

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Order Resetting Hearing

February 20, 2004
Jefferson City, Missouri
Volume 1

In the Matter of the Public Counsel's)
Investigation into Certain Resource)
Planning Decisions of the Empire) Case No.
District Electric Company.) EO-2004-0263

KEVIN THOMPSON, presiding,
Deputy Chief Regulatory Law Judge

REPORTED BY:
Jennifer L. Leibach
ASSOCIATED COURT REPORTERS

A P P E A R A N C E S

JAMES C. SWEARENGEN, attorney at Law
BRYDON, SWEARNEGEN & ENGLAND

312 East Capitol Avenue
Jefferson City, Missouri 65101
(573) 635-7166

FOR: The Empire District Electric Company

RUTH O'NEILL

P.O. Box 2230
Jefferson City, Missouri 65102
(573) 751-1304

FOR: Office of the Public Counsel

DENNIS L. FREY

STEVEN DOTTHEIM

P.O. Box 360
Jefferson City, Missouri 65102
(573) 751-5700

FOR: Staff of the Missouri Public Service
Commission

1 PROCEEDINGS

2 JUDGE THOMPSON: Let's go ahead and go on the
3 record. We are here in the matter of the Public Counsel's
4 investigation into certain Resource Planning decisions of
5 Empire District Electric Company to hear from Counsel on
6 Public Counsel's motion to open case. This is EO-2004-0263.
7 My name is Kevin Thompson, I am the Regulatory Law Judge
8 assigned to preside over this matter, and why don't we take
9 all entries of appearance at this time beginning with Public
10 Counsel, since it's your motion.

11 MS. O'NEILL: Good morning, your Honor and
12 Commission. I'm Ruth O'Neill from the Office of the Public
13 Counsel appearing on behalf of John Coffman and the Office.
14 Our address is PO Box 2230, Jefferson City, Missouri, 65102.

15 JUDGE THOMPSON: Thank you, Ms. O'Neill.
16 Let's hear from the company.

17 MR. SWEARENGEN: Thank you, Judge. Let the
18 record show the appearance of James C. Swearengen, Brydon,
19 Swearengen and England. Our address is 312 East Capital
20 Avenue, Jefferson City, Missouri, appearing on behalf of the
21 Empire District Electric Company.

22 JUDGE THOMPSON: Thank sir. Staff?

23 MR. FREY: Thanks, Judge. Dennis L. Frey
24 appearing on behalf of the Staff of the Missouri Public
25 Service Commission, PO Box 360, Jefferson City, Missouri,

1 65102.

2 JUDGE THOMPSON: Thank you. Ms. O'Neill?

3 MS. O'NEILL: Yes, good morning.

4 MR. FREY: Excuse me, may I add to that as
5 well, Steven Dottheim is also here.

6 JUDGE THOMPSON: Thank you. Mr. Frey, is your
7 microphone turned on?

8 MR. FREY: Steven dottheim is here also
9 appearing for the Staff.

10 JUDGE THOMPSON: Thank you very much. Ms.
11 O'Neill.

12 MS. O'NEILL: Your Honor, I'm here appearing,
13 first of all, on behalf of Mr. Coffman, who's got some -- had
14 an emergency come up with his family this morning, so he was
15 not able to attend.

16 It's my understanding that we have filed a
17 Motion to Open an Investigation case regarding resource
18 planning for Empire District. The reasons for that are set
19 forth in the Motion to Open Case that Mr. Coffman filed
20 previously in this matter. It appears, and my understanding
21 of this is not as complete as it normally would be, your
22 Honor. I found out about an hour ago that I needed to pitch
23 in here, but basically, Public Counsel does have a statutory
24 ability to conduct investigations, file data requests of
25 specific information from regulated utility companies with or

1 without the opening of a formal case; however, there are
2 advantages to having a formal investigation docket opened for
3 purposes of clarifying what the purpose is of data requests
4 and other types of discovery.

5 Also, should there be any disputes regarding
6 the propriety of a data request or any obligation to turn
7 over information, if there is a case filed that is opened for
8 an investigation, we have -- we have a place to go regarding
9 judges, regarding discovery disputes. They can be resolved
10 more quickly as opposed to just an informal investigation
11 where there is no case open. Those getting any discovery
12 matters resolved can be more time consuming.

13 Also, should the investigation produce results
14 that may make it likely that a Complaint would be filed, we
15 could file those results with the Commission in this
16 established case, reference that in the event that a
17 Complaint is opened or that a Complaint case is filed.

18 So for those reasons, we believe that it is --
19 it is appropriate to open an investigation docket. We
20 believe that it is not absolutely necessary for an
21 investigation docket to be opened in order for us to conduct
22 discovery regarding these resource planning issues, but
23 believe that it is procedurally more efficient to do it this
24 way.

25 JUDGE THOMPSON: Thank you, Ms. O'Neill. Any

1 questions from the bench for Ms. O'Neill?

2 COMMISSIONER MURRAY: Yes, I have a couple.

3 Thank you, Judge.

4 JUDGE THOMPSON: Commissioner Murray.

5 COMMISSIONER MURRAY: Good morning, Ms.

6 O'Neill.

7 MS. O'NEILL: Good morning, Commissioner.

8 COMMISSIONER MURRAY: And you may not be able
9 to answer these questions as thoroughly as you would had you
10 been participating in this Motion so far, but can't the
11 Office of Public Counsel bring discovery disputes to us even
12 without it being a contested case?

13 MS. O'NEILL: Yes, we can. In the past, when
14 we have had discovery disputes in matters where there wasn't
15 a case filed, getting the dispute in front of an RLJ or
16 getting it resolved seemed to be a little bit more time
17 consuming than it does in the context of the case, and this
18 seems to be more efficient, that's my understanding of one of
19 the reasons why this was opened.

20 COMMISSIONER MURRAY: Does Public Counsel have
21 any reason to believe that there will be discovery disputes
22 in this matter?

23 MS. O'NEILL: Not yet. Mr. Kind is actually
24 involved in the investigation and he may be able to answer
25 some questions, if I'm not able to.

1 COMMISSIONER MURRAY: Okay. And then my -- my
2 main question, I suppose, is isn't there a better way for the
3 Commission to be informed about the resource planning than
4 putting this in the form of a contested case where the ex
5 parte wall goes up.

6 MS. O'NEILL: I think there's a lot of
7 different ways that these cases can be handled, and it's up
8 to the Commission which way you prefer to proceed.
9 Certainly, the ex parte walls do create some -- could be of
10 concern regarding some investigations.

11 COMMISSIONER MURRAY: And wouldn't opening a
12 docket for a formal investigation, which would be outside of
13 the norm of the way we generally treat companies with their
14 resource planning issues, wouldn't that -- or couldn't it
15 possibly -- wouldn't it be likely to send out a negative
16 message to the investment community as to that particular
17 company?

18 MS. O'NEILL: I'm not real sure how to answer
19 that question, but Mr. Kind has been involved with this case.
20 Maybe he could answer the question, if you want to swear him
21 in.

22 COMMISSIONER MURRAY: Let me ask before we
23 swear in Mr. Kind, if Commissioner Clayton has any questions
24 for you, and we'll maybe shorthand the process that way. I
25 can wait for Mr. Kind until after, however you want to do it.

