

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION

3
4 HEARING

5 May 30, 2001
6 Jefferson City, Missouri
7 Volume 5

FILED

DEC 28 2004

Missouri Public
Service Commission

8 In the Matter of the Empire District)
9 Electric Company's Tariff Sheets)
10 Designed to Implement a General Rate)
11 Increase for Retail Electric Service)
12 Provided to Customers in the) ER-2001-299
13 Missouri Service Area of the)
14 Company)

15 BEFORE: VICKY RUTH, Presiding,
16 REGULATORY LAW JUDGE.
17 SHEILA LUMPE, Chair
18 CONNIE MURRAY,
19 KELVIN SIMMONS,
20 STEVE GAW,
21 COMMISSIONERS.

22 REPORTED BY:

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Staff Exhibit No. 129
Case No(s). ER-2004-0570
Date 12-15-04 Rptr. JC

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

2 JUDGE RUTH: Okay. We are on the record.

3 Today is Wednesday, May 30th. It's 8:30.

4 We're here for the hearing in ER-2001-299, in the matter
5 of Empire District Electric Company's tariff sheets
6 designed to implement a general rate increase for retail
7 electric service provided to customers in the Missouri
8 service area of the company.

9 Before we move on to the opening statements,
10 there are some preliminary matters continued from
11 yesterday that we need to address.

12 There had been a question yesterday as to
13 whether or not the parties could dispense with some of the
14 introductory foundation questions for the witnesses, and
15 I'm not going to allow that. It doesn't take too much
16 time. We're going to go ahead and do your standard
17 foundation questions.

18 Then I also noted that in the Staff's May 29
19 filing -- it was an addendum to the list of issues, list
20 of witnesses and order of cross-examination -- the parties
21 indicated that they would file the witnesses and the order
22 of cross-examination well in advance of the hearing on
23 that issue on June 6, but I would like to ask the parties
24 to file that by four o'clock on Friday.

25 If you can't do it, then you need to file

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1 something telling me you're not ready to file that by
2 Friday.

3 MR. DOTTHEIM: I think we have indicated in
4 that filing, if I understand you correctly, the witnesses.
5 We did not indicate the order of cross.

6 JUDGE RUTH: Right. If you would do so by
7 Friday, please.

8 MR. DOTTHEIM: Yes.

9 JUDGE RUTH: On May 29th Public Counsel filed a
10 request a leave to late file the prepared direct testimony
11 of Russell Trippensee, and on the record I will grant that
12 motion.

13 And I also want to address Praxair's response
14 in opposition to Staff's motion.

15 MR. DOTTHEIM: Are you going to take responses
16 to the response that Praxair filed yesterday?

17 JUDGE RUTH: The response -- I can give you a
18 brief, if you wish, but you'll need to move up to the
19 podium.

20 MR. DOTTHEIM: That would be fine. I'll try to
21 be brief as possible.

22 May it please the Commission, in the pleading
23 that Praxair filed yesterday, Staff believes that Praxair
24 clearly misconstrues the Fisher case.

25 The Fisher case does not stand for the

1 proposition that the Commission cannot consider
2 nonunanimous stipulations and agreements.

3 Fisher states that the Commission cannot limit
4 a hearing to solely consider whether or not to approve a
5 stipulation and agreement.

6 The question before the Commission is what fuel
7 and purchase power expense proposal to adopt. The
8 procedure proposed by the Staff permits that inquiry.

9 The Staff has submitted additional testimony of
10 Cary G. Featherstone and James Watkins. The Staff has not
11 withdrawn the fuel and purchase power expense testimony
12 originally filed by Mssrs. Featherstone, Watkins, Harris,
13 Bender or Choe.

14 Praxair in its response in opposition to the
15 Staff motion seems to challenge the supplemental testimony
16 of Mssrs. Featherstone and Watkins, but I think it's not
17 entirely clear what relief Praxair is requesting, if it's
18 requesting anything in regard to that supplemental
19 testimony.

20 Praxair has submitted data requests to the
21 Staff relating to the nonunanimous stipulation and
22 agreement, the joint recommendation, the Staff's present
23 position, and the Staff is processing those data requests
24 as quickly as possible.

25 Praxair has not been denied any discovery that

1 it has asked to date that I am aware of. Praxair has not
2 been denied any opportunity to file any testimony
3 respecting the nonunanimous stipulation and agreement and
4 joint recommendation, change in position of the Staff.

5 Nonetheless, Praxair asserts that the Staff is
6 engaged in an effort to hide information. The Staff does
7 not seek to impose a nonunanimous stipulation and
8 agreement on Praxair. Staff's proposed procedure permits
9 all issues to be heard.

10 Praxair asserts, quote, consider what would
11 have been the case if Praxair and Empire had submitted a
12 nonunanimous stipulation settling -- settling as between
13 those parties, that is, Praxair and Empire, a rate design
14 issue in a manner not acceptable to the Staff.

15 The Staff's principal concern in a situation
16 like that would be securing the opportunity to respond to
17 the nonunanimous stipulation and agreement and joint
18 recommendation, change in position.

19 Praxair in its pleading, its response in
20 opposition to Staff motion, cites an article titled
21 Ratepayers and Nonunanimous Settlements of Public
22 Utilities Rate Cases.

23 And in the excerpt that Praxair provides in its
24 pleading, it excerpts from a recent case, fairly recent
25 case, City of Abilene, 1993, the Public Utility

1 Commission.

2 And if one would consult that case, one would
3 find some interesting language. And if I could quote some
4 from that case. I also can provide copies.

5 But in that case the Texas Court of Appeals
6 stated, we recently considered the adoption of a
7 nonunanimous stipulation in a rate case.

8 See City of El Paso v Public Utilities
9 Commission, 839 S.W.2d 895, Texas Appeals, Austin, 1992,
10 writ granted.

11 In City of El Paso we determined that a
12 nonunanimous stipulation could be considered as a basis
13 for a final order in a rate case as long as nonstipulating
14 parties had an opportunity to be heard on the merits of
15 the stipulation and the Commission made an independent
16 finding on the merits, supported by substantial evidence
17 in the record, that the stipulation set just and
18 reasonable rates. Id. at 903.

19 The consideration of a nonunanimous stipulation
20 as a basis for the final order is proper unless it is,
21 quotation, arbitrary, unreasonable, an abusive discretion,
22 or involves consideration of factors other than those the
23 Legislature has directed the Commission to consider, close
24 quote. Id. at 904.

25 And in a subsequent page the court states, and,

1 again, I quote, the Cities cite the Missouri case for the
2 proposition that the limited hearing violates due process.
3 See State ex rel Fisher v Public Service Commission,
4 645 S.W.2d 39 (Mo.Ct.App 1982).

5 The Fisher case presents a similar procedural
6 history of a preliminary hearing to consider a
7 nonunanimous stipulation in a rate case.

8 That hearing was also limited to a
9 determination of acceptance or rejection of the
10 stipulation. The court determined that the opponents did
11 not have an opportunity to present any positions which
12 could be adopted at the stipulation hearing and, thus,
13 were denied due process. We do not find this rationale
14 compelling.

15 And the court goes on. I won't quote further.

16 But if one would look behind some of the
17 statements and the authorities that Praxair seeks to cite
18 to this Commission, I think the Commission would find that
19 the very documents, authorities, do not support what
20 Praxair is suggesting.

21 The article itself titled Problems for Captive
22 Ratepayers in Nonunanimous Settlements of Public Utility
23 Rate Cases, by Stefan H. Krieger, contains rather
24 voluminous footnotes.

25 And I can provide copies of that document.

1 The article seems internally inconsistent as to
2 how it views the case law in Missouri.

3 On page 261 it states, while some states
4 require unanimous consent before allowing settlements of
5 rate cases -- and there is a reference to footnote 20 --
6 many public utility commissions have abandoned the
7 traditional predicate for settlement, unanimity and have
8 approved rate case settlements to which several of the
9 parties had not given their assent.

10 And when one consults footnote 20 to see the
11 states that require unanimous consent before allowing
12 settlements of rate cases, one finds in the footnote, the
13 Fisher case and the Missouri ex rel Monsanto Company, the
14 Public Service Commission case, 716 S.W.2d 791 Mo 1986.

15 But if one continues further on pages 264 and
16 265 there is the statement, to date, 16 state commissions
17 in the District of Columbia, and the District of Columbia
18 Commission, have recognized the validity of nonunanimous
19 settlement of rate cases, footnote 30.

20 And if one would consult footnote 30 there is
21 the statement, the states in which commissions have
22 recognized the validity of nonunanimous settlements are
23 Arkansas, California, Indiana, Illinois, Kentucky,
24 Maryland, Michigan, Missouri, New Mexico, New York, Ohio,
25 Oregon, Pennsylvania, Texas, Vermont and West Virginia.

1 See supra note 27.

2 The very next sentence: Six of those
3 commissions have gone so far as to adopt formal rules
4 providing procedures for approval of such settlements,
5 footnote 31.

6 And if one goes to footnote 31, one finds
7 references to the rules and regulations of area's public
8 utility commissions, including a reference to Mo. Code
9 Regs, Title 3, 240-2.115.

10 So there are any number of other references
11 in -- in that article that do not appear to support the
12 assertions of Praxair.

13 JUDGE RUTH: Just a moment, please.

14 (OFF THE RECORD.)

15 JUDGE RUTH: Thank you. Back on the record.

16 MR. DOTTHEIM: I won't go -- I won't go through
17 all of them. Again, I can provide the citations. I will
18 refer to maybe one or two more.

19 There is a statement on -- or a sentence on
20 page 294: Three courts have held that in the absence of
21 unanimity, Commission-enabling acts require full
22 evidentiary rate base hearings, footnote 172.

23 And if one turns to footnote 172, one finds
24 reference to the State ex rel Fisher and the State
25 ex rel Monsanto Company cases.

1 And I will cite one more reference, on
2 page 297 the sentence appears: In other words, under
3 these statutes when confronted with a nonunanimous
4 settlement, the issue for a Commission is not whether the
5 settlement proposal reasonably balances the interest of
6 ratepayers or whether substantial evidence supports that
7 particular agreement, footnote 190, which is Id. at 702;
8 State ex rel Fisher v Public Service Commission,
9 645 S.W.2nd 39, 43 (Mo.Ct.App 1982.)

10 And the very next sentence: Instead, as in any
11 rate case, a Commission must make findings on the merits
12 regarding rate base operating expenses, rate of return and
13 rate design.

14 And footnote 191 cites to the Fisher case,
15 645 S.W.2nd at 43.

16 And, again, I won't go through others, but I
17 believe a careful review of the article that Praxair has
18 cited does not actually support the relief that Praxair is
19 seeking in this instance.

20 Praxair asserts that the joint recommendation
21 is sought by the Staff to stand alone. That is not the
22 case.

23 As previous noted, there is supplemental
24 testimony of Mssrs. Featherstone and Watkins, that address
25 the nonunanimous stipulation agreement, joint

1 recommendation, change in positions.

2 There is the assertion that the joint
3 recommendation is hearsay. Again, there is the -- there's
4 the supporting testimony of Mssrs. Featherstone and
5 Watkins which is not hearsay.

6 Mssrs. Featherstone and Watkins can be
7 cross-examined by counsel for Praxair and by the bench.

8 Praxair cites a number of cases arguing
9 privilege against the use of the nonunanimous stipulation
10 and agreement, joint recommendation, change in position.

11 The cases cited by Praxair are not
12 administrative law cases. I think they are limited to
13 civil litigation. There is not a utility regulatory case
14 among the cases which are cited.

15 Praxair also cites the UCCM case, Utility
16 Consumers Counsel of Missouri, for the proposition that
17 the nonunanimous stipulation and agreement, joint
18 recommendation, change in position violates the UCCM case,
19 in that the interim energy charge, the proposal adopted by
20 the Staff engages in one issue, ratemaking, no
21 consideration of all relevant factors.

22 They are very material differences between the
23 fuel adjustment clauses, which were the subject of the
24 UCCM case and the interim energy charge.

25 The interim energy charge does not change over

1 time, as did the fuel adjustment clause charges. It is
2 set and remains set for a set period of time.

3 And then, subsequently, there is a true-up when
4 the charges that have been collected can be refunded with
5 interest. There are no changes in rates that occur
6 outside of the context of the determinations that the
7 Commission will be making in this case, which it will be
8 hearing this week and next week.

9 Also, prudence challenges can be made at the
10 time of the true-up hearing.

11 I won't try to go through an exhaustive list of
12 the differences between the interim energy charge that is
13 proposed in this proceeding and the fuel adjustment
14 clauses that -- and the interim surcharge that were found
15 to be unlawful by the Missouri Supreme Court in 1979 of
16 the UCCM case.

17 On that note I'd like to conclude my response.

18 Of course, counsel for Praxair only had the
19 Staff's pleading for a short period of time. The Staff in
20 attempting to respond to the pleading filed yesterday by
21 Praxair, of course, had a short period of time, which we
22 tried to be as complete as possible.

