, I think the factual and  
13 the legal analysis was not adequate at the time and I  
14 think that we've got the benefit of having sat and  
15 examined these now for, you know, a year and a half or  
16 so. I think we've got a better handle on what  
17 actually was occurring at the time.

18 CHAIRMAN CLAYTON: Mr. Williams, has  
19 staff done an analysis? Is there any questions of  
20 prudence -- aside from the true-up period and whether  
21 they should be included, is there an analysis -- if we  
22 were to open the record, take evidence, is there any  
23 question of prudence on the \$9 million of fuel costs  
24 that are included within that 60-day period?

25 MR. WILLIAMS: Commissioner, for this



1 particular accumulation period we've already had  
2 true-up and prudence reviews.

3 CHAIRMAN CLAYTON: And so they were  
4 deemed prudent or the Staff found them prudent?

5 MR. WILLIAMS: I believe the Commission's  
6 found no imprudence and we're done with those -- that  
7 particular accumulation period.

8 CHAIRMAN CLAYTON: Okay. Mr. Zobrist,  
9 just to kind of close this loop and see if -- you  
10 know, since this was the guinea pig of a case, it was  
11 the first one, it was kind of an experiment as you  
12 worked through process, can you explain to me, if you  
13 know, the timing of Report and Order that rejects  
14 tariffs with follow-up approval of compliance tariffs  
15 and then the date of the accumulation period for  
16 the -- for the RAM under Empire and Ameren's cases?  
17 would they have been done differently than as they  
18 were in this case, do you know?

19 MR. ZOBRIST: I can't -- I can't speak to  
20 the AmerenUE or the Empire cases. I can tell you --  
21 if that's the question, then I don't have anything  
22 else to say.

23 I do have the chronology in this case,  
24 but -- you know, I mean this was the first case out of  
25 the box and it was compressed as to time. And Staff

1 had some opinions on the original tariff sheets and  
2 there were at least two sets submitted until the final  
3 sheets or the FAC were approved, you know, at the end  
4 of June of '07 so -- and I can give you those dates.

5 I mean, the Report and Order I think is  
6 May 18 -- I'm sorry, the Report and Order I think is  
7 May 17. There were initial sheets submitted on  
8 May 18. They were rejected in the Commission's order  
9 of May 25.

10 On that same day, May 25, Aquila made a  
11 second filing of four sheets. They were rejected in  
12 the Commission's order of June 14. And then on  
13 June 18, the four sheets that were eventually approved  
14 were submitted.

15 CHAIRMAN CLAYTON: I've got a couple of  
16 time lines that I know were part of -- part of the  
17 briefing schedule. Going back -- and what I didn't  
18 hear you say and what I don't see in this time line,  
19 if the Commission approved the underlying Report and  
20 order which set the revenue requirement, authorized  
21 the fuel adjustment clause and the other pieces of the  
22 decision, do you know when the Commission issued its  
23 order denying rehearing on that underlying Report and  
24 order?

25 MR. ZOBRIST: I don't have that with me

1 right now.

2 CHAIRMAN CLAYTON: Does anyone know that?

3 MR. MILLS: I don't know the exact date,  
4 but it was after the tariff approval process was done.  
5 So it was after all of this took place by a matter of  
6 a week or ten days at least.

7 CHAIRMAN CLAYTON: Mr. Zobrist, how many  
8 sets of compliance tariffs did GMO file following the  
9 approval of the Report and Order on May 17th?

10 MR. ZOBRIST: Three.

11 CHAIRMAN CLAYTON: And was there a  
12 difference among the compliance tariffs as it related  
13 to the accumulation period or was it consistent on  
14 each of those?

15 MR. ZOBRIST: I believe it was consistent  
16 on all those periods. It was consistent in terms of  
17 the zeros. The issues related to the SO2 allowance  
18 and how it would be factored in and related to the  
19 calculation of interest. And I think that is  
20 reflected in the Commission's June 14, 2007 order.

21 CHAIRMAN CLAYTON: Okay. Thank you very  
22 much. This has been very helpful.

23 JUDGE DIPPELL: Commissioner Gunn, did  
24 you have questions?

25 COMMISSIONER GUNN: I do. I just have a

1 couple. And Mr. Zobrist, I apologize if I missed the  
2 beginning part of this, but is GMO conceding that  
3 July 5th is kind of the magic date? That according to  
4 the Court of Appeals opinion, you can't begin an  
5 accumulation period prior to July 5th, but then any  
6 time after July 5th, the accumulation period can --  
7 can begin?

8 MR. ZOBRIST: No, Commissioner, we're not  
9 conceding that point. But if you find that is so,  
10 then we say that a refund or some type of an  
11 adjustment mechanism would only last from June 1 to  
12 July 4, those -- pardon me, July 5, those 34 days.

13 COMMISSIONER GUNN: So you believe that  
14 the Court of Appeals -- well, you believe that the  
15 Court of Appeals decision doesn't mandate that we --  
16 that we discount the July -- the June 1 to July 5th?  
17 You think that we just need to clarify what we took  
18 into account in order to determine that the  
19 accumulation period would begin on June 1st?

20 MR. ZOBRIST: That's correct. Because of  
21 all the emphasis in the Court of Appeals opinion about  
22 what would knowledgeable consumers do. Because  
23 consumers had no information about what to do until  
24 2008.

25 COMMISSIONER GUNN: And it would have

1 been impossible even though -- let's assume, just  
 2 arguendo that it began on -- that the accumulation  
 3 period began on July 5th. The argument is they still  
 4 wouldn't have any cost data on July 5th. It wouldn't  
 5 be until early 2008 that they -- that the consumer  
 6 could be informed. So -- so if the Court of Appeals  
 7 relied upon that, they probably need some  
 8 clarification because they wouldn't have had informed  
 9 consumers until early of 2008. Is that your position?

10 MR. ZOBRIST: That's correct.

11 COMMISSIONER GUNN: Okay. The second  
 12 question I have is, is there anywhere in the rule or  
 13 anywhere that you can point to that actually defines  
 14 the accumulation period or -- I know we're saying it's  
 15 not -- you're saying it's not a true-up period, but do  
 16 you have something to point to that says -- that  
 17 defines what the accumulation period is other than  
 18 general --

19 MR. ZOBRIST: Accumulation period is  
 20 defined in the tariff. It is not defined in the  
 21 regulations, per se.

22 COMMISSIONER GUNN: Okay. And if we  
 23 believe that the Court of Appeals said that the tariff  
 24 had to be into effect and we accept the July 5th date,  
 25 then the accumulation period can start on any day of a

1 month after a tariff has been approved or is  
2 effective?

3 MR. ZOBRIST: Well, I think -- I think  
4 the issue --

5 COMMISSIONER GUNN: I'm not asking you to  
6 concede that point. I'm not asking you to concede  
7 that point.

8 MR. ZOBRIST: Right. I think the issue  
9 is more narrow. Because of the Court of Appeals  
10 opinion about retroactive rate-making, you would be  
11 engaging in retroactive rate-making if you deprived  
12 the utility or the consumer, if the shoe were on the  
13 other foot, of accounting for calls from July 5 to  
14 July 31. I mean, it's a bigger question. It's not a  
15 matter of the regulation. It's -- it's a retroactive  
16 rate-making. And clearly the retroactive effect of an  
17 order ceased on July 5.

18 COMMISSIONER GUNN: Should we -- do you  
19 think we should put in our rule a definition of  
20 accumulation period?

21 MR. ZOBRIST: Oh, I think it would be  
22 helpful certainly, yes.

23 COMMISSIONER GUNN: And again, part of  
24 your argument about the refund is saying that if the  
25 Court of Appeals felt that we had decided this

1 absolutely wrongly, that the opinion would have  
2 included, as some opinions in the past have been, to  
3 order -- essentially ordering us to order refunds?

4 MR. ZOBRIST: That's correct.

5 COMMISSIONER GUNN: And that the lack of  
6 that direct order gives us the leeway that we need to  
7 have to go back to the court and say, Here's some  
8 additional information, see if you -- if you change  
9 your mind based on the additional information and the  
10 additional attention that we actually did pay to this  
11 that we may not have made clear in the previous order?

12 MR. ZOBRIST: That's correct

13 COMMISSIONER GUNN: Thank you. I don't  
14 have anything else.

15 JUDGE DIPPELL: Commissioner Kenney, did  
16 you have some additional questions?

17 COMMISSIONER KENNEY: No, I do not.  
18 Thank you.

19 JUDGE DIPPELL: Thank you. Commissioner  
20 Davis, did you have any questions that you would like  
21 to ask?

22 COMMISSIONER DAVIS: No. No.

23 JUDGE DIPPELL: Thank you. Mr. Mills,  
24 you looked like you wanted to make further response.

25 MR. MILLS: Judge, just with respect to

1 Commissioner Gunn's last question, I think with all  
2 due respect to Mr. Zobrist, the arguments that he's  
3 urging you all to make to the Court of Appeals now are  
4 exactly the same arguments that he made to the Court  
5 of Appeals in his Application for Rehearing which they  
6 discounted. So I don't think this is something that  
7 the court has not considered. I think the court has  
8 had the opportunity to consider this and has declined  
9 to find it convincing.

10               So I think -- I don't -- I don't think it  
11 would behove the Commission to explain to the court  
12 that they got it wrong and here's some stuff you  
13 haven't considered because the Court has considered  
14 that.

15               And with respect to the July 5th date, I  
16 think the reason the Court did not order refunds is  
17 because the only question posed to them was, was the  
18 approval as of July 1 going back to June 1 lawful.  
19 And they said no, it's not. They did not opine that  
20 everything after July 5 is okay. They simply said  
21 that that period -- the period from June 1 to July 5  
22 is unlawful.

23               They could tell that there was a question  
24 about the July 5 to August 1 based on the rule, but  
25 that really wasn't the question posed to them by the



1 appeal. The question posed to them by appeal was, was  
2 it lawful to go back to June 1. They didn't have  
3 before them the question of whether July 5 to August 1  
4 is unlawful. And perhaps that's a failure in framing  
5 the issues well for them, but that wasn't the question  
6 they were addressing.

7           And so the reason, in my opinion, that  
8 they didn't order a refund other than the fact that  
9 that's not typically what is done in an appeal of a  
10 Commission case, is that it's not clear to them, I  
11 don't think, from -- from the way the issues were  
12 framed exactly what a refund would constitute of. I  
13 mean how would you calculate the refund and over what  
14 period?

15           So their opinion is necessarily narrow on  
16 that issue, but I don't think that that really makes  
17 it clear that they're saying that the period from  
18 July 5 to August 1 is okay. They simply didn't  
19 address that completely in their order.

20           JUDGE DIPPELL: All right. I have just  
21 another question sort of to pose to everyone. And  
22 that is, should the Commission be concerned at all  
23 about -- say the Commission decides that refunds are  
24 what's necessary here. Should the Commission be  
25 concerned at all about the next cases in the series of

1 FACs, the sort of stacked tariffs here in these cases  
2 or -- or is that a concern for later in the next FAC  
3 case or in those cases if they come back to the  
4 Commission?

5 MR. WOODSMALL: I don't see how the  
6 decision here will affect the cases that came  
7 subsequent to it that have already been decided and --  
8 I don't believe there are any appeals of those going  
9 on. So I don't see how this decision will affect,  
10 like dominos, subsequent cases.

11 JUDGE DIPPELL: Mr. Zobrist?

12 MR. ZOBRIST: Well, I'm just chuckling  
13 because we did argue a case last week.

14 MR. WOODSMALL: Well, on different issue.

15 MR. ZOBRIST: Well, argued it. I would  
16 answer the question yes, that it is important and that  
17 you ought to take the time to at least allow the  
18 company to present its view on what costs are involved  
19 and the mechanism and so forth.

20 I mean as the Chairman pointed out, this  
21 was -- I don't like the phrase, but this was the  
22 guinea pig, this was the first case out of the chute.  
23 And I just -- I think that it makes sense even though  
24 you're not strictly guided by precedent to, you know,  
25 make certain that we have clear rules as we go

1 forward.

2 MR. WILLIAMS: Commission, in response to  
3 that query, I believe the Utility Consumers Council of  
4 Missouri case stands for the proposition that fuel  
5 clauses are retroactive rate-making and prohibited, at  
6 least with regard to residential consumers, except to  
7 the extent the legislature's permitted them.

8 And the issue in this case deals with the  
9 scope of that permission. I believe the other cases  
10 that are pending before the courts deal with the  
11 authority the Commission has in other respects with  
12 regard to fuel clauses, not just over what period  
13 within a tariff accumulation period you can compare  
14 costs to the base cost.

15 JUDGE DIPPELL: All right. And then,  
16 Mr. Mills, I wanted to ask you one other question  
17 also. And that is, you talked at the very end of  
18 your -- of your reply brief stating that nothing in  
19 section 386.266 or in the Commission's rule supported  
20 Staff's argument that refunds can only be made for  
21 certain specific types of over-collections established  
22 in certain specific types of review.

23 And then you quoted that section of the  
24 statute where it says, An adjustment mechanism shall  
25 require refund of any imprudently incurred costs plus

1 interest at the utility's short-term borrowing rate.

2 And my question was, is that section  
3 really on point when it's talking about imprudently  
4 incurred costs? Would you consider these costs  
5 imprudently incurred?

6 MR. MILLS: Judge, the -- the only -- the  
7 Commission's rules nor the statute defines what  
8 prudence is. And so the standard dictionary  
9 definition of prudence is what would a reasonable  
10 person do under the circumstances. And I think  
11 basically anything that is unlawful is almost, by  
12 definition, imprudent.