1 COMMISSIONER CLAYTON: I'd rather ask all my
2 questions at once.

3 COMMISSIONER MURRAY: Okay.

4 COMMISSIONER CLAYTON: I'd -- rather than stop
5 and go. We've only got a short time, so.

6 COMMISSIONER MURRAY: Okay. I'll just ask Mr.
7 Kind briefly then, if you would swear him in, Judge?

8 RYAN KIND,
9 of lawful age, having been produced, sworn and examined on
10 the part of the Office of the Public Counsel testified as
11 follows:

12 JUDGE THOMPSON: State your name for the
13 recorder.

14 MR. KIND: My name is Ryan Kind, and I'm the
15 Chief Energy Economist at the Missouri Office of the Public
16 Counsel.

17 COMMISSIONER MURRAY: Mr. Kind, you've been
18 involved in the Motion here; is that correct?

19 MR. KIND: That's correct.

20 COMMISSIONER MURRAY: And I believe I saw you
21 nod earlier when I asked Ms. O'Neill the question about
22 whether the Office of Public Counsel had any reason to
23 believe that in this particular resource planning matter that
24 Office of Public Counsel would be involved in discovery
25 disputes, and I believe you nodded that you had no reason to

1 believe that.

2 MR. KIND: At this point in time, there has
3 been a generally cooperative attitude in discovery issues on
4 the part of the company.

5 COMMISSIONER MURRAY: Okay. So it's not an
6 instance where you're not getting cooperation and you really
7 need to speed up the process, and therefore you need to open
8 a contested case; is that right?

9 MR. KIND: I don't think that would be the --
10 the main rationale for opening a contested case.

11 COMMISSIONER MURRAY: Okay. And then my
12 question about a message that it might send out to the
13 investment community, if we did treat this company
14 differently than we treat companies normally in the resource
15 planning process, and open a docket that is specifically to
16 investigate their resource planning, wouldn't that send out a
17 negative message?

18 MR. KIND: I don't think that that's
19 necessarily true. I think that from what I can see, the
20 investment community reacts to what they term to be a
21 negative regulatory climate, and I don't think that a close
22 scrutiny of resource planning decisions on the part of
23 utilities actually is -- there would be any linkage between
24 that and a negative or adverse regulatory climate.

25 In fact, it seems like the investment

1 community lately has been looking for greater regulatory
2 scrutiny of resource planning decisions before, and at the
3 time those decisions are made and they seem to perceive that
4 as somehow being something positive until -- as opposed to
5 just deferring the consideration of resource planning
6 decisions and the investments associated with those
7 decisions, deferring those things to a rate case.

8 COMMISSIONER MURRAY: Well, is it Public
9 Counsel's policy -- is it going to be Public Counsel's
10 policy, in the future, that all of these resource planning
11 issues are in the form of contested cases?

12 MR. KIND: I really can't speak to that. I
13 think the decision on what our policy would be in terms of
14 the Commission's procedures for how we would pursue resource
15 planning scrutiny is really set by John Coffman, the Public
16 Counsel, and I think that it was -- I, as a technical
17 witness, did not play a significant role in making that
18 decision.

19 COMMISSIONER MURRAY: So are you unfamiliar
20 with the reasons that Mr. Coffman chose to single out this
21 company for different treatment?

22 MR. KIND: I wouldn't say, you know, I could
23 not say under oath that I don't have any knowledge about that
24 subject, but I think that if I started to speak about that,
25 that our Counsel would probably suggest that there's some,

1 you know, some privileged communications that took place,
2 probably between me and my Counsel that may -- that perhaps I
3 shouldn't be speaking to in this particular form, but I would
4 seek some guidance from my Counsel on that.

5 COMMISSIONER MURRAY: Okay.

6 JUDGE THOMPSON: Mr. Kind, if you know the
7 answer, you must give it. It is Counsel's job to raise any
8 objections that may be necessary, not the job of the witness.
9 Please proceed.

10 MR. KIND: Okay. Could you please repeat the
11 question?

12 COMMISSIONER MURRAY: Okay. I'll rephrase my
13 question a little. Do you know what -- or what is your
14 position as to why we should treat this particular company,
15 in this manner with regard to their resource planning at this
16 time.

17 MS. O'NEILL: Your Honor, and I, just for the
18 record, do feel that I should probably object that this may
19 go to some confidential work product discussion regarding
20 conversations that Mr. Kind and Mr. Coffman have had, so.

21 JUDGE THOMPSON: Well, the question goes to
22 Mr. Kind's knowledge of why Mr. Coffman made the decision to
23 pursue an investigation of resource planning of Empire
24 District Electric Company, and work product -- the work
25 product doctrine protects the facts, the information, the

1 work product that lawyers and people working with lawyers
2 develop in the course of litigation, and the purpose of that
3 doctrine is to prevent an adversary from piggybacking on your
4 work, so I don't see any work product implications in the
5 question on do you know why Mr. Coffman has elected to pursue
6 this with respect to this company.

7 In addition, I don't see any attorney/client
8 privilege implications in order to address that question in
9 case it should rear its ugly head. Mr. Coffman is an
10 Official of the State of Missouri. His job is to protect the
11 interests of consumers in matters of this kind, and in making
12 those decisions, he's not acting as an attorney. He's acting
13 as a State Official with a particular statutory mandate.

14 Consequently, if you know the answer, you must
15 give it.

16 MR. KIND: And I apologize to seem like I'm
17 trying to slow things down or something, but perhaps the
18 Court Reporter could read back the question again to me to
19 make sure I'm answering the question most recently asked.

20 (THE PENDING QUESTION WAS READ BACK BY THE
21 COURT REPORTER.)

22 MR. KIND: Okay. And I -- my answer to that
23 is -- I guess I'll start with just a little bit of
24 background, which is that there have been certain
25 developments in the resource planning process at Empire

1 Electric Company over the last 6 to 12 months that have led
2 me to conclude that there's a need for increased scrutiny of
3 the resource planning process, and decisions that are being
4 made at the company regarding resource planning.

5 I think there's a resource planning meeting
6 that's referenced in our Motion to initiate that the case
7 that took place in somewhere around November or December, I
8 don't have the date on the top of my head, but after that
9 meeting, my concerns that were already present were
10 heightened -- further heightened and I had discussions with
11 Mr. Coffman about those concerns.

12 I did not suggest that because of those
13 concerns I had that there was any particular procedure that
14 should be used as a vehicle for our investigation, and I
15 really have -- don't have any strong personal opinion on that
16 subject. I did express to Mr. Coffman that I felt the need
17 for us to do some discovery after that recent resource
18 planning meeting that I'm referencing, and he appeared to
19 think that the best vehicle for doing that discovery and
20 conducting an investigation would be to open a docket to do
21 so, and if there's anything -- I am really trying to give you
22 a complete answer to your question. If there's some aspect
23 of it that I haven't touched on, please let me know.

24 COMMISSIONER MURRAY: Okay. Have you
25 attempted any discovery so far?

1 MR. KIND: I have. I don't know the exact
2 number of data requests, but probably in the range of 10 to
3 15. It's resulted in receiving significant number of
4 documents from the company, and also resulted in some
5 conversations with a representative of the company about
6 other documents that are voluminous and are subject to
7 confidentiality agreements with other parties that they had
8 some concerns about providing copies to us, so I guess the
9 gist of it is I received a significant amount of
10 documentation that I have begun to analyze, and they have --
11 we have had conversations about further documentation that is
12 available and the way in which access to that documentation
13 may be provided.