23 And if the Commission is looking for anything
24 further in the way of information, we would be willing to
25 provide that, whether it be written or just documents,

1 such as the Texas case that I cited, and the article that
2 is cited, along with the Texas case, in the pleading that
3 Praxair filed yesterday.

4 JUDGE RUTH: Mr. Dottheim, I would like a copy
5 of the cases that you've cited and the article. I don't
6 know if you'll provide that today --

7 MR. DOTTHEIM: I can do that today.

8 JUDGE RUTH: I'm sorry. Did you have something
9 to say?

10 MR. DUFFY: I'd like to just add something, if
11 I could.

12 JUDGE RUTH: Come forward, Mr. Duffy.

13 MR. DUFFY: I'll be much briefer than
14 Mr. Dottheim.

15 And I'll just say that Empire wants to state on
16 the record that it concurs with and supports the arguments
17 made by Mr. Dottheim on this particular matter.

18 I think you just have to realize that Praxair
19 is repeatedly arguing that somehow the parties are
20 attempting to impose this recommendation that the three of
21 them put together upon Praxair.

22 I've seen no pleading that says that the
23 Commission will be restricted to only considering that
24 joint recommendation in the hearing.

25 Indeed, the parties have indicated in the

1 findings that they've made that they'll make all of the
2 witnesses on these issues available for Mr. Conrad to
3 cross-examine to whatever extent he wishes.

4 I think it's also important to realize that
5 none of the parties have attempted to hide any information
6 from the Commission on this. I think the allegations made
7 by Praxair on that are completely false.

8 We're the only three parties that filed
9 testimony on the issue. Mr. Conrad had the opportunity
10 through surrebuttal to file testimony in response to the
11 nonunanimous stipulation and agreement, because it was
12 filed before surrebuttal. And I've never seen any
13 testimony from Praxair even close to any of these issues.

14 So I want the Commission to understand that we
15 do support the nonunanimous stipulation and agreement. We
16 think Praxair's agreement is full of hyperbole and false
17 statements and should not be considered by the Commission.

18 The Commission should just consider the joint
19 recommendation as one of the options open to it to
20 consider when it hears all of the issues involved in fuel
21 and purchase power.

22 Thank you.

23 JUDGE RUTH: Please don't step down.

24 I have a question for clarification. And,
25 Public Counsel, you can either jump in, and I'll give you

1 a chance to speak also, and, Mr. Dottheim.

2 I would like you to clarify, what is the
3 difference and the advantage to treating this document as
4 a joint recommendation versus just treating it as a
5 changed statement of position?

6 MR. DUFFY: Frankly, I don't know what the
7 substantive difference in that is. I think that the
8 Staff's motion -- and I would suggest they speak for
9 themselves, but since you've got me up here.

10 We filed it as a nonunanimous stipulation and
11 agreement because the Commission has a rule that talks
12 about nonunanimous stipulation and agreements.

13 And it became nonunanimous when Praxair said
14 they wanted to have a hearing on it.

15 The Commission issued an order, which, as I
16 recall, said -- well, this thing really now just becomes a
17 joint recommendation.

18 Well, I don't think that that had any change or
19 any effect on the document. The document is still the
20 document.

21 Whether you call it a nonunanimous stipulation
22 or a joint recommendation, it is still the position of
23 those three parties, that they think that instead of their
24 original positions, the Commission should pursue this
25 alternative that we have together hammered out.

1 So I don't -- I don't see any great substantive
2 difference of what you call the thing, as long as the
3 Commission recognizes that it's an alternative and the
4 Commission recognizes that it can consider it in addition
5 to all of the other issues that may be raised on the
6 point.

7 I hope that answers your question.

8 And if I misstated the Staff's position, I'll
9 sure they can say so.

10 MR. DOTTHEIM: In particular, the Staff was
11 attempting to respond to the language of the Commission's
12 order in the cases cited by the Commission.

13 JUDGE RUTH: You're speaking of the May 24th
14 order?

15 MR. DOTTHEIM: Yes. I'm sorry. The May 24th
16 order, where there is -- it's on page 3. There is -- it's
17 the first full sentence on the page after the first
18 citation on the page, being nonunanimous, the proposed
19 stipulation and agreement is no more than the joint
20 recommendation of the parties that signed it.

21 And counsel for Praxair asserted in the
22 pleading filed yesterday that, if I understood it
23 correctly, that Staff cited for authority certain cases,
24 which the cases that the Staff cited were the cases that
25 the Commission cited.

1 And so that is in particular the origin of the
2 term "joint recommendation."

3 On page 5, at the top of the page, is the
4 reference to the change in position, where the very first
5 sentence at the top of the page, it says, in several cases
6 the Commission has explained that it considers an
7 objective to nonunanimous stipulation and agreement,
8 quote, to be merely a change in position by the signatory
9 parties from their original positions to the stipulated
10 position, close quote. And then there is a citation to
11 two cases.

12 Changing the name, the title, of the document,
13 I think it's formed to a certain extent over substance.

14 It doesn't recognize that there is something
15 more than that document; that is, the testimony of two
16 Staff witnesses that refer to that document and explain
17 that document, and I think stands on their own also.

18 So that -- I don't know if that provides any
19 light, but that's the basis for the -- for the change in
20 terminology, in particular, that the -- that the Staff
21 utilized was because of the Commission's order of May 24.

22 We even suggested that if the Commission
23 desired, we could refile the testimony, removing
24 references to nonunanimous stipulation and agreement, or,
25 for that matter, joint recommendation, and just continue

1 the characterization on the testimony as a change in
2 position, which it is, and there would be no substantive
3 change.

4 There would be a change in terminology, and it
5 no slight of hand is intended by that in order to get the
6 Commission to consider something that it cannot lawfully
7 consider.

8 I don't think there is anything in the State
9 ex rel Fisher case that indicates that the Commission
10 cannot consider a nonunanimous stipulation and agreement,
11 so long as its hearing is not limited solely to
12 consideration of the nonunanimous stipulation and
13 agreement.

14 Thank you.

15 JUDGE RUTH: Thank you.

16 Public Counsel.

17 MR. COFFMAN: Thank you.

18 If I can add my two cents, I just want to
19 briefly emphasize what I think is important here.

20 Due process is very important in Public Service
21 Commission cases, and we would never diminish the
22 importance of the Fisher case. That was a case where
23 Public Counsel was not a party to a nonunanimous
24 stipulation.

25 But in that case the other parties attempted to

1 limit what could be tried at the hearing. Public Counsel
2 was not afforded an opportunity to cross-examine and to
3 have its due process on all of the issues.

4 That's not the case here. There is no dispute
5 that Praxair should have the opportunity to cross-examine
6 any witness he wishes on any topic he wants, as well as
7 offer witnesses on any issue he wants.

8 The issue in question is fuel and purchase
9 power expense. That has been what the issue has been
10 described as, and that is what it continues to be.

11 No one has suggested that there be another
12 issue called stipulation or agreement or joint
13 recommendation. The issue is fuel and purchase power
14 expense.

15 Mr. Conrad has an opportunity to take whatever
16 position he wants and have all of the due process that he
17 deserves, and this is what the all important Fisher case
18 stands for.

19 But the other parties also have due process
20 rights, and the other three parties have a right to
21 present whatever positions they have. They also have the
22 right to change their positions, and have evidence placed
23 into the record supporting what their changed positions
24 are.

25 The changed position, which is outlined in the

1 stipulation and agreement, the nonunanimous stipulation
2 and agreement on fuel, has now been noticed up to everyone
3 for over two weeks.

4 And by the time we get to the litigation of
5 that issue, the testimony of Mr. and of Mr. Watkins and
6 Mr. Featherstone in support of that interim energy charge
7 recommendation will have been available for over two weeks
8 as well.

9 We believe this is ample notice, and that when
10 we get to the issue, we believe Mr. Conrad should have all
11 of the latitude to explore and have his due process on
12 that matter.

13 That's basically what due process requires:
14 notice and opportunity for hearing.

15 We think the issue should be fully explored,
16 and we believe that the Commission should have every
17 option available to it.

18 We just want to emphasize that the other
19 parties also have due process rights, as to its joint --
20 as to the joint recommendation, and that we be allowed to
21 present that to the Commission in a full and fair hearing.

22 I'm not sure that there is a distinction
23 between what you asked about a change of position in the
24 joint recommendation, other than, I think, calling
25 something a joint recommendation points out that the new

1 position of Public Counsel, Staff and the electric company
2 here in this case are identical, at least in that we
3 believe, primarily, the terms, as they're laid out in that
4 document, in their entirety is what the Commission should
5 approve on that one issue.

6 I think that's it. Thank you.

7 JUDGE RUTH: Thank you.

8 Mr. Conrad, would you like the opportunity to
9 respond to these arguments?

10 MR. CONRAD: I told Mr. Swearengen earlier that
11 it seemed like no one liked me, that everyone hated me,
12 that I guess I better go and eat some worms.

13 I will be brief, and if Your Honor will permit,
14 I will work from here, but I suspect it's probably --

15 JUDGE RUTH: I'd prefer you move to --

16 MR. CONRAD: But I'd be happy to answer your
17 question.

18 I think the issue has gotten lost in the law
19 review article. We tried to expose all of the issues in
20 particular areas and have the author discuss the various
21 authorities on one side or the other.

22 I appreciate Mr. Dottheim spending the evening
23 reading an article that perhaps he had not read before,
24 And I'm glad that it's brought that matter to your
25 attention.

1 But, rather clearly, the thrust of the author
2 is that nonunanimous stipulations are not the best way to
3 proceed in regulatory areas. And I think he builds that
4 case very well, as you'll see when you'll see the article.

5 I'd be happy to provide you with a copy also.
6 It's also, I think, on Lexus.

7 When counsel for Staff was here, he responded
8 to my hypothetical question -- my hypothetical in a
9 response in which I had posited the situation of a
10 nonunanimous settlement between my client and the company,
11 with which Staff disagreed.

12 He said that his desire would be to respond to
13 the stipulation and agreement.

14 Mr. Duffy, a few moments ago in response to
15 your question, said, well, what we really want to have is
16 a hearing on it, "it," and that's the subtle problem.

17 We're talking here, and my position is very
18 simply, these parties could change their position. They
19 can file a new statement of position if they wish.

20 But they are seeking to put their nonunanimous
21 stipulation into the record of this case as an exhibit and
22 position me and my client against this big wall.

23 And say, oh, look how reasonable this joint
24 recommendation is in the circumstances, and thereby create
25 a subtle, or perhaps not so subtle, bias in favor of that,

1 before we've ever heard a single piece of evidence.

2 We've already gotten into material that is, I
3 believe, beyond the scope of this.

4 Take this case. Let's say, Judge Ruth, you
5 walk out and you're going across to the parking lot and
6 you're hit by a car. And after recovery you bring a suit
7 for your injuries and damages.

8 And let's say -- let's add to it somehow that
9 there were two defendants. Let's say you had the driver
10 of the car and the owner of the car.

11 Now, those two defendants in your lawsuit sit
12 down and say, well, I think Ms. Ruth should be paid
13 \$50,000 rather than the 500,000 that she's suing for.

14 So the day of trial comes and the two
15 defendants get up and say, well, finder of fact, judge or
16 jury, the two of us, we got together. We had an agreement
17 that she should get \$50,000. Isn't that reasonable?

18 We're acknowledging this problem. We're saying
19 she should have \$50,000.

20 You sit there and say, hey, wait a minute.
21 That's a settlement discussion that shouldn't even be
22 coming into the record of this process.

23 I didn't participate in that. I didn't join in
24 this settlement. I think I'm entitled to more.

25 Why are you able to tell the jury, or the

1 finder of fact in the case if it's a judge, about this?

2 That creates the bias that we're having
3 troubles with. And the very statements that counsel for
4 Staff and counsel for Company made show the confusion, and
5 what's going to lead the Commission into this, that you
6 end up having a hearing on their joint recommendation and
7 positioning their joint recommendation against what the
8 evidence shows.

9 If the joint recommendation, ma'am, was
10 supported by the evidence, why would they need to file
11 additional testimony to support it.

12 I have no problem if they want to change their
13 position. I have no problem if they want to modify their
14 statements of position that they've made here.

15 What I have a problem with is putting this
16 document into the record of this case as an exhibit.

17 I cannot cross-examine it. Certainly, I can
18 cross-examine other witnesses, but I cannot cross-examine
19 that document. That is not an exhibit.

20 It is not -- it's self-relevant, it is hearsay.
21 I've gone through all of that. I won't bore you with
22 that. I think that's the confusion.

23 JUDGE RUTH: I have a question. I just want to
24 be sure I understand your position.

25 Mr. Dottheim had stated that he would be

1 willing to refile the document and entitle it something,
2 indicating that it was a change in position. It would
3 then be like their statement of position as opposed to an
4 exhibit.

5 And what is your position on that?

6 MR. CONRAD: I'd have no problem with that.
7 Because if that's, in fact, what it is, then that's, in
8 fact, what it is. And he seems to suggest that's what it
9 is.