13 So I think that you can find, you know,  
14 flowing through unlawful accumulation periods costs  
15 accumulated in an unlawful period to, by definition,  
16 be imprudent. I think -- I think imprudent in this  
17 context means stuff that shouldn't have been in the  
18 fuel adjustment clause in the first place.

19 JUDGE DIPPELL: Okay.

20 MR. ZOBRIST: Can I just add something to  
21 that? I'm not sure I agree with Mr. Mills, although I  
22 haven't thought about it a lot, but I just think you  
23 ought to be careful with that, because this was a --  
24 if this was an error by the Commission, this was a  
25 technical error. It was not an error by the utility

1 of putting in costs that were inappropriate or, you  
 2 know, whatever -- you know, over the budget or things  
 3 like that. So we're not really dealing with the  
 4 utility's conduct here. This is the conduct of the  
 5 Commission approving a tariff. So I'm not sure it's  
 6 the same thing.

7 MR. WILLIAMS: Judge, if I might?

8 JUDGE DIPPELL: Mr. Williams?

9 MR. WILLIAMS: I believe that clause  
 10 needs to be read in the context of the entire  
 11 subsection which refers to conducting prudence reviews  
 12 no less frequently than at 18-month intervals. And  
 13 the Commission, by rule, has set out when prudence  
 14 reviews are to be done.

15 And the Commission has -- Staff has  
 16 conducted a prudence review that encompasses the  
 17 period involved here. And the Commission, I believe,  
 18 has already dealt with it. And it's cited in my  
 19 brief, Case No. EO-2009-0115.

20 JUDGE DIPPELL: Okay. And then,  
 21 Mr. Woodsmall, I had one more question for you also.  
 22 And that is, can you just restate to me again so that  
 23 I have it clear what you believe the authority of the  
 24 Commission to issue refunds in this case is?

25 MR. WOODSMALL: It's found at 386.266.4.

1 It's found in paren 2 where it talks about, Through  
2 subsequent rate adjustments or refunds. It's also  
3 talked about in refunds in response to court decisions  
4 in paren 3.

5 JUDGE DIPPELL: Okay. Okay. Thank you.  
6 I don't have any additional questions. Are there any  
7 other Commissioner questions? I'm not seeing any.

8 COMMISSIONER KENNEY: None here.

9 JUDGE DIPPELL: Did everyone feel that  
10 they had a adequate chance to respond to each of the  
11 arguments? I'm seeing heads nodding yes. Because I  
12 wanted to make sure because this procedure was also a  
13 little unusual and we didn't really have a -- two even  
14 sides so it was difficult to decide how to go forward.

15 In that case then, I believe we -- that  
16 will conclude the oral arguments. Mr. Woodsmall was  
17 going to look up one date I think for the Chairman and  
18 if you can just submit that.

19 MR. WOODSMALL: I will.

20 JUDGE DIPPELL: That would be helpful.

21 CHAIRMAN CLAYTON: What was the date?

22 MR. WOODSMALL: The Empire dates you  
23 asked for.

24 CHAIRMAN CLAYTON: Yeah. Judge, I'm not  
25 going to -- I can figure that out.

1 MR. WOODSMALL: It will take me five  
2 seconds.

3 CHAIRMAN CLAYTON: If you add it -- I can  
4 figure that out.

5 MR. MILLS: Judge, there was also I think  
6 a question pending that I was planing to address, the  
7 question of whether the Report and Order in  
8 ER-2007-0004 discussed in any detail the accumulation  
9 period. And I can file something on that if the  
10 Commission wants me to.

11 CHAIRMAN CLAYTON: I looked through the  
12 report -- forgive me, I looked through the Report and  
13 Order. I don't think it was specifically addressed.  
14 I think it just threw out the vague statement that it  
15 shall have an accumulation period or something like  
16 that. Why don't we just leave it this way that if it  
17 does and you see something that would be helpful, feel  
18 free to file it, but I don't think it's necessary. I  
19 can read the order.

20 JUDGE DIPPELL: Thank you. With that  
21 then, I believe we can conclude this proceeding and we  
22 can go off the record. Thank you.

23 (Off the record.)

24 (WHEREUPON, the oral argument was  
25 adjourned.)

CERTIFICATE OF REPORTER

I, Tracy Thorpe Taylor, CCR No. 939, within the State of Missouri, do hereby certify that the testimony appearing in the foregoing matter was duly sworn by me; that the testimony of said witnesses was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this matter was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

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Tracy Thorpe Taylor, CCR



ORAL ARGUMENT 09-20-2010

<u>\$</u>	<u>2</u>	76:10	31:21 44:17
<b>\$1.50</b>	2 20:9 27:20	<b>29th</b> 28:18,19	68:8 72:15
29:15,20	45:1 56:1,9	53:15,19	74:18 76:11
<b>\$2</b> 29:15,21	97:1	<b>2d</b> 55:13	77:4,11
<b>\$2.9</b> 73:2	<b>2.93</b> 31:11	<b>2nd</b> 61:10	87:12
<b>\$2.93</b> 31:7,21	<b>20</b> 20:7 40:15		89:13,17
<b>\$9</b> 83:23	63:10	<u>3</u>	91:20,21,24
<b>\$9.25</b> 31:13	<b>20.090(1)(I</b>	<b>3</b> 27:20,25	92:3,18
<u>0</u>	43:18	45:11	<b>573.634.2266</b>
<b>07</b> 79:10 85:4	<b>2007</b> 25:3,4,6	56:1,9,19	21:10
<b>08</b> 79:11	29:6 30:14	63:11 66:9	<b>573.635.2700</b>
	31:21,22	97:4	21:13
<u>1</u>	34:5,9 37:25	<b>300</b> 21:12	<b>573.751.4857</b>
<b>1</b> 26:10 29:19	44:3,15,18	<b>301</b> 21:9	21:16
31:21 43:6	46:1,10	<b>30th</b> 46:1,10	<b>573.751.8700</b>
44:18,22	49:15 50:7	59:18	21:19
45:2,6 50:7	52:12,15	60:16,17	<b>585</b> 55:13
52:15 58:18	59:2,8 73:12	61:1,3	<b>5th</b> 25:4
59:11,15,19,	75:11	<b>31</b> 50:7 52:15	37:25
24,25	82:7,19	89:14	41:20,21
60:9,10,18,2	86:20	<b>34</b> 25:7 26:23	42:13
2	<b>2008</b> 25:19	30:24	44:15,22
61:1,4,5,12	27:3 30:9,14	31:6,17	53:15,21
64:17,21	34:6 43:6	68:8,12 72:7	54:1
77:11	68:1 69:5	77:12 87:12	64:12,13,17
87:11,16	73:23 75:11	<b>34-day</b> 31:9	65:19
91:18,21,24	78:3,7,14	74:10	87:3,5,6,16
92:2,3,18	82:8,20	<b>360</b> 21:18	88:3,4,24
<b>11</b> 41:7 43:2	87:24 88:5,9	<b>366</b> 67:11	91:15
<b>1100</b> 21:2	<b>2010</b> 20:7	<b>386.266</b> 38:5	<u>6</u>
<b>1200</b> 21:6	32:4	55:23	<b>6</b> 28:20
<b>124</b> 76:21	<b>2230</b> 21:15	70:4,19	42:15,16
<b>127</b> 76:21	23:7	94:19	44:9
<b>12-month</b>	<b>23rd</b> 43:4	<b>386.266.4</b>	<b>60</b> 31:13 72:7
49:19	<b>240-20.090(1)</b>	96:25	<b>601</b> 21:9
<b>14</b> 85:12	(I 63:6	<b>386.266.4(2</b>	<b>60-day</b> 83:24
86:20	<b>240-20.090(2)</b>	51:15	<b>60-month</b>
<b>17</b> 25:17,24	(I 44:25	<u>4</u>	74:10
85:7	<b>240-20.090(4</b>	<b>4</b> 20:14 22:5	<b>63101</b> 21:13
<b>179</b> 83:2	20:14 22:5	28:11 44:25	<b>64111</b> 21:3
<b>17th</b> 86:9	<b>240-3.161(1)</b>	56:1,9,23	<b>65101</b> 21:19
<b>18</b> 28:13	(G 63:12	63:6,11	<b>65102</b>
85:6,8,13	<b>25</b> 28:16	87:12	21:10,16
<b>18-month</b>	85:9,10	<b>41</b> 55:13	23:8
96:12	<b>25th</b>	<b>428</b> 21:12	<b>67</b> 67:16
<b>1st</b> 25:6	59:6,7,17,21	<b>4520</b> 21:2	<u>7</u>
26:22	<b>26th</b>	<u>5</u>	<b>7</b> 37:15
54:8,10 62:3	59:6,7,17	<b>5</b> 25:5	<u>8</u>
64:14 65:19	<b>27</b> 49:15	26:10,23	<b>816.460.2545</b>
87:19	<b>27th</b> 52:12		
	<b>29</b> 25:3 34:9		

21:3 <b>816.556.2314</b> 21:7 <hr/> 9 <hr/> 9 41:6 <b>9.25</b> 31:14,20 <b>90</b> 31:17 <b>939</b> 20:24 99:3 <hr/> A <hr/> <b>AAO</b> 70:6 71:3 <b>ability</b> 28:23,25 29:7 44:19 78:12,14 99:7 <b>able</b> 60:9 61:4,12 62:11 70:17 82:16 <b>absolute</b> 47:5 <b>absolutely</b> 90:1 <b>abundantly</b> 36:8 <b>ACA</b> 50:12,16 51:12 <b>academic</b> 36:6 <b>accept</b> 64:22 88:24 <b>according</b> 61:1 87:3 <b>Accordingly</b> 52:13 <b>account</b> 87:18 <b>accounting</b> 55:5 69:7,11,19 74:5 80:8 89:13 <b>accumulate</b> 45:16 69:13 <b>accumulated</b> 95:15 <b>accumulating</b> 37:12 <b>accumulation</b> 25:5 43:18,24	45:21 46:15 52:13,25 53:2 54:3,6,13,16 ,21 55:5 58:2,10,17 59:12 60:1 63:19,24 64:6,16 66:17 68:15,18,19 70:9 73:20 74:15 75:14 84:1,7,15 86:13 87:5,6,19 88:2,14,17,1 9,25 89:20 94:13 95:14 98:8,15 <b>acknowledged</b> 54:19 <b>act</b> 83:6 <b>action</b> 47:16 99:10,14 <b>actions</b> 48:2 52:12 <b>actual</b> 37:8 42:12 49:16 63:20 65:21 77:2 <b>actually</b> 30:8,24 41:20 44:24 50:24 62:11 63:9 64:7 67:17 76:8 83:3,17 88:13 90:10 <b>add</b> 66:1 95:20 98:3 <b>addition</b> 31:17 <b>additional</b> 31:5,11 33:14,15,18 47:15 74:21 90:8,9,10,16 97:6 <b>address</b> 23:7 24:19 46:23 58:22 71:19 92:19 98:6 <b>addressed</b> 98:13	<b>addressing</b> 76:22 92:6 <b>adequate</b> 83:13 97:10 <b>adjourned</b> 98:25 <b>adjustment</b> 27:24 28:2 29:2,4 30:5 34:16 35:4 37:18,22 38:15,18,20, 25 40:20 41:10,25 43:5 45:10 47:11 51:21 52:18 53:13,14,18 55:15 56:1,10,14,1 7,22 66:9 67:15,20 68:6,11 72:22 73:3 74:2,19 76:17 78:23,24 79:18 80:6 82:23 85:21 87:11 94:24 95:18 <b>adjustments</b> 20:14 22:5 28:3 36:17 51:16 55:24 57:3 97:2 <b>administrativ e</b> 48:16 <b>adopted</b> 67:17 <b>advance</b> 46:6 54:8 <b>advise</b> 73:13 <b>affect</b> 93:6,9 <b>affected</b> 69:9 <b>afford</b> 71:19 <b>afterward</b> 74:18 <b>Ag</b> 23:14 <b>against</b> 30:5 55:20 72:13 83:10 <b>ago</b> 47:17 <b>AGP/SIEUA</b>	21:14 <b>agreed</b> 58:6 66:15 77:15 <b>agreement</b> 43:22 <b>ahead</b> 22:1 24:15 25:19 35:12,24 40:25 42:17 46:22 58:24 66:3 81:17 <b>Ahuja</b> 68:11 <b>allow</b> 27:23 38:24 47:10 67:13 93:17 <b>allowance</b> 86:17 <b>alone</b> 54:1 <b>already</b> 33:12 59:13 80:22 84:1 93:7 96:18 <b>am</b> 61:5 99:8,11 <b>Ameren's</b> 63:23 84:16 <b>AmerenUE</b> 38:16 62:2 84:20 <b>AmerenUE's</b> 38:20 <b>among</b> 86:12 <b>amount</b> 30:25 38:1 41:19,21 50:21 57:10 <b>amounts</b> 36:4,12 38:6 50:6 71:24 <b>analogous</b> 50:11 <b>analogy</b> 36:13 69:22,23 70:6,11,13 71:2 74:7,8 <b>analysis</b> 24:21,25 75:25 83:13,19,21 <b>anchor</b> 67:22 <b>announcements</b> 78:6
--	--	---	---