14 COMMISSIONER MURRAY: Okay. I believe that's
15 all I have right now, Judge. Thank you.

16 JUDGE THOMPSON: Thank you. Commissioner, do
17 you have any questions for Mr. Kind?

18 COMMISSIONER CLAYTON: I may -- no, I'm not
19 going to have any.

20 JUDGE THOMPSON: All right. You may step
21 down, Mr. Kind. And I believe it's time for Mr. Swearengen
22 to step up and give us his statement.

23 MR. SWEARENGEN: Thank you, Judge. I think
24 one of the problems of having practiced over here as long as
25 I have, and perhaps Mr. Dottheim as well, is that things go

1 full circle.

2 I can remember back I think in the 1970's, if
3 the Public Counsel had sent us some data requests and company
4 some data requests outside the context of a docketed case,
5 the company frequently would say we're not going to answer
6 those until you go to the Commission and open up a docket,
7 and that practice went on for some time, and eventually I
8 think everyone figured out that that was not a real good use
9 of time and resources, and that if the Public Counsel could
10 get the information by opening a docket, there wasn't any
11 reason that the company shouldn't just give the Public
12 Counsel the information without going through that process,
13 and in fact, there's a statute that provides for that. I
14 think it's 386.480.

15 We can provide information to the Commission,
16 to the Staff, to the Public Counsel, and if we believe it's
17 confidential, we can indicate such and it remains
18 confidential, so you can do all that without the necessity of
19 opening up the docket. And really, that's how we think this
20 ought to proceed.

21 Although we're not standing up here pounding
22 the table insisting that you not open the docket, if that's
23 what the Commission decides to do, we can support that. We
24 would think that if there is some sort of unusual
25 circumstance, in this instance, which I don't think there is,

1 we think the Public Counsel should identify that circumstance
2 and explain why the statute that I just mentioned or the
3 ongoing IRP process is not an adequate vehicle to exchange
4 information.

5 The only thing I heard this morning from Ms.
6 O'Neill was the fact that if there's a discovery dispute,
7 there's no -- a docket, there's no vehicle for the Public
8 Counsel to bring that to the attention of the Commission, and
9 I think that's right, but I haven't heard that there is or
10 have been any discovery disputes in this instance. I would
11 hope there would not be.

12 The company is perfectly willing to provide
13 this information to the Public Counsel to the extent it needs
14 to be maintained as confidential. The statute allows for
15 that. If you open a docket, then other parties, presumably,
16 will have the right to intervene and will need to establish a
17 protective order, and those generally work but not always, so
18 there is some potential under those circumstances for this
19 type of information to get out, which is highly sensitive.

20 The bottom line, from our standpoint, is we
21 think there's no need to open a docket and create additional
22 work that's associated with that at this point in time. If
23 the Public Counsel, at some time down the road, has a problem
24 with discovery, they can come back to you and open a docket
25 at that time. If, as a result of the discovery that the

1 Public Counsel undertakes, they find some problem that they
2 think would authorize them to bring a Complaint under the
3 statute about safe and adequate service, then they can do
4 that at that time.

5 That's our position. Once again, I'm not
6 telling you that we're pounding the table and saying don't
7 open the docket, but I think it's probably unnecessary under
8 the circumstances, and as I indicated in my opening comment,
9 it kind of brings us back full circle to where we were in the
10 1970's, and I thought we had gotten away from that.

11 Thank you.

12 JUDGE THOMPSON: Questions, Commissioner
13 Murray?

14 COMMISSIONER MURRAY: Just one brief question,
15 Mr. Swearengen. What is outside of a formal case? What is
16 the procedure if there's a discovery dispute? Is there one?

17 MR. SWEARENGEN: You know, I don't think there
18 is. I am not aware of that, and I indicated that earlier
19 that that's certainly a valid point that if you don't have a
20 docket, that you can go to the Judge. We can just refuse to
21 answer the data questions, and that's what we used to do back
22 in the 70's. We'd say you don't have a case, we're not
23 answering, and they'd file something. They'd have to come up
24 with something, sometimes they wouldn't. Sometimes, they
25 couldn't figure out a theory to bring before the Commission.

1 Other times, they would, but that's not productive. That's a
2 waste of time, and by the same token, once you open a docket
3 and we have formal pleadings that we have to file, and we get
4 other parties in the case, it becomes a little more
5 burdensome, a little more expensive to process, and those
6 costs ultimately are borne by the rate payers, so my position
7 today would be, I don't see a need to do this, but if you all
8 think there's a need to do it and direct it, obviously, we're
9 going to participate.

10 COMMISSIONER MURRAY: Thank you, Jim.

11 MR. SWEARENGEN: Thank you.

12 JUDGE THOMPSON: Commissioner Clayton?

13 COMMISSIONER CLAYTON: I'm going to wait.

14 JUDGE THOMPSON: Okay. Mr. Frey.

15 MR. FREY: Thank you, your Honor. As you're
16 aware, the Staff filed a pleading in this case indicating
17 that the Staff is not opposed to the opening of a docket to
18 investigate or deal with these resource planning issues. We
19 would state, however, that we think, at least at this stage,
20 the preferred way for Staff to proceed would be on an
21 informal basis, that is, to engage in discussions with the
22 company and with OPC in an effort to resolve disagreements
23 and disputes that may arise with regard to the company's
24 current resource plan, and in the event that those -- that
25 all parties are not comfortable with a resolution of the

1 dispute, then perhaps at some later time, we would file for
2 an investigation docket, but our preferred course of action,
3 as I say at this time, would be to proceed informally.

4 We have, and I should say we did, draft and
5 mail a letter to the company, I believe it was dated December
6 5th, laying out some of the concerns that we had about its
7 current resource plan, and inviting a response. And further
8 dialogue with regard to this matter, as far as I know, we
9 haven't yet received such a response, but I do believe that
10 probably the whole process was interrupted by the filing by
11 the Office of the Public Counsel of its request to open a
12 docket in this case. So that's kind of where the Staff is on
13 this issue at this point.

14 JUDGE THOMPSON: Thank you, Mr. Frey.
15 Commissioner Murray?

16 COMMISSIONER MURRAY: Thank you.

17 Mr. Frey, the Order that set this hearing
18 instructed the parties to be prepared to advise the
19 Commission regarding the prepared way for the Commission to
20 conclude the resource planning questions, whether in the
21 context of a contested case or uncontested case or outside of
22 a formal case. What is, in the Staff, the preferred method
23 in general to consider an opinion, the preferred method in
24 general to consider resource planning questions for the
25 Commission to consider them?

1 MR. FREY: Well, as I indicated, we would
2 prefer to resolve these matters informally. We think it can
3 be done in that -- in that manner, and if the Commission
4 would desire to be kept informed, for example, we could make
5 a copy available of the letter that we sent to the
6 Commission. This could be done. And again, if we reach an
7 impasse, of course, we might need to take a different course
8 of action.

9 COMMISSIONER MURRAY: In particular, in
10 keeping the Commissioners informed of the process, do you
11 have -- do you have a recommendation as to the best way to go
12 about that, if it is outside of a formal case?