10 My problem is making that document into an
11 exhibit that is then before the Commission as some kind of
12 a package that they can sit and say, well, hey, we've got
13 this thing already decided for us. All we have to do is
14 just pick this thing up.

15 Well, as you'll find out, there is some
16 problems with that, when we get to that, but that's a long
17 ways down the pike. And there is some problems with the
18 package itself.

19 But I think that, you know, to go beyond that
20 gets us beyond where we are today.

21 JUDGE RUTH: Okay. Do you have anything
22 further?

23 MR. CONRAD: No. Thank you, ma'am.

24 JUDGE RUTH: Thank you.

25 As I indicated before, I would like the

1 documents that Mr. Dottheim cited to. Depending on when
2 you provide those and I have a chance to review them, we
3 will take this matter up again.

4 MR. CONRAD: Judge, I noticed on a couple of
5 copies that I had of this, that one page had gotten
6 dropped when it went through the copier out at Kinko's.
7 And I don't know if that is universally true, but we'll
8 check on that and we'll get you the --

9 JUDGE RUTH: That's what I was trying to get
10 the file for this morning.

11 My copy was missing two pages, I believe 14 and
12 15, and I called your office yesterday and got copies of
13 those.

14 MR. CONRAD: Okay.

15 JUDGE RUTH: And I don't know about the other
16 parties.

17 MR. CONRAD: Well, they were faxed from my
18 office, and they also received e-mails, with the exception
19 of Mr. Duffy, and I had to try about twice for him, but we
20 did get e-mails.

21 As far as I know, those were completed. I
22 think it's just with the copies that we --

23 JUDGE RUTH: That were faxed?

24 MR. CONRAD: No, not the faxed ones, but the
25 ones that we had made here.

1 JUDGE RUTH: Okay.

2 MR. CONRAD: And those may include -- those may
3 include the ones that we filed downstairs, because I hand-
4 delivered one up to your office.

5 JUDGE RUTH: Mr. Dottheim indicated that he was
6 going to check on the official file because it wasn't down
7 there in the records room at eight o'clock when I checked.
8 And so it would have been checked out by Staff.

9 MR. CONRAD: Oh, you mean the file?

10 JUDGE RUTH: Yeah. I wanted to see if the
11 official file copy had all of the pages. I can't answer
12 right now whether it does.

13 My copy, I now have all of the pages, and we'll
14 see about the official file.

15 MR. CONRAD: Well, I apologize for that if that
16 happened. We're making a lot of copies, and 17 pages, and
17 I didn't go through and hand count each one. But we'll
18 get that straightened out.

19 JUDGE RUTH: Thank you.

20 MR. CONRAD: You do have a full copy?

21 JUDGE RUTH: I do. I got the extra pages from
22 your office yesterday.

23 MR. DOTTHEIM: I believe that the copies that
24 were filed with the Commission may be missing the two
25 pages, because I originally got a copy from the records

1 department and didn't realize until after the records
2 department had closed that I was missing two pages.

3 And I just assumed that the copy had -- the
4 copier had misfed them.

5 But Mr. Conrad graciously provided copies
6 otherwise by fax and by e-mail, so I was able to obtain
7 the two pages, I think 14 and 15, that were missing from
8 the copy that I obtained from the records department.

9 JUDGE RUTH: Okay. We'll verify, then, at
10 lunchtime whether or not the records department now has
11 those copies in the file.

12 MR. CONRAD: And if they don't, we'll get that
13 taken care of.

14 JUDGE RUTH: Thank you.

15 MR. DOTTHEIM: Judge Ruth, again, going back to
16 your question to Mr. Conrad and his response, the Staff
17 has stated in a motion that it filed last Friday that it
18 would be willing to refile the testimony, removing
19 references to joint recommendation and -- well, in
20 particular, references to nonunanimous stipulation and
21 agreement or references to stipulation and agreement, and
22 attach the substantive provisions of the stipulation and
23 agreement as it was originally denominated, removing any
24 reference to stipulation and agreement.

25 The Staff remains willing to do that. And if

1 that would -- resolve this matter, the Staff would suggest
2 proceeding in that manner.

3 JUDGE RUTH: I appreciate that. But I would
4 like to take a look at the articles and the cases you
5 cited, and we'll come back to this issue.

6 Thank you.

7 And I believe that concludes the preliminary
8 matters that we had agreed to discuss.

9 Do the parties have any other preliminary
10 matters before we move on to opening statements?

11 Mr. Dottheim.

12 MR. DOTTHEIM: Judge, excuse me for prolonging
13 this. I don't know if there would be an objection from
14 Mr. Conrad, and he could supplement, but I think in that
15 journal article there were over 400 footnotes.

16 And I've attempted to identify every single
17 footnote where there is a reference to a decision of the
18 Missouri Commission. And if I by attachment would
19 identify those footnotes, and he can check that, and if
20 I've missed anything, provide those.

21 It might help those who are trying to wade
22 their way through that article to see any direct reference
23 to the Missouri Commission which is not found in literally
24 the body, at least the copy that I have, where all of the
25 footnotes are at the end.

1 There are no references to the Missouri
2 Commission in the body of the article. It is in the
3 footnotes.

4 JUDGE RUTH: Just a moment.

5 Rather than prolong this, I would like you two
6 to discuss this on the next break. If Mr. Conrad has any
7 objections when you bring the document to me after our
8 break, we'll discuss that then.

9 But this way you can show Mr. Conrad what it is
10 you're proposing to do, and I will give him an opportunity
11 to speak to that.

12 MR. CONRAD: I don't have -- and I appreciate
13 that and don't want to prolong this.

14 It's a published article, and it's published
15 where it's published and it's accessible. If you want one
16 or the other of us or both of us to provide you with a
17 copy, we can get you -- I can get you an electronic copy
18 of it.

19 I think the way they do it on that is they put
20 the footnotes essentially at the end of the text, and they
21 have the footnote number up in the body, as opposed to how
22 it probably appears in the journal of which it is
23 published, which is where the footnotes would be at the
24 bottom of the respective page. If that doesn't make any
25 difference, I would just say give you the whole article.

1 The article itself is not that long. It's
2 pretty thorough research. It might be useful in some
3 other context.

4 JUDGE RUTH: I have no preference whether the
5 copy is electronic or paper, but I would like a copy.

6 And if you have already annotated those
7 Missouri cases, I would like that, unless Mr. Conrad
8 objects.

9 MR. CONRAD: I have no objection to that. The
10 point is, it's not -- the offer -- the article wasn't
11 cited to say this is what Missouri law is.

12 JUDGE RUTH: Sure, I understand that.

13 MR. CONRAD: It's a much broader scope article.

14 JUDGE RUTH: And I would like the opportunity
15 to review that, but we'll move on now.

16 I wanted to make sure, also, from the parties
17 earlier filings, the parties wish the opening statements
18 to be Empire, Staff, Public Counsel and then Praxair.

19 Is that correct?

20 MR. DOTTHEIM: That would be fine.

21 JUDGE RUTH: Well, we'll take a short five-
22 minute recess while I notify the Commissioners that we are
23 ready for opening statements.

24 We'll go off the record just briefly. Thank
25 you.

1 (A RECESS WAS TAKEN.)
2 JUDGE RUTH: Please be seated.
3 Okay. We are back on the record. We are ready
4 to begin opening statements.
5 Empire, you may start.
6 MR. DUFFY: Good morning.
7 I'm Gary Duffy representing Empire District
8 Electric Company.
9 The parties have accomplished a great deal in
10 this case in the way of attempting to resolve many of the
11 issues prior to reaching this point.
12 I would like to compliment the Staff, the
13 Office of Public Counsel and Praxair for their
14 cooperation.
15 I would especially like to compliment the Staff
16 for the way they arranged and conducted the prehearing
17 conference in this case.
18 As a result of the prehearing conference and
19 extensive negotiations thereafter, three documents have
20 been submitted to you which represent a partial resolution
21 of the issues in this case.
22 I'd like to talk to them briefly before getting
23 to the remaining issues.
24 You've been presented with a stipulation and
25 agreement regarding the in-service criteria to be applied

1 by the Staff to the operation of the new State Line
2 Combined Cycle Plant, which is now in the final phases of
3 construction.

4 Since Praxair did not request a hearing on
5 what was a nonunanimous stipulation on that point, your
6 rules -- and you've recognized -- allow you to treat that
7 document as an unanimous agreement which resolves those
8 issues.

9 You've also been presented with a stipulation
10 and agreement between the Staff, Empire and the Office of
11 Public Counsel regarding the fuel and purchase power
12 issue.

13 Praxair has requested a hearing on that
14 document, which you have said you will treat as a joint
15 recommendation by the three signatory parties.

16 The parties have presented you with an addendum
17 to the list of issues which provides for the fuel and
18 purchase power issue to be tried starting on Wednesday of
19 next week.

20 In the way of a very brief summary, I will say
21 that the Public Counsel, the Staff and Empire have agreed
22 upon a procedure which those three parties --

23 MR. CONRAD: Your Honor, I'm very hesitant to
24 interpose an objection at this point, but that's -- I
25 think that is going to what we were talking about before

1 the Commission came in, and I think at this point it's
2 inappropriate to go into that until you have ruled on
3 that.

4 JUDGE RUTH: Empire, you do need to be careful
5 on what you say as to the procedure in that the Commission
6 has not ruled on how to treat the nonunanimous stipulation
7 and agreement that has been objected to by the Company.

8 MR. DUFFY: I understand that, and I'm going to
9 tell you what we think the procedure ought to be.

10 JUDGE RUTH: Thank you. Please proceed.

11 MR. DUFFY: Those three parties are
12 recommending a procedure which they believe is a
13 reasonable resolution to a very thorny problem; namely,
14 trying to estimate in advance what fuel and purchase power
15 costs are going to be, when, number one, they can be very
16 volatile as the evidence will show, and that those costs
17 have a tremendous impact upon a company of the size of
18 Empire and with the particular generating characteristics
19 of Empire, as the evidence will also show.

20 As the prepared testimony which has been
21 submitted by the Staff and the Public Counsel recite,
22 these types of costs are very difficult to predict very
23 far into the future.

24 Due to the potential magnitude and the impact
25 of these costs on Empire, those three parties worked out

1 an approach which they believe is beneficial to all
2 concerned.

3 It calls for the establishment of an interim
4 energy charge on Empire's tariffs for a period of two
5 years.

6 It basically sets a range in which the parties
7 believe it is reasonable to expect the costs to occur.

8 Under this approach, if it is adopted by the
9 Commission after the evidentiary hearing, the ratepayers
10 will only have to pay the actual costs of fuel and
11 purchase power up to a certain amount --

12 MR. CONRAD: Your Honor, once again, I'm sorry,
13 but this is -- this is exactly and precisely the situation
14 that I wanted to try to avoid, because what we are doing
15 is we are now talking about a nonunanimous stipulation,
16 and we're placing the terms of it and we're placing the
17 conditions of it before the -- before this Commission.

18 And it's being characterized, as I've told you
19 it would be, as an agreement that is so reasonable, my
20 gosh, why could anybody ever argue about it, and I ask
21 that this be stopped at this point.

22 This is prejudicial to my client's interests
23 and my client's interest on this particular issue. You
24 have not ruled on it, and I ask that counsel be directed
25 to move on and discuss something else in his statement,

1 please.

2 MR. DUFFY: Your Honor, this is opening
3 statement, and we are allowed to comment on all of the
4 prefiled material that has been submitted and to present
5 our view on it.

6 We are presenting our view on some things which
7 we agree; we'll be presenting our view on some things
8 which we disagree.

9 It's inappropriate for counsel for Praxair to
10 stop -- or to attempt to stop me from commenting upon what
11 I think the evidence will show, because that's what the
12 purpose of an opening statement is.

13 JUDGE RUTH: I do not want to limit what you're
14 allowed to bring out in your opening statement, but I
15 caution you not to characterize the nonunanimous
16 stipulation and agreement which has been objected to as a
17 stipulation and agreement.

18 Instead, you would be wise to characterize it
19 as this point as the position of the parties.

20 MR. DUFFY: Okay.

21 JUDGE RUTH: Thank you.

22 MR. DUFFY: I think I was saying that under the
23 position of the three parties, the ratepayers will only
24 have to pay the actual costs up to a certain amount.

25 If the actual costs go above that amount, under

1 this approach of the three parties, Empire is responsible
2 for those costs. If the actual costs are less than
3 expected, the ratepayers will get a refund with interest.

4 I've just tried to give you the briefest of
5 overviews of this approach. And since Praxair has
6 requested a hearing on the fuel and purchase power issues,
7 I'm sure we'll go into a lot more detail on it when we
8 take up this issue next week.

9 That summarizes two of the three documents that
10 have been filed. Last Friday the parties filed a
11 unanimous stipulation and agreement on capital costs for
12 the State Line Combined Cycle Unit.

13 If you approve that agreement as a resolution
14 of those issues, it will resolve the issue listed as 6A on
15 the original list of issues.