<b>annual</b> 56:2 62:24	71:2,7,11,14 75:8,9 76:6,7 77:1,3,17 78:1,8,21 80:21 81:20 82:10 87:4,14,15,2 1 88:6,23 89:9,25 91:3,5 93:8	45:25 59:5,10,15,1 8 76:12	48:20 52:20 54:18 58:18 60:2 93:15
<b>anonymous</b> 67:5		<b>approved</b> 20:15 22:6 29:18 39:4,6,7,8 42:13 46:3 47:12 48:18 53:15,19 60:8,25 61:9 64:18 69:2 76:10,16 79:22 85:3,13,19 89:1	<b>arguendo</b> 88:2 <b>argues</b> 37:23 <b>arguing</b> 52:24 66:11,13 68:10 78:22
<b>answer</b> 43:1 62:14 66:6 93:16			<b>argument</b> 20:6 25:13 57:24 58:4 60:2 62:5 64:4,5,23 80:7,10 88:3 89:24 94:20 98:24
<b>answered</b> 24:15 33:12		<b>approves</b> 45:18	<b>arguments</b> 22:16 24:4 48:20 71:1 91:2,4 97:11,16
<b>answering</b> 79:4	<b>appear</b> 56:1	<b>approving</b> 27:18 39:18,22 40:17 43:8 44:12,14,17 45:9 46:4,9 47:6,13 66:8 96:5	<b>arises</b> 61:21
<b>anybody</b> 79:16	<b>appearance</b> 22:20,21 23:21		<b>articles</b> 47:8 78:5
<b>anymore</b> 81:15	<b>appeared</b> 45:22		<b>aside</b> 80:10,11 83:20
<b>anyone</b> 57:16 86:2	<b>appearing</b> 23:15 99:5		<b>assert</b> 37:25
<b>anyone's</b> 34:22	<b>appears</b> 36:1,23 51:17 53:16		<b>asserting</b> 57:5
<b>anything</b> 26:17 28:4,25 34:24 35:7 42:20 51:24 55:8 58:20 61:17 63:1,3 67:19 68:8 74:17 79:10 84:21 90:14 95:11	<b>appellate</b> 74:25 75:19,24		<b>asserts</b> 36:10
<b>anywhere</b> 88:12,13	<b>applicability</b> 41:5 43:17	<b>approximate</b> 40:7	<b>assessed</b> 30:13
<b>apologize</b> 33:9,12 41:2 42:11 87:1	<b>applicable</b> 53:17,24	<b>approximately</b> 29:20	<b>assigned</b> 22:11
<b>apparently</b> 66:10	<b>application</b> 73:23 91:5	<b>Aquila</b> 22:4 25:15 26:5 28:15 29:10,13,15 44:6,19 50:5,6 52:16 58:9,10 59:10,11,12, 13,25 60:2,17 66:11 73:23 83:6,9 85:10	<b>Association</b> 23:12,14
<b>appeal</b> 43:21 48:14 77:18 92:1,9	<b>applications</b> 49:1	<b>Aquila's</b> 54:5 67:18	<b>assume</b> 77:18 80:15 88:1
<b>appealed</b> 80:16	<b>apply</b> 65:4		<b>assuming</b> 42:13
<b>appeals</b> 22:10 24:22 25:2,7,11,13 26:1,14,18,2 1 28:6 29:3,25 30:1 33:20 34:13,23 44:8 46:16 48:16,20,21, 24 49:5,8,9 53:9 64:10 67:23 68:10,24	<b>appreciate</b> 39:15 79:6	<b>arbitrary</b> 38:22	<b>attached</b> 29:12
	<b>approach</b> 27:7	<b>area</b> 69:8	<b>attachment</b> 42:11,15,16
	<b>appropriate</b> 37:17 46:21 49:4,7 53:12 68:5,23 69:1 74:18	<b>aren't</b> 66:24	<b>attachments</b> 42:14
	<b>appropriately</b> 74:14	<b>arguably</b> 54:13	<b>attempt</b> 67:4
	<b>approval</b> 40:12 46:14 53:3 59:21,23 60:16,17 61:3 75:4 84:14 86:4,9 91:18	<b>argue</b> 36:23 64:7 80:14 93:13	<b>attention</b> 34:23 90:10
	<b>approve</b> 41:9	<b>argued</b> 34:15,21	<b>attorney</b>

21:2,5,8,12 37:5,6 99:12 <b>August</b> 43:4 45:6 60:10 61:5,12 64:9,14,17,2 1 82:18 91:24 92:3,18 <b>authority</b> 20:13 22:4 51:18 55:10,14,19, 21 56:12,21 57:2,8 69:7,11,19 71:19 73:25 74:5 94:11 96:23 <b>authorized</b> 85:20 <b>authorizes</b> 56:24 <b>available</b> 57:14 <b>avenue</b> 49:6 <b>avoided</b> 62:4 <b>away</b> 37:7  <hr/> <b>B</b> <hr/> <b>backlit</b> 32:19 <b>backwards</b> 80:13 <b>base</b> 31:10 39:9 63:21 65:16,22 76:16,17 80:6 94:14 <b>based</b> 54:1 90:9 91:24 <b>basic</b> 79:2 <b>basically</b> 80:7,24 82:25 95:11 <b>basis</b> 41:17 78:10 <b>bear</b> 44:18 <b>became</b> 25:3 37:24 42:4 43:4,5 77:4 <b>become</b> 37:22,23 38:21	41:12,25 53:20 <b>becomes</b> 36:5 37:21 <b>begin</b> 22:19 24:3,7 28:3 37:12 38:7,9,13 53:2 55:6 87:4,7,19 <b>beginning</b> 39:20 41:12 43:24 46:13 62:20 87:2 <b>begins</b> 38:11 45:16 <b>behalf</b> 23:5,18 <b>behaving</b> 59:4 <b>behavior</b> 33:3 <b>behind</b> 32:15,18 <b>behove</b> 91:11 <b>believe</b> 25:16,20 30:2,10 33:20 35:2 36:7,20 44:4 52:24 55:8 70:3 71:4 73:8 75:15 84:5 86:15 87:13,14 88:23 93:8 94:3,9 96:9,17,23 97:15 98:21 <b>believed</b> 44:7 <b>believes</b> 34:3 56:2,4 57:1,9 71:13 <b>believing</b> 60:4 <b>Bench</b> 27:7 28:14 <b>benefit</b> 83:14 <b>benefits</b> 71:22 <b>best</b> 33:3,4 99:7 <b>better</b> 32:19 83:16	<b>betw</b> 63:21 <b>beyond</b> 46:10 47:23 56:12 72:6 <b>bigger</b> 89:14 <b>bill</b> 83:2 <b>bit</b> 75:15 <b>body</b> 55:3 79:14 <b>bolster</b> 49:4 <b>bookkeeping</b> 62:6,11 <b>books</b> 41:16,17 <b>bore</b> 59:22 <b>borrowing</b> 50:8 57:1 95:1 <b>bound</b> 37:20 <b>box</b> 21:15,18 23:7 84:25 <b>brief</b> 28:12 29:12 41:7 42:11,14 43:2 45:11 52:20 66:10 94:18 96:19 <b>briefing</b> 85:17 <b>briefs</b> 22:18 25:11 34:8 44:2 47:25 <b>budget</b> 96:2 <b>building</b> 33:5  <hr/> <b>C</b> <hr/> <b>calculate</b> 27:23 28:23 29:8 67:14 72:3 92:13 <b>calculating</b> 28:4 67:19 <b>calculation</b> 25:6 52:18 69:17 86:19 <b>calculations</b> 43:9 <b>calendar</b> 38:8,9,13,20 ,22 40:22 41:12 42:1	46:13 53:3 56:5 58:3 62:19 <b>capitol</b> 21:12 <b>capricious</b> 38:23 <b>careful</b> 95:23 <b>case</b> 22:2,8,12 23:23 25:15 34:11 36:2,21 37:1,2,11,23 38:16 39:17 40:2,17 43:21 44:7 45:24 48:9 50:3,4,11 56:18,20 57:10 58:6 69:6 70:3 71:15,18 72:6 75:3,4 77:18 81:2,20 82:25 83:3 84:10,18,23, 24 92:10 93:3,13,22 94:4,8 96:19,24 97:15 <b>cases</b> 37:10 38:3 75:7 84:16,20 92:25 93:1,3,6,10 94:9 <b>caught</b> 34:22 <b>CCR</b> 20:24 99:3,17 <b>ceased</b> 89:17 <b>cents</b> 35:3 73:21 <b>certain</b> 40:17 56:6 63:17 93:25 94:21,22 <b>certainly</b> 49:22 51:8 54:22 55:7 57:6 67:6 77:24 82:1,14 83:5 89:22
---	---	---	---

<b>CERTIFICATE</b> 99:1	<b>chose</b> 62:3 75:13	30:20 31:8,14,16,1 9,23 32:12 39:1,21,24 40:4,7,10,21 ,25 42:9,16 43:7,12 49:13,19,25 50:9,17 57:19 74:22 76:15 77:6,13 79:25 80:20 82:21,25 83:18 84:3,8 85:15 86:2,7,11,21 93:20 97:17,21,24 98:3,11	<b>collecting</b> 64:8
<b>certify</b> 99:4	<b>chronology</b> 74:7 84:23		<b>collection</b> 52:13,14
<b>Chairman</b> 20:19 30:18,20 31:4,8,14,16 ,19,23 34:7 39:1,21,24 40:4,7,10,21 ,25 42:7,9,16 43:1,7,12 49:11,13,19, 25 50:9,17 57:17,19 74:20,22 76:5,15 77:6,13,25 79:15,25 80:20 81:19 82:21,25 83:18 84:3,8 85:15 86:2,7,11,21 93:20 97:17,21,24 98:3,11	<b>chuckle</b> 93:22		<b>comes</b> 70:21
	<b>circuit</b> 71:23 80:16 81:21,25		<b>coming</b> 34:17 79:6
	<b>circumstance</b> 39:11 77:22,24		<b>Comley</b> 21:8,9 23:16,17,18
	<b>circumstances</b> 69:18 95:10		<b>comma</b> 45:15,16
	<b>cit</b> 37:2		<b>commenced</b> 61:12
	<b>cite</b> 44:9,23,25 67:4 71:4 74:3		<b>comment</b> 57:24 58:5
	<b>cited</b> 45:11 53:10 55:13 71:15 96:18	<b>Clayton's</b> 43:1	<b>comments</b> 75:16
	<b>City</b> 20:8 21:3,6,10,11 ,13,16,19 22:12 23:7,18,19	<b>cleaner</b> 51:20	<b>Commission</b> 20:1 21:20 22:8 24:10,23 25:8,18,21 28:7,17 29:5,17,22 30:2,6,11 34:1,9,12,14 36:2,4,9,10, 11,15,20,25 37:20 38:2,3,6,14, 17,23 39:17 41:4,5,9,24 42:2 44:11,14 45:3,8,12,18 ,19,24,25 46:3 47:1,5,19,22 ,24 48:15 49:4,7 50:3,5 51:1,18 52:8,11 53:19,23 55:2,13,14,1 8,21 56:24 57:2,7,9 58:13 59:10,15,18 60:8,25 62:18 65:17,19 66:10,15,19, 24 67:6,18 68:14 69:7,13,16,2
<b>chance</b> 24:13 66:25 97:10		<b>clear</b> 36:8 37:12 45:1 47:4 50:1 51:6 53:9 55:11 56:13 62:21 66:15 90:11 92:10,17 93:25 96:23	
<b>change</b> 26:25 27:2 41:14 48:4 50:13 80:8 90:8	<b>clarification</b> 88:8	<b>clearly</b> 26:22 27:22 30:3 35:2 36:14 46:8 63:5 64:11 68:9,11 72:1,23 74:13 77:9 79:21 81:3 89:16	
<b>changed</b> 24:25 25:12 26:24 27:3 28:9,22 76:23 77:4	<b>clarify</b> 87:17	<b>clock</b> 70:12	
<b>changes</b> 28:16 29:14	<b>clarity</b> 39:3	<b>close</b> 41:17 60:10 84:9	
<b>changing</b> 76:12	<b>clause</b> 27:25 29:2,4 30:5 34:17 37:18,22 38:25 40:20 41:10 45:11 47:11 53:13,14,18 56:22 58:13 66:9 67:15,21 68:6,11 73:3 74:2,19 78:23,25 79:18 82:23 83:4 85:21 95:18 96:9	<b>closed</b> 32:18 49:6	
<b>Chapter</b> 63:10,11		<b>closer</b> 83:2	
<b>chapters</b> 63:13		<b>Co</b> 21:4	
<b>characterizat ion</b> 51:10	<b>clauses</b> 38:15 41:25 55:15,22 56:1 94:5,12	<b>collect</b> 70:1,17	
<b>charge</b> 30:13		<b>collected</b> 36:5,12 38:6 50:6 56:15 57:11,12 65:18	
<b>charged</b> 73:15,19	<b>Clayton</b> 20:19		
<b>charges</b> 32:4 73:18			
<b>check</b> 50:14			

