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6 TRANSCRIPT OF PROCEEDINGS
7 Oral Argument
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12 In the Matter of the)
Application of Union Electric)
13 Company d/b/a Ameren Missouri)
For the Issuance of an) File No.
14 Accounting Authority Order) EU-2012-0027
Relating to its Electrical)
15 Operations)

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DANIEL R.E. JORDAN, Presiding,
18 Senior REGULATORY LAW JUDGE.
19 STEPHEN M. STOLL,
WILLIAM KENNEY,
20 DANIEL Y. HALL,
COMMISSIONERS.

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

2 (WHEREUPON, the oral argument began
3 at 1:01 p.m.)

4 JUDGE JORDAN: Good afternoon,
5 everyone. The Commission is calling the case in
6 File No. EU-2012-0027, in the matter of the
7 application of Union Electric Company, doing
8 business as Ameren Missouri for the issuance of an
9 Accounting Authority Order relating to its
10 electrical operations.

11 We're here for oral arguments on the
12 merits of the application as requested in Ameren's
13 Response to Order Directing Filing, which was filed
14 on July 8th, 2013. And just remind everyone here
15 and anyone watching, we're not taking evidence
16 today. It's strictly argument.

17 I'll ask everyone to silence their
18 cell phone right now. I'm not going to require you
19 to turn it off, but please silence your cell. I'll
20 set a good example by doing so.

21 My name is Daniel Jordan. I'm the
22 Regulatory Law Judge assigned to this action. With
23 me, as you can see, are certain Commissioners of
24 the Public Service Commission. They may be present
25 at any time and some may be present, some may be

1 watching remotely, and we do archive this
2 presentation for later reviewing, and we do have a
3 reporter that is recording this and there will be a
4 transcript as well.

5 Let's begin with entries of
6 appearance. We'll start with the applicants.

7 MR. BYRNE: Yes, your Honor. My name
8 is Tom Byrne. I'm representing Union Electric
9 Company, doing business as Ameren Missouri. My
10 address is 1901 Chouteau Avenue, St. Louis,
11 Missouri 63103.

12 MR. MITTEN: Russ Mitten, Brydon,
13 Swearngen & England, 312 East Capitol Avenue,
14 Jefferson City, Missouri, also appearing on behalf
15 of Ameren Missouri.

16 JUDGE JORDAN: Thank you. For the
17 Staff of the Public Service Commission.

18 MR. THOMPSON: Thank you, Judge.
19 Kevin Thompson for the Staff of the Missouri Public
20 Service Commission, and on the briefs, Steve
21 Dottheim and Amy Moore. Our address is Post Office
22 Box 360, Jefferson City, Missouri 65102.

23 JUDGE JORDAN: Thank you. For the
24 Office of the Public Counsel.

25 MR. MILLS: On behalf of the Office

1 of Public Counsel and the public, my name is Lewis
2 Mills. My address is Post Office Box 2230,
3 Jefferson City, Missouri 65102. Thank you.

4 JUDGE JORDAN: Thank you. For the
5 Missouri Industrial Energy Consumers.

6 MR. ROAM: Thank you, Judge. My name
7 is Brent Roam with the law firm of Bryan Cave,
8 211 North Broadway, Suite 3600, St. Louis, Missouri
9 63102, appearing on behalf of Missouri Industrial
10 Energy Consumers or MIEC.

11 JUDGE JORDAN: Thank you. And is
12 there a separate appearance for Barnes Jewish
13 Hospital? Not seeing any for Barnes Jewish
14 Hospital. They have waived argument by a filing on
15 September 13, 2013, and I will construe that as a
16 request to be excused and I will grant that.

17 I will refresh everyone as to
18 procedure. We will have statements from the
19 parties. Our regulation provides 15 minutes,
20 except for the applicants who may have 30 and may
21 split that as an opening statement and its reply.
22 Is that what Ameren intends to do?

23 MR. BYRNE: Yes, your Honor. I guess
24 if I -- do I have to tell you the minutes I'm
25 splitting? I guess I'd save ten minutes for reply.

1 JUDGE JORDAN: That's fine. I don't
2 want anyone to feel that they have to use all the
3 time that is allotted to them. Commissioners may
4 have questions for you during your statement. They
5 may interrupt you or they may wait 'til you're done
6 or they may wait until everyone is done.

7 Oh, I'm thinking of having the
8 statements in the following order: Applicants,
9 Staff, OPC, MIEC and then the applicant's reply.
10 Is that satisfactory?

11 MR. BYRNE: Yes, your Honor.

12 JUDGE JORDAN: Very good. I did want
13 to mention one thing, just as a matter of
14 clarification. In the supplemental response to the
15 Order Directing Filing that Ameren filed on
16 September 9th, 2013, there's reference to a case
17 discussion at agenda characterized as the opinion
18 or conclusion of the RLJ assigned to the action.

19 Just want to clarify, I do not have
20 authority in this action to make any conclusions,
21 and my opinion I disclose only to the
22 Commissioners. So I don't want anyone to think
23 that there's been any prejudgment. The proper
24 characterization of that discussion was the one
25 that Commissioner William Kenney offered, which is

1 an option set forth in a memo that was circulated
2 to the Commissioners. Just to clarify that.

3 Is there anything before we begin
4 taking statements? Not hearing anything, then we
5 will begin with the applicants.

6 MR. BYRNE: Thank you, your Honor.
7 I'm Tom Byrne, and along with my co-counsel Russ
8 Mitten I'm representing Ameren Missouri in this
9 case.

10 I'd like to start by thanking the
11 Commission for holding this oral argument, taking
12 time out of what I know are busy schedules to hear
13 this. It's been almost a year and a half since the
14 hearing was held in this case. It's a long time
15 for anybody to remember anything, and I know some
16 of the Commissioners weren't even on the Commission
17 at the time of the hearing. So I'm hopeful this
18 oral argument will be helpful.

19 This is a critically important case
20 for my company, Ameren Missouri, and I also think
21 it's a critically important case for regulatory
22 policy in the State of Missouri. So hopefully this
23 oral argument will help you. I'll be glad to
24 answer any questions you have as you go.

25 There's three things that I want to

1 do with my time today. First, I want to explain
2 exactly what happened here. The facts are kind of
3 complicated, but I want to go over exactly what
4 happened.

5 I also want to explain the relief
6 that we're requesting, the Accounting Authority
7 Order, what it is, why we think the Commission has
8 the authority to issue an Accounting Authority
9 Order in these unusual circumstances, and why we
10 think the Commission should issue an Accounting
11 Authority Order in these circumstances.

12 And third, I would like to briefly
13 address some of the main arguments my opponents
14 raised in their briefs.

15 So what exactly happened here? Well,
16 from our perspective, to understand what happened
17 here you have to start with an understanding of the
18 customer that's involved in this, which is Noranda
19 Aluminum Company. And as I'm sure the Commission
20 knows, Noranda Aluminum Company has a giant
21 aluminum smelting facility down in the bootheel,
22 toward the bootheel of Missouri outside of New
23 Madrid.

24 As Noranda often says in rate cases
25 and other proceedings, Noranda is the largest

1 employer in that region. It pays hundreds of
2 workers reasonably high salaries, good benefits, in
3 an area of the state where jobs like that are rare.
4 The economic impact of the smelter is even larger
5 than that, though. They buy supplies in the area.
6 There's a multiplier effect where the workers who
7 are paid the salaries keep restaurants and gas
8 stations and hardware stores in business.

9 I don't think it's an exaggeration to
10 say that the Noranda Aluminum Company is the
11 economic engine for that area of the state, and
12 they also -- as they're often fond of saying, they
13 pay a lot of taxes down there. They keep school
14 districts in business and local governments.

15 Noranda was not -- prior to 2005
16 Noranda was not Ameren Missouri's customer. They
17 weren't in our service territory. But in 2005
18 Noranda was facing a problem that was threatening
19 the viability of their smelter. They needed a
20 low-cost, reliable source of power and they didn't
21 have one.

22 So Ameren Missouri stepped in and
23 reached an agreement with Noranda that was approved
24 by this Commission whereby Ameren Missouri gave
25 them the low-cost, reliable source of power. They

1 were able to keep their smelter open.

2 At first we entered into a long-term
3 contract with Noranda, but since then we've
4 expanded our certificated service territory to
5 encompass the smelter, and they are now taking
6 service under our rate schedule LTS, which stands
7 for large transmission service. They're the only
8 customer in that rate class, and they're the only
9 customer in that rate class because they are unlike
10 any of the other customers on our system.

11 Noranda's electric demand is huge on
12 our system. We have -- well, they operate -- they
13 operate pot lines. They operate three pot lines
14 where they smelt the aluminum, and they run their
15 plant 24 hours a day 7 days a week. They have
16 almost 100 percent load factor, which means they're
17 constantly taking the maximum amount of power that
18 they can, which is unlike any other customer.

19 And the amount of power they consume
20 is almost -- it's almost unbelievable. We have
21 1.2 million customers. We serve all the St. Louis
22 area, most of eastern Missouri. The evidence in
23 the case, in this case was that Noranda took about
24 11 percent of our power. So if you have one
25 customer out of 1.2 million customers taking

1 11 percent of your power, that's a huge customer.

2 The evidence was that their -- their
3 load is about the same as the city of Springfield.
4 Noranda consumes almost as much power as all of the
5 rest of our industrial customers put together. So
6 we have -- and we have a lot of industrial
7 customers. We serve Monsanto, Anheuser Busch, Doe
8 Run Company, General Motors assembly plant. We
9 serve a lot of big industrial customers. Noranda
10 is almost as big as all of the rest of them
11 combined.

12 So it's really important that you
13 understand how big Noranda is, and the rates that
14 Noranda pays cover a huge share of the fixed costs
15 of Ameren Missouri. We are a fixed cost company.
16 Other than fuel -- you know, we have fuel costs
17 that vary depending on how much electricity is
18 produced.

19 All the rest of our costs are fixed.
20 The costs of our generating facilities are fixed.
21 Substations, wires, poles, salaries of workers,
22 equipment, trucks, everything we do, other than
23 buying fuel, is pretty much a fixed cost. They
24 don't vary based on the amount of electricity
25 produced or the amount of electricity sold.

1 At the time this case was tried,
2 Ameren -- or Noranda was paying Ameren a total
3 annual bill of \$139 million a year. A big chunk of
4 that's fuel, but anything that's not fuel, tens of
5 millions of dollars are fixed costs, the rates that
6 are designed to cover fixed costs of Ameren
7 Missouri that don't go away when Noranda goes away.

8 On January 27th, 2009, this
9 Commission entered an order in an Ameren Missouri
10 rate case, and the January 27th order did two
11 things that are important for this case. One thing
12 it did is it allocated the typical tens of millions
13 of dollars of our fixed costs to Noranda, to be
14 recovered through rates charged to Noranda. And
15 the second thing it did was it approved for the
16 first time a fuel adjustment clause for Ameren
17 Missouri, and -- which I'll talk about a little bit
18 later.

19 On the same day that the Commission
20 issued the order in that case, southeast Missouri
21 was experiencing a really bad ice storm, and really
22 bad doesn't quite describe how bad the ice storm
23 was in January of 2009. Every customer, virtually
24 every customer in a six-county area down in the
25 bootheel was out of service. That's unheard of.

1 That doesn't ever happen hardly. And it wasn't
2 just our customers. It was customers of coops down
3 there. We had 3,800 poles that were snapped in
4 half by the weight of the ice. The ice took down
5 hundreds and hundreds of lines. You know,
6 transformers were damaged.

7 The damage to our system was really
8 unprecedented. The Ameren people who were down
9 there at the time said this is the worst ice storm
10 in 100 years of our existence. The Governor
11 declared a state of emergency. He asked for
12 federal funds. It was a complete disaster.

13 Noranda did not escape the effects of
14 this disastrous ice storm. Ameren Missouri's
15 electricity goes to the Noranda smelter over
16 transmission lines owned by Associated Electric
17 Coop. So it's not even our lines that are directly
18 connected, but it's our electricity that goes
19 there. The ice weighed down the transmission lines
20 and snapped them, and so it abruptly cut off power
21 to the Noranda smelter.

22 And as I said, the way the Noranda
23 smelter works is it's got these three pot lines,
24 has molten aluminum in it at all times. The power
25 was abruptly cut off. All the molten aluminum

1 froze in the plant. So the whole plant was gummed
2 up with molten aluminum that froze. So they went
3 out of service.