16 We urge you to give appropriate and timely
17 consideration to that unanimous agreement. If possible,
18 Empire would like to know by the end of this week whether
19 we need to bring the outside expert witnesses, to present
20 them to you if you have any questions about that issue, or
21 whether they may be excused.

22 Those two witnesses are Ms. Rolph and
23 Mr. Wilson.

24 I'd now like to turn to a topic which you
25 indicated the parties should address in opening statement,

1 and that is the possible impact of what I'll call Senate
2 Bill 387 on this case.

3 I think at heart of that topic are two
4 questions. The first question is, will Senate Bill 387
5 become law? The second question is, if it does become
6 law, will it have an effect on this case?

7 When we address the question of whether Senate
8 Bill 387 will become law, we don't know.

9 The present status is that Senate Bill 387 is
10 not the law, because, although it has been passed by the
11 General Assembly, it has not been signed by the Governor.

12 The bill has an emergency clause, so that if it
13 is signed, it will take effect upon the Governor's
14 signing.

15 We have no indication as this time when that
16 might occur or if that might occur. The Governor could
17 veto that bill.

18 If the Governor vetoes it, it does not become
19 law unless the Governor's veto is subsequently overridden
20 by the General Assembly.

21 Several of you know a whole more about that
22 than I do.

23 Alternatively, as we understand it, the
24 Governor could decide to take no action on the bill.

25 Our understanding is that if the Governor does

1 not sign the bill before July 14th of this year, then it
2 becomes law anyway.

3 That brings us to the second question I posed.

4 Assuming Senate Bill 387 becomes law, will it
5 have some impact on this case?

6 We assume that a final report and order will
7 not be issued by you in this case until approximately
8 September 21st of this year.

9 It, therefore, seems possible that Senate
10 Bill 387 could become law before this case is completed.

11 If it does, the following possibilities could
12 arise: Empire District Electric Company could apparently
13 make an emergency filing under that new law or Empire
14 could refrain from making an emergency filing under that
15 law.

16 If it becomes law, Senate Bill 387 to us does
17 not appear to contain any provisions which operate
18 independently of a request by a utility to the Commission
19 for relief under the law.

20 In other words, Senate Bill 387 doesn't operate
21 by itself to change anyone's utility rates.

22 Instead, it provides that the costs recovery
23 specified under its provisions shall be, quote, pursuant
24 to rate schedules designed to specifically recover such
25 costs, unquote.

1 Senate Bill 387 also gives the Commission,
2 quote, authority to approve a recovery mechanism, unquote.

3 So while it says that the mechanism the
4 Commission uses must be similar to the purchase gas
5 adjustment clause that you all are very familiar with --
6 and an approach the Commission has used for decades -- the
7 Commission, as we understand it, is not totally deprived
8 of discretion on how to fashion the procedure to be
9 reflected on the rate schedules.

10 Therefore, as we understand it at this time,
11 even if Senate Bill 387 becomes law, it would first take
12 action on Empire's part in the form of a filing with the
13 Commission, to request the invoking of that provision, and
14 it would take action on your part to implement that
15 procedure.

16 Section 7 of Senate Bill 387 appears to allow
17 an electrical corporation to seek within 90 days of the
18 enactment of Senate Bill 387 emergency establishment of
19 interim schedules, quote, unquote, but only if the utility
20 is experiencing a 25 percent or greater increase in the
21 price of natural gas as compared to the price used to
22 establish its then currently effective rate schedules.

23 If we assume Senate Bill 387 becomes law on or
24 before July 14th of this year, it appears reasonable to
25 interpret Section 7 to mean that if Empire can satisfy

1 that 25 percent natural gas price test at that time, it
2 could submit proposed emergency rate schedules to the
3 Commission after Senate Bill 387 becomes law but before
4 the Commission issues a report and order in this case.

5 In Empire's view that could complicate things
6 in this case.

7 There are unanswered questions about what
8 procedure the Commission might follow in such a situation.

9 For example, would the Commission require an
10 audit before allowing the emergency interim rate schedules
11 to take effect?

12 Would the Commission have any discretion to
13 reject the proposed emergency interim rate schedules that
14 the law contemplates?

15 Empire does not propose to speculate at this
16 time about those or other problems that you might think of
17 that could arise under such a situation.

18 Empire's view is that it is not necessary to
19 engage in speculation about what Empire might do under
20 those circumstances and assumptions.

21 That's because Empire executed a document
22 regarding fuel and purchase power expense with the Staff
23 and the Public Counsel on May 14th, 2001. That was filed
24 with you.

25 MR. CONRAD: Your Honor -- excuse me.

1 Your Honor, again, here we are back into the
2 text, and the reference is to the document. This has got
3 to be stopped.

4 JUDGE RUTH: Can you restate your reference
5 to --

6 MR. DUFFY: What do you want me to call it?

7 I've tried to call it a document, is the most
8 innocuous thing I can think of.

9 MR. CONRAD: Your Honor, if Mr. Duffy is
10 struggling for words, I might suggest that he could use
11 what his client's position is.

12 JUDGE RUTH: Yes. I would prefer that you
13 state your client's position.

14 First of all, we have not addressed -- or we
15 have addressed, but we haven't decided what will happen to
16 the nonunanimous, objected-to stipulation and agreement,
17 and at this point it's a position.

18 MR. DUFFY: I understand that.

19 And I'm going to quote a sentence out of that
20 thing that we filed in order to explain to the Commission
21 as they requested what our position regarding Senate Bill
22 387 is, and I have to do that in order to make clear what
23 our position is.

24 JUDGE RUTH: And actually, Mr. Conrad, I'm
25 going to allow him to call to a document, because it has

1 been filed as a document, whether it's a position
2 statement or joint recommendation, what have you. He can
3 call it a document.

4 MR. DUFFY: Okay. As I was saying, I don't
5 think it's necessary to engage in a lot of speculation
6 about what Empire may or may not do because of a statement
7 that Empire made in the context of this document that we
8 filed with the Commission.

9 And I'm going to read you one sentence that
10 reflects what Empire's position was in that document, and
11 it comes out of paragraph 9.

12 And that statement was: In consideration of
13 the implementation of the IEC, the interim energy charge,
14 in this proceeding, meaning this rate case, and
15 co-extensive with the duration of the IEC, Empire agrees
16 to voluntarily forego any right it may have to request the
17 use of or to use any other procedure or remedy available
18 under current Missouri statute or subsequently enacted
19 Missouri statute in the form of a fuel adjustment clause,
20 a natural gas cost recovery mechanism or other energy
21 related adjustment mechanism to which Empire would
22 otherwise be entitled.

23 Well, I want to go back and just emphasize what
24 we said.

25 In consideration of the implementation of the

1 IEC in this proceeding, Empire agrees to voluntary forego
2 any right it would have under any statute in the form of a
3 fuel adjustment clause.

4 Now, Empire's position is that that statement
5 makes it clear that Empire prefers the treatment of fuel
6 and purchase power expense available under that document,
7 the position as hammered out between the Staff, Public
8 Counsel and Empire, assuming its implemented by the
9 Commission.

10 And we prefer that procedure over the procedure
11 that appears in Senate Bill 387, if it becomes law.

12 And to us it is apparent that the Staff and the
13 Public Counsel also approve and endorse that procedure as
14 opposed to the procedure under Senate Bill 387; otherwise,
15 we would assume the Staff and Public Counsel wouldn't have
16 joined in that document with us.

17 By entering into that document, making that
18 statement, its Empire's position that we are clearly
19 waiving the right to take advantage of the Senate Bill 387
20 procedure if the Commission approves the recommendation
21 that we've made.

22 Therefore, although it might be theoretically
23 possible for Empire to make an emergency interim tariff
24 filing under the terms of Senate Bill 387 while this case
25 is still in progress and the Commission is considering the

1 fuel and purchase power issues, Empire has no current
2 intention of doing that.

3 Such a hypothetical filing of relief by Empire
4 seeking relief under Senate Bill 387 while the Commission
5 was still considering this case would -- and I said
6 earlier -- likely only cause consternation and confusion.

7 It might be considered a breach of good faith
8 on Empire's part given the representations and assurances
9 that we've given the Staff and Public Counsel and the
10 Commission in that document that I quoted from, that it
11 would not seek relief under such statute while the IEC
12 provision is in effect.

13 As Empire's supplemental position statement on
14 the fuel and purchase power issue states, Empire fully
15 supports the approach contained in that document, and it
16 urges the Commission after it's heard all of the evidence
17 on all of the fuel and purchase power issues to adopt that
18 approach.

19 Now I'd like to turn to the remaining issues in
20 this case and give you a brief summary of what we think
21 the evidence will demonstrate with regard to them.

22 There are two primary issues involving the
23 depreciation issue that you'll hear shortly. The first
24 concerns the treatment of net salvage.

25 The Staff has proposed to remove net salvage

1 from the depreciation calculation and instead expense it
2 as it is incurred.

3 Empire believes that this is a radical approach
4 out of the mainstream of utility accounting.

5 Further, we believe there are no compelling
6 reasons for the Commission to take such an approach in
7 this case.

8 We believe the evidence will show that Staff's
9 proposal is inequitable because it creates inter-
10 generational subsidies.

11 In other words, it would make one generation of
12 ratepayers pay for something used by an earlier generation
13 of ratepayers.

14 Additionally, rather than spreading the costs
15 of removal over the entire life of the affected property,
16 and, thereby, smoothing the effect of that on rates, we
17 believe the Staff's proposal would potentially result in
18 unneeded rate shock by the payment of the same cost of
19 removal over a much shorter period of time.

20 The second depreciation issue relates to the
21 service life of generation property.

22 Both the new State Line Combined Cycle Unit, as
23 well as -- as well as existing generating plants of
24 Empire, the evidence will show that the Staff has failed
25 to synchronize life span with the investment that is

1 required in order for the plants to achieve that life span
2 that is assumed.

3 For example, the Staff proposes to depreciate
4 the investment in the new State Line Combined Cycle Unit
5 over a period of 35 years, when, in order to actually
6 achieve a life span of 35 years, Empire will be required
7 to make significant additional investments, and those
8 investments are not included in the Staff's calculation.

9 Staff's failure, we believe, to properly match
10 life span with investment will result in the inability of
11 Empire to recover its investment in plant which is used
12 and useful over the service life of the investment.

13 On what is shown as the bad debt issue, we
14 believe the evidence will show that there is a historical
15 correlation between revenues and bad debts for this
16 Company.

17 Empire and the Staff have agreed in this case
18 that the appropriate level of bad debt expense expressed
19 as a percentage of the test year revenue is .25 percent,
20 .25 percent.

21 But all that does is recognize that there is a
22 bad debt level based on the current level of revenues.

23 All Empire is asking in this issue is that that
24 very same percentage, .25 percent, be applied to the
25 increase that the Commission orders in this case.

1 Because we believe that as the revenue
2 increases, the bad debts are likely to increase by that
3 same .25, and we've presented evidence to that effect.

4 On the incentive pay issue, we believe the
5 evidence will show that an additional \$323,000 of
6 compensation should be included in the cost of service and
7 recovered through rates, because Empire's performance-
8 based incentive pay is a cost-effective approach which
9 benefits both consumers and shareholders.

10 We believe this is also an approach that the
11 Commission approved in a prior Empire rate case, the one
12 in 1997.

13 On the rate of return issue, we believe the
14 evidence will show that the Staff has misapplied the
15 discounted cash flow, or DCF, formula in several respects.

16 Most importantly, the Staff has utilized
17 Empire's stock prices which reflect the premium associated
18 with the proposed merger, proposed and failed merger,
19 between Empire and Utilicorp United.

20 The evidence will show that at one time as a
21 result of the pending merger, Empire's stock traded as
22 high as \$30.75 a share, 30.75. I think it closed
23 yesterday at 20.

24 The Staff's approach relies upon abnormally
25 high stock price.

1 On January 2nd, 2001, as you well know,
2 Utilicorp announced unilaterally that it would not go
3 forward with that merger. Empire's stock price dropped
4 dramatically.

5 Since that time the evidence will show that
6 Empire's stock has traded in a narrow range, between \$19
7 and \$20 per share, nowhere close to the 30.75, when people
8 were thinking that merger was going to occur.

9 We believe that this mistaken approach by the
10 Staff, which has not been used by either Empire or Public
11 Counsel, can be fixed by either using a 19 or \$20 stock
12 price in the DCF formula, which we believe the evidence
13 will support, or the Commission could choose to perhaps
14 true-up the stock price to June 30th of this year, which
15 would then allow the Commission to use five months,
16 February through June of this year, of actual stock
17 prices, which would exclude the anticipated merger
18 premium.

19 The evidence will show, we believe, that fixing
20 this mistaken approach of the Staff, along with several
21 others made by the Staff and Public Counsel, which I won't
22 go into detail on, will result in an authorized return on
23 equity for Empire in the range of 11.5 to 12 percent.