<p>0 70:1  71:6,10  72:13,25  73:8,11,16,2  2,24  74:3,6,24  75:11,12,22,  24 76:1,3  77:15,17,21  80:1 81:22  82:2,11 83:6  85:19,22  91:11  92:10,22,23,  24 93:4  94:2,11  95:24  96:5,13,15,1  7,24 98:10  <b>Commissioner</b>  30:4 31:4  32:6,8,12,21  ,23  33:6,8,19  35:6,8,9  42:18,20,22,  23  51:3,5,9,23,  25 52:2  57:21,23  58:22,25  60:6,20,24  61:7,16,20  62:9,17,25  63:2,4,8,9,1  4 64:15,25  65:3,6  66:2,21  81:9,13  83:25  86:23,25  87:8,13,25  88:11,22  89:5,18,23  90:5,13,15,1  7,19,22 91:1  97:7,8  <b>Commissioners</b>  20:21 22:13  23:3  24:11,17  27:8 32:5,15  50:20 75:2  <b>Commission's</b>  25:1,14 26:1  34:10 36:1  41:15 42:3  45:9  48:2,6,7,9,1</p>	<p>0 53:20  55:10 65:11  66:7 78:6  84:5 85:8,12  86:20 94:19  95:7  <b>commonly</b>  57:15  <b>communicated</b>  80:23  <b>company</b> 20:13  22:3,25 24:7  31:2  34:3,15,20  45:15 71:13  73:8 74:14  93:18  <b>company's</b>  20:14 22:6  74:12  <b>compare</b> 39:11  63:21 94:13  <b>comparing</b>  54:14  <b>comparison</b>  64:8,11  65:22  <b>comparisons</b>  63:25  <b>compel</b> 72:16  <b>complaint</b>  72:11  <b>complete</b>  41:22 68:16  <b>completely</b>  92:19  <b>compliance</b>  40:3 84:14  86:8,12  <b>complicated</b>  75:8 78:24  <b>compressed</b>  84:25  <b>concede</b> 77:24  89:6  <b>conceded</b>  58:19  <b>conceding</b>  87:2,9  <b>concern</b> 73:16  93:2  <b>concerned</b></p>	<p>58:12  92:22,25  <b>concerns</b>  67:12 79:7  <b>conclude</b>  97:16 98:21  <b>concur</b> 51:9  <b>conduct</b> 34:1  96:4  <b>conducted</b>  96:16  <b>conducting</b>  96:11  <b>confused</b>  78:22  <b>consider</b> 91:8  95:4  <b>consideration</b>  36:2 62:10  <b>considered</b>  48:24,25  54:4 91:7,13  <b>considering</b>  73:12  <b>consistent</b>  33:21  81:4,23  86:13,15,16  <b>constitute</b>  33:16 92:12  <b>constituted</b>  27:18  <b>construction</b>  54:1  <b>consumer</b> 67:9  68:24  78:9,10  82:10,17  88:5 89:12  <b>consumers</b>  26:2 28:3  29:7,22  30:15 34:16  55:12 67:23  78:2 79:9  82:13  87:22,23  88:9 94:3,6  <b>contain</b> 65:12  <b>contained</b>  26:10,12  27:1</p>	<p>28:17,20  63:10,11  69:4  <b>containing</b>  53:18  <b>contemplates</b>  36:14  <b>contention</b>  70:8  <b>context</b> 59:16  74:15 95:17  96:10  <b>contrast</b>  54:17  <b>controlled</b>  46:14 58:19  <b>controversies</b>  37:11  <b>convenient</b>  62:6  <b>conversation</b>  24:4  <b>convince</b>  49:5,9 54:22  <b>convinced</b>  49:2  <b>convincing</b>  91:9  <b>copies</b> 27:11  28:13 57:15  <b>copy</b> 42:12  <b>correct</b>  31:12,15  36:15 40:23  61:5,6,15  62:22 63:6,7  76:22 87:20  88:10  90:4,12  <b>correction</b>  59:7  <b>cost</b> 20:15  22:6 28:5  29:1 31:7,11  36:19 63:25  64:8 67:20  69:4 70:2  73:20 78:7  88:4 94:14  <b>costs</b> 25:6  26:4 28:24  29:24 37:16  44:20</p>
---	--	--	---

45:6,16 52:14,17 53:11 54:3,15 56:25 63:21 65:16,17,21 68:4,22 69:13 70:22 72:9,17,22 73:17 83:23 93:18 94:14,25 95:4,14 96:1 <b>Council</b> 55:12 94:3 <b>counsel</b> 21:15,17,18 23:4,6 24:5 27:11 32:11 43:21 58:1 61:11 64:23 66:12 70:23 73:7 99:9,12 <b>count</b> 72:13 <b>couple</b> 24:20 30:20 74:23 75:16 85:15 87:1 <b>course</b> 26:15 34:23 <b>court</b> 20:24 22:10,21 24:22 25:2,7,11,13 26:1,14,15,1 7,18,21 27:21 28:6 29:3,25 30:1 33:20 34:13,23 37:11,16 44:8 46:16 47:18,21 48:1,19,21,2 3,24 49:5,8,9 52:5,19 53:8,16,22 55:11 56:11,12,14 64:10 65:11 67:6,16,22 68:9,10,24 71:2,7,11,13 ,16,18,23 72:1 74:17 75:9 76:6,7,25	77:3,16,19,2 5 78:8,16,21 79:24 80:16,21 81:20,21 82:9,16 87:4,14,15,2 1 88:6,23 89:9,25 90:7 91:3,4,7,11, 13,16 97:3 <b>courts</b> 27:21 37:10 47:24 57:6,11 73:13 94:10 <b>court's</b> 37:15 47:3,17 48:10 <b>Courts</b> 37:9 <b>credit</b> 52:17 <b>critical</b> 26:20 68:3 <b>CSR</b> 20:14 22:5 44:25 63:6,11 <b>currently</b> 32:13 <b>curtains</b> 32:18 <b>customer</b> 27:23 28:23 <b>customers</b> 27:4 50:15 51:20 55:16 67:12,18 78:17 <b>cut</b> 50:14 <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <b>data</b> 69:17 70:1,2 73:21 78:7 88:4 <b>date</b> 25:4 28:2 37:13,17 39:19 40:5,7,11,12 43:7 44:18,19 45:17 46:6 47:6,13 49:15 53:11 54:2 58:18 59:19,21 60:3,13	61:4,22,23 64:18,21,24 68:4,8,13,23 69:13 84:15 86:3 87:3 88:24 91:15 97:17,21 <b>dated</b> 25:17 49:15 <b>dates</b> 39:16 40:16,24 64:2 85:4 97:22 <b>David</b> 21:12 23:14 <b>Davis</b> 20:19 90:20,22 <b>day</b> 38:8,9,13,19 ,22 40:22 41:18 42:1 45:16 46:13 55:6 58:3 59:8 61:24 62:19 70:16 85:10 88:25 <b>days</b> 25:7 26:23 30:24 31:6,13,17,1 8 40:15 43:5 46:3 68:9,12 72:7 77:12 86:6 87:12 <b>deal</b> 60:12 73:17 77:1 83:7 94:10 <b>dealing</b> 96:3 <b>deals</b> 56:9,23 94:8 <b>dealt</b> 73:18 96:18 <b>debriefing</b> 25:13 <b>debt</b> 36:18 <b>decades</b> 69:8 <b>December</b> 29:10 <b>decide</b> 28:25 29:23 37:10 55:3 78:12 97:14 <b>decided</b> 25:16 26:21 28:8 35:16 79:15	89:25 93:7 <b>decides</b> 55:4 92:23 <b>decision</b> 26:16,17 27:5,15 30:14 33:22 36:23,24,25 37:12,15 57:16 68:25 74:25 75:1 77:15 78:11 80:15 81:25 82:2,18 85:22 87:15 93:6,9 <b>decisions</b> 25:23 26:3,16 30:16 48:16 79:23 97:3 <b>declined</b> 91:8 <b>decrease</b> 72:12 <b>deemed</b> 84:4 <b>defend</b> 79:13 <b>defined</b> 64:16 68:16 74:16 88:20 <b>defines</b> 45:20 61:22 88:13,17 95:7 <b>definitely</b> 56:11 <b>definition</b> 43:18 45:13 54:20 61:21 62:19,21 64:20 65:4 66:16,17 68:18,19 70:7 89:19 95:9,12,15 <b>degree</b> 78:22 <b>delay</b> 41:10 <b>delegation</b> 33:1 <b>denial</b> 26:13 <b>denied</b> 26:15 <b>deny</b> 26:16 <b>denying</b> 85:23
--	---	---	--

<b>deprived</b> 89:11	52:4,19 53:5 57:17,21	53:24	60:13,19
<b>Deputy</b> 20:18 21:18	58:24 61:19 62:8 63:2	<b>dollar</b> 30:25	61:23 64:1,2
<b>describe</b> 73:11	65:8,24 66:3,23 70:5	<b>dollars</b> 30:8 35:2 73:21	68:4,8,13,23
<b>design</b> 39:25	71:1,8 73:5 74:20	77:2 80:5	74:18 76:11
<b>designated</b> 49:16	81:6,11,14 86:23	<b>dominos</b> 93:10	77:4 89:2
<b>detail</b> 73:25 98:8	90:15,19,23 92:20 93:11	<b>done</b> 37:25 72:4 75:22	<b>eight</b> 25:19
<b>detailed</b> 41:8 79:4	94:15 95:19 96:8,20	83:19 84:6,17 86:4	<b>either</b> 31:2 32:20 50:24
<b>determination</b> 62:18 71:24	97:5,9,20 98:20	92:9 96:14	51:18 72:9
<b>determine</b> 57:10 65:20 87:18	<b>direct</b> 48:13 51:11 90:6	<b>drape</b> 32:15	<b>elaborate</b> 75:18 76:2
<b>determined</b> 64:19	<b>directed</b> 81:3	<b>drapes</b> 33:4	<b>electric</b> 28:1 29:23
<b>determines</b> 55:2 56:14 65:17	<b>direction</b> 36:19 74:13 99:8	<b>due</b> 71:24 91:2	<b>electrical</b> 28:4 29:1 67:19
<b>dicta</b> 37:19	<b>directions</b> 81:21	<b>duly</b> 99:5	<b>electricity</b> 26:4 29:9 69:1
<b>dictionary</b> 95:8	<b>directly</b> 66:6	<b>during</b> 31:10 65:16	<b>else</b> 26:6 35:7 48:19
<b>difference</b> 30:24 31:9,10	<b>discount</b> 87:16	<hr/> <b>E</b> <hr/>	51:24 56:12
40:11 65:15 74:24 86:12	<b>discounted</b> 48:21 91:6	<b>earlier</b> 22:9 44:19	84:22 90:14
<b>different</b> 63:13 93:14	<b>discuss</b> 76:6 80:3	<b>earliest</b> 54:2	<b>emphasis</b> 68:24 82:10 87:21
<b>differently</b> 84:17	<b>discussed</b> 71:5,7 98:8	<b>early</b> 88:5,9	<b>Empire</b> 38:15,16
<b>difficult</b> 25:23 78:25 97:14	<b>discusses</b> 53:22	<b>earthquake</b> 69:24 70:15	39:5,17
<b>dioxide</b> 73:18	<b>discussion</b> 75:15	<b>easier</b> 54:23 62:7	40:2,11,17
<b>Dippell</b> 20:17 22:1,11	<b>discussions</b> 62:15	<b>economic</b> 79:23	43:3 62:2
23:4,9,11,16 ,20 27:9,11	<b>display</b> 81:16	<b>effect</b> 26:22 34:4,6,10,21	84:16,20
30:18	<b>disregarding</b> 53:23	36:22 37:14	97:22
32:1,5,10,17	<b>dissent</b> 79:17	39:20 40:19	<b>Empire's</b> 38:17 39:6
33:6	<b>dissented</b> 75:2	69:5 72:15	<b>employed</b> 99:9,12
35:7,11,19,2 3	<b>District</b> 22:9,10	73:21,22	<b>employee</b> 99:12
42:7,18,22,2 4 43:13	<b>District's</b> 36:23	76:11	<b>encompasses</b> 96:16
46:22 49:11	<b>division</b> 29:15,16	77:2,10,11	<b>Energy</b> 23:13
50:18	<b>doctrine</b> 47:4	78:17 88:24	<b>engage</b> 30:6 41:23
51:2,8,25		89:16	<b>engaged</b> 24:23 25:8 28:7
		<b>effective</b> 25:3,4 29:19	33:10 48:11
		37:17,22,24	79:7
		38:21 39:19	<b>engaging</b> 89:11
		41:13,25	<b>entire</b> 41:11 44:23 45:6
		43:4,5	
		44:15,18	
		45:17 46:1,5	
		47:6,13	
		49:15	
		53:11,15,20	
		54:3,9	
		59:18,21	