13 MR. FREY: Will you excuse me for a minute?

14 COMMISSIONER MURRAY: Sure.

15 MR. FREY: Your Honor, Commissioner Murray, we
16 would certainly, if we saw -- if we thought it appropriate,
17 we could certainly file or submit, I should say, a memorandum
18 to the Commission, which we would make available to the
19 company; however, it would have to be very careful in making
20 sure that the information was kept essentially confidential,
21 but that would be at our instance, at the Staff's instance.

22 COMMISSIONER MURRAY: So outside of some
23 unusual circumstance, the Commission really is not a part of
24 the process?

25 MR. FREY: Well, I guess it wouldn't

1 necessarily have to be an unusual circumstance, but there
2 would be -- I guess there would be no formal direction on the
3 part of the Commission or requirement that we do so, no.

4 COMMISSIONER MURRAY: Is there anything that
5 prevents less than a majority of the Commissioners at one
6 time from sitting in on any of the resource planning
7 sessions?

8 MR. FREY: I'll turn that one over to Mr.
9 Dottheim. Thank you.

10 MS. O'NEILL: Commissioner, also, I think that
11 in Mr. Coffman's initial motion to open a case, he does have
12 reference to the Commission's Electric Integrated Resource
13 Planning rules, CSR 240-22.010, et al., and that there is a
14 formal rule process for the Commission to receive
15 information about resource planning issues, but Empire, and I
16 believe most of the other major electric utilities regulated
17 by the Commission were granted variances from that rule, and
18 I think that's where these resource planning meetings come
19 from is from that agreement for a variance.

20 That variance is going to expire, Mr. Kind
21 tells me, sometime in the next year or so, year or two, and
22 then depending on which utility we're talking about, and then
23 the Commission will have a formal procedure for obtaining
24 that information under that rule, but because of the
25 variance, these processes have changed a little bit, and I'm

1 not really familiar with how that happened, but there is a
2 formal means for getting this information once those
3 variances expire.

4 COMMISSIONER MURRAY: I don't know who's at
5 the mike, Jim?

6 MR. SWEARENGEN: Mr. Dottheim has kindly
7 yielded to me about one verbal point that was set out in our
8 pleading that I did not discuss when I was up here, and that
9 is, it leads back to the fundamental question I have.

10 I don't know how much information the
11 Commission ultimately gets about the IRP process. We deal
12 with the Staff and the Public Counsel and perhaps others, but
13 one of the things that we did point out in our Pleading in
14 this case, and are certainly willing to do, we would like the
15 opportunity -- Empire would like the opportunity to come to
16 the Commission and to make a presentation concerning its
17 planning process.

18 It's certainly appropriate to do that to the
19 extent that we would be discussing confidential information.
20 There are ways to resolve that, but that way, the Commission,
21 itself, would know where we are in the process, and if a
22 formal docket is set up to do this, that might, without the
23 consent of the parties, prevent us from being able to do
24 that, so I wanted to make that one point.

25 That's something that we would like the

1 opportunity to do, and that's come to the Commission and let
2 you know what our current thinking is, and those types of
3 presentations have occurred in the past with other companies
4 from time to time, and they generally come into an agenda
5 meeting and discuss about what's going on, and once again to
6 the extent that we need to get into confidential information,
7 there's ways to deal with that, and thank you. Thank you for
8 letting me make that point.

9 JUDGE THOMPSON: Thank you, Mr. Swearngen.
10 Mr. Dottheim.

11 MR. DOTTHEIM: Yes, thank you. To try to add
12 some further detail and maybe even a little historical
13 perspective, which Mr. Swearngen has gone into some. Ms.
14 O'Neill has mentioned Chapter 22, the Resource Planning Rule,
15 and she's also mentioned that that rule, the electric
16 utilities were granted variances from that rule, and that is
17 correct.

18 In fact, there were a couple of cases where
19 that occurred, the utilities -- electric utilities first
20 filed for rescission of that rule after I believe each of the
21 utilities had an individual docket been given variances, but
22 the Staff can put together a packet of materials for the
23 Commission that traces the history, but the cases involved
24 are EO-99-365 and EO-99-544, and it's in EO-99-544 where the
25 Commission granted the electric utilities a variance for

1 their next filing, and this, again, came about because of
2 filing by various utilities in EO-99-365 for rescission of
3 Chapter 22.

4 In Empire's situation, Empire, in the
5 Commission's Order in EO-99-544, which is a May 20, 1999,
6 order, Empire was given a variance from filing on September
7 -- or in September, 2001, and in September, 2004, so each of
8 the utilities were on a three-year cycle for filing in
9 compliance with Chapter 22. So empire's next filing, if one
10 were looking at that cycle, would be September, 2007.

11 Prior to Chapter 22, and Chapter 22 was an
12 effort for a formal manner in which the Commission could
13 review the planning process of the electric utilities, there
14 was no approval that occurred as a result of the resource
15 planning rules. What was reviewed was the planning process
16 itself as opposed to necessarily the end result as to what
17 options the utilities were taking, but the rule is very clear
18 that it was not intended to be as pre-approval or any making
19 -- any rate-making determination.

20 I don't know if these in particular are the
21 cases that Mr. Swearingen was thinking of. I'm not aware,
22 offhand, of a case involving Empire, but back in the 70's,
23 80's, there were two, in particular, investigations of the
24 generation expansion programs of Union Electric Company in
25 Kansas City Power and Light, and the docket number for the

1 generation expansion investigation of Union Electric Company
2 is EO-80-57, and the docket for the investigation of KCPL's
3 generation expansion program is EO-81-101, and those were
4 actually, as indicated, docketed -- docketed cases, and I
5 believe there were formal proceedings, hearings, in the UE
6 case, EO-80-57.

7 Unfortunately, I don't recall, and I didn't
8 have time to go back and take a look whether there were
9 actually formal hearings that occurred in the KCPL docket,
10 which is again EO-81-101. The Staff can put together a packet
11 of these materials for the Commission, if that's what the
12 Commission would like to see.

13 COMMISSIONER MURRAY: I'm not sure if that
14 amount of detail is going to be necessary, but can you tell
15 me the date of the rule?

16 MR. DOTTHEIM: The rule itself, I believe is
17 1994 is when it went -- it was effective May 6, 1993, and
18 it's my recollection that each of the electric utilities went
19 through one cycle of the rule, and it was as the utilities, I
20 believe, were going into the second cycle of the rule that --
21 that waivers were being sought and being granted by the -- by
22 the Commission.

23 Of course, at that time, it was a somewhat
24 different world, it was all occurring in the context of
25 electric restructuring, and activity, even here in Missouri

1 on the state level of looking at electric restructuring, and
2 the Legislature and even with the Commission's own task force
3 on electric restructuring, so one has to place that all in
4 perspective, and even when I try to think back historically,
5 I don't necessarily remember all the forces that were
6 operating at the time and was -- and were possibly factors in
7 the various parties in the Commission's own thinking.
8 COMMISSIONER MURRAY: Mr. Dottheim, the
9 variance that is effective for Empire for the September, '04
10 filing --
11 MR. DOTTHEIM: Yes.
12 COMMISSIONER MURRAY: -- what specifically is
13 that filing?
14 MR. DOTTHEIM: That would have been the filing
15 in compliance with Chapter 22 of the Commission's rules.
16 COMMISSIONER MURRAY: Which they do not have
17 to do in '04, correct?
18 MR. DOTTHEIM: Correct. In fact, again, each
19 -- each of the utilities were granted variances from those
20 filings.
21 COMMISSIONER MURRAY: And information that
22 would be contained in those filings is -- is it your opinion
23 that that same information is available through the informal
24 IRP process?
25 MR. DOTTHEIM: Yes, I think that would be the

1 Staff position. Now, as part of the IRP process, there was
2 -- when the utilities filed for rescission of Chapter 22,
3 there was a resolution, a stipulation and agreement that was
4 worked out, and as part of that stipulation and agreement, it
5 provides the details for the IRP process that presently
6 occurs, which is a semi-annual presentation by each of the
7 electric utilities based upon these specifics of what were
8 agreed to be provided by the utilities as a result of the
9 rescission docket and the variances that were granted. Now,
10 when the companies, if I recall correctly, would file in
11 compliance with Chapter 22, that would be a natural filing,
12 it would be a docketed case.