24 On the capital structure issue, the evidence
25 will show that the Commission should adopt a capital

1 structure for Empire of 52.5 percent debt and 47.5 percent
2 common equity as filed, or a trued-up normal capital
3 structure of 45 percent common equity, 7.2 percent trust
4 preferred and 47.1 percent long-term debt.

5 This is as opposed to Empire's actual of
6 June 30, 2001 capital structure.

7 The evidence will show that Empire's actual
8 capital structure is abnormal because it is a direct
9 result of the failed merger, the rejection of the merger
10 by Utilicorp.

11 As a result of that merger agreement between
12 Empire and Utilicorp, Empire was prohibited from issuing
13 additional common equity.

14 As a result of the merger agreement, Empire
15 also redeemed its previously outstanding preferred stock.

16 As a consequence of these things, the evidence
17 will show that Empire's actual capital structure right now
18 is much more debt heavy than Empire's historically normal
19 capital structure.

20 That historically normal capital structure
21 ranged from 45 to 50 percent equity, 45 to 50 percent debt
22 and 5 to 10 percent preferred stock, all prior to entering
23 into the merger agreement.

24 On the issue involving the State Line Combined
25 Cycle Plant, as I indicated earlier, there is a unanimous

1 agreement on the capital costs of that plant.

2 That agreement is in the context of the true-up
3 portion of this case, so we presume there will be further
4 evidence presented on that topic in the true-up.

5 On the operation and maintenance cost issue for
6 the State Line Plant and the Energy Center Plant, the
7 important point to remember is that generating plants must
8 have maintenance performed on them in order for them to
9 continue to function.

10 Some of this maintenance will be performed by
11 Empire on its own, much as it does with its other
12 generating facilities.

13 Some of it will most likely be performed under
14 the terms of a long-term contract which is under
15 negotiation.

16 Empire believes that the evidence will show
17 that it is vital that the rates set in this case reflect
18 the appropriate levels of maintenance costs for Empire's
19 combustion turbine-based generating facilities.

20 Part of the problem is that there is very
21 little, if any, historical experience at the Energy Center
22 and State Line to utilize for the purpose of setting a
23 normal level of expense.

24 Traditionally, you're used to the Staff
25 presenting multi-year averages, perhaps, of historical

1 costs. Well, we don't have those in this situation.

2 The Energy Center is being used completely
3 differently than it has in the past, and that drives
4 different maintenance costs. And, of course, the State
5 Line Plant is brand new, so we don't have a track record
6 on that.

7 Empire has presented expert evidence on what
8 level of maintenance costs should be experienced for the
9 State Line Combined Cycle and State Line 1.

10 And we have two -- essentially two different
11 plants at State Line. One is State Line 1. It's a simple
12 cycle combustion turbine. The other is a State Line
13 Combined Cycle, where we took one of the existing plants,
14 added another combustion turbine to it, added the heat
15 recovery steam generators. So state Line is essentially
16 two different things.

17 Because this is also part of the true-up
18 process, it may be that this issue is not decided in this
19 phase of the hearing, and it may work itself out in the
20 true-up.

21 On the issue of cost of service and rate
22 design, we believe the evidence will show that it is
23 appropriate to increase the nonfuel portion of any
24 increase that you allow in this case by applying an equal
25 percentage to all rate classes.

1 However, any increase related to fuel and
2 purchase power, Empire believes the evidence will show,
3 should be applied on a per kilowatt hour basis.

4 I'm going to skip over the fuel and purchase
5 power issues since we've talked about that at length.

6 In conclusion, I'd like to tell you that this
7 is not an ordinary rate case. There is something of a
8 sense of being on the edge of a precipice.

9 We're dealing with a situation where this
10 Company has been derated by two of the three rating firms
11 that follow it.

12 Empire has always been a very conservative
13 company, but it's now a conservative company that is
14 having trouble earning enough to meet the obligations to
15 its bondholders, its shareholders and its ratepayers.

16 This is a company that has done the responsible
17 thing for southwest Missouri. It has planned and built
18 more generation, a very highly efficient form of
19 generation, in the form of the State Line Combined Cycle
20 Unit.

21 It did that rather than try an easier route, as
22 some other jurisdictions have, and try to rely upon the
23 vagaries of the wholesale spot market.

24 As we're learning from the headlines in the
25 nightly newspapers, energy cannot necessarily be taken for

1 granted today.

2 Empire stepped up to the plate, brought on line
3 a new generation resource for its customers. The
4 shareholders made that investment. Now it's time for the
5 customers to start paying for that plant.

6 I want to leave you with this thought: This is
7 not a case about shareholder greed. Except for the brief
8 abnormal period when the merger premium was reflected in
9 Empire's stock price, Empire's long-term shareholders had
10 seen no appreciation in the share price over the last
11 decade.

12 There has been no increase in the dividend paid
13 on Empire's common stock since 1992. This is not about
14 shareholder greed. This is about the Commission supplying
15 the authority for Empire to recover enough revenue to
16 recover its reasonable operating costs and to meet its
17 obligations to its bondholders and its shareholders and
18 its customers.

19 While the Commission will be focusing on
20 several issues in this case, it should not lose sight of
21 the situation in which Empire finds itself.

22 A person with 100 cuts, 100 small cuts, can
23 bleed to death just as easily as a person with one gaping
24 wound. When you're dealing with all of the individual
25 issues in this case, I want you to think about that.

1 The Commission's adoption of several positions
2 that do not favor Empire, which individually and by
3 themselves may seem small, can have an overall serious
4 effect on Empire's financial health and its future.

5 Please keep that in mind as you hear the
6 evidence and make your decision to this case.

7 Thank you.

8 JUDGE RUTH: Thank you, Mr. Duffy.

9 Staff.

10 MR. FREY: Thank you, Your Honor.

11 May it please the Commission, this case was
12 initiated on November 3rd of last year. The empire
13 District Electric Company filed for an increase in revenue
14 requirement of more than \$41 million, which represents
15 almost a 20 percent increase over existing electric
16 revenues.

17 From the very beginning the case has been
18 driven by two major circumstances that the company
19 currently faces. The first is the extreme volatility in
20 natural gas prices, which counsel for Empire has alluded
21 to, the volatility that we have witnessed this year and
22 which has seen prices soar to unprecedented levels.

23 The second is Empire's construction now nearing
24 completion of a combined cycle plant at its State Line
25 facilities.

1 Indeed, these two circumstances are
2 inextricably linked, because the new State Line facility
3 is, in retrospect, perhaps unfortunately, designed to
4 operate strictly on natural gas.

5 As a result, Empire Company, already heavily
6 relying on natural gas compared to other electric
7 utilities in this state, would produce an even greater
8 percentage of its electricity from natural gas.

9 In other words, the Company has sustained, if
10 you will, a double whammy in connection with natural gas
11 both in terms of its increased price and the company's
12 considerably increased usage of this commodity.

13 It turns out that most of the major issues you
14 will hear are connected to the new combined cycle unit.

15 The combination of anticipated growth in
16 Empire's service area and the imminent expiration of two
17 contracts for purchase power -- actually, they will expire
18 at midnight tomorrow -- cause the Company to seek
19 additional capacity.

20 It was only after Empire had investigated the
21 possibility of obtaining firm purchase power to meet its
22 need for additional capacity that it decided to focus on
23 the build option.

24 After considering a number of proposals, the
25 Company ultimately entered into a agreement with Western

1 Resources to jointly construct the State Line Combined
2 Cycle Unit.

3 Empire must have a 60 percent equity position
4 in the plant; the Western, the remaining 40 percent.

5 The new plant has the capability of delivering
6 500 megawatts of capacity, with 60 percent of its output,
7 or 300 megawatts belonging to Empire, and the remaining
8 40 percent going to Western.

9 The combined cycle plant incorporates already
10 existing State Line Unit 2, which had a capacity of
11 150 megawatts.

12 Hence, when one factors in the expiration of
13 two purchase power contracts, the Company is expected to
14 realize a net capacity gain of less than 150 megawatts.

15 The combined cycle unit is nearing completion,
16 and is, in fact, scheduled to come on line on or about
17 June 1st of this year.

18 The June 1 date is some -- is of some
19 importance, because it permits certification of the new
20 capacity by the Southwest Power Pool.

21 More important is the fact that the unit is
22 scheduled to be in service in time for the company's
23 summer peak.

24 The June 1 date, in essence, dictated the need
25 for the company to file for its rate case -- for its rate

1 increase -- excuse me -- back in November of last year.

2 This would help ensure that Empire would have
3 rates in place in close proximity to the in-service date,
4 and, thus, would be able to minimize the time period
5 during which the Company would be unable to earn a return
6 on its investment funds through the allowance for funds
7 used during construction, the so-called AFUDC.

8 As a consequence of the installation of this
9 major new production facility, this case is what one might
10 term back-end loaded; that is, a higher than normal
11 percentage of the dollars at issue are at the current time
12 not -- not right for argument.

13 As a consequence, neither the Staff, nor any
14 other party, is at this time capable of making a solid
15 recommendation regarding revenue requirement.

16 Once the evidentiary hearing is completed, the
17 true-up phase of the proceeding will commence.

18 This phase will provide an opportunity for the
19 parties to firm up their cases as answers to a number of
20 key questions, primarily involving the combined cycle
21 plant, will begin to surface.

22 The true-up hearings are scheduled for
23 August 22nd and August 23rd.

24 Evidence of back-end loading of this case can
25 be seen in the approach taken by the Staff in filing its

1 direct case.

2 Staff's original filing, which, among other
3 things, did not include recognition of the State Line
4 Combined Cycle Unit was on the order of a negative
5 \$18 million, a figure that is a result of some
6 adjustments, has moved to the current figure of minus,
7 approximately, 15 million.

8 However, at the same time, the Staff,
9 recognizing the considerable likelihood of the combined
10 cycle unit would come on line, did not wish to send a
11 misleading signal to key groups and stakeholders in the
12 state that the Staff's case is, in fact, negative, and
13 then at a later time have to reverse its field when things
14 came into focus and dollar impacts could be quantified
15 with far greater precision.

16 For that reason, following some appropriate
17 modeling of various scenarios, the Staff included in its
18 direct case an increase in the revenue requirement of
19 \$35 million.

20 This amount -- and so would net out to, if
21 you're adding the 35 million to the negative 18, would be,
22 I guess, about 7 -- 17 million positive.

23 This amount is not intended be a recommendation
24 of any kind. Rather, it is simply an estimate designed to
25 provide a signal as to where the Staff believes the case

1 will go following the true-up and other adjustments, and
2 assuming that the combined cycle plant is deemed to be
3 in-service for purposes of this rate case.

4 Since the filings of the direct cases the
5 parties have made considerable progress. As mentioned
6 earlier, two stipulation and agreements, now unanimous,
7 have now been filed. One deals with the question of the
8 appropriate in-service criteria to be used for evaluation
9 of the new combined cycle plant.

10 Testing will begin shortly, and the Staff will
11 be actively involved in that process.

12 The other unanimous stipulation and agreement
13 proposes to resolve the matter of the appropriate
14 construction costs of the new unit to be included in the
15 rate base.

16 It might be noted that the Staff hasn't
17 performed a construction audit since the nuclear projects
18 of the '80s.

19 Although, in fact, Empire State Line Units
20 No. 1 and 2 have come on line since then. Each of these
21 was more of a so-called turn-key package, with little room
22 for additional costs, and as a result, these projects did
23 not require a full-blown audit.

24 In the wake of its audit in this case, the
25 Staff raised an issue related to contractor performance on

1 the heat recovery steam generators.

2 Parties have reached a unanimous agreement
3 regarding that issue, and have also agreed as to the
4 manner in which other sources of additional construction
5 costs are to be considered for rate base treatment.

6 The Staff's case embraces the very important
7 issues of fuel and purchase power.

8 As suggested earlier, the problem of natural
9 gas prices is especially critical in the case of Empire,
10 because of its heavy and now increasing allowance on
11 natural gas fuel generation.

12 Moreover, the volatility of the market for
13 proposed -- for purchase power is well known and not
14 likely to abate in the foreseeable future.

15 Under the circumstances the Staff felt that it
16 had to come up with something a bit out of the ordinary in
17 an effort to deal with this vexing problem in this case.

18 Staff chose not to put such an approach in its
19 direct case because it did not wish to saddle any of the
20 parties with a position and create a situation in which
21 parties might feel the need to posture.

22 Staff felt that this approach stood a better
23 chance of producing a free and open discussion during the
24 prehearing conference, with an approved prospect for
25 developing consensus on this difficult issue.

1 The result was a nontraditional, somewhat
2 unique, though, not entirely unprecedented approach to the
3 issue of fuel and purchase power, and this has become
4 Staff's position; namely, the approach being this interim
5 energy charge above a base rate for a combination of fuel
6 and purchase power.

7 The proposal costs, the interim energy charge,
8 which would last for up to two years, in which following
9 an audit would be subject to refund to the appropriate
10 customers to the extent that the interim energy charge
11 exceeds actual costs, provided that the Company is
12 permitted to keep all revenues generated at the base
13 level.