<p>96:10</p> <p><b>entries</b> 22:20,21</p> <p><b>entry</b> 23:21</p> <p><b>EO-2008-0216</b> 20:14 22:2</p> <p><b>EO-2009-0115</b> 96:19</p> <p><b>ER-2007-0004</b> 98:8</p> <p><b>ER-2007-004</b> 45:24</p> <p><b>ER-2008-0093</b> 38:16</p> <p><b>error</b> 95:24,25</p> <p><b>essence</b> 78:11</p> <p><b>essentially</b> 69:20 90:3</p> <p><b>establish</b> 45:10 66:8</p> <p><b>established</b> 94:21</p> <p><b>estimated</b> 29:14</p> <p><b>event</b> 56:7,13</p> <p><b>events</b> 56:6 63:17</p> <p><b>eventually</b> 69:5 85:13</p> <p><b>everybody</b> 33:2</p> <p><b>everyone</b> 24:14 43:22,25 46:12,24 83:1 92:21 97:9</p> <p><b>everyone's</b> 24:13</p> <p><b>everything</b> 91:20</p> <p><b>evidence</b> 26:24 33:14,15,18 47:15 50:21,25 65:15,21 75:25 80:3 83:22</p> <p><b>ex</b> 55:11</p>	<p><b>exact</b> 36:25 39:16 86:3</p> <p><b>exactly</b> 50:13 62:2 69:15 70:2,4 75:23 91:4 92:12</p> <p><b>examined</b> 83:15</p> <p><b>example</b> 39:5 63:23</p> <p><b>examples</b> 39:3</p> <p><b>except</b> 64:3 94:6</p> <p><b>excess</b> 47:18</p> <p><b>Excuse</b> 31:19</p> <p><b>exercise</b> 36:6</p> <p><b>Exhibit</b> 29:13</p> <p><b>existing</b> 82:2</p> <p><b>expanding</b> 82:15</p> <p><b>expect</b> 75:23</p> <p><b>expectations</b> 67:9</p> <p><b>expense</b> 41:19</p> <p><b>experiment</b> 84:11</p> <p><b>explain</b> 27:21 30:3,11 33:16 43:25 73:25 84:12 91:11</p> <p><b>explained</b> 47:2</p> <p><b>explanation</b> 34:14</p> <p><b>expressed</b> 28:9</p> <p><b>extent</b> 94:7</p> <p><b>extra</b> 72:10</p> <hr/> <p><b>F</b></p> <hr/> <p><b>FAC</b> 25:19 37:13,14,23, 24 38:8,10,12 41:11 44:17 45:18 46:14,15 47:6,7,13 50:5,14,16,2 3 51:21</p>	<p>52:18,25 53:2 85:3 93:2</p> <p><b>face</b> 45:20</p> <p><b>faced</b> 41:13 64:13</p> <p><b>FACs</b> 93:1</p> <p><b>fact</b> 25:22 26:8 29:13 42:3 44:4,13 47:9,21 48:25 55:20 58:5 66:14 69:25 80:5 92:8</p> <p><b>factor</b> 50:12,14</p> <p><b>factored</b> 86:18</p> <p><b>facts</b> 53:17</p> <p><b>factual</b> 83:12</p> <p><b>failure</b> 92:4</p> <p><b>fall</b> 57:4</p> <p><b>favor</b> 30:5</p> <p><b>February</b> 25:19 29:18 63:24</p> <p><b>feedback</b> 81:1</p> <p><b>feel</b> 24:18 97:9 98:17</p> <p><b>felt</b> 28:7 34:13 89:25</p> <p><b>figure</b> 97:25 98:4</p> <p><b>file</b> 20:13 40:3 49:23 56:17 86:8 98:9,18</p> <p><b>filed</b> 26:25 28:11 29:13 44:15 45:23 47:4 53:24 59:4,8,16 72:11</p> <p><b>filing</b> 28:13 29:11 50:5 85:11</p> <p><b>filings</b> 76:18</p> <p><b>filled</b> 27:3</p> <p><b>final</b> 37:21 42:4 85:2</p>	<p><b>finally</b> 45:22 48:17 72:5</p> <p><b>financially</b> 99:13</p> <p><b>fine</b> 70:1</p> <p><b>finish</b> 40:25</p> <p><b>first</b> 25:18 27:4,16,17 28:11 33:9,14 36:2,3 38:5,7,9,13, 19,21 40:22 42:1 44:1 45:16,17 46:13 53:3,8 54:23 55:4,6 58:3,10 61:24 62:19 66:14 68:7 82:22 83:3 84:11,24 93:22 95:18</p> <p><b>five</b> 59:9 98:1</p> <p><b>fix</b> 49:7</p> <p><b>flow</b> 46:9 50:15 82:16</p> <p><b>flowed</b> 72:3</p> <p><b>flowing</b> 95:14</p> <p><b>focus</b> 25:10,11 26:8,21 34:8 43:16 67:8,11</p> <p><b>focused</b> 25:2,14,22 34:13</p> <p><b>focusing</b> 26:7 34:19 68:12</p> <p><b>follow-up</b> 60:7 84:14</p> <p><b>foot</b> 72:8 89:13</p> <p><b>Footnote</b> 44:9</p> <p><b>foregoing</b> 99:5</p> <p><b>forgive</b> 98:12</p> <p><b>form</b> 35:3</p> <p><b>formal</b> 24:19</p> <p><b>formally</b> 31:3</p>
---	---	---	--

<b>formerly</b> 22:3 <b>formula</b> 76:13 <b>forth</b> 93:19 <b>forward</b> 40:21 94:1 97:14 <b>framed</b> 92:12 <b>frames</b> 56:5 <b>framing</b> 92:4 <b>free</b> 24:18 55:7 98:18 <b>frequently</b> 96:12 <b>front</b> 75:20 <b>fuel</b> 20:15 22:6 27:24 28:2,3 29:2,4 30:5 31:10 34:16 37:18,22 38:15,18,20, 24 40:19 41:9,19,25 43:4 44:20 45:6,10 47:10 53:12,14,18 55:15,22,25 56:21 58:13 66:8 67:15,20 68:5,10 73:3,17 74:2,19 76:17 78:23,24 79:18 80:6 82:22 83:23 85:21 94:4,12 95:18 <b>full</b> 31:13 34:3 <b>fully</b> 56:15 58:23 59:3 <b>functions</b> 76:1 <b>future</b> 50:23 69:14,19 78:13 80:9 <b>fuzzy</b> 75:5 <hr/> <b>G</b> <b>game</b> 80:12	<b>gas</b> 26:5 <b>general</b> 25:15 34:11 55:14 88:18 <b>generally</b> 47:10 <b>gets</b> 55:3 <b>getting</b> 35:12 <b>given</b> 22:20 36:19 56:21 59:13 68:23 74:16 80:13 <b>gives</b> 90:6 <b>glad</b> 76:4 <b>GMO</b> 36:5,23 37:2,3,4,12, 23 38:24 41:6,8,14 42:2,14 44:6,10,15 45:4 47:20 52:16 57:25 75:13,23 76:2 77:15,17 80:2 83:10 86:8 87:2 <b>GMO's</b> 37:22,25 38:2,4 <b>gosh</b> 72:14 <b>govern</b> 63:18 64:19 <b>governed</b> 43:23 <b>governs</b> 54:21 63:15,17 <b>granted</b> 51:11 69:12 <b>Great</b> 32:10 51:23 67:2 <b>Greater</b> 20:13 21:4 22:3,24 <b>ground</b> 70:16 <b>guess</b> 41:18,22 50:10 61:7 <b>guidance</b> 36:24 37:9,10,19 <b>guided</b> 93:24 <b>guinea</b> 83:1	84:10 93:22 <b>Gunn</b> 20:20 32:6,8,21,23 42:18,20 51:3,5,9,23 57:21,23 58:25 60:6,20,24 61:7,16,20 62:9,17,25 81:9,13 86:23,25 87:13,25 88:11,22 89:5,18,23 90:5,13 <b>Gunn's</b> 91:1 <hr/> <b>H</b> <b>half</b> 83:15 <b>handle</b> 74:24 83:16 <b>happen</b> 80:15 <b>happened</b> 57:4 70:3 76:1 <b>happens</b> 52:21 72:21 <b>hate</b> 39:2 <b>haven't</b> 91:13 95:22 <b>having</b> 62:5 83:14 <b>head</b> 49:24 <b>heads</b> 97:11 <b>hear</b> 32:7,8 81:9,11,12 85:18 <b>heard</b> 48:20 <b>hearings</b> 82:15 <b>helpful</b> 34:2,3,25 74:3 75:17 82:5,11 86:22 89:22 97:20 98:17 <b>hereby</b> 52:16 99:4 <b>here's</b> 48:14 75:12 81:1 90:7 91:12 <b>he's</b> 91:2	<b>high</b> 29:15 <b>historical</b> 69:17 <b>hit</b> 70:16 <b>hold</b> 24:12 <b>holding</b> 27:21 29:24 <b>holdings</b> 27:16,17 37:5 <b>holds</b> 37:16 <b>honor</b> 68:18 <b>hoping</b> 59:13 <b>hurricane</b> 70:14 <hr/> <b>I</b> <b>ice</b> 69:9 <b>I'd</b> 27:7 37:7 39:7 51:18 75:17 76:4 <b>idea</b> 31:4 <b>identified</b> 31:1 <b>III</b> 20:19 <b>I'll</b> 24:1 31:24 35:15 42:17 43:10 49:25 57:19 62:1 67:3 <b>I'm</b> 22:11,19 24:7 28:19 35:12,18 42:12,13 46:23 49:13,14 57:14 61:13 63:20 74:23 75:5 76:21 81:7,14,15 85:6 89:5,6 93:12 95:21 96:5 97:7,11,24 <b>impermissible</b> 27:19 <b>implement</b> 20:14 22:4 38:24 47:22 52:17 56:21 83:3 <b>implemented</b>
---	--	--	---

<p>38:15,17 74:4 79:21</p> <p><b>implementing</b> 39:9 74:1</p> <p><b>implication</b> 46:8</p> <p><b>important</b> 24:14 78:1 79:24 93:16</p> <p><b>impossible</b> 88:1</p> <p><b>impression</b> 66:11 76:9 77:3</p> <p><b>imprinted</b> 46:7</p> <p><b>improperly</b> 57:11</p> <p><b>imprudence</b> 84:6</p> <p><b>imprudent</b> 95:12,16</p> <p><b>imprudently</b> 56:25 94:25 95:3,5</p> <p><b>inadequate</b> 34:14</p> <p><b>inappropriate</b> 96:1</p> <p><b>Inc</b> 22:4</p> <p><b>include</b> 32:4 36:18</p> <p><b>included</b> 83:21,24 90:2</p> <p><b>including</b> 42:2</p> <p><b>inclusion</b> 74:19</p> <p><b>incorrect</b> 36:13</p> <p><b>increase</b> 29:14,20</p> <p><b>incurred</b> 37:16 41:20,21 53:11 56:25 68:4,22 94:25 95:4,5</p> <p><b>indicated</b> 45:12 51:22</p>	<p><b>indicates</b> 59:22</p> <p><b>indication</b> 66:18</p> <p><b>Industrial</b> 23:11,13 41:7 58:1 61:10,14</p> <p><b>Industrials</b> 25:20 43:21 44:1</p> <p><b>Industrial's</b> 64:23</p> <p><b>information</b> 26:2 48:22 67:12,13,25 68:1 69:4 70:17 75:6 80:4 82:15,17,19 87:23 90:8,9</p> <p><b>informed</b> 78:2,17 79:9 88:6,8</p> <p><b>inherent</b> 71:19</p> <p><b>initial</b> 28:12,13 29:11 41:24 42:11,14 43:2 85:7</p> <p><b>initiated</b> 77:5</p> <p><b>instance</b> 55:4</p> <p><b>instances</b> 41:8</p> <p><b>instead</b> 37:10 61:1</p> <p><b>intelligent</b> 78:11</p> <p><b>intend</b> 30:6</p> <p><b>interest</b> 32:3,4 50:7 56:25 73:19 79:19 86:19 95:1</p> <p><b>interested</b> 99:14</p> <p><b>interesting</b> 37:3 67:8</p> <p><b>Interestingly</b> 41:4</p>	<p><b>interests</b> 36:18</p> <p><b>interpretatio ns</b> 38:4</p> <p><b>interrupt</b> 24:11,18 39:2,13 70:5</p> <p><b>intervals</b> 96:12</p> <p><b>Intervenors</b> 41:7 58:1 61:10,14 70:24</p> <p><b>involved</b> 62:13 93:18 96:17</p> <p><b>irrelevant</b> 61:8</p> <p><b>issue</b> 36:22 50:14 55:10,19,22 57:7 58:16 65:22 75:14 82:3 89:4,8 92:16 93:14 94:8 96:24</p> <p><b>issued</b> 25:18 29:19 39:17 44:14 45:4,5 46:4 85:22</p> <p><b>issues</b> 22:17,19 36:1 62:12 73:16 79:22 80:3 83:8 86:17 92:5,11</p> <p><b>it's</b> 25:6 26:20 31:13 33:4,12 40:14 42:15 44:3 45:1 49:3,6 51:20 54:22,25 55:7 56:12,21 61:24,25 62:6 63:10,11,12, 16,17 65:9,20 67:8,25 69:22 70:11 71:6,13 80:24 88:14,15</p>	<p>89:14,15 91:19 92:10 95:3 96:5,18,25 97:1,2 98:18</p> <p><b>I've</b> 50:10 73:6 85:15</p> <hr/> <p><b>J</b></p> <p><b>JARRETT</b> 20:20</p> <p><b>JEFF</b> 20:19</p> <p><b>Jefferson</b> 20:8 21:10,13,16, 19 22:12 23:7</p> <p><b>job</b> 79:4</p> <p><b>JR</b> 21:15</p> <p><b>judge</b> 20:18 22:1,11 23:4,9,11,16 ,20 24:16 27:9,11,14 30:17,18 32:1,5,10,17 33:6 35:7,11,19,2 3 39:1 42:7,18,22,2 4 43:13,15 46:22 49:11 50:18 51:2,8,25 52:4,19,23 53:5,7 57:17,21 58:24 61:19 62:8 63:2 65:8,24 66:1,3,23 67:2 68:11 70:5,11 71:1,8 73:4,5 74:20 81:6,10,11,1 4,25 86:23 90:15,19,23, 25 92:20 93:11 94:15 95:6,19 96:7,8,20 97:5,9,20,24 98:5,20</p> <p><b>judgment</b> 67:5</p> <p><b>July</b> 25:4,5 26:10,23</p>
---	--	---	--