4 One of the three pot lines wasn't
5 that bad. They fairly quickly got it up. But
6 two-thirds of the pot lines were so gummed up, they
7 had to go in with jackhammers and jackhammer out
8 the frozen aluminum. And that process, the process
9 they went through to get their plant up and running
10 took 14 months. So for 14 months they were
11 operating the one pot line but not the other ones.

12 So anyway, in the immediate aftermath
13 of the storm, Ameren Missouri's focus was on
14 getting customers restored to service. We sent
15 crews down to southeast Missouri. They worked
16 16-hour days in really bad conditions. They slept
17 in motel rooms that didn't have electricity. But
18 in about a week or ten days they got all our
19 customers back on service. And then for about the
20 next two or three weeks they worked on -- with the
21 coops, trying to get the coop customers back in
22 service.

23 But, you know, after the emergency
24 subsided, it started to dawn on us that we were in
25 real trouble with Noranda being out of service for

1 the indefinite future. We didn't know if they
2 would ever come back online.

3 And again, we were still incurring
4 all our fixed costs. All those fixed costs that
5 had been allocated to Noranda just on the January
6 27th rate case order were still being incurred. We
7 were still paying our employees. We were still
8 having our facilities there. We were still
9 depreciating our facilities, but we weren't getting
10 hardly any of the money that Noranda usually would
11 pay to cover those fixed costs.

12 So you would think in this situation
13 an obvious answer is Ameren Missouri could just
14 turn around and take the power it was going to sell
15 to Noranda and find another buyer and then -- then
16 it could cover its fixed costs with the proceeds of
17 that sale, but that wasn't possible.

18 One of the provisions of the fuel
19 adjustment clause that had just been approved was,
20 if we sold any power to an off-system customer,
21 95 percent of the proceeds had to go back to our
22 other customers. So if we turned around and took
23 this giant amount of power that Noranda used to buy
24 from us, which was exempt from the fuel adjustment
25 clause because it's a native sale, if we took that

1 same power, turned around and tried to sell it to
2 somebody else, all the money -- we don't get to
3 keep any of the money. It doesn't cover our fixed
4 costs.

5 So what do you do? There was an
6 exception in our fuel adjustment clause tariff, and
7 the exception was, if you had -- if you had a
8 contract that was a long-term full or partial
9 requirements contract, the fuel adjustment clause
10 tariff said it was exempted from being flowed back
11 through the fuel adjustment clause.

12 So we thought, great, we'll find a
13 long-term full or partial requirements contract,
14 we'll sell the power we were going to sell to
15 Noranda to those people. We'll get the money. It
16 will cover our costs. Customers will be no worse
17 off than if the storm hadn't happened. Everything
18 will be fine.

19 So we tried to do that. We went and
20 found two counter parties, AEP and Wabash, and we
21 took the power that we were going to sell to
22 Noranda and we sold it to them under what we
23 thought were long-term requirements contracts.
24 We thought they were long-term because the
25 contracts were for 15 months and 18 months, and we

1 believed that long-term was greater than a year.
2 And that was about the amount of time -- that
3 corresponded about to the amount of time we
4 expected Noranda to be out.

5 We thought they were requirements
6 contracts because those -- the purchasers were
7 using it to serve requirements of customers that
8 they had to serve. AEP is like a -- it's like
9 Ameren Missouri in that it has different state
10 regulated electric utilities that it was using the
11 power for. I think Wabash buys power for Citizens
12 Coop. So they had requirements, and we thought
13 they were long-term contracts, and so that's what
14 we did.

15 Unfortunately, everybody else didn't
16 agree with that. Staff opposed us and said, no,
17 they're not long-term contracts, they're not
18 requirements contracts. The industrial customers,
19 too, Office of the Public Counsel, everybody said,
20 no, you've made a terrible mistake, you know, that
21 that's not -- that's not what these qualify as.
22 You have to refund this money through your FAC.

23 And we litigated that issue for about
24 nine months, and the end of the nine months, it
25 was a hard litigated case, very divisive, divisive

1 amongst the Commissioners. Ultimately the
2 Commission ruled three to two that everybody else
3 was right and we were wrong. They weren't
4 long-term requirements contracts. We had to give
5 the money back.

6 So that order was issued in, I think
7 it was -- I think the Order on Rehearing that
8 finalized the case was May 26th, 2011. When we got
9 that order, when that case was final, we did two
10 things. No. 1, we appealed the decision because we
11 thought it was wrong. No. 2, we filed this case
12 because getting an Accounting Authority Order would
13 be an alternative way we could try to recover our
14 costs, try to keep ourselves whole from this
15 disaster.

16 The appeal of the case, back then it
17 was long enough ago that appeals went to circuit
18 court. Now they go straight to the Court of
19 Appeals. We went to Cole County Circuit Court and
20 we won. They reversed the Commission and said,
21 you're right, it is a long-term requirements
22 contract. It's exempt from the FAC. You get to
23 use that to recover your fixed costs. You win.

24 But then the Commission and the other
25 parties appealed it to the Court of Appeals of the

1 Western District, and they upheld the Commission's
2 original decision, original three/two decision.
3 And interestingly enough, the Court of Appeals
4 said -- part of the reason for the Court of Appeals
5 order was they said the fuel adjustment clause
6 statute isn't broad enough to cover this kind of a
7 thing. It's only for fuel. It's only for
8 transportation. This isn't either one of those
9 things. You can't use the fuel adjustment clause
10 to make yourself whole for this or you can't use
11 the fuel adjustment clause to recover your costs in
12 this way.

13 But they did say you have -- the
14 Court of Appeals did say there are other
15 alternatives, and they specifically said maybe you
16 should get an Accounting Authority Order. I also
17 note that when the Commission was discussing the
18 original case, they -- some of the Commissioners
19 suggested maybe an Accounting Authority Order would
20 be the right thing to do.

21 So meanwhile, while -- in the years
22 that this appeal was wending its way through the
23 courts, we went ahead and tried this Accounting
24 Authority Order case. It went to the Commission.
25 We had a hearing. Everybody's against it, of

1 course, and -- but when it came time for the
2 Commission to decide, the Commission did what I
3 think is a smart thing. They said, look, we're not
4 going to decide this case until this other appeal
5 is resolved, because they were sort of
6 alternatives. If we had won that appeal, we
7 wouldn't have needed this Accounting Authority
8 Order. We would have covered our fixed costs and
9 we wouldn't have needed any additional regulatory
10 relief.

11 So the Commission I think smartly
12 said, we're going to hold off deciding this until
13 we get a final order in the appeal. We lost the
14 appeal, so now -- now the Accounting Authority Case
15 is live again.

16 JUDGE JORDAN: Five minutes.

17 MR. BYRNE: Maybe could I shorten my
18 reply time, Judge, to five minutes?

19 JUDGE JORDAN: Yes.

20 MR. BYRNE: Here's what we're asking
21 for in this case. We're asking for an Accounting
22 Authority Order, and Accounting Authority Orders
23 are commonly issued by the Commission in cases
24 where utilities face events which are
25 extraordinary, unusual and unique and not -- and

1 nonrecurring which prevent them from having an
2 opportunity to recover their costs.

3 For example, this Commission commonly
4 issues Accounting Authority Orders to address
5 expenses that utilities incur in responding to
6 major storms. It's a common thing. They've issued
7 dozens of Accounting Authority Orders for that. In
8 addition, the Commission's issued Accounting
9 Authority Orders where utilities have to incur
10 expenses to comply with mandates from regulators,
11 like the Commission's gas safety program.

12 The Commission has issued Accounting
13 Authority Orders to recover revenue shortfalls. In
14 one case where the Cold Weather Rule was adopted,
15 utilities were allowed to have an Accounting
16 Authority Order for both costs that they incurred
17 to comply with the Cold Weather Rule and revenues
18 that they lost.

19 There are other things. The
20 Commission's issued Accounting Authority Orders for
21 the cost of a coal conversion at a power plant.
22 Basically, any time the utility faces a situation
23 that's extraordinary, unusual and unique and
24 nonrecurring that doesn't allow it to recover its
25 costs, an Accounting Authority Order is what has

1 been used.

2 And basically, Accounting Authority
3 Orders don't allow you to change your rates. All
4 they do is they allow you to account for these
5 costs so that when you come in for a subsequent
6 rate case, you have the opportunity to ask to
7 recover them.

8 And typically the Commission will
9 allow an amortization in a rate case of any amount
10 that's allowed to be deferred through an Accounting
11 Authority Order, and typically they have a
12 requirement that you have to come in -- it expires
13 after a year or two. If you don't file a rate case
14 in a year or two, you no longer have the Accounting
15 Authority Order.

16 There's two provisions of the Uniform
17 System of Accounts that govern Accounting Authority
18 Orders. I'll briefly go over them. This is
19 Account 182.3, other regulatory assets, and this is
20 the account that amounts are deferred to. And it
21 just says, the amounts included in this account are
22 to be established by those charges that have been
23 included in net income, or accumulated other
24 comprehensive income, determinations in the system
25 of accounts but for it being probable that such

1 items will be included in a different period for
2 purposes of developing rates that the utility is
3 authorized to charge for utility services.
4 So that's where -- where the accounting
5 authority --

6 JUDGE JORDAN: Can you move that a
7 little bit over that direction?

8 MR. BYRNE: Can you see that? How
9 about if I hold it up here?

10 JUDGE JORDAN: Well, I can definitely
11 see it now.

12 MR. BYRNE: And there's a definition
13 of regulatory assets that's also -- see, this
14 account is other regulatory assets, and there's a
15 definition of regulatory assets in the Uniform
16 System of Accounts that's also relevant. It's
17 Definition 31, I think. Yeah, Definition 31,
18 regulatory assets and liabilities. It says,
19 regulatory assets and liabilities are assets and
20 liabilities that result from rate actions of
21 regulatory agencies, which would be the Accounting
22 Authority Order. Regulatory assets and liabilities
23 arise from specific revenues, expenses, gains or
24 losses that would have been included in net income
25 determinations in one period under the general

1 requirements of the Uniform System of Accounts but
2 for it's probable that they can be recovered.

3 And I think what the importance of
4 this definition is, it applies to revenues,
5 expenses, gains or losses. And a lot of people
6 have -- there's been a lot of debate about whether
7 we're asking for lost revenues or costs. We
8 believe we're asking for our fixed costs that we
9 couldn't recover. But under the Uniform System of
10 Accounts, an Accounting Authority Order can be
11 issued for revenues, expenses, gains or losses,
12 which clearly covers this.

13 And this Commission -- this is
14 exactly the kind of circumstance that AAOs were
15 designed to deal with. The Commission
16 unquestionably has the power to grant this AAO.
17 Staff accountant Mark Oligschlaeger testified that
18 even Staff, who is opposed to this application, is
19 not contending that this Commission lacks the power
20 to issue this AAO. Instead, the Commission is --
21 the Staff is arguing the Commission should not
22 issue the AAO.

23 But we believe that Staff and the
24 other parties who support this position are wrong.
25 Ameren Missouri has an obligation to serve its

1 customers, provide safe and adequate service. This
2 Commission also has an obligation to give us an
3 opportunity to recover our costs of providing
4 service to customers. And in this situation where
5 Noranda, a customer with a demand the size of the
6 city of Springfield, was off the system for
7 14 months, we did not have the opportunity to
8 recover our costs.

9 I should also note that if an AAO is
10 issued, there need not be a significant impact on
11 customers. AAOs are typically amortized in a rate
12 case. It could be amortized over a long period in
13 a way that wouldn't hurt customers or wouldn't
14 impact customers very severely. But if we don't
15 get an AAO, this is going to have a severe and
16 immediate financial impact on my company.

17 A couple of the arguments that other
18 parties have raised. Some of the first words in
19 MIEC's brief are a quote from -- a quote from an
20 MGE case, and the quote from the MGE case says,
21 ungenerated revenue never existed, never does exist
22 and never will exist. Revenue generated from
23 service not provided represents no exchange of
24 value. There is neither revenue nor cost to record
25 in the current period or any other. The quote goes

1 on a little bit.

2 I guess the MGE case that this is
3 taken from occurred in the aftermath of the Joplin
4 tornado. And as the Commission knows, Joplin is a
5 small part of MGE's service territory which is
6 primarily in the Kansas City area. In the wake of
7 the Joplin tornado, MGE sought an AAO to recover an
8 unspecified amount of lost revenue based on
9 businesses and residences that no longer took
10 service after the tornado.

