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PUBLIC SERVICE COMMISSION

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TRANSCRIPT OF PROCEEDINGS

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Public Hearing

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In the Matter of Proposed)

Rules 4 CSR 240-3.162 and)

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4 CSR 240-20.091, Environmental) Case No. EX-2009-0252

Cost Recovery Mechanisms)

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COLLEEN M. DALE, Presiding,

CHIEF REGULATORY LAW JUDGE.

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ROBERT M. CLAYTON III, Chairman,

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

2 JUDGE DALE: We are here today, March 4th,
3 2009, in the matter of proposed Rules 4 CSR 240-3.162 and
4 4 CSR 240-20.091, environmental cost recovery mechanisms,
5 Case No. EX-2008-- 2009-0250 -- 2, 0252. I'll just slow
6 down.

7 We will begin with entries of appearance,
8 starting with Staff.

9 MR. DOTTHEIM: Steven Dottheim, Post Office
10 Box 360, Jefferson City, Missouri 65102, appearing on
11 behalf of Staff of the Missouri Public Service Commission.

12 MR. POSTON: Marc Poston, P.O. Box 2230,
13 Jefferson City, Missouri 65102, appearing for the Office
14 of the Public Counsel and the public.

15 MR. DOWNEY: Edward F. Downey, Bryan Cave,
16 LLP, 221 Bolivar Street, Suite 101, Jefferson City,
17 Missouri, appearing for the Missouri Industrial Energy
18 Consumers.

19 MR. LOWERY: James B. Lowery, Smith Lewis,
20 LLP, P.O. Box 918, Columbia, Missouri 65205, appearing on
21 behalf of Union Electric Company.

22 JUDGE DALE: Is there any other counsel who
23 wishes to enter an appearance?

24 (No response.)

25 JUDGE DALE: We are here to take testimony

1 of at least one witness for Staff and receive comments
2 from other people. In light of the fact this is the
3 second time through this particular rulemaking, I would
4 like as much as possible for each participant in this
5 matter to say all that they have to say at one point and
6 then we move on to another participant, so that we are not
7 going back and forth among the participants, which leads
8 to a more difficult record for me to summarize.

9 With that, let's begin with Staff and Staff
10 testimony.

11 MR. DOTTHEIM: Judge, the Staff filed late
12 this morning its comments. It runs really a little over
13 one page. And the two members of the Staff who are
14 present this afternoon to provide testimony are Ms. Lena
15 Mantle and Mr. Mark Oligschlaeger.

16 The comments of the Staff are limited to a
17 suggestion, recommendation made by AmerenUE in its
18 comments. The Staff has no objection to the
19 recommendation of AmerenUE. It's a subject that AmerenUE
20 raised in the prior rulemaking, EX-2008-0105. The Staff
21 had no objection to AmerenUE's rulemaking --
22 recommendation when it raised the matter in a prior
23 rulemaking and subsequently.

24 And that is the extent of the -- of the
25 Staff's comments. Given -- given that, it might make more

1 sense to take AmerenUE first. I don't even know if there
2 would be any questions of the Staff witnesses at this
3 stage.

4 I would -- I would note that when Staff
5 filed its comments earlier today, the only other comments
6 that had been filed were AmerenUE's that were filed
7 yesterday. Subsequently, the Office of Public Counsel
8 filed comments, and I'm under the impression that MIEC has
9 now filed comments, and, of course, a situation where
10 participants, commenters file on the day when the hearing
11 is held, if the Commission is interested in participants
12 responding to the comments of other participants, that can
13 be difficult under those -- those circumstances.

14 Having said that, would you still want to
15 have Ms. Mantle and Mr. Oligschlaeger take the stand or
16 might you want to have AmerenUE put its witness on the
17 stand?

18 JUDGE DALE: I don't think it makes any
19 difference, but Mr. Lowery, you're up.

20 MR. LOWERY: Thank you, Judge. Judge, I
21 was going to just summarize or illuminate very briefly the
22 comments that we filed for the record as additional
23 comments. I also, given that OPC just about 25 minutes
24 before the hearing began filed some additional comments,
25 their comments, would like an opportunity to provide

1 comments on those as well.

2 In terms of a witness, I have with me today
3 Mr. Mark Birk, who's the vice president of power
4 operations for AmerenUE. Runs essentially the fossil, the
5 steam generating operations for the company. I don't know
6 whether anybody has -- whether any Commissioners have
7 questions that Mr. Birk would need to answer from his
8 standpoint as opposed to me providing comments on behalf
9 of the company.

10 I guess initially I would suggest that I
11 would just provide comments, and if there are questions
12 about environmental investments or some of those kinds of
13 things that would be beyond my ability to really deal
14 with, then we can certainly have Mr. Birk testify, and
15 we'll leave that up to the Commissioners.