<p>31:21 37:25 41:20,21 42:13 44:15,18,20, 22,23 45:7 50:7 52:15 53:15,21 54:1 59:6,11,12,1 4,15,19,21,2 4,25 60:1,9,18,22 61:1,4,10 64:12,13,17 65:19 68:8 69:3 72:15 74:18 76:11 77:4,11 82:18 87:3,5,6,12, 16 88:3,4,24 89:13,14,17 91:15,18,20, 21,24 92:3,18</p> <p><b>jumping</b> 39:15</p> <p><b>June</b> 25:3,6 26:10,22 28:17,18,19 31:20,21 34:9 46:1,10 50:7 52:12,15 53:15,19 54:7,8,10 58:11,14,18 59:7,13,17,1 8 60:16,17 61:1,3 64:5,6 65:19 69:3 76:10 82:18 85:4,12,13 86:20 87:11,16,19 91:18,21 92:2</p> <p><b>justify</b> 47:16</p> <hr/> <p><b>K</b></p> <p><b>Kansas</b> 21:3,6,11 23:19</p> <p><b>Karl</b> 21:2 23:1 33:4</p> <p><b>KCP&amp;L</b> 20:13 21:4,5,7</p>	<p>22:3,24</p> <p><b>Kenney</b> 20:21 32:6 33:6,8 35:6,8,9 42:22,23 51:25 52:2 63:2,4,8,14 64:15,25 65:3,6 66:21 90:15,17 97:8</p> <p><b>Kenney's</b> 66:2</p> <p><b>KEVIN</b> 20:20</p> <p><b>key</b> 45:13 67:12,22</p> <p><b>keying</b> 82:9</p> <p><b>knew</b> 67:24</p> <p><b>knowledgeable</b> 82:10,13 87:22</p> <p><b>known</b> 22:4 44:6</p> <hr/> <p><b>L</b></p> <p><b>L&amp;P</b> 29:16,20</p> <p><b>lack</b> 90:5</p> <p><b>language</b> 53:10,24 55:8 56:3 58:14,15 67:9,11 74:17</p> <p><b>last</b> 25:15 35:20 56:13 68:10 71:17 75:15,16 78:22 81:19 87:11 91:1 93:13</p> <p><b>late</b> 29:18 33:11</p> <p><b>later</b> 43:5 53:16 58:17 70:2,18 93:2</p> <p><b>law</b> 20:18 21:2,5,8,12 22:11 27:14 37:3,20 67:4 69:20</p> <p><b>lawful</b> 91:18 92:2</p> <p><b>lawfulness</b> 48:2</p>	<p><b>lays</b> 60:3</p> <p><b>least</b> 34:15 54:13 55:4,15 58:1,6 60:4 62:18 75:20 81:18 85:2 86:6 93:17 94:6</p> <p><b>leave</b> 98:16</p> <p><b>led</b> 25:7</p> <p><b>leeway</b> 90:6</p> <p><b>legacy</b> 82:14</p> <p><b>legal</b> 83:13</p> <p><b>legislature</b> 79:21</p> <p><b>legislature's</b> 94:7</p> <p><b>less</b> 46:5 96:12</p> <p><b>let's</b> 22:1 35:11 39:5 68:2,21 79:25 80:1,2 88:1</p> <p><b>letter</b> 80:21</p> <p><b>Lewis</b> 21:15 23:6</p> <p><b>likely</b> 80:18</p> <p><b>line</b> 85:18</p> <p><b>lines</b> 85:16</p> <p><b>list</b> 36:3</p> <p><b>literal</b> 74:17</p> <p><b>litigating</b> 25:25</p> <p><b>little</b> 32:19 58:23 75:5 97:13</p> <p><b>LLC</b> 20:24</p> <p><b>logic</b> 42:3</p> <p><b>logical</b> 41:16</p> <p><b>long</b> 75:6</p> <p><b>loop</b> 84:9</p> <p><b>lose</b> 59:11 60:1</p> <p><b>losing</b> 44:19</p> <p><b>lot</b> 75:7 80:24 82:1 95:22</p>	<p><b>Louis</b> 22:14 32:6</p> <hr/> <p><b>M</b></p> <p><b>magic</b> 87:3</p> <p><b>Main</b> 21:2,6</p> <p><b>mandate</b> 55:1 56:7 58:4 87:15</p> <p><b>mandates</b> 55:9</p> <p><b>March</b> 29:19 64:1</p> <p><b>Mark</b> 21:8 23:17</p> <p><b>materials</b> 78:5</p> <p><b>matter</b> 20:13 22:2,16 35:21 46:2 86:5 89:15 99:5,10</p> <p><b>matters</b> 47:12</p> <p><b>may</b> 25:16,17,24 28:13,16 29:6 32:3 33:11 34:17 37:17 42:10 49:15 53:12 54:21 58:5 60:11 61:18 62:5 63:22 65:19 68:5 85:6,7,8,9,1 0 86:9 90:11</p> <p><b>maybe</b> 37:5 60:15</p> <p><b>mean</b> 26:17 27:16 31:1 39:12 41:10 43:25 45:2 49:22 55:4 59:6 63:5 69:2,3 72:7,8,12 76:5 77:9,13 79:12 80:22 82:13 84:24 85:5 89:14 92:13 93:20</p> <p><b>meaning</b> 45:15</p> <p><b>means</b> 26:18 28:4 30:25 55:5,17</p>
---	--	--	--

<p>67:18 95:17  <b>mechanism</b>  20:15 22:7  39:25  56:14,17  73:3 76:17  80:6 82:22  87:11 93:19  94:24  <b>meeting</b> 33:10  <b>mention</b> 32:24  <b>mentions</b>  34:24  <b>merely</b> 36:24  37:4,9 38:1  <b>method</b> 71:25  <b>middle</b>  38:18,25  39:20 40:19  <b>million</b>  31:7,11,13,2  0,21 73:2  83:23  <b>Mills</b> 21:15  23:5,6 25:21  35:16  43:14,15  46:23,25  49:13,18,20  50:2,4,13,18  ,24  51:4,6,10,21  52:4,10,23  54:17 57:25  58:22 59:1  60:14,22  61:6,13 63:7  65:10  66:1,4,22  67:10 71:9  81:24 86:3  90:23,25  94:16  95:6,21 98:5  <b>mind</b> 90:9  <b>minimize</b> 38:1  <b>minute</b> 50:19  <b>minutes</b> 33:11  <b>misreading</b>  47:3  <b>missed</b> 87:1  <b>Missouri</b>  20:2,8,13  21:3,4,6,10,</p>	<p>11,13,16,19,  20 22:3,9,24  23:8 29:21  55:12 94:4  99:4  <b>misspoke</b>  60:15,18  <b>mistakenly</b>  36:9  <b>modify</b> 42:2,4  <b>Moldovan</b>  32:25  <b>moment</b> 70:6  81:7  <b>money</b> 70:16  72:10  <b>monies</b> 56:15  <b>monitor</b> 32:11  <b>Monroe</b> 21:9  <b>month</b>  29:16,21  38:8,9,13,18  ,20,22,25  39:20  40:19,22  41:11,12  42:1  44:20,23  45:7,17  46:14 53:3  54:24 55:6  61:24,25  62:4,20 89:1  <b>monthly</b> 41:17  <b>months</b> 25:19  52:21  <b>morning</b> 35:25  43:16  <b>motions</b> 35:12  44:2 49:1  <b>move</b> 40:21  60:1  <b>MPS</b> 29:15  <hr/> <b>N</b>  <hr/> <b>Nancy</b> 20:17  22:10  <b>narrow</b> 89:9  92:15  <b>Nathan</b> 21:18  23:10</p>	<p><b>natural</b> 26:5  <b>nearly</b> 47:5  <b>necessarily</b>  92:15  <b>necessary</b>  92:24 98:18  <b>necessity</b>  38:8  <b>neither</b> 99:9  <b>Newman</b> 21:9  23:18  <b>newspaper</b>  47:8 78:5  <b>nine</b> 25:19  43:5  <b>nodding</b> 97:11  <b>noise</b> 81:18  <b>none</b> 42:1  47:12 78:7  97:8  <b>nor</b> 95:7  99:9,13  <b>normal</b> 48:14  <b>nothing</b> 26:10  27:1  28:12,18,20  32:16 72:19  73:15 76:13  78:18 94:18  <b>notice</b> 34:16  80:4  <b>November</b> 54:7  58:11 64:6  <hr/> <b>O</b>  <hr/> <b>obligated</b>  68:18  <b>obligation</b>  56:17  <b>obvious</b> 44:3  <b>obviously</b>  76:22  <b>occur</b> 30:9  56:6 63:17  72:1  <b>occurred</b>  30:8,14  73:22 75:7  <b>occurring</b>  83:17</p>	<p><b>odd</b> 77:22  <b>offer</b> 30:22  <b>office</b> 21:17  22:14  23:4,5,7  <b>Oh</b> 89:21  <b>okay</b> 24:16  39:14 41:3  42:16 43:12  53:5 61:16  62:25 63:8  65:6 70:1  71:8 84:8  86:21  88:11,22  91:20 92:18  95:19 96:20  97:5  <b>one-year</b>  49:16  <b>OPC</b> 44:1  66:13  <b>OPC's</b> 61:13  <b>open</b> 32:15  83:22  <b>opening</b> 24:9  30:22  46:18,19  <b>openings</b>  31:25 42:10  <b>Operations</b>  20:13 21:4  22:3,24  <b>opine</b> 91:19  <b>opinion</b> 22:10  25:12,14  26:19 28:9  37:4,8 44:8  45:4,9,23  47:3,4,18  53:10,16,23  65:12  67:7,23 71:7  73:9 74:25  75:19,24  77:1 81:4,23  82:3 87:4,21  89:10 90:1  92:7,15  <b>opinions</b> 85:1  90:2  <b>opportunity</b>  27:5 29:23  30:16 79:23</p>
---	---	---	--

<p>91:8  <b>opposed</b> 63:21  75:4  <b>opposite</b>  66:12 75:23  <b>oral</b> 20:6  22:15 24:4  97:16 98:24  <b>order</b> 24:6  25:3,14,17,1  9,24 26:2,8  27:22 28:18  29:6,7 30:11  33:22  34:9,11  36:3,4,9,10,  11,15,21  39:4,6,18,22  ,25  40:1,11,13,1  7 43:8  44:14,17  45:4,9,18  46:4  47:6,10,13,2  2,24  48:6,7,10  49:14,17  50:5  52:7,10,12,2  0,22 53:4,20  57:6 61:23  65:11,13,23  66:7  69:7,11,20  71:12,14,16,  20 72:2 73:8  75:3 76:24  77:4,10  81:20 84:13  85:5,6,8,12,  20,23,24  86:9,20  87:18 89:17  90:3,6,11  91:16  92:8,19  98:7,13,19  <b>ordered</b> 29:5  40:2 47:19  52:16 71:12  <b>ordering</b> 90:3  <b>orders</b> 25:1  27:18 28:1  45:5 47:25  71:6 74:5  79:22</p>	<p><b>original</b>  23:23 52:20  85:1  <b>originally</b>  64:4  <b>otherwise</b>  38:10 99:13  <b>ought</b> 71:10  93:17 95:23  <b>outcome</b> 99:14  <b>over-</b>  <b>collecting</b>  72:9  <b>over-</b>  <b>collection</b>  72:12,17  <b>over-</b>  <b>collections</b>  36:16 94:21  <b>owe</b> 73:2  <hr/> P  <hr/> <b>P.C</b> 21:9  <b>page</b> 37:15  43:2 45:11  66:9 67:16  <b>pages</b> 41:6  76:21  <b>paid</b> 72:23  <b>par</b> 60:16  <b>paragraph</b>  44:17 71:18  81:20  <b>paragraphs</b>  27:17  <b>pardon</b> 34:12  87:12  <b>paren</b> 97:1,4  <b>participated</b>  23:24  <b>participating</b>  23:23  <b>participation</b>  22:13  <b>particular</b>  43:22 56:7  84:1,7  <b>Particularly</b>  72:18  <b>parties</b>  22:17,22</p>	<p>23:22,24  24:2 30:22  42:17  58:6,20 59:3  64:7  71:20,21  76:7  99:10,13  <b>party</b> 23:20  <b>passed</b> 79:20  <b>past</b> 61:4  90:2  <b>pay</b> 90:10  <b>paying</b> 27:24  28:24 67:14  78:3  <b>pending</b> 94:10  98:6  <b>people</b> 78:21  79:1,23  <b>per</b> 29:20  53:20 88:21  <b>perfect</b> 69:22  70:11,13  74:6,8  <b>perhaps</b> 25:20  56:11 92:4  <b>period</b> 31:9  37:13  43:19,24  44:21  45:15,20,21  46:13,15  49:16,18,19  52:15,25  53:2  54:3,6,13,16  ,21 55:5  58:2,10  59:12 60:1  63:19,20,24  64:6,12,16  65:4,17,20  66:16,17  68:19,20  70:9 74:15  75:14 77:7  80:8  83:20,24  84:1,7,15  86:13  87:5,6,19  88:3,14,15,1  7,19,25  89:20 91:21  92:14,17</p>	<p>94:12,13  95:15 96:17  98:9,15  <b>periods</b> 58:17  86:16 95:14  <b>period's</b>  65:18  <b>permanent</b>  36:12 43:3  <b>permission</b>  94:9  <b>permitted</b>  25:5 33:15  68:9 70:4,19  94:7  <b>person</b> 95:10  <b>personally</b>  62:16  <b>person's</b> 67:5  <b>PGA</b> 50:11  <b>phrase</b> 93:21  <b>pick</b> 39:5  <b>pieces</b> 85:21  <b>pig</b> 83:1  84:10 93:22  <b>places</b>  63:10,12  <b>planing</b> 98:6  <b>pleading</b>  44:24  <b>pleadings</b>  44:9 59:9  <b>Please</b> 42:4  58:25  <b>pleasure</b>  35:22  <b>plus</b> 50:7  56:25 94:25  <b>PO</b> 21:15,18  <b>point</b> 23:25  26:13 27:25  31:1 32:22  33:7 35:4  43:20  46:9,19  47:1,11,16,2  0 49:3,7  50:25 51:14  59:12 62:1  66:12 68:7  70:24 72:20</p>
--	--	---	---