14 In the opinion of the Staff, the interim energy
15 charge successfully addresses the two fundamental concerns
16 presented, especially by the uncertainties and prices of
17 natural gas.

18 Specifically, Staff did not want to see the
19 ratepayers get stuck with \$6 or \$7 gas during a period of
20 declining prices.

21 By the same token, the Staff did not want to
22 expose the Company to the financial risk of putting gas in
23 a range of \$2 and \$3 and having it jump to \$7.

24 Such a result could cost the Company in excess
25 of \$20 million, which is on the order of a year's worth of

1 earnings for Empire.

2 In its May 24th, 2001 order directing filing,
3 the Commission ordered, among other things, that the
4 parties be prepared to address in their opening statements
5 the effect of any of the passage of SCS/SB 387 on this
6 case.

7 Mr. Duffy has spoken on that issue. The Staff
8 believes that it has adequately addressed the matter in
9 its May 25th pleading filed in response to the
10 Commission's May 24th order.

11 In paragraph 1 of its pleading, Staff noted
12 that Empire has agreed not to avail itself of any rights
13 it may have under such legislation during the period of
14 effectiveness of an energy credit.

15 The Staff, after pointing out that the bill had
16 not yet been signed into law by the Governor, then
17 expressed the view that the approach adopted and proposed
18 by Staff is much superior to the one created by that bill.

19 So far I have been focusing on the somewhat
20 unique issues that are driving this case.

21 With the growing need for electrical power
22 nationwide, it's probably fair to say that the Commission
23 and its Staff expect to see more cases such as this one
24 coming along in the not too distant future.

25 This case has, however, also presented some

1 issues that one might view of a more traditional nature.

2 Today, for example, we expect to address the
3 issue of depreciation, where the Staff and Company have
4 substantial differences amounting to some \$10 million.

5 In particular, two parties differ substantially
6 in the service lives and the assets -- of the assets in
7 question.

8 The Staff believes that the longer service
9 lives, it is sponsoring a more realistic than those
10 proposed by the Company.

11 With regard to the future expenditures of an
12 asset, on an asset, the Company believes that these should
13 be included in the depreciation rate calculation.

14 On the other hand, Staff believes that they
15 should not be included because they are not known and
16 measurable.

17 Another area of disagreement involves whether
18 or not to include estimated future net salvage dollars of
19 existing assets and depreciation calculation.

20 The Commission has already ruled on this
21 question at least twice.

22 In a recent Laclede case, I believe it's
23 GR-99-315, the Commission ordered that Staff's approach be
24 adopted.

25 In the recently decided St. Louis Water case,

1 however, Case WR-2000-844, the Commission decided against
2 the Staff's approach.

3 While the Staff does not quarrel with the
4 Commission's decision in the water case, Staff asserts
5 that this case is different.

6 Here there is not a need to replace plant
7 infrastructure over a finite period. Moreover, revenue
8 reduction is not anticipated in the instant case.

9 The Staff believes that estimated future net
10 salvage costs are to be too speculative and, at any rate,
11 not yet incurred and, therefore, takes the position that
12 they should not be included. Instead, only currently
13 incurred net salvage costs should be included and they
14 should be expensed.

15 The Staff differs substantially with the
16 Company on the issue of return on equity as well.

17 Staff is proposing a range of 8 1/2 to
18 9 1/2 percent, and Empire at 11 1/2 to 12 percent. Public
19 Counsel falls in the middle at about 10 to 10 1/4 percent.

20 Staff believes the evidence will show that the
21 stock prices it used in its DCF calculation are
22 appropriate.

23 With regard to the issue of capital structure,
24 Staff and Public Counsel agree that the Company's actual
25 capital structure should be used as opposed to the

1 hypothetical one proposed by the Company.

2 Both Staff and Public Counsel are in the
3 general area of a 60/40 percent debt-to-equity ratio.
4 Public Counsel is more -- I think it's 58 to 42, but it's
5 much closer to Staff on that issue than it is to the
6 Company.

7 Further, the Staff has agreed to a true-up
8 capital structure to the actual as of June 30th.

9 In addition to this issue -- these issues,
10 you'll here about the difference between the Company and
11 the Staff on the appropriate treatment of bad debt
12 vis-a-vis Missouri jurisdictional revenues.

13 Mr. Duffy touched on that and suggested that
14 there was a correlation between bad debt and growth and
15 revenues, and Staff would simply disagree and say there
16 is -- that the evidence will show that there is no such
17 correlation.

18 Finally, there are the issues of class cost of
19 service and rate design.

20 Here the Staff and Public Counsel take issue
21 with Praxair regarding the appropriate allocation of
22 transmission and capacity costs.

23 The latter proposes an allocation method that
24 places substantially greater weight on the usage of
25 capacity during the systems peak, while Staff and Public

1 Counsel's approach is based on an entirely different
2 philosophy; namely, that allocation of transmission and
3 production capacity should be based upon demands and every
4 hour the capacity is utilized.

5 Among other things, the parties also differ on
6 the treatment of the interim energy charge that may be
7 ordered in this case.

8 Only Praxair believes that an equal percentage
9 increase should be applied to all classes, including the
10 interim energy charge component.

11 The Company, Public Counsel and the Staff all
12 oppose Praxair's rate design recommendation, which could
13 result in a permanent rate reduction to Praxair and a rate
14 increase to every other customer.

15 Thank you.

16 JUDGE RUTH: Thank you.

17 Public Counsel.

18 MR. COFFMAN: Thank you.

19 May it please the Commission, good morning. My
20 name is John Coffman. I'm Deputy Public Counsel.

21 And this is indeed an unusual rate case in a
22 couple respects.

23 First of all, much of the potential rate impact
24 in this case will not be known for certain until we reach
25 the true-up hearing, and after the new unit at the State

1 Line Plant has been audited pursuant to the agreed-upon
2 in-service criteria.

3 Another reason this case is unusual is that the
4 largest and most important issue in the case, the fuel and
5 purchase power expense, has been exceedingly difficult for
6 the parties to grapple with.

7 And that's because, I think, at this particular
8 moment in history, it has been an even greater challenge
9 than normal to accurately predict what fuel prices will be
10 in the near future.

11 And because, as the Commission has noted, a
12 piece of legislation, which Public Counsel believes would
13 be dangerous to consumers, has been preceding along in the
14 General Assembly simultaneous to the timetable of this
15 case.

16 Now, the good news that has been mentioned is
17 that several issues in this case has settled, and we
18 should have no trouble completing the hearing within the
19 time that you've allotted.

20 As to the fuel and purchase power issue, the
21 three parties that have filed prepared testimony on this
22 issue have each changed positions to a joint
23 recommendation that we believe is a creative and balanced
24 approach to the problem, and that is the interim energy
25 charge that has been outlined in the May 14 document.

1 But let me go back and first briefly review the
2 original filed positions as to the parties on the natural
3 gas component of the fuel expense.

4 Staff had recommended a three-year historical
5 average for that cost. Empire had recommended a one-year
6 future strip for natural gas. Public Counsel had
7 recommended a hybrid approach, which took an average of
8 two years historical and two years future strip. And that
9 recommendation is contained in the prepared testimony of
10 James Busch.

11 Now, if we feel that -- if you for whatever
12 reason do not want to adopt the interim energy charge
13 recommendation and you feel that you must pick one number
14 on a given day to represent this price into the future,
15 that Public Counsel's hybrid method is the smoothest
16 predictor and the fairest way to do that, although I
17 believe all parties have recognized this year's unstable
18 energy markets have made the task of estimation tricky
19 with regard to natural gas rates.

20 And that's why the parties have had
21 constructive talks on this issue, and I believe that we
22 have come up with a better way to resolve the issue.

23 And it is based on a method that was used by
24 the Commission during the last energy crisis after fuel
25 adjustment clauses were outlawed. And in a few cases

1 adjustments were ordered to occur subsequent to the
2 completion of a rate case.

3 Now, the joint recommendation for an interim
4 energy charge is a solution that I believe would present
5 the most just and reasonable method of resolving this
6 issue for this Company in this rate case.

7 I can say without reservation that this 24-
8 month interim subject-to-refund methodology would be in
9 the public interest.

10 But, again, I would condition that as a
11 temporary solution for this small company in its current
12 situation and given the unusually unstable energy markets
13 that we're currently seeing.

14 Our chief accountant, Russell W. Trippensee,
15 has filed prepared testimony and will be available for
16 cross-examination during the fuel and purchase power
17 expense issue to explain the desirability of this
18 recommendation from the perspective of Empire's captive
19 residential and small business consumers.

20 I urge you to inquire of him about this
21 recommendation when he takes the stand.

22 The Commission has asked the parties to address
23 Senate Bill 387.

24 As the participants were negotiating, we were
25 all keenly aware of the debate that was raging across the

1 street over this bill. And this is why Public Counsel
2 insisted that one component of this interim energy charge
3 recommendation be a condition that Empire would forego the
4 use of any fuel adjustment remedy that could become
5 possibly -- could possibly become available if the
6 Governor signs Senate Bill 387.

7 This would prevent Empire from double recovery
8 from the ratepayers under two different rate procedures,
9 and should prevent the complication that Mr. Duffy
10 explained to you under the emergency provision.

11 The Commission will have the opportunity to
12 accept or reject a proposed fuel adjustment clause if
13 Senate Bill 387 is passed, if it believes that it is not
14 in the long-term best interests of the ratepayers.

15 However, this flexibility for the Commission I
16 do not believe applies pursuant to Section 7 of that
17 legislation, which is the emergency provision that
18 Mr. Duffy explained. So it would be a complicated mess.

19 So the condition that Empire forego use of
20 Senate Bill 387 if the interim energy charge
21 recommendation is approved is absolutely critical to our
22 recommendation that you approve the interim energy charge.

23 Now, if this legislation is signed into law,
24 Public Counsel will use whatever resources it can muster
25 to point out to the Commission what we believe to be the

1 dangers of fuel adjustment clauses.

2 And if Empire attempts to use it, we will
3 participate as fully as we can in the new parallel
4 procedure to help the Commission avoid as many of the
5 dangers that we see in that procedure as possible.

6 Public Counsel is concerned that despite some
7 of the safeguards written into the bill, that it could be
8 utilized in a manner that would be unfair to consumers and
9 result in volatile rate increases.

10 We hope that it won't come to that and that
11 Missouri will not become a fuel adjustment state, but that
12 is something that we have to be aware of.

13 When the Supreme Court struck down fuel
14 adjustment clauses in 1979, stating that they violate the
15 fundamental provisions against single-issue ratemaking and
16 the prohibition against retroactive ratemaking, we
17 considered that to be a very important consumer victory.

18 What a lot of people did not remember is the
19 dire predictions that came from electric companies at the
20 time, that economic ruin would certainly follow that
21 decision.

22 What followed was not economic ruin. In fact,
23 we believe that both shareholders and ratepayers have done
24 very well.

25 Not only have electric rates been comparatively

1 low in our state since that time, electric companies have
2 thrived and enjoyed very healthy profits.

3 Many experienced regulatory auditors believe
4 that without a fuel adjustment clause to use as a crutch,
5 our Missouri companies have become more efficient in
6 managing their fuel portfolios and fuel purchases, and
7 this has benefited them in the long-run.

8 Now, Empire is not one of the companies that is
9 currently enjoying record profits, but we do not believe
10 that it's temporarily -- the temporary economic situation
11 is something that will continue. And I think that the
12 financial analyst would bear this out.

13 We do not believe that they're in an emergency
14 situation. We do not believe they are on a precipice. We
15 believe that no matter what the Commission decides on the
16 contested issues in this case, the resulting rate increase
17 will place Empire in a very positive situation, to be very
18 healthy into the future.

19 I might also point out that Empire has not
20 during this difficult year, after the failed merger and
21 other circumstances, has not decreased its regular
22 dividends to shareholders.

23 But getting back to the interim energy charge,
24 I think there is several things that need to be point out
25 as to how this approach would be far superior to the fuel

1 adjustment clause approach of Senate Bill 387.

2 The interim energy charge we are recommending
3 in this case would be the product of a rate case, and that
4 is significant because all relevant factors can be
5 considered in establishing it.

6 Senate Bill 387 would explicitly permit single-
7 issue ratemaking through a new parallel process, parallel
8 to the rate case procedure.

9 With an interim energy charge as opposed to a
10 fuel adjustment clause, there will be fewer rate changes
11 and less volatility in rates over the next two years.

12 Now, this next point is very important. In
13 fact, we think it's huge.

14 The interim energy charge has been designed --
15 and you can see it in the May 14 document -- to be a per
16 kilowatt hour charge, covering the expense for all fuel
17 that could be used to generate electricity.

18 And we believe this would encourage Empire to
19 use the most efficient fuel mix available to it other the
20 next 24 months.

21 On the other hand, Senate Bill 387 would allow
22 preferential treatment for burning natural gas as fuel
23 even if other fuels may be cheaper or more efficient.

24 We believe that this is not a desirable
25 incentive. Electric and utilities should be incented to

1 use the most efficient fuel sources available to it.