16 I'd also like to ask that the rulemaking,
17 the Notice of Proposed Rulemaking indicated that comments
18 were due on March the 4th, and March the 4th, of course,
19 isn't over until midnight tonight. And given that we're
20 getting comments sort of late in the game and we don't
21 have MIEC's comments, I'd ask for leave to be able to file
22 a response to those, responsive comments up 'til midnight
23 this evening through EFIS if that's necessary.

24 I don't know whether the -- I'm not at all
25 sure whether the Commission needs to waive its rules on

1 four o'clock and five o'clock, but I would ask the
2 Commission to do that to the extent a waiver might be
3 necessary so that we could respond if we feel it's
4 necessary given that we don't really have an opportunity
5 to perhaps properly deal with this on the fly, and as I've
6 said, we haven't seen MIEC's comments that are expected.
7 So I would ask for that ruling from the Bench.

8 JUDGE DALE: For all of you and anyone else
9 who's listening, comments will be received until midnight
10 irrespective of what may be in the rule about filing
11 deadlines.

12 MR. LOWERY: So with that, if it pleases
13 the Commission, I'll try to give some fairly brief remarks
14 and then also try to comment as best I can on some of the
15 OPC suggestions that have been made.

16 The comments that the company filed, while
17 there's a packet of 40 or 50 pages, the comments are
18 actually only four and a half pages long, and that's
19 because the company is just making one minor but important
20 technical comment about the drafting of the rule as
21 proposed. The company finds the rules as proposed to be
22 acceptable otherwise. In fact, the rules as proposed are
23 virtually identical to the rules that were adopted but set
24 aside for procedural not substantive reasons from the last
25 rulemaking.

1 The Commission's already found that these
2 rules are necessary. In its Notice of Necessity for the
3 rules, the Commission stated that given the current
4 economic climate, these rules are necessary now more than
5 ever in that timely recovery of investment capital is
6 going to be essential to financing environmental upgrades
7 to existing power plants and hastening compliance with
8 government mandates designed to improve the quality of the
9 environment for all Missourians. And I think the
10 Commission's recognized that very directly.

11 This drafting problem that is outlined in
12 our four and a half pages of comments -- and we've
13 attached some other things that were pertinent to that to
14 those as part of our comments -- it's the same problem
15 that we identified just after the Final Orders of
16 Rulemaking in the last case were adopted in EX-2008-0105.
17 The Commission didn't feel like it had time to deal with
18 it at that time, so a correction was not made.

19 In summary, what our comments say on this
20 point is that it seems very clear that the intent of the
21 proposed rules is for an environmental revenue requirement
22 to be established in the rate case where the ECRM is
23 established so that changes in environmental costs tracked
24 in ECRM can be compared to that environmental revenue
25 requirement.

1 It also seems clear the intent of the
2 proposed rules is that, as to the rate base component of
3 the environmental revenue requirement, that only major
4 projects whose primary purpose was environmental
5 compliance must be included in this environmental rate
6 base.

7 Given this, we believe it's important that
8 the rules properly deal with the three types of costs
9 associated with capital investment, cost of capital, the
10 return, depreciation and taxes. The problem, the
11 ambiguity I think really more properly characterized
12 that's in the proposed rules as drafted is that two of
13 those items, depreciation and taxes, if you apply standard
14 accounting practices would be expensed.

15 So in two places, one in each of -- one in
16 the Chapter 3 rule and one in the Chapter 20 rule where
17 this subject's dealt with, some might argue in a rate
18 case, for example, that the environmental revenue
19 requirement must include all expensed environmental costs,
20 all expensed, which would include these capital-related
21 items of depreciation and taxes.

22 It would follow if that interpretation was
23 accepted that you've got to go back and figure out an
24 environmental rate base for everything that might be
25 environmental related that the company's put in for the

1 last 50 years, not just major projects whose primary
2 purpose is environmental. That would, we believe, cause
3 that major projects primary purpose distinction to be lost
4 if that argument were accepted and would be impractical
5 and disabling of the use of an ECRM, which we don't think
6 is what the Legislature intended or what the Commission
7 intends in these proposed rules.

8 Fixing the problem is quite easy. There is
9 a fix that involves probably ten words or less in
10 paragraph 9 of AmerenUE's comments, and we urge the
11 Commission to make that one change to the proposed rules
12 to solve that problem.

13 Now, if I might comment, I'm not going to
14 attempt to comment on the 11 pages of text that the Public
15 Counsel has included, because I haven't had a chance to
16 read them to be perfectly honest, but if I could comment
17 on these specific red lining, the proposed changes Public
18 Counsel has put in, and I'll go page by page. There
19 aren't that many of them, so I think I can do this in just
20 a few minutes.