13 COMMISSIONER MURRAY: Okay. And in your
14 opinion, is the process -- the IRP process working?

15 MR. DOTTHEIM: I don't think that it's -- it's
16 working as well as the Staff would like for it to work.

17 COMMISSIONER MURRAY: In what way?

18 MR. DOTTHEIM: I believe in -- and I would
19 look to members of the Staff who are here today if they might
20 want to address that, but I believe in the level of detail
21 that's involved in the -- in the process, and very possibly
22 the planning process itself and the decision-making process.
23 At the same -- at the same time, and I might -- I might add
24 it's a consideration that -- that the Commissioners, keep in
25 mind, if Chapter 22 were back in place, if the companies had

1 to make filing in keeping with Chapter 22, the Staff, as far
2 as the electric company was concerned, doesn't presently have
3 the resources where the Staff could process those filing in a
4 manner that the Staff would have previously, when the rules
5 were in effect.

6 What occurred in the 90's was that there were
7 a number of individuals on the Commission's Staff in the
8 electric department who left the Commission, and when they
9 left, those positions were transferred to other departments,
10 I think, in particular the telecommunications department, so
11 even if the rule were in effect now, the Staff wouldn't have
12 the resources in place that it previously did to process
13 those filing.

14 COMMISSIONER MURRAY: In today's climate with
15 the resources that are available to Staff, is Staff taking
16 the position here that the IRP process is the best method to
17 consider Empire's resource planning at this time?

18 MR. DOTTHEIM: Well, the Staff hasn't made a
19 recommendation to the Commission to go back to Chapter 22 or
20 that the circumstances are so changed that the Commission
21 should literally, at this time, revisit the waivers to -- of
22 Chapter 22.

23 The Staff is willing to continue to work with
24 the companies on an informal basis and raise questions,
25 concerns, and if there's no resolution of those, then come

1 before the Commission in a more formal filing, and I would --
2 I would mention that when Chapter 22, and I'm sorry to
3 wander, but when Chapter 22 was adopted, if we had to do it
4 over again today, Chapter 22 concentrates very heavily on
5 generation, and in retrospect, is light on transmission, so
6 if we were to make a recommendation today as to whether
7 Chapter 22 should be reinstated, I think we would recommend
8 that it should be revisited and there should be some changes
9 with it, and I would also mention that, and I don't try to
10 get into these other cases, because they involve companies
11 that aren't here today, and they are pending cases before the
12 Commission, matters that would come up in Chapter 22 are also
13 surfacing in other docketed cases.

14 For example, there are -- there's an Aquila
15 rate case pending before the Commission that starts on Monday
16 of next week. There's an issue in that case involving the
17 Aries generating unit. I think the Staff would view that as
18 a Chapter 22 issue. And the Staff also had filed with the
19 Commission for an investigation of Aquila's sale of the Aries
20 unit. The Staff would view that as a Chapter 22 issue.
21 There's a case pending before the Commission involving Union
22 Electric Company that the transfer of Union Electric
23 Company's metroeast facilities and customers to Ameren SIPS.
24 There are facets of that case that the Staff view as resource
25 planning issues, so it's not a situation that because Chapter

1 22 isn't in effect or isn't being followed at the moment
2 because there are variances that these issues are not
3 surfacing in one or more forms before the Commission.

4 COMMISSIONER MURRAY: Has Staff come to the
5 Commission with a recommendation that we revise Chapter 22?

6 MR. DOTTHEIM: No. Again, because there are
7 variances in effect and the Staff has attempted to live
8 within its prior commitments in the form of the stipulation
9 and agreement that previously was entered into which lead to
10 the variances.

11 COMMISSIONER MURRAY: And it would not be
12 timely to revisit Chapter 22 until closer to the time that
13 the variances expire. Is that your position?

14 MR. DOTTHEIM: That is probably the Staff's
15 position at this time. Now, of course, the Commission on its
16 own, can raise that question, and may want to direct the
17 Staff, the Office of Public Counsel, and the -- and the
18 electric utilities and parties that generally intervene in --
19 in matters such as Chapter 22 for their thoughts on -- on
20 that matter or maybe the Commission might want to convene a
21 round table or some -- some form to address that matter. I
22 think there was a round table in November of -- of last year
23 that touched upon those matters.

24 COMMISSIONER MURRAY: And it's Staff's opinion
25 that Chapter 22 does not contain enough about transmission?

1 MR. DOTTHEIM: Yes, that's correct.
2 COMMISSIONER MURRAY: All right. I think I'm
3 going to stop for right now and pass to Commissioner Clayton.
4 JUDGE THOMPSON: Thank you, Commissioner
5 Murray.
6 COMMISSIONER CLAYTON: For right now --
7 COMMISSIONER MURRAY: Well, I might ask some
8 more.
9 COMMISSIONER CLAYTON: -- Ms. O'Neill, can I
10 ask you a couple questions?
11 MS. O'NEILL: Yes.
12 COMMISSIONER CLAYTON: Explain to me your
13 options here today, in light of your Motion, I assume that we
14 could take no action or did I hear deny your motion? That's
15 one option.
16 MS. O'NEILL: I think that's an option, yes.
17 You could grant the option to open the case, let the
18 investigation proceed.
19 COMMISSIONER CLAYTON: We could open a
20 contested case is what you're requesting.
21 MS. O'NEILL: Yes.
22 COMMISSIONER CLAYTON: Okay. Could we -- we
23 could open up a working docket, which would not be a
24 contested case.
25 MS. O'NEILL: I think that's another option

1 that would be available to the Commission.

2 COMMISSIONER CLAYTON: Are there any other
3 options that we have?

4 MS. O'NEILL: Those are probably the ones that
5 I could think of when I was upstairs preparing to come down
6 here this morning is certainly we could proceed with
7 investigation without any type of case.

8 COMMISSIONER CLAYTON: Which would be the same
9 as just denying the motion.

10 MS. O'NEILL: So those are the three Motions.

11 COMMISSIONER CLAYTON: Let's go through each
12 of these scenarios. If there is no docket or we deny the
13 motion or we just not grant it and the thing just lingers.
14 What type of discovery are you able to seek? Any right now?

15 MS. O'NEILL: Yes.

16 COMMISSIONER CLAYTON: This is kind of an
17 education to me because I'm not sure what powers that Staff
18 and OPC have if there is no docket.

19 MS. O'NEILL: Both the Commission, Staff, and
20 Office of Public Counsel do have statutory authority to
21 conduct discovery with or without an open case file.