2 And, again, this is crucial to Public Counsel's
3 recommendation on this issue.

4 The interim energy charge would be preferable
5 to the more complicated fuel adjustment clause procedure
6 of Senate Bill 387 because it could also save the state as
7 much as a half a million dollars over at least the first
8 year.

9 The fiscal note for this legislation, if
10 utilized by Empire, includes significant costs for
11 Public Counsel to participate, and these dollars would
12 come out of general revenue in a very tight budget year.

13 The Commission has projected \$250,000 a year in
14 its fiscal note to implement the new fuel adjustment
15 clause procedure.

16 And this money, as you know, would be paid the
17 utility assessments, presumably, the lion share of this on
18 Empire, since the legislation only applies to Empire as a
19 regulated shareholder-owned company.

20 And in the future rate case, I assume this
21 level of assessment could be passed right on to Empire's
22 customers, the ones who would be suffering for the fuel
23 adjustment clause.

24 One other point -- and you'll find in this
25 paragraph 8 of the May 14 document -- there are important

1 provisions in the interim energy charge recommendation
2 that would require an offset for natural gas capacity
3 release and off-system sales for natural gas.

4 Praxair has argued that it deserves a full and
5 fair hearing on the fuel issue, as is its right under the
6 Fisher case.

7 As I said earlier, we should not diminish the
8 importance of that case.

9 And Mr. Conrad should be, I believe, afforded
10 all due process that is fair. He should have the
11 opportunity to offer witnesses and cross-examine any
12 witnesses that have prepared testimony in this case on any
13 issue.

14 However, we believe the other parties also have
15 due-process rights, and we do believe we should have the
16 opportunity to have our testimony in support of the
17 interim energy charge accepted into evidence and allowed
18 an opportunity to more fully explore this new position.

19 There are two other issues on which Public
20 Counsel is participating of the contested issues.

21 On capital structure and rate of return, we
22 believe the Commission should utilize the actual capital
23 structure from the end of the test year in this case.

24 We believe you should also adopt a return on
25 common equity, consistent with Public Counsel Witness Mark

1 Burdette's discounted cash flow analysis. And that would
2 be a common equity recommendation in the range of
3 10.0 percent to 10.25.

4 And then, finally, as to rate design, we
5 believe the Commission should recognize the class cost of
6 service recommendation of Public Counsel Economist Hung
7 Hu.

8 The Commission should reject the average and
9 excess method of Company and Praxair, which would allocate
10 production and transmission plant costs differently than
11 Staff and Public Counsel would recommend.

12 Staff and Public Counsel use different methods
13 but reach results very similar, and either Staff or Public
14 Counsel's approach on that allocation of production and
15 transmission plant costs would be reasonable.

16 And as Public Counsel typically recommends, we
17 believe that the Commission should move halfway towards
18 the class cost-of-service study results, balancing
19 movement towards cost of service, with affordability and
20 other rate impact considerations.

21 The customer charge should be increased for
22 residential consumers in the same percentage as the
23 overall increase to residential revenues.

24 And if the Commission adopts the interim energy
25 charge, we believe that it should be applied after the

1 changes to the cost of service under our recommendation;
2 that is, the rate design recommendation should be applied
3 and then the interim energy charge should be in a separate
4 tariff placed on top of that.

5 And that is all I have. Thank you very much.

6 JUDGE RUTH: Thank you, Mr. Coffman.

7 And, Mr. Conrad, are you ready?

8 MR. CONRAD: I am. At least I believe I am.

9 Good morning, and may it please the Commission,
10 and a particular welcome to the new commissioner,
11 Commissioner Gaw.

12 I think you'll find this process to be perhaps
13 not as challenging but certainly different from what you
14 had across the street.

15 Your Honors, I'm here this morning to represent
16 Praxair. I want to tell you for a moment or two a little
17 bit about Praxair, but before I do that, I want to quickly
18 address a couple of points that have been made, most
19 particularly in this point by Staff counsel, in which he
20 has referred to this case as back-end loaded.

21 He's right. I agree with them.

22 The problem, however, is that this Commission
23 has in kind of incremental stages gotten itself into a
24 situation in which cases are back-loaded, instead of
25 having the full statutory time period to do the

1 investigation, by use of this true-up mechanism.

2 In the past clients that I have represented,
3 and the Public Counsel, have objected to that. We have
4 said that that compresses the time frame that you-all have
5 to work in. It compresses the time frame that the Staff
6 has to work in. It -- these cases are, Commissioner Gaw,
7 complicated.

8 There is a lot of accounting data. At the same
9 time it would seem that the companies have built into
10 their rates of return the idea of regulatory lag.

11 And essentially what has happened in
12 incremental stages, just a little bit, a little bit here,
13 a little bit here, a little bit here. But the case has
14 been moved -- not just this case, but other cases. You'll
15 see this in the MGE case to come. You'll see in this
16 other cases -- get moved further and further and further
17 back to the operation of law date, to the point that
18 you-all don't have any time to consider it, the Staff
19 doesn't have time to research it and do their audits
20 thoroughly. They are pressed. Everybody gets pressed
21 into that last three or four weeks.

22 That's not how the situation was originally
23 designed by the Legislature to work.

24 Just as a flip note -- it's not particularly an
25 issue. We haven't briefed it. I frankly don't intend to.

1 But I would ask, since I have all four of you here today,
2 that you-all think about how that process of this true-up
3 has incrementally has affected how this Commission
4 regulates and how that has affected the idea of regulatory
5 lag that is built into the company's rates of return.
6 Perhaps those rates of return are too high if they have
7 virtually immediate relief.

8 You have asked us to talk briefly about Senate
9 Bill 387. I'll do that. I don't have a lot to add.

10 My client here opposed that bill pretty much
11 for the same reasons that Public Counsel has indicated.
12 We think it's bad legislation. It has a number of things
13 wrong with it.

14 And I suspect that if it is made law and is
15 utilized, that it will be subjected to some degree, shall
16 we say, of judicial review on that.

17 I'll stand on their statements with respect to
18 it. I think that's probably adequately covered.

19 But let me tell you now about Praxair.

20 Praxair is the largest, so far as we're aware,
21 industrial customer. It's the largest load that Empire
22 serves. Its approximately a 7 1/2 to 8 megawatt. That's
23 8,000 kilowatts of load.

24 Praxair is unique. Praxair is an interruptible
25 customer. It's firm load by contract is 300 kilowatts.

1 That means that it is virtually completely
2 interruptible, and on exceptionally short notice for an
3 interruptible customer pursuant to the terms of its
4 contract.

5 The significance that that has for you as we
6 address the issue of cost-of-service allocation and rate
7 design is that this customer imposes practically no load
8 on Empire that cannot be virtually instantaneously shed.

9 It means that Praxair's load largely
10 disappears, except for that tiny slice at the bottom, when
11 Empire needs that capacity to serve other customers.

12 And as a result, we don't think that Empire
13 sees capacity costs that are imposed by its need to serve
14 Praxair.

15 Praxair works in a very competitive business.
16 Some of you may have seen the trucks around that say
17 Praxair. Some of you may have seen -- I think one of the
18 hospitals over here has a big tank on the outside of it
19 that says Praxair.

20 Praxair is a manufacturer of commercial and
21 industrial gases. They make an exceptionally high use of
22 electricity. Electric is, fact, their highest cost item.

23 They compress and use a process which they call
24 liquification to fraction out air into its various
25 components, carbon dioxide, oxygen, nitrogen, various

1 other types of industrial gases.

2 Their business is highly competitive. They
3 face, unlike this Company that you're regulating today,
4 actual competition, and that competition is determined on
5 pennies per unit of product for that.

6 The plant here that is served by Empire is
7 located near Neosho, Missouri. It dispatches its load to
8 its point of consumption for its customers by truck.

9 Those trucks are dispatched and orders are
10 filled based on a very complicated computer program that
11 is somewhere back in the -- in the East Coast, that
12 actually figures out what it costs to fill a particular
13 order for a particular plant and say, okay, it's cheaper
14 for us to fill that order from this plant than from this
15 plant and so on.

16 What you end up with, if you think that
17 through, is you end up with a radius. It's not a precise
18 circular radius because it's going to be driven by how the
19 interstates and so on go.

20 But their business from this plant is
21 subscribed --

22 JUDGE RUTH: Just a moment, please. I don't
23 know what is making that noise.

24 (OFF THE RECORD.)

25 JUDGE RUTH: Sorry for the interruption. We'll

1 continue.

2 MR. CONRAD: I understand. Technology is fun.

3 But I was trying to point out that they have a
4 competitive service area that is dictated to a large
5 extent by their cost.

6 Praxair is also a unique customer in that it
7 has its own classification from this company for
8 ratemaking purposes. It receives the electricity that it
9 does take at high load -- excuse me -- at high voltage
10 levels.

11 Praxair, perhaps, is not unique of having its
12 own substation, but it has one of the largest ones, and
13 that -- the level of voltage at which it takes service
14 affects the cost.

15 And, importantly, I want to discuss with you
16 for just a moment that because of its interruptibility, in
17 a traditional load factor calculation, Praxair's load
18 factor would actually be over 100 percent. That's not
19 really theoretically possible.

20 But what that means is that its load and
21 capacity needs disappear because of its interruptibility.

22 Commissioner Gaw, you may or may not be
23 familiar with the term "load factors." We use it over
24 here. But as I use it, it is an index or a measure of how
25 uniform use is.

1 If you had, for example, a machine that cost a
2 million dollars, it could produce 10,000 widgets an hour.
3 If you only ran that machine and produced 10,000 widgets
4 for one hour, you would have to take the cost of that
5 \$1 million machine and spread it over the 10,000 widgets.

6 Alternatively, if you could run that machine
7 for 8,760 hours, which would be the whole hours in a year,
8 you could produce and spread the cost of the machine over
9 87,600,000 widgets. And so the cost per widget goes down.

10 By having high-load factor customers on the
11 system, on an electric system, you create efficiencies for
12 that system that otherwise would not be there.

13 The utility has to install or provide for the
14 capacity needs of its customers at its peak.

15 Now, the question is, can you then use up
16 capacity that is otherwise underutilized or not utilized
17 at all in off-peak periods? High-load factor customers do
18 that by their very nature.

19 The class cost-of-service issue is going to
20 surface here. And I would mention to you just briefly
21 that the very purpose of regulation is to stand as a
22 substitute, as a surrogate, for competition.

23 Some 80 years ago the people of this state,
24 through their elected representatives, said we're going to
25 have a Public Service Commission, but, importantly, we're

1 going to allow public utilities, because they're capital
2 intensive in their operations, to have monopoly service
3 territories.

4 And within that territory we're only going to
5 allow one company to provide that service. We're not
6 going to have duplication of facilities and so on.

7 But if they're going to do that, we're going to
8 have a tradeoff with them, and that is, they're going to
9 have to accept a substitute for what would otherwise be a
10 competitive market.

11 So they decreed -- the Legislature, General
12 Assembly, decreed a limited monopoly within an area. The
13 public utility has the right to exclude competitors. And
14 within that area it has other sovereign rights that are
15 given only to the sovereign; namely, eminent domain, to
16 condemn property. And they replace competition with you
17 folks, a regulatory commission.

18 We group customers into classes based on common
19 shared load and surface characteristics, so that they're
20 relatively homogeneous in those groups, and we attempt to
21 set prices at the approximate levels that would be
22 achieved if there were competition. And we submit that
23 that is going to be based on what cost of service is.

24 Imagine for a moment with me that you had an
25 iterative process, that the Legislature had not acted, and

1 that you had the ability as a residential, as a commercial
2 or industrial commercial, to go out and, in effect, plug
3 your extension cord into several different utilities, and
4 you had that choice.

5 The utility trying to serve you would
6 ultimately get its rates down through an iterative process
7 to what would be a cost-of-service level.

8 If one utility said, well, I'm going to serve
9 this customer that is at the low-cost rate and make up the
10 difference over here, he might attract -- he might attract
11 a lot of customers for a relatively short period of time,
12 but then the others would come in and match that.

13 Because the guys over here whose prices were
14 increased to make up the loss would disappear and go to
15 Company B.

16 So if you model that through an entire economy,
17 what you end up with is an iterative process that pushes
18 everybody's rates down to where their costs are, and the
19 costs for that purpose include the profit for the
20 provider.

21 Now, how do we do that? Since we don't have
22 that competitive market, that we try to model that through
23 cost-of-service pricing.

24 We say that's the substitute for monopoly. We
25 try to eliminate what we call in the statutes undue

1 preferences, undue discriminations.

2 Now, a lot of people will argue about what
3 undue means, but essentially what I think it means is its
4 recognition if that if you have 3 or 400,000 customers,
5 that you simply cannot have a price or a rate for each
6 customer that exactly recovers what their costs are.

7 You have to group them. So there are going to
8 be people at one extreme or the other. And you have to
9 recognize that when you do that homogeneous grouping,
10 there is going to be some give in that system.