21 And I'm in the, I guess it's the markup of
22 the proposed rule. I'm going to use the page numbers, the
23 pagination from that markup for clarity of the record, and
24 this is an attachment to OPC's comments that were filed
25 today.

1 The first one is on page 2, sub 2E, and OPC
2 suggests adding but not in excess of a fair return on
3 equity. The problem with this is it's not -- it's not
4 consistent with Senate Bill 179 and the intent of Senate
5 Bill 179 as I think expressed by the Legislature as I
6 think the Commission already found in the prior Order of
7 Rulemaking involving nearly identical rules.

8 In order to figure that out, what you would
9 have to do is you're going to have to figure out a revenue
10 requirement at a given point in time every time an ECRM
11 adjustment is made. As the Commission knows, revenue
12 requirements are based on normalized conditions. We can
13 have hot weather. We have cold weather. We can have
14 abnormal outages. We can have abnormal forced outages.
15 We can have a lot of variables going on that make looking
16 at an ROE at a particular snapshot point in time not
17 consistent or not equal to whether a utility may be over
18 or under-earning.

19 And there's nothing in the legislation that
20 suggests that this is required. In fact, the legislation
21 indicates that the mechanism needs to be reasonably
22 designed to provide -- or to provide a fair opportunity to
23 earn a reasonable ROE, but there's nothing about a cap,
24 there's nothing about having essentially earnings test
25 between rate cases. In fact, earnings tests apply each

1 time an ECRM adjustment is made.

2 We don't think this comports with the
3 intent of the statute, the language of the statute, and
4 certainly it is -- it would be impractical and essentially
5 disable the use of the mechanism entirely.

6 Another important thing to keep in mind is
7 that Senate Bill 179 specifically had provision that you
8 must establish an ECRM in a rate case and you must come
9 back in for a rate case. And we believe that evinces a
10 legislative intent that the way earnings of utilities
11 between rate cases and what the effect of one of these
12 mechanisms are on those earnings is the Commission's going
13 to look at that in both those rate cases.

14 If there's truly an excess earnings
15 situation, then a complaint can be filed, and in fact,
16 that's recognized by the proposed rules. And the proposed
17 rules have extensive surveillance and reporting to all of
18 the parties, not just -- not just the Staff, all of the
19 parties in the rate case in which it's established that
20 will allow people to monitor this. So this provision is
21 not only necessary, it's unwise, and it's not consistent
22 with the statute.

23 Some of OPC's other comments really kind of
24 go to the same subject. On page 3, items P and Q,
25 essentially OPC is asking for data on a backwards-looking

1 basis, and I guess the backwards-looking basis is OPC
2 wants, I believe, as I -- as I -- if I understand the
3 proposal, OPC wants to be able in, let's say it's the rate
4 case after the rate case when an ECRM is established and
5 the utility's back in a for rate case and they're asking
6 to continue the ECRM and or they're asking to recover
7 deferrals that may have been built up because of the 2 and
8 a half percent cap in the statute.

9 I think what OPC is going for here is an
10 ability to go back and look at a revenue requirement in
11 year one, year two, year three, year four, in addition to
12 the historic test year that you're going to be looking at
13 in the rate case. And that I believe would be the only
14 logical purpose of this data.

15 Again, that for all the reasons I just gave
16 is inconsistent with the statute. It's not what the
17 Commission is empowered or has made the regulatory
18 judgment, I believe, in its proposed rules to do to apply
19 earnings test each year to adjustments under the ECRM.

20 The forecast that OPC asks for in item Q
21 apparently is an attempt to try to look forward over a
22 four or five-year period, and I think it's pretty obvious
23 that forecasts over that kind of a period become much less
24 reliable and circumstances change, can change very
25 quickly, and apparently wants to impose some type of

1 earnings test on the ECRM at the front end beyond the
2 reasonably designed to allow a fair opportunity to earn a
3 fair return on equity that's already in the statute. And
4 the rules cannot go beyond the statute. The rules have
5 got to comport with the statute.

6 On page 4, this but not in excess of a fair
7 return on equity change is suggested, and for all the
8 reasons I already gave, it should not be made and is not
9 warranted.

10 On page 5, there's another five-year annual
11 history, and again, I think for the reasons I just gave,
12 that is not supported by the statute and should not be
13 included in the rules.

14 We have the same not in excess of fair
15 return on equity on page 6, and I've already addressed
16 that for all the reasons that I gave.

17 I'm assuming similar changes exist in
18 Chapter 20, if I can just take a look. On page 14,
19 Chapter 20 -- or the Chapter 20 rules, 20.091(b), OPC
20 suggests that some or all of the net increases or
21 decreases would be allowed.