<p>77:25 87:9 88:13,16 89:6,7 95:3 <b>pointed</b> 53:4 74:6 81:24 93:20 <b>points</b> 24:20 27:20 47:21 66:24 <b>policy</b> 25:23 <b>pose</b> 92:21 <b>posed</b> 91:17,25 92:1 <b>position</b> 37:25 38:2 41:14 44:11 54:18,25 61:10,13 63:15,16,18 65:1 66:5,20 74:12 88:9 <b>positions</b> 58:21 83:9 <b>possibility</b> 41:13 <b>possibly</b> 37:5 <b>Post</b> 23:7 <b>potential</b> 35:3 <b>power</b> 20:15 22:6 41:19 <b>precedence</b> 74:4 <b>precedent</b> 38:3 41:4 93:24 <b>preceding</b> 69:13 <b>preference</b> 24:6 <b>prepared</b> 35:18 <b>present</b> 23:2,21,24 24:2 76:7 93:18 <b>presentation</b> 24:19 <b>Presiding</b> 20:17 <b>pretty</b> 44:3</p>	<p>53:9 77:22 79:3 <b>prevent</b> 45:5 69:17,18 <b>previous</b> 38:3 90:11 <b>previously</b> 22:18 37:1 38:14 41:6 45:12 <b>prior</b> 37:13 38:4 41:20 74:25 87:5 <b>probably</b> 62:15 65:14 80:19 88:7 <b>problems</b> 39:10 51:14 <b>procedurally</b> 79:25 80:14 <b>procedure</b> 23:25 97:12 <b>proceed</b> 22:16 <b>proceeding</b> 33:25 35:4 50:22,23 69:14 71:21 98:21 <b>proceedings</b> 20:5 33:21,24 34:2 52:6 81:4,22 <b>process</b> 48:16 49:3 51:12 70:21 72:2 76:13 77:5,6 78:25 80:17 84:12 86:4 <b>Processing</b> 23:14 <b>proforma</b> 26:25 34:5 73:14 <b>prohibited</b> 55:21 94:5 <b>prohibition</b> 53:25 55:20 <b>proper</b> 24:21 69:17 71:25 <b>proposed</b> 28:1,16</p>	<p>41:24 <b>proposition</b> 94:4 <b>prospective</b> 26:3 <b>provide</b> 27:8 37:4,10 40:8,16,24 67:4 <b>provided</b> 37:2,4,11 40:18 <b>provider's</b> 28:1 <b>provision</b> 44:24 45:13 <b>provisions</b> 54:10 <b>prudence</b> 56:23 83:20,23 84:2 95:8,9 96:11,13,16 <b>prudent</b> 84:4 <b>PSC</b> 27:22,25 <b>PSC's</b> 27:18 <b>public</b> 20:1 21:15,17,20 23:4,6 29:21 43:20 55:12 57:25 61:11 64:23 66:12 70:23 73:7,13 78:4 79:18 80:4 82:15 <b>pull</b> 32:17 <b>purchased</b> 20:15 22:6 41:19 <b>pure</b> 41:18 <b>purely</b> 36:5 <b>putting</b> 96:1 <hr/><b>Q</b> <hr/><b>quantify</b> 30:24 <b>query</b> 94:3 <b>question</b> 26:23 37:21 39:15 43:2,16,17</p>	<p>48:17 52:5,24 54:24 60:7,11,21,2 5 61:8 62:14 65:9 66:2,5 77:16 83:23 84:21 88:12 89:14 91:1,17,23,2 5 92:1,3,5,21 93:16 94:16 95:2 96:21 98:6,7 <b>questions</b> 23:3 24:10,12,15, 18 30:19,21 31:6 32:21,24 33:7 42:8,19 49:12 51:3 52:1 57:14,18,22 60:15 65:25 66:24 73:4 74:21,23 79:2 83:19 86:24 90:16,20 97:6,7 <b>quick</b> 30:21 60:7 <b>quicker</b> 51:20 <b>quickly</b> 42:25 83:7 <b>quite</b> 75:8,15 <b>quote</b> 37:16 66:7,15 67:13 <b>quoted</b> 66:9 83:10 94:23 <b>quotes</b> 68:3 <hr/><b>R</b> <hr/><b>raised</b> 47:21 <b>RAM</b> 39:9 84:16 <b>rate</b> 20:14 22:4 24:25 25:12,15 26:23,24 27:2 28:9,22 29:9,13</p>
--	---	---	--

<p>30:13 34:11 36:12 38:17 39:18 40:18 43:3 45:10 47:4 50:8 51:16 53:24 55:24 56:18,20 57:1 66:8 67:17 73:14 76:11,12 95:1 97:2</p> <p><b>rate-making</b> 24:24 25:9 27:19 28:8 30:7,12 33:17 48:11 53:25 55:20 70:21 72:18 73:1,21 78:12 79:8,16 83:8 89:10,11,16 94:5</p> <p><b>ratepayers</b> 31:2 72:3</p> <p><b>rates</b> 29:9 31:10 39:9 57:13 67:24 73:19 76:16,17,23 77:4 78:3 80:6</p> <p><b>rather</b> 35:20 41:23 59:21 60:22</p> <p><b>reach</b> 36:25</p> <p><b>reached</b> 37:1</p> <p><b>real</b> 30:21 37:9 42:25</p> <p><b>reality</b> 58:7</p> <p><b>really</b> 23:24 26:11 34:21 47:2 59:2 70:24 72:6,15 73:2 76:20,21 77:21 79:8 83:1,11 91:25 92:16 95:3 96:3 97:13</p> <p><b>reason</b> 41:15 55:18 56:3 60:3 78:4 91:16 92:7</p>	<p><b>reasonable</b> 95:9</p> <p><b>reasonableness</b> 48:3</p> <p><b>reasoning</b> 42:3</p> <p><b>reasons</b> 44:5 62:3,6 75:12</p> <p><b>recall</b> 34:18 49:20,23 61:22 82:22</p> <p><b>recently</b> 44:13 45:3</p> <p><b>recites</b> 53:17</p> <p><b>recognition</b> 58:2</p> <p><b>recognize</b> 71:11</p> <p><b>recognized</b> 38:14 41:6 45:19 46:8,12,16 58:7 59:23 69:8</p> <p><b>recognizes</b> 52:11</p> <p><b>recollection</b> 58:8,19</p> <p><b>recommendation</b> 45:24 59:5,17</p> <p><b>recommended</b> 45:25 59:20 60:16,17</p> <p><b>recommending</b> 54:9 58:12 59:17</p> <p><b>reconsideration</b> 44:16</p> <p><b>record</b> 22:2 24:1,5 34:4,20 48:24 49:5 82:1,5 83:22 98:22,23</p> <p><b>recording</b> 81:15</p> <p><b>recover</b> 44:20</p> <p><b>recovered</b> 37:18 53:12 68:5</p> <p><b>recovering</b></p>	<p>45:6</p> <p><b>recovery</b> 20:15 22:7 69:18</p> <p><b>redefine</b> 68:14</p> <p><b>redress</b> 71:19,20</p> <p><b>reduced</b> 99:8</p> <p><b>redundant</b> 33:12</p> <p><b>reference</b> 28:2</p> <p><b>referred</b> 44:10 55:25 57:15 62:2</p> <p><b>referring</b> 56:19</p> <p><b>refers</b> 53:23 56:10 96:11</p> <p><b>reflect</b> 24:1</p> <p><b>reflected</b> 86:20</p> <p><b>refund</b> 33:22 35:3 47:22 50:6,10 55:19 56:25 71:12,14,16 72:2,16 87:10 89:24 92:8,12,13 94:25</p> <p><b>refunded</b> 56:16</p> <p><b>refunds</b> 36:3,4,9,10, 11,16,17,21 38:1 41:14 50:15 51:11,17,19 55:11,22,25 57:3,6 90:3 91:16 92:23 94:20 96:24 97:2,3</p> <p><b>regard</b> 27:6 34:4 35:2 70:6,8 94:6,12</p> <p><b>regarding</b> 50:21 54:18 55:25 58:17</p> <p><b>regardless</b></p>	<p>47:8,9</p> <p><b>regulation</b> 68:15 89:15</p> <p><b>regulations</b> 36:8 74:14 88:21</p> <p><b>regulatory</b> 20:18 22:11 45:13</p> <p><b>rehear</b> 26:18</p> <p><b>rehearing</b> 25:21 26:12,14 34:21 44:3 49:1 85:23 91:5</p> <p><b>rejected</b> 28:17 40:2 85:8,11</p> <p><b>rejecting</b> 28:1</p> <p><b>rejects</b> 84:13</p> <p><b>rel</b> 55:11</p> <p><b>related</b> 86:12,17,18 99:9</p> <p><b>relations</b> 78:4 80:4</p> <p><b>relative</b> 99:11</p> <p><b>release</b> 29:19</p> <p><b>relied</b> 88:7</p> <p><b>relief</b> 50:2 51:10</p> <p><b>relieved</b> 56:16</p> <p><b>remaining</b> 52:21</p> <p><b>remand</b> 22:8 23:25 48:13 52:9 65:11 73:9 81:22</p> <p><b>remanded</b> 33:21,25 52:6 71:23 81:21</p> <p><b>remarks</b> 24:9 30:17 46:19 76:22</p> <p><b>remedy</b> 57:6</p> <p><b>reply</b> 22:18</p>
---	--	--	---



<p>29:12 45:11 66:10 94:18 <b>report</b> 25:14,16,24 26:1,8 27:14,15 29:5 34:10 39:4,6,24 40:1,11 43:8 46:4 47:9 49:14,17 75:3 76:24 84:13 85:5,6,19,23 86:9 98:7,12 <b>REPORTED</b> 20:23 <b>reporter</b> 22:21 99:1 <b>REPORTING</b> 20:24 <b>representing</b> 22:23 <b>reputation</b> 79:13 <b>request</b> 44:15 <b>requested</b> 64:3 <b>require</b> 35:5 56:24 94:25 <b>required</b> 20:14 22:5 41:24 56:11,20 61:5 83:1 <b>requirement</b> 43:9 85:20 <b>requires</b> 36:17 38:5,7 54:25 62:24 <b>residential</b> 55:16 94:6 <b>respect</b> 46:25 47:20 48:17 55:15 90:25 91:2,15 <b>respectively</b> 80:22,25 <b>respects</b> 48:7,8 94:11 <b>respond</b> 46:19 67:1 97:10 <b>response</b> 52:8</p>	<p>66:2,4 80:25 90:24 94:2 97:3 <b>responses</b> 67:1 <b>rest</b> 52:25 60:5 <b>restate</b> 96:22 <b>restitution</b> 71:17 72:1,2 <b>restore</b> 71:21 <b>result</b> 27:24 42:6 53:9 55:9 67:14 71:25 76:23 <b>retreat</b> 38:23 <b>retroactive</b> 24:23 25:8 26:9,22 27:19 28:8 30:6,12 33:17 48:11 53:25 55:20 72:18 73:1 77:7,10 78:12,17 79:8,16 83:8 89:10,11,15, 16 94:5 <b>retroactiveness</b> 74:8 <b>return</b> 38:2 <b>revenue</b> 43:8 85:20 <b>review</b> 47:23,24 48:1 94:22 96:16 <b>reviewed</b> 54:8 70:22 <b>reviewing</b> 73:13,25 <b>reviews</b> 48:2 56:24 84:2 96:11,14 <b>rewriting</b> 68:16 <b>rid</b> 81:16 <b>risks</b> 44:19 <b>Ritchie</b> 79:3 <b>road</b> 80:2 <b>ROBERT</b></p>	<p>20:19,21 <b>Roger</b> 21:5 23:1 <b>room</b> 30:2,11 33:2 <b>round</b> 46:24 <b>rule</b> 38:7,24 41:16,24 42:2,4,5,6 43:22 44:23 45:19 46:12 54:24 55:9 56:5 58:4,15,19 62:10 63:5 64:16 68:15,17 70:7 83:2 88:12 89:19 91:24 94:19 96:13 <b>rulemaking</b> 62:14 <b>rules</b> 38:3 41:5 54:20 55:3 80:11,12 93:25 95:7 <b>running</b> 70:12 <b>rush</b> 23:2 31:5 41:8 <b>Ruth</b> 21:9 23:18 <hr/><b>S</b><hr/><b>S.W</b> 55:13 <b>sat</b> 83:14 <b>satisfy</b> 47:17 <b>schedule</b> 85:17 <b>schedules</b> 45:10 66:8 67:17 <b>scope</b> 47:23 57:2 94:9 <b>se</b> 88:21 <b>second</b> 24:24 36:22 51:7 85:11 88:11 <b>seconds</b> 98:2 <b>section</b> 38:5 43:23 51:14</p>	<p>94:19,23 95:2 <b>Sedalia</b> 23:11,13 <b>seeing</b> 23:22 97:7,11 <b>seeking</b> 72:22 <b>seems</b> 24:6 81:7 <b>seen</b> 44:1,2 47:25 <b>Senate</b> 83:2 <b>send</b> 80:20 <b>sense</b> 30:12 93:23 <b>sentence</b> 56:13 66:14 68:2,3,21 <b>separate</b> 60:11,14 76:17 <b>September</b> 20:7 43:6 <b>sequentially</b> 67:3 <b>series</b> 92:25 <b>seriously</b> 79:14 <b>service</b> 20:1 21:20 29:21 55:13 69:8 <b>services</b> 27:6 <b>sets</b> 46:12 56:5 85:2 86:8 <b>setting</b> 39:25 80:13 <b>several</b> 23:22 41:8 47:21 75:8 <b>severe</b> 69:9 <b>shadows</b> 32:16 <b>sheet</b> 76:10,15 <b>sheets</b> 26:9,11 28:10,20 34:19,24 44:18 46:1 47:14 59:5 76:8,19</p>
--	---	---	--