11 However, MGE could not quantify what,
12 if any, revenues it had lost because it didn't know
13 whether or when the customers who stopped taking
14 service would come back. The evidence in the case
15 also showed that MGE's overall revenues increased
16 in the period after the tornado. The facts in this
17 case are completely different. Here we --

18 JUDGE JORDAN: You have three
19 minutes.

20 MR. BYRNE: Here we know with exact
21 certainty how much money is at issue. Staff and
22 the company have agreed that \$35,561,503 are at
23 issue in this case. These are not phantom costs.
24 These are the costs of our facilities, costs that
25 we paid our employees, costs that we paid for our

1 equipment. In addition, the evidence shows that
2 our revenues dropped from 2008 to 2009 by
3 \$56 million. That's the complete opposite of the
4 situation.

5 Other parties argue that our
6 application is untimely. This is also not true.
7 This issue was never -- we never suffered a loss
8 that we could have asked for until the Commission
9 issued its order. In 2011 we began recording the
10 loss to our income statement. So this is not
11 untimely.

12 We filed it as soon as we could have,
13 and the Commission has never required customers to
14 file -- or companies to file for AAOs in the same
15 period. In particular where there's been ice
16 storms in November or December of a certain year,
17 oftentimes the filing and the order comes in the
18 next year.

19 Another argument parties make is
20 these are just our profits. Truth is these are
21 costs. If you don't let us recover them, of course
22 it's going to lower our profits, but that doesn't
23 turn costs into profits. We earned a rate of
24 return of 6.69 percent during the 14-month period
25 when Noranda was off our system. That's

1 significantly below our authorized return. It's a
2 significant financial penalty.

3 Other parties have argued this is
4 retroactive ratemaking. There's five Court of
5 Appeals cases that we cited in our brief that say
6 AAOs are not retroactive ratemaking.

7 Parties say we had other regulatory
8 alternatives. We did not. If we would have filed
9 a rate case to try to recover these costs, it would
10 have been over -- by the time the rate case was
11 over, Noranda would have almost been back on the
12 system. And it was a one-time, nonrecurring cost,
13 which is not appropriate for inclusion in a general
14 rate case.

15 An AAO is the right way to do this.
16 That's the right vehicle to -- for us to use, and
17 so we're trying to use it. We really had no other
18 option than this, and it -- you know, in summary,
19 you know, the other parties would like to live in a
20 world where there's no AAOs, where when an
21 extraordinarily bad things happens to a utility
22 there's no relief, but that's not the appropriate
23 world that -- to live in. That's not -- that
24 doesn't strike an appropriate balance between
25 utilities and their customers.

1 So I would urge the Commission to
2 grant the AAO that we've asked for. Thank you.

3 JUDGE JORDAN: Thank you. I see no
4 question from the Chairman, so go right ahead.

5 COMMISSIONER STOLL: Mr. Byrne, you
6 said that the company didn't have any other
7 options, but I don't know if you can answer this,
8 but did you consider appealing the decision of
9 Missouri Court of Appeals?

10 MR. BYRNE: Yeah, we did consider it,
11 but I think -- I'm not even sure. We may have
12 tried to.

13 COMMISSIONER STOLL: I don't know the
14 answer to this. That's why I'm asking.

15 MR. BYRNE: You know, you have a
16 right to appeal up to the Court of Appeals, but
17 it's discretionary to get to the Supreme Court, and
18 very, very few cases get to the Supreme Court. We
19 may have tried to get to the Supreme Court and lost
20 or just not even tried. I just don't remember.

21 COMMISSIONER STOLL: Okay. I guess
22 one other quick thing is that when you were talking
23 about the fixed costs, there is evidence in the
24 record that the company and Staff agree on the
25 amount that's been quantified?

1 MR. BYRNE: Yes. We were able to
2 quantify it because Noranda had -- we knew exactly
3 when Noranda went off the system, exactly when they
4 came back on, exactly what their load is because
5 they use the same amount every day. So we were
6 able to -- we had a witness that filed testimony,
7 Mr. Wills filed testimony, and then a Staff witness
8 filed testimony. They were a little bit apart.

9 Ultimately we reached an agreement on
10 the exact dollar amount. You know, Staff said it's
11 the portion of foregone -- a portion of foregone
12 revenues. We say it's the fixed costs that were
13 embedded that we would have recovered through the
14 rates. We've agreed on the dollar amount.

15 And that's a really important
16 difference between our case and MGE's where they
17 had no idea what the dollar amount was, you know.

18 COMMISSIONER STOLL: Okay. I'll save
19 anything else for later. Thank you very much.

20 COMMISSIONER W. KENNEY: In 2005 when
21 you -- when Ameren and Noranda entered this
22 contract, was there discussions about what would
23 happen if -- did Noranda have -- in the contract is
24 there a time frame of how much time Noranda had to
25 give you if they were going to leave Ameren?

1 MR. BYRNE: Yes. There was a
2 five-year notice provision in the contract.

3 COMMISSIONER W. KENNEY: Got you.
4 Five-year notice.

5 MR. BYRNE: Because Noranda is such a
6 big load.

7 COMMISSIONER W. KENNEY: I
8 understand. All right. Thank you.

9 JUDGE JORDAN: Commissioner Hall?

10 COMMISSIONER HALL: I'll sorry. One
11 quick question. Going back to the standards that
12 we need to apply in this application, and I believe
13 it was -- well, it was one of the charts that
14 you -- there were two that you --

15 MR. BYRNE: The revenues, expenses,
16 gains or losses one?

17 COMMISSIONER HALL: Yeah. What is
18 the purpose of the word probable there?

19 MR. BYRNE: Well, I think -- I
20 think --

21 COMMISSIONER HALL: Or how do you
22 interpret the word probable?

23 MR. BYRNE: I think the idea is if
24 the Commission has issued an Accounting Authority
25 Order, the accounting community will say it's

1 probable that we're going to be able to recover
2 these costs or these revenue shortfalls in a future
3 period. If the Commission doesn't issue an
4 Accounting Authority Order, then it's not probable.
5 Because normally when you do a rate case you've got
6 a test year, and anything that happened before the
7 test year is off the table.

8 So there's no way to recover
9 something that happened before the test year,
10 unless you get something like an Accounting
11 Authority Order from the Commission that makes it
12 probable, and then the accountants -- the
13 accountants always use the term probable. But then
14 if you issue an Accounting Authority Order, it
15 meets the standards for accountants to recognize it
16 on the books and records.

17 COMMISSIONER HALL: So it's not
18 comparable to likelihood of success on the merits
19 in a rate case? It's -- your position would be
20 that there's just two things you need to show,
21 extraordinary event and materiality?

22 MR. BYRNE: Yes, extraordinary event
23 and materiality, that's -- well, I think there were
24 three things. It's got to be nonrecurring,
25 extraordinary and unique. That's what it's got to

1 be, according to cases in Missouri.

2 COMMISSIONER HALL: Okay. I'll be
3 interested to hear how other parties view that word
4 probable as well.

5 MR. BYRNE: Right. Yeah. I think
6 the point is, if we get a regulatory order, the
7 accountants say it becomes probable that we'll
8 recover it. If we don't get that order, they don't
9 think it's probable that we'll recover.

10 COMMISSIONER HALL: Thank you.

11 JUDGE JORDAN: I had just one that I
12 needed to clarify, and that is on your poster of
13 Account 182.3.

14 MR. BYRNE: Yes.

15 JUDGE JORDAN: Let's see that again.
16 I wasn't planning to ask any questions, but I think
17 it's important to clarify.

18 MR. BYRNE: All right. Here it is.

19 JUDGE JORDAN: Your bold language.

20 MR. BYRNE: Yes.

21 JUDGE JORDAN: Those charges which
22 have been included in net income.

23 MR. BYRNE: Yes. Yeah. I guess
24 these -- these -- to my mind, this incident is
25 reflected in our net income. It was reflected in

1 two entries, one in 2011 and one in 2013.

2 JUDGE JORDAN: I'm thinking that your
3 copy has dropped a couple of words, the words being
4 would have, or one word, which would have been
5 included in net income.

6 MR. BYRNE: I'm told it's not
7 missing. See, which has been included in net
8 income, this has affected our net income. I think
9 what they're talking about is something has to have
10 affected your net income. This has affected our
11 net income because we had to refund all the money
12 from the --

13 JUDGE JORDAN: Right. You just
14 showed us definition 31, though, that says would
15 have been included in net income. I'm just trying
16 to clarify that, that quotation.

17 MR. BYRNE: I'm not sure. I guess if
18 you have it, you've got the word would in there?
19 Okay.

20 MR. MITTEN: That's correct.

21 MR. BYRNE: You are correct, Judge.

22 JUDGE JORDAN: Thank you.

23 MR. BYRNE: Anything else? Thanks.

24 JUDGE JORDAN: Staff, please.

25 MR. THOMPSON: Thank you, Judge. May

1 it please the Commission? First I have a handout
2 for you which has the language of the FERC
3 Account 182.3 and General Instruction No. 7. This
4 was Staff's Exhibit No. 5 received during the
5 hearing of this case. Here is a copy for the
6 Chairman. And that does have that language "would
7 have" that you were just asking about.

8 Okay. There's a game that they play
9 on the streets of New York and maybe on the streets
10 of St. Louis. It's called Three Card Monte. It's
11 a game that's actually a con. It's a con game, and
12 it depends on misdirection. And we are here today
13 for a con being run by Ameren Missouri that also
14 depends on misdirection. Now, that's strong talk,
15 but I think that it's applicable. I think it's
16 warranted.

17 Ameren Missouri says it's here to get
18 an Accounting Authority Order, an AAO, to defer
19 approximately \$36 million in fixed costs that it
20 was unable to collect from Noranda because of that
21 terrible ice storm that you heard about. Okay?
22 No, it's not here to collect uncollected or
23 uncollected fixed costs. It's here for revenue.
24 It's here for revenue, for income, uncollected
25 income.

1 Because of the storm, Noranda went
2 offline. Only three -- two-thirds of its load was
3 gone, and so Ameren Missouri sold only one-third of
4 the electricity it had anticipated selling to
5 Noranda. It collected only one-third of the
6 revenue it had anticipated collecting from Noranda.

7 So they are here for uncollected
8 income, and it wasn't collected because the service
9 was never delivered. Noranda didn't take that
10 electricity. It could not. That electricity was
11 not sold to Noranda. So they are here for
12 electricity -- for money for sales that were never
13 made. They are asking you to give them an AAO to
14 preserve for future rate case consideration and
15 possible recovery money for electricity that was
16 never sold. Never sold.

17 Well, if I have a store and I buy a
18 bunch of inventory for my store, I've got costs, no
19 question, and I've got employees and I've got rent
20 and I've got utilities and I don't make any sales,
21 guess what? I'm out of business. That's how that
22 works. I'm trying to sell something, and if I
23 can't sell it, I don't get the income that I had
24 expected to get.

25 Now, I could say, well, you know,

1 this is going to be very disappointing to my
2 landlord because I was going to pay my rent out of
3 that income. This will be very disappointing to
4 whoever supplies my inventory because I was going
5 to pay those bills out of this. But you know what,
6 that doesn't matter. The money I didn't get with
7 my unsuccessful store, that was income. That was
8 retail sales income. The money Ameren didn't get
9 was retail sales income.

10 So let's understand first of all what
11 we're here for. We're here for income for
12 electricity that was never sold to Noranda. And
13 then, adding insult to injury, the electricity was
14 sold to Wabash and AEP. The electricity, in fact,
15 was sold to Wabash and AEP. So why should the --
16 why should the ratepayers make them whole for the
17 income they didn't get selling the electricity to
18 Noranda but which they did sell to AEP and Wabash?
19 Huh? We're going to have to pay for electricity we
20 didn't get but that they sold to somebody else and
21 were fully paid for by them?

22 Really, they're trying to evade their
23 tariff, their FAC tariff. That's what the
24 EO-2010-0255 case that Mr. Byrne alluded to, that's
25 what that case was all about, where they went out

1 and made contracts with AEP and Wabash so they
2 could sell the electricity that they were planning
3 to make but couldn't sell to Noranda because of the
4 ice storm. Right? You heard all about that. And
5 they did make those contracts and they did sell
6 that electricity and they were paid for that
7 electricity, but, but under their FAC tariff that
8 they begged this Commission to give them, they had
9 to share that income with the ratepayers, who after
10 all paid for the power facilities that they used to
11 make that power that they sold to Wabash and AEP.
12 They had to share 95 percent of that income with
13 the ratepayers.

14 So that's why they're still here
15 trying to be made whole, but they're trying to be
16 made whole for a situation of their own creation.
17 They asked for that tariff. They asked this
18 Commission to give them a fuel adjustment clause
19 tariff. They said, everybody else has one. Come
20 on, get in the 20th century, Commission. Give us a
21 fuel adjustment clause like everybody else has.