22 The statute says that the utility -- if the
23 Commission approves an ECRM -- the Commission doesn't have
24 to approve one. We would agree the Commission does not
25 have to approve one. But if the Commission approves one,

1 the statute says that utility will be able to propose
2 tariffs that would reflect changes in their environmental
3 cost. And I don't know, I haven't got to the later
4 comment, but I know in the last rulemaking there was
5 discussion about having sharing mechanisms or some kind of
6 incentive mechanisms in an ECRM.

7 The problem with that in the ECRM context
8 is, Senate Bill 179 has a subsection 1 and a subsection 2.
9 Subsection 1 specifically -- and I don't have the language
10 in front of me, but the Commission can take notice of what
11 that language is. Subsection 1 specifically indicates
12 that the Commission can consider and incorporate incentive
13 mechanisms designed to encourage better fuel and purchased
14 power purchasing requirements.

15 Subsection 2 does not have any language of
16 that nature whatsoever, and I think that evinces a
17 legislative intent that incentive mechanisms are not
18 authorized for ECRM-type mechanisms like they might be
19 authorized for what we commonly call fuel adjustment
20 clauses.

21 And so this language we believe is contrary
22 to the intent of the statute and, therefore, should not be
23 adopted. If the federal government or the state
24 government or local governments are mandating an
25 environmental cost and the utility incurs it, the utility

1 ought to be able to pass that cost through.

2 On page 15, item 2A, says the Commission
3 only adopts an ECRM it approves is necessary and
4 reasonably designed to provide the electric utility with
5 sufficient opportunity to earn a fair return on equity but
6 no greater than a fair return.

7 Well, what OPC is seeking to do is amend
8 386.266.4, sub 1, which -- I now have the statute in front
9 of me thanks to Mr. Dottheim -- says the Commission must
10 find that the mechanism is reasonably designed to provide
11 the utility with a sufficient opportunity to earn a fair
12 return on equity. It doesn't say anything about
13 necessity, and it certainly doesn't impose a cap.

14 Another problem with this cap idea that OPC
15 has throughout its comments is that they would impose a
16 cap based on a snapshot in time, non-normalized
17 conditions, but there would be no floor. What if the
18 utility's been under-earning? There's no -- there's no
19 symmetry to the mechanism that they're proposing, and we
20 don't think it's authorized by the statute in any event.

21 They have a comment on page 16 at the top,
22 any rate schedule approved to implement an ECRM must
23 conform to the ECRM approved by the Commission. We don't
24 have an objection to that one. I don't think it's
25 necessary. I think it's pretty obvious that that would

1 have to be the case. That's true of every compliance
2 tariff that a utility has to file after a rate case,
3 you've got to conform to the order of the Commission. But
4 in concept, we don't have a -- we don't have a problem
5 with that.

6 Item B on the top of page 16, the
7 Commission shall take into account any change in business
8 risk. Again, OPC is seeking to amend Senate Bill 179,
9 386.266, which -- and I may not put my hands on the exact
10 reference, but the Senate Bill 179 says that the
11 Commission may, uses the word may take into account any
12 change in business risk. It does not use the word shall.
13 Shall has a different meaning. And the Commission's not
14 authorized to adopt rules that are contrary to the statute
15 itself.

16 OPC on item C on page 16 wants the
17 volatility of the costs to be taken into account. Well,
18 environmental costs, for one thing, volatility is just one
19 non-binding factor that the Commission has looked at in
20 connection with fuel adjustment clause requests. It's not
21 anywhere in the statute, and it's not something that is a
22 yes or no question that the Commission is bound that it
23 must do something whether it's volatile or not volatile.

24 But environmental costs are different in
25 nature and kind anyway than fuel or net fuel costs in fuel

1 about any party to the general rate case may propose the
2 discontinuation of an ECRM on the grounds that the
3 electric utility is currently or in the next four years is
4 likely to experience declining costs or on any other
5 grounds that would result in a detriment to the public
6 interest.

7 This addition that OPC proposes is not in
8 the fuel adjustment clause rules. This provision
9 otherwise is exactly as exists in the fuel adjustment
10 clause rules. And this appears to be an attempt to impose
11 some overall public interest standard on the ECRM rules
12 that doesn't appear in Senate Bill 179 and we don't think
13 is authorized.

14 The shall on that same page, for the
15 reasons I gave before, is unauthorized by the statute.
16 The some or all on page 18 in item B again is unauthorized
17 and unwise for the reasons I gave before.

18 At the bottom of page 18, there is language
19 related to deferred costs. Says the recovery of any
20 deferred costs and related carrying costs shall be limited
21 to those deferrals that absent deferral would have
22 resulted in the utility earning less than its authorized
23 return, et cetera. That's the same thing as this but no
24 more than -- no more than the authorized return. It's
25 exactly the same issue. It's language that would have the

1 same effect, and for the reasons I've already given, it's
2 not authorized and it's also unwise and should not be
3 adopted.