22 COMMISSIONER CLAYTON: So you can seek
23 information?

24 MS. O'NEILL: Yes.

25 COMMISSIONER CLAYTON: Through data requests.

1 Can you take depositions? I'm not sure whether you do that
2 or not.

3 MS. O'NEILL: We generally, our office
4 generally doesn't do depositions except in certain limited
5 situations usually when there's a formal major case going on.

6 COMMISSIONER CLAYTON: Okay.

7 MS. O'NEILL: So that would be an unusual step
8 for us to take.

9 COMMISSIONER CLAYTON: And then explain to me
10 what happens when you have a dispute on a discovery item.
11 Does anything happen? Is there a way to resolve it?

12 MS. O'NEILL: I think what would probably end
13 up happening, I think Mr. Frey and Mr. Swearngen eluded to
14 in their comments earlier, is should there be a discovery
15 dispute, probably what would have to happen is we would have
16 to come and find a Regulatory Law Judge to discuss that in
17 the context of resolving that dispute. We would probably
18 seek to open a docket of some sort so that those discovery
19 disputes could be addressed.

20 COMMISSIONER CLAYTON: Okay. How would an
21 informal non-docket investigation quote-unquote, for lack of
22 a better term, how would it conclude? Would OPC and the
23 Staff issue a report? What would be the conclusion of that
24 or would there be a conclusion?

25 MS. O'NEILL: There -- well, presumably,

1 whatever investigation was undertaken in connection of that
2 would eventually reach a point where either my office would
3 conclude that further investigation was unnecessary and that
4 the concerns that we had had been either addressed or did not
5 turn out to be.

6 COMMISSIONER CLAYTON: Would you issue a
7 report? Would you submit anything to the Commission or would
8 it just be a matter of satisfying specific -- I don't want to
9 say personal concerns, but concerns that either Staff or your
10 office or that Mr. Coffman have?

11 MS. O'NEILL: I think that probably what would
12 happen at the conclusion of that would be either should those
13 concerns be satisfied, resolved, corrections, if necessary,
14 undertaken probably there would be something brief filed
15 saying we've gone through this investigation and the
16 questions that we have have been addressed.

17 If, on the other hand, the concerns that my
18 office has remain, and there is resistance to addressing
19 those concerns or dispute about what those concerns mean for
20 the customers in the state of Missouri, we might issue
21 something suggesting that we -- it may rise to the level of
22 wanting to file a Complaint, at which point we would probably
23 also file something, yes.

24 COMMISSIONER CLAYTON: Well, I guess if it
25 raised concerns, then OPC would have -- would have the

1 ability to file a motion and open some sort of contested
2 case.

3 MS. O'NEILL: Yes, we could -- we could file a
4 Complaint.

5 COMMISSIONER CLAYTON: Okay. And if your
6 concerns were satisfied, that you are satisfied with the
7 responses and that there are no concerns warranting opening a
8 case, then.

9 MS. O'NEILL: I think we would probably file a
10 brief pleading to the effect that the investigation is
11 concluded and --

12 COMMISSIONER CLAYTON: Satisfied and we're
13 going on.

14 MS. O'NEILL: It's been addressed.

15 COMMISSIONER CLAYTON: With no docket, we
16 would be able to have the Commission have access to this
17 information to each of the parties, there would be no wall,
18 no ex parte contact problems, correct?

19 MS. O'NEILL: That's correct. I do think that
20 there could be a mechanism for filing the results of that
21 investigation, with the Commission at the conclusion or on an
22 interim basis as well.

23 COMMISSIONER CLAYTON: Okay. If we were to
24 open up a contested -- well, let's go to a working docket, an
25 uncontested working docket, other than having a case number

1 to resolve discovery disputes, is there any enhanced
2 discovery tools that Staff or OPC would have available that
3 it wouldn't have outside of an uncontested case?

4 MS. O'NEILL: No, our discovery tools that we
5 have available to us are the same regardless.

6 COMMISSIONER CLAYTON: So that wouldn't make
7 any difference. In a working docket, theoretically, we would
8 have a place to place all of the pleadings and all of the
9 working papers, correct?

10 MS. O'NEILL: That's correct.

11 COMMISSIONER CLAYTON: Is there a need for --
12 for having the working papers of this working docket saved in
13 perpetuity? Are there actual documents that we would
14 actually need or other than just issuing a final report and
15 having a place to file that in EFAS.

16 MS. O'NEILL: I think that depends on the type
17 of investigation, and to be frank with you, I'm not familiar
18 enough with this particular investigation to know the answer
19 to that question, but -- but if I could have just a moment, I
20 may be able to answer it. Mr. Kind does remind me that to
21 the extent that the documents are discovered in this process
22 are relevant regarding a future case, a rate-making case, for
23 example, those documents would be preserved and would be able
24 to be presented in the context of that subsequent case.

25 COMMISSIONER CLAYTON: Regardless of whether

1 there's a docket though?

2 MS. O'NEILL: Right. Right.

3 COMMISSIONER CLAYTON: They can be presented
4 in an uncontested case. Those documents, just because
5 they're filed in EFAS, would have no legal significance other
6 than just for what they are, correct?

7 MS. O'NEILL: Right. They would be -- they
8 would have to be filed in that contested case in the future
9 in order for them to be considered by the Commission in that
10 case.

11 COMMISSIONER CLAYTON: Okay. In a working
12 docket, there most certainly would be some sort of report
13 that would close out the case, and we would still have no
14 wall, we'd have no problems with ex parte communication,
15 correct?

16 MS. O'NEILL: That is my understanding,
17 because there would not be -- unlike a formal case, there
18 would not be a schedule of hearings to be set and that sort
19 of thing.

20 COMMISSIONER CLAYTON: Okay. And then
21 thirdly, in the contested docket, we would have the ex parte
22 wall and then most certainly, we would have the full spectrum
23 of legal pleadings and reports and recommendations, correct?

24 MS. O'NEILL: Yes.

25 COMMISSIONER CLAYTON: Okay. Either you or

1 Mr. Kind made a statement awhile ago regarding developments
2 in the last 6 to 12 months requiring added scrutiny. Now,
3 there was discussion in the media, I guess in your Motion
4 regarding certain media reports regarding this resource
5 planning. Can you give me an idea of what other developments
6 that you were referring to?

7 MS. O'NEILL: That's the primary -- hold on.
8 I think Mr. Kind addressed that.

9 COMMISSIONER CLAYTON: Well, I think he's
10 still under oath and I don't think he needs to come up,
11 unless there's any objection from anybody.

12 MR. KIND: I'm not sure that this is working
13 or if we can get it working, but.

14 COMMISSIONER CLAYTON: I can hear you, that's
15 what's important.

16 MR. KIND: I think that to answer your
17 question, we might have to go in camera, because developments
18 have to do with, you know, the internal decision-making
19 process at Empire, and that decision-making process is
20 revealed through these twice-a-year annual briefing that we
21 get from the utilities, and also has been further revealed
22 through some of their responses to the discovery that I've
23 done, and all that information is confidential.

24 COMMISSIONER CLAYTON: Okay. Well, before, I
25 don't think that's going to be necessary. I'm not -- I don't

1 think we're going to have time for that, but let me ask you,
2 from your position, you want a contested case; is that right?

3 MR. KIND: As a, you know, just as a technical
4 expert, no, that's not right. I tried to clarify when I was
5 on the stand that I really just see the need for scrutiny,
6 and the vehicle for that scrutiny, I don't have an opinion
7 about.