22 So we gave them one. You gave them
23 one. It was a smart choice. It was the right
24 thing to do. But now, because of that unexpected
25 storm, they want to evade the effects of that

1 tariff. They want to evade the effects of that
2 tariff.

3 So, first of all, there's
4 misdirection in mischaracterizing the money as
5 fixed costs when, in fact, it's revenue. It's
6 income, retail sales income from sales that were
7 not made to Noranda, that were instead made to
8 Wabash and AEP but then they couldn't profit from
9 because of the sharing mechanism. That's been
10 fully litigated in front of this Commission and in
11 front of the Court of Appeals.

12 Secondly, it's Staff's position you
13 can't give an AAO to defer transactions that never
14 occurred. You can certainly defer revenues. We
15 agree. It says so. But how do you defer revenues
16 that were never received, that were never
17 collected, transactions that didn't happen? How do
18 you defer them?

19 The AAO language, General
20 Instruction 7 says, items related to the effects of
21 events and transactions which have occurred during
22 the current period, right? Items, transactions.
23 Items are transactions. These are items that never
24 happened, transactions that did not occur. They
25 wouldn't have been booked in the current period

1 because they didn't occur.

2 As the judge explained in his
3 decision in the MGE case, that we're told is
4 totally different and doesn't apply, they want an
5 AAO that will create income out of thin air because
6 you'll be deferring income that would not have been
7 booked in the current period because it didn't
8 happen. You'll be deferring something that never
9 happened and thereby creating it. Can't do it. I
10 say you can't do it.

11 Next, I suggest to you that their
12 application is late. Even if you could do it, it's
13 too late, because the books were closed on 2009 a
14 long time ago. Everything that happened in 2009
15 has already been booked. In fact, so has 2010 and
16 2011 and 2012. Those books are closed. They use a
17 calendar year fiscal year. Those years are done.
18 How are we going to reach back into 2009 and change
19 the effect of transactions which, by the way, never
20 happened then either? You can't do it. So it's
21 too late. It's too late.

22 And when the instructions talk about
23 current period, they're talking about the current
24 fiscal accounting period. Current fiscal
25 accounting period. That would be in the year 2009.

1 You want an AAO for 2009 events, ask for it in 2009
2 while those books are open, while you can, in fact,
3 defer it. You can't defer -- you can't defer a
4 transaction that did occur in 2009 that's already
5 been booked. Those books are closed. They're
6 done. That accounting's finished.

7 Retroactive ratemaking. Retroactive
8 ratemaking is when you make ratepayers pay now for
9 a revenue/expense mismatch in a prior period.
10 Prior period mismatch. Okay. That's if we say at
11 the close of 2009, well, heck, I didn't get as much
12 revenue as I expected. I didn't get enough
13 revenue. In fact, that is what they're saying.
14 And so I want to make ratepayers today pay me some
15 extra revenue for 2009 so I'll feel more
16 comfortable about how 2009 worked out. You can't
17 do it. That is retroactive ratemaking.

18 If everybody had known the ice storm
19 was going to happen, rates would have been set up
20 quite a bit differently than they were. If
21 everyone had known the ice storm was going to
22 happen or was even likely to happen, the FAC clause
23 would probably have been set up differently than it
24 was, and in fact, it was eventually changed.

25 But I think we're stuck with the

1 tariffs that were in effect in 2009. We're stuck
2 with the effect of those tariffs, and the effect of
3 those tariffs is that they lost a certain amount of
4 money because of that ice storm, that the money
5 earned from the Wabash and AEP contracts had to be
6 shared with the ratepayers, and that is simply the
7 law.

8 Thank you very much.

9 JUDGE JORDAN: Thank you, counsel. I
10 don't have any questions from the Chairman.
11 Commissioner Stoll?

12 COMMISSIONER STOLL: Thank you,
13 Mr. Chairman. Just to make sure that I understand
14 this, so under -- under the original off-system
15 sales tariff before we had the FAC, before it was
16 adopted, was the company allowed to recover what is
17 referred to as fixed costs?

18 MR. THOMPSON: Well, fixed costs are
19 any costs that don't vary with the volume of sales.

20 COMMISSIONER STOLL: Right.

21 MR. THOMPSON: Okay. And as
22 Mr. Byrne pointed out, most of their costs are, in
23 fact, fixed costs. So when you're doing ratemaking
24 and you're assigning costs to the different rate
25 classes to make sure you're going to collect enough

1 money to cover those costs, that's when you do the
 2 kind of assignment that he was talking about.
 3 That's when they would have said, okay, we've got
 4 this large transmission service class and we expect
 5 it's going to take this much power and pay this
 6 much for it, and we'll assign an appropriate
 7 proportion of fixed class -- fixed costs to that
 8 class in setting those rates.

9 That's only in the rate design
 10 portion. Later, when you're looking at the actual
 11 year of operation, you look at it on a total
 12 company basis. Did the company earn enough money
 13 to pay its bills, and was there any income net of
 14 expenses that would be profit to the shareholders?
 15 Okay?

16 COMMISSIONER STOLL: Okay.

17 MR. THOMPSON: I don't know if that
 18 answers your question, but I attempted to.

19 COMMISSIONER STOLL: Okay. I guess
 20 what I have to -- maybe to inquire of others also,
 21 but if in the FAC tariff they're required that
 22 95 percent of the off-system sales is deducted from
 23 fuel costs, then that would be passed along to the
 24 ratepayers, correct?

25 MR. THOMPSON: Right.

1 COMMISSIONER STOLL: Was there -- so
2 you're saying then that, even with the FAC, the
3 recovery of fixed costs is built in to the base
4 or --

5 MR. THOMPSON: The FAC only applies
6 to fuel, which Mr. Byrne pointed out is the
7 variable cost because fuel does vary with the
8 amount of electricity you make. So the fuel
9 clause, the FAC only goes for fuel costs and
10 purchased power costs. Okay?

11 COMMISSIONER STOLL: Right.

12 MR. THOMPSON: The whole point of
13 having it is so that the amount of money they
14 collect from the ratepayers for fuel and purchased
15 power can go up and down between rate cases to more
16 quickly match the actual costs. Okay. It is a
17 risk-reducing measure for the company. So it only
18 deals with variable costs.

19 And that 95/5 sharing, just as the
20 revenues are shared 95/5, so are the expenses. So
21 are the expenses. So the ratepayers would bear the
22 effect of 95 percent of any unexpected costs, just
23 like the ratepayers get the benefit of 95 percent
24 of any unexpected revenue, such as the Wabash and
25 AEP. It's fair in that sense.

1 COMMISSIONER STOLL: So do you see
2 that the -- do you believe that the FAC -- this may
3 not be what you're saying, but do you believe that
4 the FAC was -- had -- what role did it have in
5 this?

6 MR. THOMPSON: The role it had was it
7 deflected the revenue they sought as an alternative
8 to the Noranda revenue. When they saw they
9 couldn't sell that electricity to Noranda, they
10 looked for somebody else to sell it to because they
11 knew they had the power capacity. They were going
12 to have a money shortfall. Let's sell that power
13 to somebody else, make up that money.

14 So the effect of the FAC was to
15 deflect 95 percent of that revenue away from the
16 company and to the ratepayers. What that means is
17 it reduced the amount of money the ratepayers had
18 to pay under the FAC for fuel because AEP and
19 Wabash were paying for the fuel.

20 COMMISSIONER STOLL: Okay. Thank
21 you.

22 MR. THOMPSON: Certainly.

23 JUDGE JORDAN: Anything else?
24 Commissioner Kenney.

25 COMMISSIONER W. KENNEY: Mr.

1 Thompson, getting to what Commissioner Stoll was
2 talking about, now, the -- prior to the 2008 FAC,
3 those off-system sales would have been able to be
4 kept by the company to offset their expenses or
5 would be income for them, correct?

6 MR. THOMPSON: I believe it would
7 have been. I don't know the details of that
8 tariff, but I think that's true.

9 COMMISSIONER W. KENNEY: Also you
10 talked about, you said it's not timely. Well, when
11 would you have thought they should have filed this?
12 If they thought -- if they made sales -- if Ameren
13 made sales to AEP and Wabash and it didn't -- until
14 there was a decision in 2010 by the PSC, what would
15 have been timely for them? When should they have
16 tried to --

17 MR. THOMPSON: If what they're trying
18 to defer is the money from Noranda, either revenues
19 or costs, either way, and they've said you can call
20 it either, then I believe the application needed to
21 be filed in 2009 while the books for 2009 were
22 open.

23 COMMISSIONER W. KENNEY: But how do
24 you file it if it's not an issue? If you've made
25 your money, you have your income, you close your

1 books, and then -- and then after the fact the
2 Commission comes back and says, uh-oh, you can't do
3 that, that's not a long-term contract, you need to
4 give back 95 percent of that money to the
5 ratepayers. So how do you do it?

6 MR. THOMPSON: I agree, it is a hard
7 decision.

8 COMMISSIONER W. KENNEY: Well, not a
9 decision. There's no decision to be made. There
10 wasn't a decision to be made in 2009. That would
11 be my point. There wasn't a decision. How could
12 you make a decision if you've already -- if you
13 thought you were -- I mean, I don't think -- I
14 don't think Ameren was probably trying to make a --

15 MR. THOMPSON: It would have taken a
16 lawyer who could see the future. I agree with you.

17 COMMISSIONER W. KENNEY: So I don't
18 think Ameren was saying, hey, we want to cost our
19 shareholders 36 million, so let's just sell this
20 power to them, because if they would have -- if
21 they would have thought that, they would have come
22 up with some other solution, I would imagine.

23 MR. THOMPSON: Right.

24 COMMISSIONER W. KENNEY: It's an
25 unfortunate situation.

1 MR. THOMPSON: I agree. And I do
2 not -- I do not want to let you think for a minute
3 that Staff is not sensitive to the economic blow
4 that the ice storm caused to Ameren Missouri, to
5 Noranda, to the people of southeastern Missouri,
6 and we're also very appreciate of the heroic
7 efforts made by Ameren Missouri to restore service
8 to its customers.

9 COMMISSIONER W. KENNEY: Workers did
10 a great job.

11 MR. THOMPSON: Yes, they did.

12 COMMISSIONER W. KENNEY: Regarding
13 the FAC, you mentioned that they asked for it?

14 MR. THOMPSON: Yes, they did.

15 COMMISSIONER W. KENNEY: Do you think
16 an FAC is a good thing or a bad thing?

17 MR. THOMPSON: I think it's a good
18 thing.

19 COMMISSIONER W. KENNEY: Now, the way
20 I look at an FAC is that there's no real winner or
21 loser. I think a company just wants stability.
22 They want to be stable. They want to know what's
23 going to go on. Whereas, because it's -- it goes
24 up or down, correct?

25 MR. THOMPSON: Correct.

1 COMMISSIONER W. KENNEY: So I would
2 think --

3 MR. THOMPSON: It also reduces risk,
4 so the company's a winner.

5 COMMISSIONER W. KENNEY: Well, yeah,
6 but the customer's a winner, too, because it will
7 probably save money in the long run instead of
8 having to do more rate cases. If they can put off
9 a rate case for a year, it would save money because
10 of all those extra fees.

11 So I don't think the customer -- the
12 ratepayer loses. I don't think the -- the company
13 just doesn't have risk, as much risk.

14 MR. THOMPSON: It reduces the risk
15 the company has that fuel costs will be higher than
16 were expected when the rates were set.

17 COMMISSIONER W. KENNEY: Okay. So
18 what that -- but they would get that adjustment in
19 another rate case in the future, correct?

20 MR. THOMPSON: In a later case, you
21 would raise the rates, but they would never recover
22 the money that they hadn't collected when rates
23 were too low.

24 COMMISSIONER W. KENNEY: Okay. So do
25 you think the customers lose, the ratepayer?

1 MR. THOMPSON: The customers also in
2 a sense are -- customers are in the same boat.
3 See, it affects both sides equally in a mirror sort
4 of way. The customers lose the opportunity that
5 they would have where -- if fuel costs are higher
6 than expected and their rates don't change.

7 COMMISSIONER W. KENNEY: Right.

8 MR. THOMPSON: I'm paying ten bucks,
9 but you know what, the cost of fuel has gone up and
10 I'm not having to cover the difference. See, the
11 shareholders are essentially making up the
12 difference. In traditional ratemaking, both sides
13 take a risk that there's going to be a mismatch
14 between income and costs. So either side could
15 benefit.

16 COMMISSIONER W. KENNEY: Yeah. And
17 the ratepayer can benefit when fuel prices go down
18 like we've seen over the last few years with gas
19 and everything?