4 The next change, the recovery period for
5 which deferred costs are eligible for recovery shall be
6 equal to the life of the asset if the cost would have been
7 a capital cost or related to a capital cost in the period
8 incurred absent its deferral.

9 I'm not sure at this point I can comment
10 all that intelligently on that one and how that would fit
11 in with the 2 and a half percent provision that's in the
12 statute. Perhaps it will be illuminated if I read the
13 rest of it.

14 It appears that this language at first
15 blush is an attempt to modify the 2 and a half percent cap
16 and deferral provision that's in Senate Bill 179. And I
17 think the language of that is pretty clear. If I can find
18 it here, that language says, any rate adjustment made
19 under such rate schedules, and we're talking about ECRM
20 rate schedules, shall not exceed an annual amount equal to
21 2 and 1/2 percent of the utility's gross jurisdictional
22 revenues, including gross receipts taxes, et cetera.
23 That's an annual amount equal to 2 and a half percent, so
24 it's an annual cap. So, for example, could be 10 percent
25 increase over the four-year period.

1 Then the last sentence of that provision,
2 386.266.2 says, any costs not recovered as a result of the
3 annual 2 and half percent limitation on rate adjustments
4 may be deferred at a carrying cost each month equal to the
5 utility's net of tax cost of capital for recovery in a
6 subsequent year or in the corporation's next general rate
7 case or complaint proceeding.

8 This appears to be an attempt to not allow
9 recovery in the company's next general rate proceeding but
10 to spread that recovery out over a longer period of time.
11 And to the extent that that's what's intended, it's
12 contrary to the statute and for that reason should not be
13 adopted.

14 The last change starts on the bottom of
15 page 23 and goes on to page 24, and it is essentially, I
16 believe at first blush it appears to be language that's
17 been copied from the fuel adjustment clause rules into the
18 ECRM rules or something very close to it. The problem, as
19 I pointed out earlier, is there is specific language in
20 the fuel adjustment clause provisions of 368.266 that
21 authorizes incentives.

22 There is no such language in the
23 environmental provisions of 386.266, and therefore, under
24 very basic principles of statutory construction, the
25 absence of that I think precludes these types of incentive

1 mechanisms and they should not -- therefore, this
2 provision should not be included.

3 In addition, as I mentioned, these are
4 mandated environmental costs that are caused by
5 environmental regulation. They're not revenue producing.
6 In fact, many of these investments will take megawatt
7 hours away from the generating capability of the plant,
8 for example, which means that the utility's revenues are
9 going to go down as a result of these, of many of these
10 expenditures, and so some type of incentive mechanism, in
11 addition to I believe being unlawful, is unfair and unwise
12 and should not be adopted.

13 And given the limited time I have, I think
14 that's all I can share with you now. We may have some
15 additional comments to be filed later today in reply.

16 JUDGE DALE: Thank you. Commissioner
17 Clayton, do you have questions of Mr. Lowery or his
18 witnesses?

19 CHAIRMAN CLAYTON: Judge, I couldn't hear
20 what you asked.

21 JUDGE DALE: I asked if you have any
22 questions of Mr. Lowery or his witnesses.

23 CHAIRMAN CLAYTON: If I have any questions?
24 I do. May I go ahead?

25 JUDGE DALE: Yes, please.

1 no? Do you think it is the statute's intent to authorize
2 a utility to earn greater than their authorized rate of
3 return?

4 MR. LOWERY: It's a qualified no. I don't
5 believe the statute is trying to cause a utility to over
6 or under-earn, but over and under-earning is not
7 necessarily tied to a snapshot point in time as to what
8 the authorized return is.

9 That's -- I guess that's where I have
10 difficulty giving you an unqualified no because I think
11 your question seems to presuppose that the authorized
12 return is some kind of cap, and if you earn at any moment
13 one basis point above the cap, you are overearning, and I
14 don't believe that's the law.

15 CHAIRMAN CLAYTON: Okay. So you don't
16 think the Legislature said we really want a utility to
17 earn greater than their authorized rate of return? That's
18 not why this surcharge is there; would you agree with that
19 statement?

20 MR. LOWERY: I don't believe the
21 Legislature passed a statute that says we really want the
22 utility to overearn, whatever overearning means. I agree
23 with that.

24 CHAIRMAN CLAYTON: What do you think
25 overearning means?

1 MR. LOWERY: I think it means a systemic
2 earnings in excess of the utility's cost of capital, which
3 can change from the time of the rate case from what was
4 authorized based on normalized conditions. I don't think
5 it means --

6 CHAIRMAN CLAYTON: There is such a thing as
7 overearning? I mean, it's not something I just made up
8 there; you would agree with that?

9 MR. LOWERY: I think there are
10 circumstances where the utility's rates can become unjust
11 and unreasonable, and I think that's what you mean by
12 overearnings.