11 Nonetheless, the objective is to try to get
12 those costs and identify them and reflect them in rates.

13 We index that by rate of return, and we test it
14 whether the rate of return for a particular customer or a
15 customer class is greater than or less than the rate of
16 return for the utility as a whole.

17 No particular type of business should be more
18 profitable or less profitable for a utility to serve.

19 The situation in this case is not really unique
20 in my view. The company's original proposal was an equal
21 percentage increase.

22 I find out this morning that they have -- based
23 on Mr. Duffy's statement, that they have a new proposal
24 which we haven't seen yet and which isn't reflected in
25 their testimony.

1 Our problem is, very simply, they have the
2 wrong revenues for Praxair.

3 A simple thing, you say. Take 12 monthly bills
4 add them up; there you got it.

5 Huh-uh. The Company has admitted that its
6 Praxair revenue number is wrong in their study, but they
7 have never gone back and corrected their cost of service
8 study.

9 And when it's corrected, Praxair is shown under
10 current rates to be producing at an above average rate of
11 return.

12 And what that means is that Praxair's rates are
13 in excess of the cost that Praxair causes for the utility
14 to provide that service.

15 Now, sadly, you all are going to hear and have
16 to be bored with a long struggle about which class
17 cost-of-service study should be used.

18 Well, we would submit that there are certain
19 time-proven methods in the industry to do this. You're
20 not having to reinvent the wheel.

21 The average and excess method which was used by
22 the Company, albeit incorrectly, is one that recognizes
23 both the demands for capacity and the overall use of that
24 capacity.

25 And both Company and our consultant,

1 Mr. Brubaker, who you'll hear from next week, have used
2 this method.

3 Now, some don't like the results that industry-
4 standard studies produce. I understand that. That's why
5 we have arguments about this.

6 Staff and Public Counsel have used a class
7 cost-of-service method that is unique to them. And Public
8 Counsel acknowledges that, as does Staff counsel, in their
9 opening statements.

10 Their methods are unique to them. They're not
11 used by anybody else. They're unique insofar as we're
12 aware of to Missouri. They're not modeled by any --
13 anywhere else. And they both massively allocate -- over-
14 allocate costs to business customers. Not just Praxair
15 but to all business customers, all high-load factor
16 customers.

17 In the specific case of Praxair, both studies
18 treat Praxair as though it's not interruptible.

19 They treat all 8 megawatts as though it were a
20 firm load, despite the fact that there is a contract
21 there, despite the fact that the classification is there
22 and despite the fact that Praxair has been interrupted
23 numerous times by the utility.

24 They simply say, well, we'll handle the issue
25 of the interruptibility off over here somewhere. But when

1 we talk start talking about revenues, when we start
2 talking about the cost allocation, they don't want to
3 recognize that my client simply disappears from the
4 system.

5 And that results in an increase that they would
6 propose to Praxair that is far greater than the system
7 average. It is particularly onerous because its
8 concentrated on one customer and one class.

9 Let me sum up for Praxair.

10 We believe we are entitled under the evidence
11 that will come in to an increase that is less than system
12 average, but certainly we should not have an increase that
13 is greater than system average.

14 And as you will see, that is what both Staff
15 and Public Counsel propose.

16 We ask your consideration of that evidence, and
17 we would ask your rejection of nontraditional, unique and
18 result-driven approaches to allocate costs.

19 Those approaches are not developed to identify
20 cost causation or cost causal relationships, but they are,
21 rather, developed to justify a particular result.

22 Thank you.

23 JUDGE RUTH: Okay. Thank you.

24 The clock in the back of the room indicates
25 it's about eight minutes until 11. Let's take an eight-

1 minute break, then, and start back up at eleven o'clock.

2 (A RECESS WAS TAKEN.)

3 JUDGE RUTH: Let's go back on the record.

4 We finished the opening statements before our
5 break, and we are now ready to have Empire call its first
6 witness.

7 MR. COOPER: Your Honor, good morning.
8 Commissioners, good morning. My name is Dean Cooper. I'm
9 from the law firm of Brydon, Swearngen and England. And
10 along with Mr. Duffy and Mr. Swearngen, I'll be
11 representing Empire in this matter.

12 At this time Empire would call Mr. L. W. Loos.

13 JUDGE RUTH: Thank you.

14 Would you please raise your right hand.

15 (Witness sworn/affirmed.)

16 JUDGE RUTH: Thank you.

17 Please proceed with your foundation questions.

18 L. W. LOOS testified as follows:

19 DIRECT EXAMINATION BY MR. COOPER:

20 Q. Please state your name and your business
21 address.

22 A. L. W. Loos, 8400 Ward Parkway, Kansas City,
23 Missouri, 64114.

24 Q. By whom are you employed and in what capacity?

25 A. I'm a vice-president with the firm of Black and

1 Veatch Corporation.

2 Q. Have you been retained by Empire to appear and
3 testify in this matter?

4 A. Yes, I have.

5 Q. For purposes of this case, have you prepared
6 direct, rebuttal and surrebuttal testimony in
7 question-and-answer form?

8 A. Yes, I have.

9 Q. Is it your understanding that this testimony
10 has been marked as Exhibits 11, 22 and 31, respectively,
11 for identification?

12 A. Yes.

13 Q. Are there any changes or corrections that you
14 would like to make to that testimony at this time?

15 A. Yes, there is several.

16 In connection with my direct testimony, which
17 is Exhibit 11, on page 8, lines 2 and 3, the reference to
18 45-year life should be 40-year life. The reference to the
19 year 2015 should be 2010. The reference to the year 2031
20 should be 2020 -- 2025.

21 In my rebuttal testimony, Exhibit 22, page 4,
22 line 23, the parenthetical, exclusive of SLCC, should be
23 deleted.

24 Surrebuttal testimony, Exhibit 31, page 9,
25 line 8, the words "lot of" should be replaced with short.

1 Also in the surrebuttal testimony, page 11,
2 line 1, in that line there is an extra "of net" included.
3 It should read, impacts on the level of interim additions
4 and no consideration of net salvage.

5 Q. Do you have any other changes or corrections?

6 A. No, I do not.

7 Q. If I were to ask you the same questions
8 contained in Exhibits 11, 22 and 31, would your answers as
9 just corrected be substantially the same?

10 A. Yes, they would.

11 Q. Are those answers and the attached schedules
12 true and correct to the best of your knowledge,
13 information and belief?

14 A. They are.

15 MR. COOPER: Your Honor, at this time I would
16 offer Exhibits 11, 22 and 31 and tender the witness for
17 cross-examination.

18 JUDGE RUTH: Okay. Thank you.

19 Praxair, do you have any objections to
20 Exhibits 11, 22 and 31 being offered into the record?

21 MR. CONRAD: No, ma'am.

22 JUDGE RUTH: Okay. And Public Counsel?

23 MR. COFFMAN: None.

24 JUDGE RUTH: Staff?

25 MR. WILLIAMS: No objection.

1 JUDGE RUTH: Okay. Then Exhibit 11, the direct
2 testimony, Exhibit 22, the rebuttal, and Exhibit 31, the
3 surrebuttal, of Mr. Loos -- is that correct?

4 THE WITNESS: Yes

5 JUDGE RUTH: -- are admitted into the record.

6 (EXHIBIT NOS. 11, 22 AND 31 WERE RECEIVED INTO
7 EVIDENCE.)

8 JUDGE RUTH: Okay. We'll begin our
9 cross-examination with Praxair.

10 MR. CONRAD: And we have no questions for
11 Mr. Loos on this issue. Thank you, Your Honor.

12 JUDGE RUTH: Okay. And Public Counsel.

13 MR. COFFMAN: No questions.

14 JUDGE RUTH: Staff.

15 MR. WILLIAMS: Thank you, Your Honor.

16 CROSS-EXAMINATION BY MR. WILLIAMS:

17 Q. Mr. Loos, my name is Nathan Williams, and I'm
18 representing Staff, and I have a few questions for you.

19 On Table 4-2 that's attached to your direct
20 testimony as Schedule LWL-1 on page 4-4 --

21 A. I have that.

22 Q. -- you set out some projected retirement dates.

23 A. Yes.

24 Q. And for the Riverton Units, 7, 8 and 9 you have
25 projected retirement dates of 2008?

1 A. That is correct.

2 Q. And those three units make up approximately
3 100 megawatts of capacity?

4 A. Yes.

5 Q. Does Empire have any plans to make up that
6 capacity assuming those units are retired as you
7 projected?

8 A. I'm unaware of any existing plans as to
9 precisely what that capacity would be replaced with.

10 Q. Do you know if there are plans to replace that
11 capacity?

12 A. No, I'm not aware of any specific plans.

13 Q. And would that also be the case for Asbury
14 Units 1 and 2 which have projected retirement dates of
15 2014?

16 A. Yes.

17 Q. And also Iatan Unit 1?

18 A. Yes.

19 Q. On page 4-1 of Schedule LWL-1, it's attached to
20 your direct testimony, which is Exhibit 11, you state
21 that, quote, the retirement dates shown in Table 4-2 are
22 based on the company's current plans.

23 Then in your surrebuttal testimony, which is
24 Exhibit 31, at page 7, you indicate that you did not have
25 from Empire detailed plans regarding plant additions,

1 upgrades, modifications and retirement.

2 A. What was that reference again?

3 Q. It's on page 7 of your surrebuttal testimony.

4 A. Yes, I have that.

5 Q. Did you request from Empire what its plans were
6 regarding plant retirement?

7 A. We inquired as to whether there were any change
8 in plans from what we had been -- had received previously
9 in prior studies.

10 Q. And are the projected retirement dates you have
11 shown on Table 4-2 based on the information that the
12 Company provided you as to its planned retirement dates?

13 A. That information, plus my judgment with respect
14 to the life span of the various types of generating units.

15 Q. Can you point out which of these dates are
16 based on the Company information and which are based on
17 your engineering judgment?

18 A. With respect to the Riverton Units 7, 8 and 9,
19 that 2008 date is one that we obtained from the Company.
20 The other dates are based on the company's indication that
21 at the present time there is no definitive plans as to
22 when those would be retired.

23 Based on my experience, I concluded that a 45-year
24 life span for Asbury, 35 for Iatan and the 35 for
25 combustion turbine-based technology generally should be

1 used.

2 Q. Where did you get the information on the 1008
3 projected retirement date for the Riverton Units 7, 8 and
4 9 from Empire?

5 A. Originally that was 1998. And I reconfirmed
6 that today with respect to the -- what would happen with
7 respect to various situations surrounding the Riverton
8 plant and what would be a reasonable, anticipated
9 retirement date for the purpose of depreciation.

10 Q. I want to direct your attention to the Asbury
11 plant.

12 In your direct you've indicated that the plant
13 life for both of the turbines should be determined by the
14 boiler life. Is that correct?

15 A. Yes, that's generally the case.

16 Q. And you've conducted studies for Empire for --
17 based on plant as of December 31st of 1992, 1995, 1996 and
18 1997, have you not?

19 A. I believe so, yes.

20 Q. And did you recommend that same treatment for
21 Asbury in those studies?

22 A. I believe so, yes.

23 Q. And were all of those studies done in
24 connection with rate cases before this Commission?

25 A. No.

1 Q. Were any of those studies done in connection
2 with rate cases before this Commission?

3 A. The 1992 study, I believe, was around the time
4 of the rate case, although I did not testify on it.

5 Q. Was it prepared for purposes of that rate case?

6 A. I don't believe so. I think it was in
7 conjunction with the five-year requirement for the
8 Commission.

9 Q. What about any of the other studies?

10 A. My recollection is those were also updates.

11 Q. So none of those were done in connection with
12 rate cases?

13 A. That's my understanding and recollection.

14 Q. How do you distinguish a life-extending project
15 from a maintenance project?

16 A. A life-extending project typically is one
17 which, because of the magnitude of the dollars or the
18 nature of the project, indicates that a plant will have
19 additional life.

20 For example, if as a result of changes in
21 environmental law, a substantial capital addition or
22 modification is required at a plant at the 20th year,
23 25th year, typically that will require an order to
24 economically justify that addition, that the life be
25 extended for analysis purposes, and taking into

1 consideration the additional improvements would be likely
2 to be required.

3 If a major project is indicated which can't be
4 economically justified on existing plant -- for example,
5 you mentioned the Riverton plant earlier.

6 If a substantial environmental is introduced at
7 Riverton, then most likely Empire would be unable to
8 economically justify that addition in light of the plant's
9 age and the other possible maintenance requirements --
10 maintenance capital requirements that that plant would
11 reasonably -- reasonably be anticipated to have during the
12 economic evaluation period.

13 Q. You stated in your surrebuttal testimony at
14 page 14 that the cyclone project at Asbury, which was a
15 \$10 million expenditure, as I understand it, was not a
16 life-extension project?

17 A. That's correct.

18 Q. Why not?

19 A. That project is required in order for the plant
20 to continue to operate through the 45-year life that I've
21 assumed -- life span -- excuse me -- that I've assumed in
22 this engagement.

23 Without that improvement, then the plant would
24 at some time fail to be economical with respect to its
25 ability to generate electricity.