20 MR. THOMPSON: Right.

21 COMMISSIONER W. KENNEY: I guess it's
22 variable.

23 MR. THOMPSON: Right. Right.

24 COMMISSIONER W. KENNEY: Thank you
25 very much. No more questions.

1 JUDGE JORDAN: Commissioner Hall.

2 COMMISSIONER HALL: A few questions.

3 Would -- the parties have agreed that the fixed
4 costs at issue here are 36 million; is that
5 correct?

6 MR. THOMPSON: That's correct.

7 COMMISSIONER HALL: To what extent is
8 your argument contingent upon us determining that
9 the request here is not for a loss of -- or fixed
10 cost but instead lost revenue?

11 MR. THOMPSON: I think that's
12 essential to our argument.

13 COMMISSIONER HALL: Explain that to
14 me.

15 MR. THOMPSON: Well, the best way I
16 can think of to explain it is to talk about what
17 AAOs are most typically used for, and they're most
18 typically used for extraordinary items of expense
19 that would -- are not part of rates and are not
20 part of the test year.

21 In other words, when you set up
22 rates, you try to predict a normal year, what's a
23 typical year going to be like, and you set the
24 rates based on a typical year. What are they going
25 to pay for fuel? What are they going to pay for

1 labor? What are they going to pay for everything,
2 all the different items they have to pay, and then
3 you add an ROE on to the top of that to allow for
4 profit. Right?

5 So sometimes something unusual
6 happens. Let's take ice storms, for example,
7 which, you know, Ameren has had to deal with a lot
8 of storms and storm restoration costs. Let's say
9 you build in \$10 million into the rates for storm
10 restoration costs because that's the average that's
11 been spent over the last five years normalized and
12 adjusted. Right? You say, okay, 10 million's
13 good.

14 And then let's say they have the most
15 unexpected tremendous storm and it costs them
16 \$35 million to restore their customers after that.
17 So they've got 25 million more than was built in to
18 rates. Okay?

19 Now, what often happens with that
20 kind of storm restoration, extraordinary storm
21 restoration thing is they would come in and ask for
22 an AAO for some part of that money, and they would
23 say, well, this was an extraordinary event and
24 we're not planning to come in for a rate case, and
25 it might not make it into costs anyway because

1 remember the costs are being normalized, right, to
2 predict a normal year and everybody agrees this
3 wasn't normal. See? But nonetheless, we did spend
4 that money, and the customers had the benefit of
5 that money. It isn't fair we should lose it.

6 So the Commission would say, okay,
7 we'll give you an AAO for, let's say, 15 million,
8 20 million, some portion of that extraordinary
9 expense, and in the next rate case we will consider
10 that. And often what they'll do the next rate case
11 is say, okay, we'll put that into rates and let you
12 recover it over five years or ten years. We'll
13 amortize it into rates over some period of time.

14 And the idea is to make the company
15 whole for costs it really did incur doing something
16 of benefit to the ratepayers that it would not
17 otherwise recover. That's the most typical use of
18 an AAO.

19 Here what they want is to defer
20 revenues that were never paid. At least that's how
21 we view it. Now, they'll tell you, no, it's costs,
22 it's costs because we allocated so many millions of
23 dollars of costs to that rate class when we set up
24 the rates, and since that's the only customer and
25 they didn't pay it, we can say confidently that

1 nobody paid those costs.

2 But remember what I said in terms of
3 operating, it's a total company picture. They made
4 enough money to cover those costs and still have a
5 profit. They just didn't have as much profit as
6 they would have had had that not happened.

7 COMMISSIONER HALL: The standard that
8 we are to apply in determining whether to grant
9 this application, two issues: Extraordinary,
10 unusual, unique and not recurring; second,
11 materiality?

12 MR. THOMPSON: I would suggest to you
13 there's a third element and it's so basic it hasn't
14 been mentioned, and that would be the element that
15 there was, in fact, a transaction that occurred.

16 COMMISSIONER HALL: Do you agree that
17 the first two elements have been met?

18 MR. THOMPSON: I agree it was an
19 extraordinary event. I agree it was material.
20 This is -- if we're talking about the Noranda ice
21 storm. I mean, maybe we're talking about trying to
22 defer the money they had to give back to ratepayers
23 after losing the case on the FAC prudence review,
24 in which case I would say no, they don't get that
25 back.

1 COMMISSIONER HALL: Okay. Thank you.

2 COMMISSIONER STOLL: One more quick
3 question.

4 MR. THOMPSON: Yes, sir.

5 COMMISSIONER STOLL: So is it your
6 contention that one-third of the power that Noranda
7 had used before they continued to use because one
8 of the three lines was open?

9 MR. THOMPSON: That's what I
10 understand.

11 COMMISSIONER STOLL: And another
12 third was sold to AEP and Wabash, and are you
13 saying that it was this last third that was
14 never -- nothing was sold and therefore they lost
15 the revenue because of lack of sales? Is that --

16 MR. THOMPSON: I guess --

17 COMMISSIONER STOLL: I think you said
18 that earlier.

19 MR. THOMPSON: No. 1, the amount sold
20 to AEP and Wabash was actually larger than we've
21 been talking about in this case because it was in
22 two different cases, because it fell into two
23 different FAC review periods. And I do not recall
24 offhand what the combined total was, but it was
25 bigger than that 17 million that they're -- that

1 you've seen in the briefs from the 0255 case.

2 No. 2, talking about whether the
3 money is the same, you know, the money that was
4 received but deflected for the power sold to AEP
5 and Wabash or whether it was money never received
6 at all kind of depends on how you characterize what
7 they're trying to defer. You see what I'm saying?

8 In other words, when they say these
9 are fixed costs that Noranda didn't pay, which is
10 how they've primarily tried to characterize it,
11 then I would say that's the same as saying it's
12 revenue Noranda didn't pay because they didn't get
13 any electricity. Right? That would be the
14 two-thirds of the power they didn't take because of
15 the ice storm.

16 COMMISSIONER STOLL: Okay. I'll
17 listen to the rest of the testimony or the -- not
18 testimony.

19 MR. THOMPSON: I realize -- I
20 apologize for not being more clear. I do
21 apologize.

22 COMMISSIONER STOLL: Okay. Thank
23 you.

24 COMMISSIONER W. KENNEY: One more
25 short question. I have not had the privilege of

1 sitting in on a large company rate case yet. So
2 regarding Noranda, when their rates are determined
3 or when Ameren's rate schedule is determined, and
4 obviously since Noranda is I think an LTS and only
5 one in that category, are fixed costs associated
6 with that rate, that rate that it's determined?

7 MR. THOMPSON: When the rate's
8 designed.

9 COMMISSIONER W. KENNEY: Yes, when
10 the rate's designed.

11 MR. THOMPSON: Well, to be quick, a
12 rate case has basically two phases. The first half
13 you figure out on a total company basis how much
14 money does this company need to collect in a year
15 to operate. We call that revenue requirement.

16 In a second phase, you divide the
17 revenue requirement across the rate classes based
18 on what are called the billing characteristics,
19 which have to do with how many members of the
20 class, how much power they take, what times of day
21 they take the power and stuff like that, how often
22 they're billed. And from these billing
23 determinants they figure out the rates by dividing
24 the costs out across the rate classes, the idea
25 being that each class will pay for the costs it's

1 responsible for.

2 COMMISSIONER W. KENNEY: So the
3 answer is yes?

4 MR. THOMPSON: I think so.

5 COMMISSIONER W. KENNEY: Okay. Thank
6 you.

7 JUDGE JORDAN: I have nothing for
8 you, counsel. Thank you.

9 MR. THOMPSON: Thank you.

10 JUDGE JORDAN: Office of the Public
11 Counsel.

12 MR. MILLS: Good afternoon. May it
13 please the Commission?

14 I want to apologize in advance
15 because Mr. Thompson and Mr. Roam and I did not
16 really coordinate. We all have fairly similar
17 positions. We did not coordinate how we're going
18 to do our arguments today, and I was basically
19 going to say a lot of the same things that
20 Mr. Thompson was, although I did not come up with
21 the Three Card Monte description. That was not
22 going to be part of my spiel.

23 So instead of just going over the
24 same stuff again, I'm going to try to sort of
25 answer some of the questions that have come up

1 because I think I have a little bit different take
2 than Mr. Thompson does.

3 First of all, with respect to the
4 last question about ratemaking and costs assigned
5 to a class, I think I would -- I would take it even
6 farther I think than Mr. Thompson did. The purpose
7 of a rate case and a test year is to try to get
8 from a historical perspective a general idea of the
9 relationship between revenues, expenses, rate base
10 and return. Those are the things that you're
11 trying to match up in a rate case.

12 In Missouri we think the best way to
13 do that is to look at a historical period when all
14 of those numbers are known with certainty, rather
15 than some states use projected test years. We use
16 a historical test year when all of those are known.

17 But once you look at that historical
18 period and you try to set that relationship and you
19 try to determine what revenue going forward the
20 company will need to match the expenses you
21 anticipate going forward, really all the stuff that
22 you've done in the rate case, you can throw that
23 out. That doesn't matter at all anymore.

24 So, for example, if after the rate
25 case Noranda goes out to business -- goes out of

1 business but 17 new Monsanto come in in a
2 different rate class, they're fine. There is no
3 reason to come in for another rate case. If the
4 residential demand goes up unexpectedly even though
5 Monsanto goes out of business, that's fine, too.

6 You don't look at after the fact
7 where the revenues come from. As long as the
8 company is still from its perspective maintaining a
9 sufficient level of profitability, then they won't
10 come in for a rate case and it doesn't really
11 matter to them, nor should it, nor can it really,
12 it doesn't drive another rate case.

13 So I think the idea, and you've seen
14 it in the briefs, you heard a little bit in
15 argument today, that there's a certain level of
16 fixed costs assigned to Noranda is just false.
17 That's not the way it works going forward. That's
18 a calculus you use to set rates for that class, but
19 those costs are not in any way going forward
20 assigned to a particular class, not to Noranda, not
21 to residential, not to anybody else.

22 Those are just a pot of revenues that
23 come in. As long as the revenues as a whole are
24 sufficient, it doesn't matter where they come from,
25 and there's no mechanism after a rate case to try

1 to track costs to a particular class or revenues to
2 a particular class.

3 And so I think that certainly is a
4 fundamental difference that I have with the
5 company's point of view.

6 Another question I think, and this is
7 again one of your questions, Commissioner Kenney,
8 is the notion of how could they have asked for an
9 AAO sooner. And I think the answer is they
10 couldn't have, but that doesn't mean that it's okay
11 for them to ask for it late.

12 That just means that these are not
13 the kinds of things that you can get an AAO for
14 because there is -- you have to ask for it in the
15 current period, and if it's something different
16 from the kinds of things that you can record or
17 track in a current period, then you can't get an
18 AAO for it. It's not really -- that doesn't mean
19 that you should ignore the USOA and say, well, we
20 can do this later. I think it just means that the
21 USOA does not have provisions that would allow for
22 an AAO for this type of an event or nonevent as you
23 may -- as you may call it.

24 So I think also there is -- there is
25 some question as to what else the company could

1 have done in the immediate aftermath of the ice
2 storm other than seeking an AAO, and I think there
3 are a number of things they could have done. The
4 only thing that they did do was seek rehearing of
5 the Public Service Commission decision in the rate
6 case, which the Commission denied at the time, but
7 that's really -- that was -- that's really sort of
8 a weak vehicle for what they wanted to do.

9 Really what they wanted to do was
10 make the Commission aware that circumstances have
11 changed since the decision was made and that there
12 was new evidence, new facts on the ground, and the
13 Commission should do something else based on those
14 new facts.

15 That's not really what you do in an
16 application for rehearing. An application for
17 rehearing, what you're doing is you're telling the
18 Commission you have the facts and you got it wrong
19 and here's how you got it wrong. You don't use an
20 application for rehearing to say now circumstances
21 have changed and the decision you made is no longer
22 proper.

23 So they could have -- for example,
24 they could have sought to reopen the record
25 pursuant to Commission Rule 4 CSR 240-2.110(8). It

1 didn't do that. It could have tried to simply
2 withdraw the fuel adjustment clause tariffs, in
3 which case they wouldn't have been in this
4 situation. They would have had to wait for another
5 rate case to get a fuel adjustment clause, but they
6 could have done that.

7 And I think -- most of you were not
8 here then, but that was the second case in a row in
9 which the issue of whether or not Ameren should get
10 a fuel adjustment clause was fought tooth and nail.
11 It was -- for two cases in a row it was probably
12 the most hard fought issue in the case.