13 CHAIRMAN CLAYTON: Okay. Do you think it
14 is possible that a utility that uses an ECRM can earn
15 greater than its authorized rate of return? Do you think
16 it's possible, during a period of time in which the
17 surcharge is in place?

18 MR. LOWERY: Anything is possible.

19 CHAIRMAN CLAYTON: Okay. That would be a
20 yes, right?

21 MR. LOWERY: That would be a yes, with the
22 additional comment that given the magnitude of the
23 environmental investments that at least my client is
24 facing and the other costs and revenue issues that it
25 faces, I think that is highly, highly unlikely.

1 CHAIRMAN CLAYTON: Okay. But the answer
2 was yes, correct?

3 MR. LOWERY: Yes, anything is possible,
4 that's right.

5 CHAIRMAN CLAYTON: Okay. Can you tell me
6 whether or not the ECRM will accelerate environmental
7 projects, accelerate their completion?

8 MR. LOWERY: I cannot tell you that one way
9 or the other.

10 CHAIRMAN CLAYTON: Can you tell me one way
11 or the other whether more projects relating to the
12 environment will be done with the presence of this
13 surcharge?

14 MR. LOWERY: No, I cannot tell you one way
15 or the other. Mr. Birk might be able to assist you with
16 those questions, though, and I've made note of both of
17 them.

18 CHAIRMAN CLAYTON: Okay.

19 MR. LOWERY: And we'd be happy to have him
20 sworn, and perhaps we should do so so he can try to
21 address your questions.

22 JUDGE DALE: Commissioner Clayton, if it's
23 all right with you, I'll go ahead and have Mr. Birk sworn
24 right now. He can answer your questions so that we don't
25 skip around.

1 CHAIRMAN CLAYTON: Is that okay with
2 everybody else? Is that sticking with your plan?

3 JUDGE DALE: Yes.

4 CHAIRMAN CLAYTON: Okay.

5 JUDGE DALE: Mr. Birk.

6 MR. LOWERY: Where would you like him to
7 sit?

8 JUDGE DALE: You can sit right where you're
9 about to. Before you do that, if you will....

10 (Mark Birk was sworn.)

11 JUDGE DALE: Thank you.

12 CHAIRMAN CLAYTON: Mr. Birk, can you hear
13 me okay?

14 MR. BIRK: Yes, I can, Commissioner.

15 CHAIRMAN CLAYTON: I apologize to be
16 calling in. I'm on my way to St. Joe right now for a
17 public hearing. I apologize for participating in this
18 fashion.

19 Are you able to provide answers relating to
20 specific environmental projects that will be affected by
21 the presence of an ECRM?

22 MR. BIRK: Yes, I can.

23 CHAIRMAN CLAYTON: Okay. Is it your
24 testimony that the presence of an ECRM for a utility will
25 accelerate the completion of environmental projects?

1 MR. BIRK: Chairman, I do not believe that
2 the presence of an ECRM will accelerate the completion of
3 environmental projects.

4 CHAIRMAN CLAYTON: Do you think the
5 presence of an ECRM will allow for more environmental
6 projects to be completed than if there was no ECRM?

7 MR. BIRK: The environmental projects that
8 are -- that we would be completing would be required by --
9 essentially they're regulatory requirements that are
10 imposed upon us. So we will need to basically install
11 those projects to meet regulatory requirements.

12 CHAIRMAN CLAYTON: Okay. So if -- with
13 those two questions, this isn't going to accelerate any
14 project and it's not going to cause more environmental
15 upgrades to occur, would you agree that this rule and the
16 presence of an ECRM will not necessarily improve the
17 environmental performance of a utility?

18 MR. BIRK: I believe what the rule will
19 allow us to do is to be able to more effectively meet
20 those environmental requirements and still allow us to get
21 access to the necessary capital to continue to invest in
22 and maintain other plant assets over and above the
23 environmental assets.

24 CHAIRMAN CLAYTON: Is that an agree or
25 disagree with the statement?

1 MR. BIRK: Can you please repeat the
2 statement again?

3 CHAIRMAN CLAYTON: Do you agree or disagree
4 that considering the answers that this is not going to get
5 more projects done, it's not going to enhance projects,
6 it's not going to accelerate environmental projects, would
7 you agree or disagree that this rule will not necessarily
8 improve the environmental performance of a utility?

9 MR. BIRK: I believe the -- as I mentioned
10 earlier, I believe that the -- what the rule really will
11 do is allow us to more effectively install the
12 environmental projects that are needed to comply with
13 regulatory requirements. You know, I'm hesitant to say,
14 you know, because we have to meet our regulatory
15 obligations whether the rule is in place or not. I still
16 cannot emit more than I am allowed to from a regulatory
17 standpoint. So I have to meet that no matter what.