<p>77:20 78:19 82:6,7 83:12 85:1,3,7,11, 13 <b>shoe</b> 72:7 89:12 <b>shortened</b> 54:15 <b>shortening</b> 56:10 <b>shortest</b> 65:18 <b>short-term</b> 36:18 50:8 57:1 95:1 <b>sic</b> 74:10 <b>sides</b> 77:17 97:14 <b>significance</b> 59:23 62:20 72:6 <b>significant</b> 71:13 <b>similar</b> 64:3 65:9 69:6 70:21 <b>similarly</b> 29:17 38:20 67:16 <b>simply</b> 22:22 24:22 26:13 42:5 47:17 48:6,15 52:11 73:20 91:20 92:18 <b>simultaneous</b> 33:10 <b>single</b> 41:18 42:5 <b>sitting</b> 33:2 <b>situation</b> 38:10 <b>Sixty</b> 31:18 <b>smart</b> 78:20 79:1 <b>SO2</b> 86:17 <b>someone</b> 56:11 72:11 <b>sorry</b> 28:19 81:7 85:6 <b>sort</b> 24:4</p>	<p>46:24 60:3 66:25 67:3 76:2 92:21 93:1 <b>sought</b> 25:21 <b>speak</b> 61:14 62:16 84:19 <b>speaker</b> 24:13 <b>specific</b> 27:22 36:19 94:21,22 <b>specifically</b> 44:8 50:2 51:15 73:17 98:13 <b>speculation</b> 41:23 <b>spend</b> 34:18 <b>spending</b> 70:16 <b>St</b> 22:14 32:6 <b>stacked</b> 93:1 <b>staff</b> 21:20 23:9 35:17 36:9 45:22,23,25 46:7 53:6,8 54:8 55:7 56:2,4 57:1,9,18,25 58:12,17 59:4,16,23 60:2,4,16 64:12 66:5,11 70:23 72:11 73:7 74:15 83:19 84:4,25 96:15 <b>Staff's</b> 36:13 54:18,19,25 57:5 63:14,16,18 65:1,12 66:20 94:20 <b>stake</b> 22:17 <b>standard</b> 48:1 95:8 <b>stands</b> 26:19 94:4 <b>start</b> 28:2 40:22 47:5,12</p>	<p>54:21,23 55:6 56:7 58:3 60:9 61:4,5 62:3 64:7,11,13 80:12,16 88:25 <b>started</b> 63:24 64:5 70:15 81:6 <b>starting</b> 56:8 63:25 64:4 <b>state</b> 20:2 22:22 27:22 33:5 55:11 99:4 <b>stated</b> 28:7 <b>statement</b> 24:23 41:1 75:10,20 77:19 98:14 <b>states</b> 45:14 65:23 <b>stating</b> 29:19 94:18 <b>statute</b> 36:14,17,19 38:12 51:17 55:23,25 62:23 94:24 95:7 <b>statutes</b> 36:7 79:14 <b>statutory</b> 53:24 54:1 <b>Steiner</b> 21:5 23:2 <b>step</b> 48:12 <b>stick</b> 26:4 <b>stop</b> 24:22 <b>stopped</b> 81:18 <b>storm</b> 69:9,24 <b>street</b> 21:2,6,9 72:19 <b>strictly</b> 93:24 <b>stuff</b> 47:12 79:5 91:12 95:17 <b>sub</b> 56:1,9,19,23</p>	<p><b>subject</b> 38:6,11 69:14 <b>submit</b> 97:18 <b>submitted</b> 22:18 73:23 85:2,7,14 <b>subsection</b> 45:1 96:11 <b>subsequent</b> 36:16 51:16,21 52:14 93:7,10 97:2 <b>substitute</b> 67:4 <b>suddenly</b> 38:23 41:14 <b>sufficient</b> 26:2 <b>suggest</b> 75:21 80:8 <b>suggests</b> 75:21 <b>Suite</b> 21:9,12 <b>sulfur</b> 73:18 <b>summer</b> 79:10,11 <b>Sunday</b> 44:18 <b>supplement</b> 82:5 <b>support</b> 37:1 <b>supported</b> 94:19 <b>supposedly</b> 26:9 <b>Supreme</b> 26:14,17 71:16 <b>surcharge</b> 71:25 <b>sure</b> 49:21 58:24,25 61:9 81:14 95:21 96:5 97:12 <b>switch</b> 26:5 <b>sworn</b> 99:6</p> <hr/> <p style="text-align: center;">T</p>
---	--	---	--

<b>tab</b> 28:11,20	53:17 54:2	61:6,13,15	66:9
<b>tables</b> 32:11	58:13	63:7 64:3	<b>tornado</b>
<b>tacit</b> 58:1	59:11,15,18,	66:9,17,18	69:10,25
<b>tacitly</b> 58:7	22 69:2,4	68:17 69:14	70:14,16
60:4	73:12,14	70:2,3,11,24	<b>total</b> 31:16
<b>talk</b> 26:11	75:4 78:24	73:3 74:6,12	<b>track</b> 34:17
48:1	84:14	76:21 80:19	62:11
<b>talked</b> 29:3	86:8,12 93:1	81:2	<b>Tracy</b> 20:24
94:17 97:3	<b>Taylor</b> 20:24	82:13,14	99:3,17
<b>talking</b> 29:4	99:3,17	84:21 87:20	<b>train</b> 39:13
39:21	<b>technical</b>	88:10	<b>TRANSCRIPT</b>
44:21,22	79:5 95:25	90:4,12	20:5
50:11	<b>teleconferenc</b>	92:4,9	<b>transfer</b>
63:5,6,20	<b>e</b> 22:14	<b>themselves</b>	26:15,16
76:20 95:3	<b>ten</b> 86:6	26:12 46:7	49:2
<b>talks</b> 43:2	<b>ten-day</b> 46:5	48:23	<b>tried</b> 41:8
51:15 56:2,3	<b>term</b> 50:10	<b>theoretical</b>	<b>true</b> 80:19
97:1	69:1	29:2,4	<b>true-up</b>
<b>tardy</b> 33:9	<b>terms</b> 30:8	<b>theory</b> 52:7	38:6,7,11
<b>tari</b>	70:12 74:7,9	<b>thereafter</b>	45:14,20
<b>ff</b>	76:18 82:14	99:7	46:13 49:18
26:9,11,25	86:16	<b>therefore</b>	51:15
28:10,16,19	<b>TERRY</b> 20:20	30:10 38:12	54:19,20,23
29:18	<b>tested</b> 70:23	41:18	56:3,4,8
34:19,24	<b>testimony</b>	<b>there's</b> 44:24	61:21
37:17 40:13	34:4,25 35:5	55:7,8 56:10	62:19,22
42:12 44:17	99:5,6	60:14 77:18	64:20 65:3
45:10 46:1	<b>thank</b> 24:16	<b>thereto</b> 99:13	66:16 68:16
47:14 52:22	30:18	<b>thereunder</b>	70:8 74:16
53:12,14	35:6,9,25	56:15	77:7 83:20
54:5,6,7,9,1	42:6,7,17,21	<b>they'd</b> 24:11	84:2 88:15
0,15 58:14	,23 43:15	<b>they're</b> 33:2	<b>true-ups</b>
59:5	49:10,11	44:21,22	43:23 56:2,9
63:22,24	50:17	48:23 92:17	62:24
64:1,2,18	51:2,23 52:2	<b>they've</b> 69:25	<b>truly</b> 78:8
66:8 68:5,23	53:7 61:16	83:9	<b>truncated</b>
69:1,3 72:15	62:25 65:7	<b>thorny</b> 52:24	54:12,13
76:8,10,15,1	66:21 67:2	<b>Thorpe</b>	<b>try</b> 47:16
8,19 77:20	71:8 74:20	99:3,17	49:4,5,9
78:19 82:6,7	86:21	<b>threw</b> 98:14	<b>trying</b> 60:18
83:12 85:1	90:13,18,19,	<b>throw</b> 37:7	74:23 81:15
86:4	23 97:5	69:20	<b>turned</b> 32:11
88:20,23	98:20,22	<b>thrown</b> 53:1	<b>two-way</b> 72:19
89:1 94:13	<b>Thanks</b> 31:25	<b>thunderstorm</b>	<b>type</b> 70:7
96:5	<b>that's</b> 25:25	69:9	87:10
<b>tariffs</b> 27:18	29:24	<b>TIGER</b> 20:24	<b>types</b>
28:2 34:5	31:12,16,17,	<b>Tim</b> 23:2	94:21,22
36:12	23 32:3 33:3	<b>today</b> 22:15	<b>typewriting</b>
38:17,18,21	37:8 39:14	24:2 44:5	99:8
39:7,8,18,19	41:3 42:13	75:1	<b>typical</b> 46:5
,22	43:17 44:4	<b>top</b> 49:23	<b>typically</b>
40:2,3,18,20	46:18		
43:3,4,5	47:2,23		
44:12,14	48:15 52:23		
46:5,7,9	56:10 57:2		
47:11			
48:18,23			

<p>36:11 40:15 69:11,12 71:12 92:9 <b>typo</b> 44:24</p> <hr/> <p><b>U</b></p> <p><b>UCCM</b> 57:16 71:15 <b>ultimately</b> 29:18 <b>uncontested</b> 67:25 <b>under-</b> <b>collected</b> 72:21 <b>underlying</b> 41:15 49:17 75:3 76:16,23 85:19,23 <b>undermined</b> 38:2 <b>understand</b> 59:3 77:14,21 78:16,25 79:6 82:12 83:8,10 <b>understanding</b> 31:6 60:5 65:1 79:17 <b>unlawful</b> 48:7,10 52:12,16 56:15 91:22 92:4 95:11,14,15 <b>unlawfully</b> 36:5 65:18 <b>unless</b> 44:17 73:4 <b>unquestionabl</b> <b>e</b> 36:20 <b>unquote</b> 37:18 <b>unreasonable</b> 48:6 <b>unusual</b> 77:23 97:13 <b>upon</b> 82:9 88:7 <b>urge</b> 24:17 67:6</p>	<p><b>urged</b> 59:10 83:6 <b>urging</b> 59:14 91:3 <b>Users</b> 23:11,14 <b>utilities</b> 41:16,17 42:1 54:22 69:23 71:20 <b>utility</b> 27:6 28:1 42:5 55:12 56:16,20 69:10 70:13,20 72:8,14,21 73:1 89:12 94:3 95:25 <b>utility's</b> 36:18 95:1 96:4</p> <hr/> <p><b>V</b></p> <p><b>vacated</b> 52:20 53:4 81:25 <b>vague</b> 98:14 <b>valid</b> 57:12 <b>vehemently</b> 59:14 <b>versus</b> 55:12 70:9 74:10 <b>view</b> 53:8 93:18 <b>violate</b> 38:12 <b>virtue</b> 24:25 30:13 71:18 72:22 73:2 <b>volume</b> 20:9 <b>voted</b> 30:4</p> <hr/> <p><b>W</b></p> <p><b>wait</b> 31:24 35:20 41:11 57:20 <b>waited</b> 38:19 40:20 <b>wasn't</b> 53:14 64:1 71:5 91:25 92:5 <b>week</b> 68:10 78:22 86:6</p>	<p>93:13 <b>we'll</b> 35:23 <b>well-known</b> 74:4 <b>we're</b> 22:12 33:10,15 44:5 47:10 50:10 53:1 62:5 63:4,5 64:4 76:20 84:6 87:8 88:14 96:3 <b>west</b> 27:14 37:3 67:4 <b>western</b> 22:9 36:23 <b>we've</b> 22:15 75:7 80:22 83:14,16 84:1 <b>whatever</b> 35:22 96:2 <b>whenever</b> 53:22 56:21 58:16 <b>whereby</b> 70:22 <b>WHEREUPON</b> 98:24 <b>whether</b> 26:1 30:4 48:18 54:24 57:7 64:4,5 66:5 83:20 92:3 98:7 <b>whom</b> 71:25 <b>williams</b> 21:18 23:10 35:19,21 53:6,7 57:24 58:8 61:18,19,20 62:13,23 63:1,16 64:22 65:2,5,9,13, 25 71:15 83:18,25 84:5 94:2 96:7,8,9 <b>willing</b> 53:1 <b>wish</b> 28:14 <b>witnesses</b> 99:6</p>	<p><b>won</b> 43:21 <b>wondering</b> 42:10 <b>woodsmall</b> 21:12 23:13,14 35:13,14,15, 24,25 39:2,14,23 40:1,6,8,14, 23 41:3 42:25 43:10 44:10 51:7,13 53:10 54:18 61:15 62:1 63:9 67:10 68:3 79:3 93:5,14 96:21,25 97:16,19,22 98:1 <b>work</b> 35:17 <b>worked</b> 75:5 84:12 <b>works</b> 48:16 78:23 <b>written</b> 22:20 <b>wrong</b> 49:6,8,10 75:22 81:1 91:12 <b>wrongly</b> 90:1</p> <hr/> <p><b>Y</b></p> <p><b>yet</b> 35:10 52:2 <b>you'll</b> 37:9 54:5 <b>you've</b> 22:20 31:5 44:1,2 47:25 48:3,4,5</p> <hr/> <p><b>Z</b></p> <p><b>zero</b> 78:18 80:5 <b>zeros</b> 26:10 27:1,3 28:12,18,21 34:19,21 48:18 72:19 73:15 76:14 86:17</p>
---	---	---	---

**Zobrist** 21:2

23:1

24:8,15,16

27:10,13

30:23

31:3,12,15,1

8,20 32:2,14

33:13,19

42:15 46:20

66:25 67:2

70:10 71:4,9

73:6,10

74:22

76:4,19

77:9,23

80:18

81:3,17,19

82:21,24

83:5 84:8,19

85:25

86:7,10,15

87:1,8,20

88:10,19

89:3,8,21

90:4,12 91:2

93:11,12,15

95:20

**Zobrist's**

47:1