13 So I think if Ameren had come to the
14 parties in that case and said, we want to give up
15 on the fuel adjustment clause, I think many of the
16 parties would have said, okay, that's fine. And
17 then we wouldn't have had this issue. They
18 wouldn't have had a fuel adjustment clause. They
19 would have sold the power to AEP and Wabash and it
20 would have flowed through just like any other
21 off-system sales had prior to the fuel adjustment
22 clause.

23 But they didn't do that. They didn't
24 ask the Commission if they could withdraw the
25 tariffs and file different tariffs. So I think

1 there were other options that they could have taken
2 other than the one they took at the time and the
3 AAO they sought later, but they didn't, and so we
4 are where we are, and I think they are seeking to
5 get an AAO for something that is simply not
6 available for them.

7 And, you know, Mr. Byrne put this
8 language up from the MGE decision, and Mr. Thompson
9 referenced it as well, but I think that is an
10 absolutely critical decision of the Commission
11 because, you know, Mr. Byrne tried to come up with
12 a few things that are slightly different.

13 Of course, no case is exactly like
14 any other case, but in all relevant parameters,
15 what has happened here is exactly what happened to
16 MGE in the wake of the Joplin tornado. They were
17 unable to get some revenue from some customers who
18 did not take service, and the Commission -- you
19 heard -- you heard the recitation of what the
20 Commission said in that order. Basically the
21 Commission said this revenue never existed, the
22 transaction never happened, and so you can't get an
23 AAO for it. And I think that's exactly what we're
24 talking about here. There is no -- there is no
25 significant difference between the two cases.

1 With respect to under what
2 circumstances an AAO is allowed, I think,
3 Commissioner Hall, you've called out the
4 appropriate criteria, which are extraordinary,
5 nonrecurring and material, but I think what you
6 need to bear in mind is that those are the minimum
7 criteria. If you meet those criteria, that does
8 not mean that you automatically get an AAO. If you
9 don't meet those, then you should not get an AAO.
10 But even if you do meet them, it's still within the
11 Commission's discretion as to whether or not an AAO
12 is appropriate under the circumstances.

13 So I think there is sort of an
14 unspoken other criteria, which is that in addition
15 to being extraordinary, nonrecurring and material,
16 the other criteria is that granting one would be in
17 the public interest. And that's sort of at the
18 heart of everything that the Commission does, but
19 it's a necessary judgment that the Commission would
20 have to make even if the company demonstrates that
21 it has met the minimum criteria, which in this case
22 I don't think they have.

23 And, Commissioner Hall, I think you
24 asked another question about if the Commission
25 determines that these are fixed costs -- fixed

1 costs, does that negate the entire argument? And
2 it does. It negates part of it. But even if they
3 are fixed costs, even if the Commission decides
4 that they are, which I don't believe that they are,
5 awarding an Accounting Authority Order and
6 ultimately recovery would still constitute
7 retroactive ratemaking even if they were fixed
8 costs because they're from a period -- they're from
9 a period long, long ago.

10 And as Mr. Thompson said, asking
11 customers in some future period to pay for a
12 shortfall of revenues back in 2009 is the very
13 definition of retroactive ratemaking, and that's
14 unlawful in Missouri.

15 And also, even if they are fixed
16 costs, and I think Mr. Byrne admitted this in his
17 opening statement, during the period in question
18 the company not only covered all of its fixed
19 costs, it made a 6 percent profit. So if there are
20 fixed costs, they were recovered.

21 The profit was not as high as they
22 would have liked. It was only 6 percent. They
23 would probably rather have 10. They probably would
24 rather have 12. They could argue perhaps that they
25 were entitled to something around 10 and they only

1 got 6, but that doesn't mean that they did not
2 recover their fixed costs. They did recover all of
3 their fixed costs, and they did make a profit on
4 top of that.

5 So even if the Commission does
6 determine that the moneys at issue were fixed
7 costs, I don't think it negates the argument
8 entirely because those are the two arguments that
9 apply even if they are fixed costs.

10 And, Commissioner, if you want, I can
11 get into a discussion with you about the FAC
12 because I don't necessarily agree with Mr. Thompson
13 that an FAC is always a good thing. I think there
14 are circumstances, certain market climates, certain
15 utilities for which an FAC can be a good thing.
16 Other times I don't think it's necessary and -- and
17 as Mr. Thompson noted, it certainly shifts a
18 significant portion of risk from ratepayers -- I
19 mean from the shareholders to the ratepayers, and I
20 don't think in any case that the Commission has
21 adequately recognized that shift.

22 So I would have a slightly different
23 opinion than Mr. Thompson about an FAC being a good
24 thing. Can be, but generally speaking it's not.

25 And with that, I'd be happy to answer

1 questions.

2 JUDGE JORDAN: Thank you, counselor.

3 I don't see any questions from the Chairman.

4 Commissioner Stoll.

5 COMMISSIONER STOLL: I'll ask one.

6 So in your opinion, the claim of loss of fixed
7 costs/revenue really is not a valid claim, that
8 they did recover it. So it's -- in your
9 estimation, it's not because of the fuel adjustment
10 clause being there. Well, does the fuel adjustment
11 clause and/or the storm play any role in this?

12 MR. MILLS: Sure. Absolutely it
13 does. But for the storm and but for the operation
14 of the fuel adjustment clause, we wouldn't even be
15 having this discussion. So those are obviously
16 important factors.

17 But even if you get past all of that,
18 if you're talking about whether or not they should
19 be allowed to defer recovery of these fixed costs,
20 I would say no because they recovered all their
21 fixed costs, just in different ways.

22 For example, if you think back to
23 Mr. Thompson's grocery store analogy, if, for
24 example, the grocery store sold twice as many boxes
25 of Fruit Loops as it thought it was going to and

1 half as many boxes of Raisin Bran, it's not going
2 to say, oh, my gosh, we lost money because we
3 didn't sell our Raisin Bran. They got the right
4 amount of revenue coming in. They just got it from
5 a different source than they expected. And that
6 doesn't -- that wouldn't cause them to do anything
7 different in terms of their revenues and expenses.

8 It may cause them in the future to
9 buy fewer boxes of Raisin Bran to keep on the
10 shelf, but it doesn't mean that their operation is
11 any less profitable. They simply got the revenue
12 from some different source, and nonetheless, they
13 have the revenue they expected, the expenses they
14 expected, and they're good going forward.

15 COMMISSIONER STOLL: Thank you.

16 JUDGE JORDAN: Commissioner Kenney.

17 COMMISSIONER W. KENNEY: Thank you,
18 Mr. Mills. On the fuel adjustment clause, express
19 your feelings a little more. No. Serious.
20 Because I look at it as it does take risk away
21 from -- or instability away from a company.

22 MR. MILLS: Yes.

23 COMMISSIONER W. KENNEY: The company
24 just wants stability.

25 MR. MILLS: Yes.

1 COMMISSIONER W. KENNEY: Any company
2 wants stability. But does it really put much of a
3 bigger risk -- if it goes both ways, does it put a
4 big risk on the consumer just to -- I mean, it just
5 does it a little faster, doesn't it?

6 MR. MILLS: When utility rates are
7 set, the rate of return, the profit on rate base is
8 based on the risk profile of the company and what
9 different businesses with similar risk profiles
10 would make. When you take that much risk, when you
11 take -- because fuel cost is one of the company's
12 largest costs, if not the largest cost. When you
13 take the risk of volatility in that huge cost away
14 from the company so that they really don't face any
15 risk if costs go up or down, when you take that
16 away you are severely lowering their risk profile.

17 And I don't believe that the
18 Commission in its decisions when it's awarded
19 companies fuel adjustment clauses have recognized
20 that reduction in risk. So it's really not so much
21 that it -- that it shifts risks to customers,
22 because it does, but it's that that shift has not
23 really been recognized. The reduction in risk on
24 the utility has not been recognized and reflected
25 in the return on equity.

1 COMMISSIONER W. KENNEY: Meaning that
2 because it's less of a risk, maybe they don't need
3 as high of a return?

4 MR. MILLS: Exactly. Instead of
5 getting 9 percent or so, they should be getting
6 significantly lower.

7 COMMISSIONER W. KENNEY: Thank you.

8 JUDGE JORDAN: Commissioner Hall.

9 COMMISSIONER HALL: Thank you. In
10 the Joplin case, was there any discussion of
11 whether the -- whether the application was seeking
12 loss of fixed costs or loss of revenue? Was that
13 discussion involved?

14 MR. MILLS: Honestly, Commissioner, I
15 don't recall. I know in the Commission's decision
16 the Commission's decision talked about revenues
17 that were not received and costs that were not
18 incurred. Whether any of the parties tried to --
19 tried to frame the question in terms of fixed
20 costs, I don't recall. I'd certainly be happy to
21 look at that and file something in the case.

22 COMMISSIONER HALL: That's okay.
23 Thank you.

24 JUDGE JORDAN: I have no questions.
25 Any other questions from the Bench? Thank you,

1 counselor.

2 MIEC.

3 MR. ROAM: May it please the
4 Commission?

5 I'll just address a couple of
6 questions real quickly and then I have many of the
7 same arguments as the other counsel.

8 To answer your question, Commissioner
9 Hall, yes, that question was addressed in the MGE
10 case. MGE was seeking, quote, the lost fixed cost
11 recovery from its distribution rates. That's how
12 it characterized what it was seeking.

13 What really was happening in that
14 case is that, in the aftermath of the Joplin
15 tornadoes, MGE came to the Commission and said,
16 we've incurred a ton of expense that was
17 unanticipated for storm recovery, and so we're
18 seeking an AAO to recover those expenses. In
19 addition, we're likely to lose a lot of revenue
20 because of the Joplin tornado, and so we also want
21 an AAO to recover what they characterized as lost
22 fixed cost recovery.

23 But really what they were seeking is
24 the same thing Ameren is seeking here, which is the
25 revenue that they would be unlikely to generate as

1 a result of the tornado. The Commission said, with
2 respect to the storm recovery expenses that you've
3 incurred, those are extraordinary, those are
4 unique, those are material and those are expenses,
5 and so we're going to grant you an AAO to recover
6 all of those, and they allowed MGE to recover every
7 dollar of that expense.

8 With respect to the revenue that MGE
9 sought to recover, which they characterized as lost
10 cost recovery, the Commission said, that's not an
11 item for deferral. Those are phantom revenues.
12 That's ungenerated revenue for which you cannot
13 seek an AAO. This jurisdiction nor any
14 jurisdiction in the country provides AAOs for
15 ungenerated revenue that you hope or that you
16 anticipated receiving but that you, in fact, did
17 not receive.

18 So that item is not an item. It
19 doesn't exist. It's a hoped-for, an anticipated, a
20 desired amount of money that never transacted. It
21 didn't happen. You can't -- you can't defer it
22 because there's nothing to defer. It's a -- it's a
23 phantom thing.

24 And so that's how that case played
25 out. They granted the AAO for the storm costs.

1 They did not grant the AAO for the ungenerated
2 revenue.

3 In this case, the record is
4 absolutely clear. Every single dollar of storm
5 recovery costs, every dollar it took to recover for
6 the storm, Ameren got that, and that's in the
7 record. Lynn Barnes testified extensively to that,
8 and you can find all that in the record, in the
9 briefs. So there wasn't a -- there aren't expenses
10 or costs that Ameren didn't recover. They
11 recovered for every dollar that they spent.

12 And, in fact, again, as Mr. Byrne
13 pointed out, made a 6.69 percent profit that year.
14 So not only did they cover -- recover all of their
15 expenses, but they also made a profit on top of
16 that.

17 So what they're really seeking is the
18 difference between the profit that they made and
19 the profit that they anticipated making if they had
20 sold that electricity to Noranda, and that is
21 ungenerated revenue for which you cannot grant an
22 Accounting Authority Order, not in this case, not
23 in any jurisdiction.

24 With respect to how the court -- or
25 how these -- this amount should be characterized,

1 the Missouri District -- Missouri Western District
2 Court of Appeals has already answered that question
3 in the last case. And let me just read you a
4 portion of their opinion. And this was a case that
5 I argued in front of them, and they were very clear
6 about what this amount was.

7 The court says, we're not persuaded
8 by Ameren's emotive equitable appeal which is built
9 on a shaky foundation. Ameren's attempt to shock
10 this court's sense of justice ignores that the risk
11 of a dramatic loss of, quote, retail revenue is a
12 business risk that every utility faces. The risk
13 of lost revenue is simply not a risk a utility is
14 authorized to remediate with a fuel adjustment
15 clause.