8 COMMISSIONER CLAYTON: So in your opinion, you
9 really don't -- you really don't need a case, do you?

10 MR. KIND: No, I think I tried to indicate
11 that it was more -- that it was just the Public Counsel, John
12 Coffman, following up on my pointing out to him the need for
13 scrutiny. I would say that I'm really -- I'm very unclear
14 about the idea of an informal case versus a formal case, and
15 I can't even recall what an -- what an example of an informal
16 case that I've participated in might be to know whether or
17 not that might be a good process for this.

18 COMMISSIONER CLAYTON: Okay. There are no
19 specific powers that you would have or tools that you would
20 have in a case, there are no added powers that you don't
21 already have outside of the case, correct?

22 MR. KIND: I think that's correct, and I think
23 as Ms. O'Neill pointed out earlier, it might just facilitate,
24 speed up the process of applying those powers to have a case
25 already opened.

1 COMMISSIONER CLAYTON: In the event of a
2 discovery dispute you mean?
3 MR. KIND: Right, right.
4 COMMISSIONER CLAYTON: Okay. Okay. Okay.
5 Did you have an opportunity to see an article in one of the
6 electric publications regarding the decision of Empire not to
7 pursue the plant with CU utilities?
8 MR. KIND: I have seen, probably, a couple of
9 articles to that -- on that subject.
10 COMMISSIONER CLAYTON: Regarding the
11 Commission being opposed to it?
12 MR. KIND: I did see that particular article,
13 yes.
14 COMMISSIONER CLAYTON: Was that included in
15 your analysis of whether a case should be opened? Is that
16 one of the developments in the last 6 to 12 months?
17 MR. KIND: I think that that is -- that that
18 is something that -- that Mr. Coffman definitely took note of
19 -- of that occurring. I don't know if you really -- if the
20 Commission is aware that I think that publication that stated
21 that issue, that article, later issued a correction and the
22 company evidently contacted that publication.
23 COMMISSIONER CLAYTON: So there was a
24 correction?
25 MR. KIND: Said that their spokesperson had

1 been -- that their quotes had not been relayed properly in
2 the article, and the Commission may not be aware of that.

3 COMMISSIONER CLAYTON: Okay. Can you tell me
4 from the -- well, I guess Ms. O'Neill, can you tell me from
5 the perspective of Public Counsel when the last time that OPC
6 sought a case of this sort? Do you know when was the last
7 time, if ever?

8 MS. O'NEILL: I don't know when we have. I
9 know that we've discussed doing that.

10 COMMISSIONER CLAYTON: Okay. You've answered
11 the question. You don't know. Okay. That's it.

12 MR. KIND: I can answer that, I think. I've
13 been involved in all the, you know, reviewing all the
14 resource plans of all the electric utilities in Missouri, and
15 I think that this is -- I'm fairly confident this is the
16 first time that we've requested that a docket be opened and
17 that also this is -- is a unique set of circumstances that --
18 that we felt merited, you know, some -- extra scrutiny.

19 COMMISSIONER CLAYTON: Okay. Mr. Frey.

20 MR. FREY: Yes.

21 COMMISSIONER CLAYTON: Just so that I
22 understand the position of Staff, Staff is not opposed to it,
23 any sort of docket that really doesn't have a preference or
24 would prefer, I think you said, informally to proceed?

25 MR. FREY: Yes.

1 COMMISSIONER CLAYTON: Does informally mean no
2 docket or working docket?
3 MR. FREY: No docket.
4 COMMISSIONER CLAYTON: Okay. Is Staff --
5 MR. FREY: Although, again, we wouldn't be
6 opposed to an establishment of a working docket, as well.
7 COMMISSIONER CLAY: I understand. Would you
8 all be opposed to a contested docket?
9 MR. FREY: No.
10 COMMISSIONER CLAYTON: Okay. You all are
11 awfully agreeable today. Has Staff worked with OPC or has
12 Staff -- I guess what I want to know is is Staff aware of
13 these unique circumstances that OPC refers to?
14 MR. FREY: Well, OPC, of course, has its own
15 view of the situation, but I --
16 COMMISSIONER CLAYTON: Is the Staff aware of
17 the facts that they're referring to?
18 MR. FREY: Yes.
19 COMMISSIONER CLAYTON: And Staff doesn't feel
20 that they're unique enough circumstances to warrant opening
21 up a case?
22 MR. FREY: No.
23 COMMISSIONER CLAYTON: Okay. Does Staff know,
24 and I'm not sure if there's someone lurking around the corner
25 here. He's trying to hide, and I guess either of you may

1 answer this. Without getting into a lengthy history, which I
2 appreciate and I enjoy it, when was the last time that Staff
3 initiated a more formal investigation of this sort?

4 MR. DOTTHEIM: You mean in connection with a
5 resource planning?

6 COMMISSIONER CLAYTON: Resource planning.

7 MR. DOTTHEIM: Commissioner, I'm not sure I
8 know what you're asking. We go through these semi-annual
9 meetings with each of the electric utilities, and if there's
10 something that occurs, some information we become aware of
11 that we want to follow-up on it, we do informally.

12 COMMISSIONER CLAYTON: Informally and without
13 a case?

14 MR. DOTTHEIM: Yes.

15 COMMISSIONER CLAYTON: Has there been any
16 occasion where you haven't been satisfied, and I say you
17 meaning Staff. Staff has not been satisfied with the level
18 cooperation or certain unique circumstances that would
19 require opening up a more formal docket?

20 MR. DOTTHEIM: Not to date. We haven't
21 through the --

22 COMMISSIONER CLAYTON: So the last time was
23 never?

24 MR. DOTTHEIM: Correct.

25 COMMISSIONER CLAYTON: Okay.

1 MR. DOTTHEIM: And in part, that may well be,
2 because there have been other cases filed by those companies
3 that have touched upon our concerns in the context of those
4 other cases, some of which are pending before the Commission.
5 We have raised our concerns, so we've had -- we've had a
6 vehicle in order to raise our concerns without asking for a
7 formal investigation as the Office of Public Counsel has, in
8 this instance. There's been mention in the Pleading we
9 filed, and Mr. Frey has mentioned the December 5 letter that
10 the Staff sent to Empire raising concerns, and there have
11 been subsequent contact discussions between the company and
12 the Staff in respect to that December 5 letter.

13 COMMISSIONER CLAYTON: Last question. Do we
14 have to rule on this Motion to open a case? Could we just
15 let it sit and things proceed informally with -- with a case
16 number, sitting here in the event of any disputes popping up?

17 MR. DOTTHEIM: I think that is a possible way
18 of proceeding, but I would think maybe the Commission would
19 want to indicate that it's not doing anything further in the
20 docket that exists is not an indication that the company need
21 not respond to data requests or inquiries from the Office of
22 Public Counsel or the Staff of the Commission.

23 In part, I think companies that originally
24 would not respond to Public Counsel, the Staff inquiries,
25 data requests, without a docket being in existence, move off

1 of that position, possibly, and in large part, because they
2 learn that if the Staff or the Office of Public Counsel filed
3 to open a docket, then there would be interveners, and that
4 the interveners would then be submitting data requests to the
5 company and everything considered the company would prefer
6 just to respond to the Office of Public Counsel and the Staff
7 as opposed to --

8 COMMISSIONER CLAYTON: I forgot about those
9 pesky interveners. Someone jumped to attention back here.
10 Perhaps Jim.

11 MR. SWEARENGEN: Two points, Judge. One is I
12 can assure you that if the Commission does nothing in this
13 docket right now, that that, in no way, is going to impede
14 the ability of the Public Counsel to continue discovery. We
15 will not take that as a signal that we do not have to answer
16 their discovery requests.