18 CHAIRMAN CLAYTON: So do you agree or
19 disagree?

20 MR. BIRK: I guess I'm a little perplexed
21 by the question.

22 CHAIRMAN CLAYTON: Why?

23 MR. BIRK: Well --

24 CHAIRMAN CLAYTON: It's not my intention to
25 perplex.

1 MR. BIRK: Yeah. Because I believe -- I
2 believe that the rule itself is really a mechanism to
3 allow utilities to be able to most effectively install
4 environmental projects that are required. So to not have
5 the rule, I'm still going to have to install those
6 environmental projects, but what will happen is I'll
7 basically not have access to additional capital that would
8 be required to perform other needed maintenance and
9 equipment upgrades on balance of plant.

10 So basically by -- you know, I have a
11 mandate that I have to install these things, and by not
12 having the ability to effectively earn recovery on them,
13 it's going to take away other potential projects that will
14 enhance reliability on existing generating.

15 CHAIRMAN CLAYTON: I follow you. So
16 basically what you're saying is that the projects are
17 going to be done one way or the other because they're
18 mandated. So this rule is more about attraction of
19 capital, it's more about -- it's more about being able to
20 access capital than it is improving the environment?

21 MR. BIRK: We're going to improve the
22 environment either way, Chairman.

23 CHAIRMAN CLAYTON: Right. So the rule is
24 not necessary to enforce those environmental obligations,
25 correct?

1 MR. BIRK: It is not necessary to do that,
2 but by not having it, it will probably lead to higher cost
3 associated with installation of those environmental
4 projects.

5 CHAIRMAN CLAYTON: The rule in and of
6 itself is leading to higher costs, too, isn't it?

7 MR. BIRK: I don't -- I don't see how that
8 is the case.

9 CHAIRMAN CLAYTON: Well, it's a higher cost
10 to the ratepayer, isn't it?

11 MR. BIRK: No. Ultimately -- ultimately if
12 we're mandated to install environmental equipment on our
13 plants, you know, ultimately we -- we are of a belief that
14 those costs will be passed on to ratepayers. And as I
15 mentioned before, we believe by being able to recover
16 those costs quicker, it actually can lead to a lower
17 overall cost for the installation of that mandated
18 equipment on our generating plants.

19 CHAIRMAN CLAYTON: So you're saying that
20 this surcharge benefits consumers, is that your testimony?

21 MR. BIRK: Yes.

22 CHAIRMAN CLAYTON: Well, if that is the
23 case, then why don't the ratepayer advocates support the
24 rule?

25 MR. BIRK: I can't speak for the ratepayer

1 advocates, sir.

2 CHAIRMAN CLAYTON: Okay. Thank you very
3 much.

4 MR. BIRK: You're welcome.

5 CHAIRMAN CLAYTON: No further questions.

6 JUDGE DALE: Mr. Lowery, do you have
7 anything else to add?

8 MR. LOWERY: I have nothing further, Judge.
9 Thank you.

10 JUDGE DALE: Mr. Birk, could you please
11 state your full name and spell it for the court reporter.

12 MR. BIRK: Mark Christopher Birk, M-a-r-k
13 -- do I have to spell the whole thing or just the last
14 name?

15 JUDGE DALE: Just the last name.

16 MR. BIRK: B-i-r-k is the last name.

17 JUDGE DALE: Thank you.

18 MR. BIRK: Thank you.

19 JUDGE DALE: With that, then, we will move
20 on to Staff.

21 MR. DOTTHEIM: And the Staff's comments are
22 limited to not objecting to AmerenUE's proposed change to
23 4 CSR 240-3.162.1(f)(1) and (2) and AmerenUE's proposed
24 change to proposed Rule 4 CSR 240-20.091.1(d)(1) and (2),
25 which Mr. Lowery addressed, which is an attempt to make

1 you hear me okay?

2 MR. OLIGSCHLAEGER: Yes, I can.

3 CHAIRMAN CLAYTON: Okay. Were you in the
4 hearing room when I had the discussion with Mr. Lowery and
5 Mr. Birk regarding the rule?

6 MR. OLIGSCHLAEGER: Yes, I was.

7 CHAIRMAN CLAYTON: Okay. Does the Staff
8 believe that it is possible for a utility to earn greater
9 than their authorized rate of return with the presence of
10 an ECRM?

11 MR. OLIGSCHLAEGER: Yes.

12 CHAIRMAN CLAYTON: Does Staff believe it is
13 likely, unlikely? Is there any way to predict? Does it
14 have much of an effect on whether a utility earns more
15 than their authorized rate of return?