16 So the Court of Appeals has already
17 established as a matter of law what it is that
18 Ameren is seeking. Ameren can call it fixed costs,
19 but I can guarantee you that if this goes back up
20 to the Court of Appeals, they're not going to see
21 it as fixed costs. In fact, the Court of Appeals
22 repeatedly noted that even though Ameren calls it
23 lost fixed costs, it's actually revenue,
24 ungenerated revenue.

25 So that -- I just wanted to clear up

1 that point briefly and to say that, if I can expand
2 just a little bit more -- most of the arguments
3 that I was going to make have already been made,
4 but I see it -- I'm going to give one more analogy.

5 I see it sort of as this: You're the
6 boss of a paper company. You've got a sales guy
7 who every year goes up to St. Louis. One of your
8 biggest clients is up there in St. Louis, and every
9 year he goes up there and he takes them out to a
10 ballgame, he takes them out to a restaurant, he
11 pays for gas on the way up and back, he gets a
12 hotel, and every year he comes back and he's got --
13 he's got a deal with that company up there, that
14 client, and every year he gets a \$10,000 commission
15 for that deal that he made.

16 This year he goes up, he takes them
17 out to the ballgame, takes them to the restaurant,
18 takes them -- pays for gas on the way up and back,
19 spends the night in the hotel, comes back, gives
20 you the receipts for all these expenses. You pay
21 him for all these expenses. You reimburse him
22 every dollar.

23 Then he gets a call from that client
24 and says, due to unexpected circumstances, we're
25 not going to do a deal with you this year. He

1 comes back to you and says, hey, I was expecting a
2 \$10,000 commission. I want to be reimbursed for
3 that expense. You're going to say, that's not an
4 expense. That's an ungenerated revenue. That's a
5 revenue that you anticipated getting that you
6 didn't get. I'm only reimbursing you for expenses.

7 That's exactly the situation here.

8 That's exactly the situation in the MGE case, and
9 that's exactly what Ameren is seeking here.
10 They're seeking ungenerated revenues. And I will
11 just point out, there is a little bit of
12 misdirection. I would agree. I don't know that I
13 would go the same analogy with the shell game, but
14 there is some misdirection with respect to these
15 rules. Okay?

16 For instance -- well, let me just
17 point it out on your document, on the document that
18 was given to you, 182.3.

19 JUDGE JORDAN: That's the one on top,
20 the very first one.

21 MR. ROAM: Here we go. If you look
22 at 182.3, other regulatory assets, it says this
23 account shall include the amounts of regulatory
24 created assets. All right. Then -- so it's
25 talking about regulatory assets. Then this other

1 portion of the rule is -- is a discussion of
2 regulatory assets and liabilities. Okay.

3 Ungenerated revenue is not a
4 regulatory asset that can be deferred in Account
5 182.3. It may be a regulatory liability. It may
6 not fit within that definition either. But there's
7 a little bit of -- I would argue, and it was in the
8 case as well, and we pointed it out in our brief,
9 there was a bit of misstatement of the rules during
10 the hearing. This is just not an item that can be
11 deferred with an AAO. It's a nonexistent fiction
12 that is not deferrable in this or any other
13 jurisdiction.

14 And to the extent -- if it's granted,
15 if the AAO is granted and the Commission then
16 attempts down the road or Ameren seeks to have the
17 Commission factor it into rates, it will be
18 reversed by the Missouri Court of Appeals extremely
19 quickly because it's retroactive ratemaking and
20 it's already been determined what it is. It's
21 ungenerated revenue.

22 So although every -- all of us will
23 have a lot of extra work to do between now and
24 then, it's a massive waste of ratepayer money. And
25 so for that -- for those reasons, I would recommend

1 that you -- or request that you deny the request
2 for an AAO.

3 JUDGE JORDAN: Thank you, counselor.
4 I'm seeing no questions from the Chairman. So
5 Commissioner Stoll.

6 COMMISSIONER STOLL: Thank you.
7 Relatively quickly, Mr. Roam. I was reading -- you
8 mentioned Lynn Barnes' testimony, and I was reading
9 that, and one thing that I was trying to figure out
10 is in a footnote on page 8 where it says, it is
11 noteworthy to point out that as a result of the
12 January 2009 storm and the consequential drop in
13 Noranda's usage, in the company's next rate case,
14 ER-2010-0036, the parties in the case agreed to and
15 the Commission approved the addition of an N factor
16 to the FAC calculation which allows the company to
17 retain revenues from off-system sales in an amount
18 equal to the fixed costs not recovered from Noranda
19 in the event a significant reduction in usage would
20 occur similar to the drop in 2009-2010.

21 Do you recall that? Is that --

22 MR. ROAM: I'm sorry. What were you
23 reading from?

24 COMMISSIONER STOLL: This is in a
25 footnote from her surrebuttal testimony.

1 MR. ROAM: Okay.

2 COMMISSIONER STOLL: I was just
3 curious about that.

4 MR. ROAM: The N factor, I think that
5 was discussed in the last case. I believe that was
6 a black -- was that a black -- somebody might be
7 able to answer that better than I am.

8 There was a black box agreement where
9 that amount was discussed and addressed, and I
10 believe that there in the last case -- I've kind of
11 gotten these cases mixed up, but in the previous
12 case Ameren was taking the position that the amount
13 at issue for purposes of the prudence review should
14 have been \$3 million less because of this N factor.
15 Is that right?

16 MR. BYRNE: Maybe I can help. The
17 N factor, it was part of a settlement. It was
18 added to our fuel adjustment clause basically to
19 address circumstances just like Noranda being lost
20 in an ice storm. And what it basically said is if
21 Noranda lost a certain amount of power, which is
22 about a third of its power or more, Ameren Missouri
23 could make itself whole from by collecting the
24 money from the other customers.

25 So it fixed the problem of this ice

1 storm on a going-forward basis. We didn't have the
2 N factor when the ice storm hit, but as part of a
3 settlement, everyone agreed that on a going-forward
4 basis Ameren shouldn't be put in this situation.

5 COMMISSIONER STOLL: Is it currently?

6 MR. BYRNE: Yes, it's currently in
7 effect.

8 MR. MILLS: It is currently in
9 effect. If I may add, that was not the only item
10 in that agreement. That was a negotiated agreement
11 in which parties gave and take on a lot of
12 different things. That's something that I think
13 it's fair to say that Ameren wanted. Some other
14 things in the agreement other parties wanted, and
15 that's how it came about. It was not simply
16 everybody agrees we've got to give Ameren this,
17 it's the right thing to do. It was a negotiated --

18 MR. ROAM: Just to that extent, The
19 fact that one would need to include something like
20 that I think speaks to the fact that, you know,
21 that at the time that was not available to them.

22 COMMISSIONER STOLL: And that wasn't
23 available because of the fuel adjustment clause?

24 MR. ROAM: Well, no. Let me say
25 this. Okay. The amount of revenue, anticipated

1 revenue fluctuation between the amount they
2 anticipated and the amount that they received as a
3 result of Noranda going offline, and I think we've
4 got the evidence in this case, was less significant
5 than normal weather changes that have happened
6 historically, fluctuations of weather.

7 So if Ameren has a particularly cool
8 winter and people don't use their air conditioners
9 as much, there will be a fluctuation in revenue.
10 Okay. There will be a dip in revenue. Ameren's
11 coming to you today to say, hey, we need to replace
12 the revenue that we didn't generate when Noranda
13 went offline would be the same as them coming to
14 you after a particularly cool winter and saying,
15 you know, we need to replace revenue that we --
16 that we should have generated if it had been
17 warmer. And so, you know, that's just not
18 something that is done, you know.

19 COMMISSIONER STOLL: I'm just curious
20 as to why parties would agree to this N factor
21 after the event and, you know, kind of disclaim it
22 now, I guess.

23 MR. THOMPSON: Well, Commissioner, if
24 I may, it's as Mr. Mills said. It was something
25 that Ameren wanted strongly given the experience

1 they had just had and that other parties were
2 willing to agree to in exchange for concessions by
3 Ameren on other topics.

4 MR. ROAM: A settlement agreement
5 doesn't -- a settlement agreement is two parties
6 who both want something. Ameren's going to give us
7 something. And, you know, Noranda's part of MIEC,
8 so I represent -- we represent them. But, you
9 know, and so we'll give them something, and what
10 we -- what we give them is not something we want to
11 give them, and what they give us is not something
12 they want to give us, but the only way for us to
13 get something we want is for us to give them
14 something they want.

15 So the N factor that's part of the
16 agreement doesn't in any way factor in to analysis
17 of whether or not they can -- they can get -- that
18 you should grant an AAO for ungenerated revenue.

19 COMMISSIONER STOLL: I guess to me,
20 if I didn't think it was justified, I just wouldn't
21 enter into that agreement, but that's a whole other
22 story.

23 MR. ROAM: There's a lot of horse
24 trading going on in these settlement agreements.

25 COMMISSIONER STOLL: Okay. Thank

1 you.

2 MR. ROAM: You bet.

3 JUDGE JORDAN: Commissioner Kenney.

4 COMMISSIONER W. KENNEY: I have no
5 questions. Thank you.

6 JUDGE JORDAN: Commissioner Hall.

7 COMMISSIONER HALL: Thank you. 2006
8 there's a Court of Appeals decision in MGE versus
9 PSC. Are you familiar with the case?

10 MR. ROAM: No. 2006?

11 COMMISSIONER HALL: It's -- 210 SW
12 3rd 330. I don't even know if it's eastern or
13 western. I mean, in that decision at least my
14 understanding is that the Court said that if
15 there's an AAO in place, it's not -- not
16 retroactive ratemaking.

17 MR. ROAM: Right. So you granting
18 the -- if you grant the AAO that they're seeking,
19 you have not -- there's not been retroactive
20 ratemaking, and that's absolutely clear under the
21 law. You've not committed retroactive ratemaking.
22 Okay?

23 But if you defer that cost, the only
24 reason to defer a cost is because down the road in
25 the next rate case you're going to factor that cost

1 in to rates. You're going to factor those
2 deferred -- that deferred amount in to rates. If
3 you factored the amount that you've deferred -- if
4 you grant the AAO in this case and then when they
5 come to the next rate case and say, hey, you know,
6 we've deferred this amount, you've granted us an
7 AAO, now we're asking you to factor it in to rates
8 and you factor it in to rates, that's retroactive
9 ratemaking in Missouri. It will immediately be
10 overturned.

11 COMMISSIONER HALL: So it sounds like
12 you're saying it's fine to issue an AAO, but it
13 never can have any significance.

14 MR. ROAM: No.

15 COMMISSIONER HALL: It can never be
16 factored in to rates.

17 MR. ROAM: No. It can absolutely be
18 factored in to rates if it's within the same
19 period. Okay. So if they sought an AAO within
20 the proper period and they come before the
21 Commission in the next rate case and seek to have
22 those -- that deferred amount factored in, that's
23 not retroactive ratemaking.

24 If they come to you three rate cases
25 later, which is what they're doing now, and seek to

1 have a deferred -- what they're calling a deferred
2 cost, which the court clearly calls ungenerated
3 revenue, into rates going forward from an issue
4 that happened in 2009, there's not a court in
5 Missouri that -- that's not a hard decision. That
6 opinion will get written quickly. That's
7 retroactive ratemaking.

8 COMMISSIONER HALL: Thank you.

9 COMMISSIONER W. KENNEY: One short
10 question. Okay. If that's retroactive ratemaking,
11 then why would they be here? If that's what you're
12 saying, that's definitely going to happen, they're
13 smart people, just like you're smart people.

14 MR. ROAM: Right. That is a very
15 good question, and I would defer to them on that.
16 I think it's -- I think this is -- I think it's a
17 bad idea for them to be here. I think it's -- I
18 think it's a waste of time. I think it's a waste
19 of a lot of money. I think -- I don't understand
20 why they're seeking this.

21 I think this is futile, and, you
22 know, and it may take a while to prove its futility
23 if this thing is granted and then, you know, there
24 will be a rate case and they'll seek to have it
25 factored in. If it's factored in, it will get

1 reversed by the Missouri District Court of Appeals.

2 I don't know why they're here seeking
3 this, but I think it's a -- I think it's a waste of
4 time and I think it's a waste of money.

5 COMMISSIONER W. KENNEY: Again,
6 that's your opinion, right?

7 MR. ROAM: It's absolutely my
8 opinion, but the law is really clear on this,
9 especially now that the Western District Court of
10 Appeals has explained expressly. This is the same
11 body that the next case will be up before, and
12 they're going to say, didn't we tell you in the
13 last case this was lost revenue, this is
14 ungenerated revenue? Why are you seeking an AAO
15 for that? Why are you seeking to have a -- why are
16 you seeking to have an amount in rates, factored in
17 to rates that's clearly retroactive ratemaking?