17 Second point is the only thing I really heard
18 today that would justify opening a docket is a discovery
19 dispute, and I can't remember the last time that the Empire
20 District Electric Company got involved in a discovery dispute
21 with the Staff or the Public Counsel. Maybe you can
22 remember, but I think they've been extremely cooperative over
23 the years in all of the cases I've been involved in, data
24 cases, and I'm talking about contested cases, so I don't
25 think it's a real problem.

1 COMMISSIONER CLAYTON: Would Empire object to
2 just letting this case sit in the event of some dispute or
3 would you prefer that this case be resolved and shut down or
4 proceed with whatever type of docket?
5 MR. SWEARENGEN: We don't really care.
6 COMMISSIONER CLAYTON: Would you all care to
7 respond to that discovery dispute? Have there been problems,
8 a history of problems in the past?
9 MR. KIND: I'll respond to that. Public
10 Counsel definitely has a history of problems with discovery
11 with certain companies in Missouri, electric utilities, and
12 sometimes pertaining to resource planning decisions, but my
13 memory of just recent discovery problems over the last few
14 years, they do not include Empire.
15 COMMISSIONER CLAYTON: Okay. Problem or no
16 problem?
17 MR. DOTTHEIM: No problem that we can recall
18 at the moment.
19 COMMISSIONER CLAYTON: That we can recall at
20 the moment? Is that a qualified answer, Mr. Dottheim?
21 MR. DOTTHEIM: I think so.
22 COMMISSIONER CLAYTON: I don't think I have
23 any further questions. We'll see if Commissioner Murray is
24 finished at this time.
25 JUDGE THOMPSON: Commissioner Murray?

1 COMMISSIONER MURRAY: At this time, I may have
2 one or two more. Thank you. I would just like to ask if Mr.
3 Swearengen or Ms. O'Neill would like to add anything or
4 express any comment about Mr. Dottheim's statements regarding
5 Chapter 22 and either the wisdom or necessity of revisiting
6 it.

7 MS. O'NEILL: Commissioner, I, because most of
8 my work has not been with electric and with resource
9 planning, I think Mr. Kind might be a better person to answer
10 that if we have a response.

11 MR. KIND: And I don't think it does any good
12 to point that my way, but I do have a quick response, which
13 is just that I think that there is -- one of the Staff
14 members mentioned a few -- awhile back that, in this morning,
15 that he felt there was the same level of information
16 available through the informal process as was available
17 through the formal process, and I don't agree with that.

18 I think, you know, I would agree maybe with
19 some of the statements that the Staff made about there not
20 being enough attention to transmission issues in the rule
21 that was rescinded, but there was also something that was --
22 had a lot of value in the rule that was rescinded and which
23 we're not getting the same -- anything close to the same
24 level of information in the formal process has to do with the
25 area of risk analysis and utilities doing -- looking at

1 various scenarios for changes, say, in the future costs of
2 environmental compliance and how that might affect the --
3 what their least cost options are.

4 That is just either -- it appears is not being
5 done by the utilities to the same extent that it formally was
6 or they're not providing that analysis to us as part of our
7 brief, and I don't -- I'm not suggesting that they're in
8 violation of the variances and information that they agreed
9 to provide as part of that variance, but we're just not
10 getting as much information in that area, and I see that as
11 being a really serious shortfall.

12 COMMISSIONER MURRAY: You spoke about the
13 rescission of the rule, are you talking about the variances?

14 MR. KIND: Yeah, that's what I meant, yeah.

15 MR. SWEARENGEN: Empire doesn't have a
16 position on the rule at this time. Once again, I would renew
17 our offer to come in and visit with the Commission about
18 Empire's plans. We would be more than happy to do that.

19 COMMISSIONER MURRAY: Thank you. Thank you,
20 Judge.

21 JUDGE THOMPSON: Thank you, Commissioner.

22 COMMISSIONER MURRAY: That's all I have at
23 this time.

24 JUDGE THOMPSON: Does anyone else have
25 anything at this time?

1 MS. O'NEILL: No, your Honor.

2 MR. FREY: I do.

3 JUDGE THOMPSON: Mr. Frey, please.

4 MR. FREY: I would just like to make sure a
5 point is crystal clear on the record. Earlier I said that we
6 had not heard from this company in response from our letters.
7 Mr. Dottheim indicated that we had. He was correct, and I
8 just want to make sure that's clarified for the record. We
9 have had subsequent discussions I now learned, as well as a
10 response to our letter and an expression -- additional
11 information, as well as an expression of willingness to meet
12 on this topic.

13 Thank you.

14 JUDGE THOMPSON: Thank you, Mr. Frey. Anyone
15 else? Mr. Dottheim?

16 MR. DOTTHEIM: Judge, excuse me, I don't know
17 whether you were going to close the hearings or whether you
18 were going to go to that one other item that you had in the
19 order that you issued, Order Setting Hearing, where you said
20 the parties shall also be prepared to advise the Commission
21 how best to protect highly confidential and proprietary
22 information while permitting public discussion at a general
23 session of matters in which there necessarily is great public
24 interest.

25 JUDGE THOMPSON: Well, thank you for reminding

1 me, Mr. Dottheim, and do you have any advice to tender, at
2 this time?

3 MR. DOTTHEIM: I do have a document.

4 JUDGE THOMPSON: Yes.

5 MR. DOTTHEIM: And that the Commissioners may
6 want to review. It's -- it may provide some guidance. It is
7 a Findings of Fact and Conclusions of Law in judgment in the
8 Cole County circuit Court from 1993 when, in a Southwestern
9 -- in a Staff Earnings Complaint Case against Southwestern
10 Bell, the Commission reclassified and declassified, I believe,
11 certain information regarding yellow pages, and Southwestern
12 Bell obtained a temporary restraining order blocking the
13 release or reclassification or declassification of that -- of
14 that information, and a permanent injunction, I believe, was
15 ordered by the court and the discussion of the law that is
16 contained in that Circuit Court judgment that, again, it's
17 not a Western District Court of Appeals or Supreme Court
18 decision, but a Circuit Court decision, it is a discussion of
19 the law regarding proprietary information, highly
20 confidential, trade secret, economic information.

21 The Commissioners might find that of interest
22 in taking a look at, in regards to this issue. There is a
23 short paragraph for Chapter 610 itself is even mentioned, so
24 on that topic, I have copies of that Findings of Fact and
25 Conclusions of Law in judgment, if the Commissioners, you

1 Judge, would like copies.

2 JUDGE THOMPSON: I think that would be useful.
3 Do you have copies for Counsel?

4 MR. DOTTHEIM: Yes.

5 JUDGE THOMPSON: Very well. Judge Mills is
6 threatening to come down and throw my body out of this room.
7 I wonder if anyone else has anything at this time? We have
8 another hearing that is getting ready to begin. Since
9 there's nothing further, we will adjourn at this time. Thank
10 you all very much.

11 WHEREUPON, the recorded portion of the
12 prehearing conference was concluded.

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