18 I mean, I just -- I just -- I agree
19 that it is -- I don't think it's a good idea for
20 them to be seeking this. I think it should be -- I
21 think if it's denied by this Commission, that will
22 stop the bleeding, because I don't know what the
23 next move will be, but surely it will be over.

24 COMMISSIONER W. KENNEY: Thank you.

25 COMMISSIONER STOLL: I'll just ask

1 one more then. So do you know, did they have the
2 legal authority to appeal the decision of the
3 Missouri Court of Appeals or is that something
4 that --

5 MR. ROAM: I don't remember if you
6 guys appealed it or not. They could -- so what
7 they could have done is -- what they could have --
8 and they may have done that.

9 COMMISSIONER STOLL: And they may
10 have -- the Supreme Court may have said, no, we're
11 not going to hear it.

12 MR. ROAM: Right. Right. But I
13 don't remember if that happened or not. If they
14 didn't, I certainly wouldn't hold that against
15 them. This is not the kind of case that the
16 Missouri Supreme Court is going to care about.

17 COMMISSIONER STOLL: Yeah.

18 MR. ROAM: And so if they didn't, I
19 wouldn't hold that against them from an analysis
20 point of view, because, you know, I think they'd
21 probably -- if they didn't, they probably felt it
22 was futile, and it would have been.

23 COMMISSIONER STOLL: That's kind of
24 what I was -- okay. Thank you.

25 MR. ROAM: You bet.

1 JUDGE JORDAN: I have nothing for
2 you. Thank you.

3 Applicants have reserved five
4 minutes.

5 MR. BYRNE: Real quick. Mr. Roam
6 couldn't be more wrong about his analysis of this
7 being retroactive ratemaking. The Court of Appeals
8 suggested an Accounting Authority Order would be a
9 good option for us in their opinion on the other
10 case. The case that you cited specifically says
11 you can get an Accounting Authority Order and then
12 in a subsequent case the Commission can include it
13 and that's not retroactive ratemaking. He's
14 completely wrong about it.

15 The fact that -- again, whether this
16 is revenues or not, they keep bringing that up,
17 saying it's ungenerated revenues. This
18 Commission's allowed AAOs to consider ungenerated
19 revenues, and it's been upheld by the Court of
20 Appeals. There's a case involving the Cold Weather
21 Rule that had both costs and revenue losses built
22 into the Accounting Authority Order. It's been
23 done before.

24 This Commission looks at lost
25 revenues and lost fixed cost recovery on its energy

1 efficiency. There's energy efficiency lost fixed
2 cost recovery that's included. It's actually a
3 pretty common thing. So whether this is -- whether
4 you characterize this as revenues or lost fixed
5 costs, the Commission clearly has the authority to
6 issue an Accounting Authority Order.

7 I would also refer you back to
8 Definition No. 31, and this is the definition that
9 governs regulatory assets, which is what we're
10 talking about, and it says, assets and liabilities
11 arise from specific revenues, expenses, gains or
12 losses. So it doesn't matter whether you call it a
13 revenue or an expense or a gain or a loss, you have
14 the power to grant an Accounting Authority Order to
15 deal with it.

16 And in this case, the timeliness has
17 been an issue. The real truth is, this did not hit
18 our books and records -- the first time there was
19 an adverse hit on our books and records was in
20 April of 2011, after you guys had issued the order
21 in the first case, because up until then we
22 reflected that as income to us. When we had to
23 give it back to our customers, that was the adverse
24 impact on our books and records, and that's the
25 adverse impact that we're seeking to offset with

1 this Accounting Authority Order.

2 Mr. Thompson -- I won't into the
3 Three Card Monte, although that's a little
4 offensive. I don't think we're being dishonest
5 here. We're trying to get -- we lost -- we lost a
6 customer the size of the city of Springfield for
7 14 months. We didn't recover a whole bunch of
8 fixed costs that we had to pay. And there's a
9 vehicle, if the Commission chooses to do so, that
10 they can -- that they can issue, an Accounting
11 Authority Order.

12 And his analogy to the store is not
13 appropriate. A store is not a regulated utility.
14 When you're a regulated utility, you have an
15 obligation to serve all your customers no matter
16 what. That's the obligation we undertake, and we
17 charge regulated rates. We can't charge any more
18 than that, and we can't charge any less than that.

19 But the Commission also has
20 obligations to customers and to utilities, and one
21 of the obligations the Commission has under this
22 regulatory compact is we've got to be given an
23 opportunity to recover our costs and an opportunity
24 to -- at least the opportunity to earn a fair rate
25 of return.

1 And in this case, when Noranda left
2 the system, we didn't have that opportunity. And
3 there's a -- and there's a specific mechanism to
4 deal with these unique, unusual, unforeseen,
5 one-of-a-kind circumstances. The unique vehicle is
6 an Accounting Authority Order, and that's why we're
7 asking for it.

8 Mr. Mills said we had options. We
9 didn't have any options. Reopen the record in our
10 rate case, that would not have worked. When we
11 filed our request for rehearing, the Commission
12 said there's no time to reopen the record. So the
13 Commission determined that was not an option for
14 us.

15 He said we could have withdrawn the
16 FAC. No, we could not have. Once it was approved,
17 and it was already approved, you've got to file a
18 rate case to change, withdraw, amend the FAC. We
19 did not have the power to do that. Could we have
20 negotiated something with all the different
21 parties? I don't know, you know, but we don't have
22 the legal authority to withdraw an FAC after the
23 rate case is over with.

24 Again, the current period I believe
25 is 2011. That's when we filed to get this AAO, and

1 that's when it hit our books and records. Let's
2 see.

3 JUDGE JORDAN: Little less than one
4 minute.

5 MR. BYRNE: I guess if I could leave
6 you with one thing, it's this: If we don't get an
7 Accounting Authority Order, basically what will
8 have happened is we incurred tens of millions of
9 dollars of fixed costs that nobody has claimed were
10 imprudent. In fact, in the rate case they were
11 allocated to Noranda, so the Commission considered
12 them to be prudent.

13 Because of this ice storm we lost a
14 customer the size of the city of Springfield,
15 Missouri for 14 months. We did not get a chance to
16 recover our costs, and we think it's appropriate,
17 it's certainly within the Commission's power to
18 grant an AAO. If you do grant an AAO, you can deal
19 with ratepayer impacts in our next rate case. It
20 doesn't have to hurt ratepayers very much.

21 If you don't grant us the AAO, we're
22 going to have an immediate significant financial
23 impact because of that ice storm. Thank you.

24 JUDGE JORDAN: Thank you. I don't
25 have any questions from the Chair. Commissioner

1 Stoll.

2 COMMISSIONER STOLL: No questions.

3 Thank you, your Honor. Thanks for everyone being
4 here and explaining your position and giving us an
5 opportunity to ask questions.

6 JUDGE JORDAN: Commissioner Kenney.

7 COMMISSIONER W. KENNEY: I have no
8 questions, too, but I would like to thank
9 Mr. Byrne, Mr. Thompson, Mr. Mills, Mr. Roam
10 because obviously I had requested this hearing so
11 we could be informed because, as you know, none of
12 us were on this Commission at that time, but I
13 appreciate it. Very educational, and you-all have
14 made some excellent points and given us something
15 to think about. Thank you.

16 JUDGE JORDAN: Commissioner Hall.

17 COMMISSIONER HALL: A couple
18 questions, I think for Mr. Thompson.

19 MR. THOMPSON: Yes, sir.

20 COMMISSIONER HALL: Are there -- are
21 there instances that you're aware of where when the
22 Commission has granted one of these accounting
23 orders and the Commission has not taken that into
24 account in the rate case?

25 MR. THOMPSON: I think there are --

1 there are instances where the Commission has not
2 allowed recovery in the rate case, but certainly
3 they've always considered it.

4 COMMISSIONER HALL: So it is not
5 uncommon to grant the accounting order but not give
6 it full -- not allow for full recovery in rates in
7 the upcoming rate case?

8 MR. THOMPSON: I think my position
9 would be that more often than not the deferred
10 amount is granted recovery in the rate case, but
11 not always.

12 MR. MILLS: Commissioner, if I can
13 answer that. In 25 years, I cannot recall an
14 instance in which that has happened. I don't think
15 that that -- certainly it is a possibility, but I
16 don't think it happens.

17 MR. BYRNE: If I could address it,
18 too. I mean, deciding on this Accounting Authority
19 Order does not decide the issue in the rate case.
20 You are free to allow some, none or all of the
21 amounts that are deferred in an Accounting
22 Authority Order in the next rate case. But if you
23 don't defer it, you can't even consider it.

24 MR. MILLS: And I don't disagree with
25 that, but I thought the question was has the

1 Commission in subsequent rate cases failed to
2 account for it, and I don't think that happens.

3 COMMISSIONER W. KENNEY: Commissioner
4 Hall, can I follow up on that just real quick?

5 Mr. Mills, I thought the question
6 was -- and I could be wrong. Maybe I didn't hear
7 it all -- was that if an AAO has been granted, have
8 in ratemaking in previous -- in previous
9 situations, have the -- has the determining factor
10 that all -- have all the requested amounts not been
11 allocated or if it was like this case, 36 million,
12 and they were given -- have there been situations
13 where they've been given much less than that or
14 none of it? You said --

15 MR. MILLS: And that was the question
16 I was answering. If in a case a utility is allowed
17 to create a deferred account and then the utility
18 later comes in in a rate case and seeks recovery of
19 that deferred amount, I cannot recall a single
20 instance where the Commission said, no, we allowed
21 deferral, but now we're not going to allow
22 recovery.

23 COMMISSIONER W. KENNEY: A hundred
24 percent or --

25 MR. MILLS: As far as I can recall.

1 COMMISSIONER W. KENNEY: Thank you.

2 Thank you, Commissioner Hall.

3 MR. BYRNE: Could I address that just
4 briefly? Sometimes, and not infrequently, what the
5 Commission will do is start the amortization before
6 the rate case. So in other words, you grant an
7 Accounting Authority Order -- this happens quite
8 frequently. You grant the Accounting Authority
9 Order. You say that Ameren -- it's a ten-year
10 amortization that starts immediately. Well, then
11 by the time the rate case comes along, you know,
12 two or three years of it's already been amortized
13 away so that the utility only recovers 70 percent
14 of it instead of 100 percent of it. That happens
15 very frequently.

16 MR. MILLS: And again, you can argue
17 about whether or not the utility has recovered it
18 simply because it's amortized before the next rate
19 change. Here again, you're getting to the question
20 about if they're covering their costs and earning a
21 profit, are they covering those costs as well? You
22 know, we could debate the finer points of that, but
23 I agree that the situation that Mr. Byrne has
24 described sometimes happens.

25 COMMISSIONER W. KENNEY: Thank you.

1 Thank you, Commissioner.

2 MR. MILLS: Judge, if I could just
3 offer one more thing. Several times I believe
4 Mr. Byrne has referred to the Western District sort
5 of inviting the company to seek an AAO, and I think
6 the language in the Western District --

7 MR. BYRNE: Your Honor, I guess his
8 time for oral argument's over with. He's not
9 responding to a question from the Commission. I
10 don't think he should be allowed to supplement.

11 JUDGE JORDAN: I think we've all read
12 the language from the Court on that.

13 MR. MILLS: I was simply going to
14 cite you to the page. I wasn't going to read it.

15 JUDGE JORDAN: Thank you, counselor.
16 Anything else from the Commission?

17 MR. ROAM: Judge, I apologize. Would
18 it be all right for him to cite the page? I just
19 feel like for purposes of clarification with
20 this --

21 COMMISSIONER W. KENNEY: Judge, I'd
22 like to hear the -- would you please cite the page?

23 MR. MILLS: It's page 26 of the slip
24 opinion, which I think would be about page 493 of
25 the Southwest Reporter.

1 JUDGE JORDAN: Isn't that a paragraph
2 or two before the end?

3 MR. MILLS: Well, on the slip opinion
4 it goes through to 29, so it's about three pages
5 before the end.

6 COMMISSIONER HALL: It's page 17 of
7 22.

8 JUDGE JORDAN: Hearing nothing else
9 from the Commission, is there anything else the
10 Commission needs to address before we go off the
11 record? I am not seeing anything. So thank you
12 everyone for your concise and helpful arguments,
13 and we will go off the record. We're adjourned.

14 (WHEREUPON, the oral argument
15 concluded at 2:54 p.m.)
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