16 MR. OLIGSCHLAEGER: I would say that would
17 largely depend upon the magnitude of the environmental
18 costs in question. Obviously the greater the magnitude of
19 those costs and the more they are flowed into rates
20 without consideration of all relevant factors, then the
21 possibility of overearnings would exist. Of course, the
22 cap of 2 and a half percent would have some impact on that
23 as well.

24 CHAIRMAN CLAYTON: Does Staff have a
25 position one way or another on statutory intent with

1 regard to overearning? Meaning I guess what I'm trying to
2 ask is, do you-all read into the statute that the
3 Legislature intends for utilities to earn greater than
4 their authorized rate of return?

5 MR. OLIGSCHLAEGER: I would say no, we do
6 not read that intent in the law.

7 CHAIRMAN CLAYTON: Okay. Does Staff have a
8 position about the adequacy or inadequacy of the presence
9 of a cap on this rule?

10 MR. OLIGSCHLAEGER: I'm not aware of that
11 position.

12 CHAIRMAN CLAYTON: Okay. Does Staff have a
13 position one way or another regarding the definition of
14 eligible cost?

15 MR. OLIGSCHLAEGER: By eligible cost, do
16 you mean the --

17 CHAIRMAN CLAYTON: I didn't mean to stump
18 you. Are you looking at the draft or --

19 MR. OLIGSCHLAEGER: Yes. Are you referring
20 to Section 2C of --

21 CHAIRMAN CLAYTON: I'm really not referring
22 to any specific provision. Basically I'm just wanting to
23 know if Staff has a position with regard to costs that are
24 eligible to be recovered through an ECRM. And Staff may
25 not have a position, because you didn't file any comments

1 on it. I mean, is it overly broad? Is it narrow? Is it
2 just right? That's what I'm basically getting at.

3 MR. OLIGSCHLAEGER: I think to some degree
4 that's a question we would need to look at on a
5 case-by-case basis in reviewing what a utility would claim
6 would be their environmental costs.

7 CHAIRMAN CLAYTON: But are you satisfied --
8 are you comfortable with the definitions included in the
9 proposed rule?

10 MS. MANTLE: There is no definition of --

11 CHAIRMAN CLAYTON: There is no definition?

12 MS. MANTLE: No. We did -- excuse me,
13 Mr. Chairman. We did discuss this quite a bit in the
14 workshop trying to define it a bit more, and we found
15 difficulties in either restricting it too much or making
16 it too broad, and it was -- it was Staff's determination
17 that it would be best left to the discretion of the
18 Commission because it could go either way very easily.

19 CHAIRMAN CLAYTON: Okay. I'm going to --
20 I'll tell you what, why don't we -- I'll get to you in
21 just a second, Ms. Mantle. I'll get off that question and
22 move on to something else.

23 Mr. Oligschlaeger --

24 MR. DOTTHEIM: Chairman?

25 CHAIRMAN CLAYTON: Yes.

1 MR. DOTTHEIM: Judge, may I interject
2 myself?

3 JUDGE DALE: Certainly.

4 MR. DOTTHEIM: Chairman, I don't know if
5 we're going to get into this any, but I think as
6 Ms. Mantle indicated, you've now broached an area which
7 was addressed in comments, that is my recollection, in the
8 prior rulemaking. The Staff addressed that in comments in
9 the prior rulemaking to some extent. I wouldn't say that
10 the Staff addressed that extensively, but my recollection
11 is that the Staff did address that.

12 I'm not aware whether the comments of any
13 other commenter addresses that in this docket, this
14 rulemaking. I don't know if any thought has been given to
15 taking administrative notice of any of the filings in the
16 prior rulemaking. But in that the record is going to be
17 kept open until midnight today, that affords the Staff,
18 for example, the opportunity of taking those comments or
19 excerpting from those comments and filing those still in
20 this proceeding.

21 JUDGE DALE: Let me just interject that to
22 the extent parties have prior comments that they wish to
23 make again, you don't even have to change the caption.
24 You can just put a new cover pleading on it and say that
25 you wish to reiterate your comments.

1 MR. DOTTHEIM: Thank you, Judge. Chairman,
2 I apologize for interrupting. Please proceed.

3 CHAIRMAN CLAYTON: Quite all right. That's
4 quite all right.

5 Mr. Oligschlaeger, let me get back to you.
6 Do you believe that the presence of an ECRM is a benefit
7 to the ratepayer, as stated by Mr. Birk? Do you agree or
8 disagree with that statement?

9 MR. OLIGSCHLAEGER: I think I would
10 disagree. I believe perhaps at best it's a neutral and,
11 if used properly, that it would -- I would view it as a
12 neutral impact.

13 CHAIRMAN CLAYTON: So do you -- Staff is
14 neutral. Does Staff believe that ratepayers would receive
15 a specific benefit by the presence of an ECRM, and if so,
16 what?

17 MR. OLIGSCHLAEGER: I think what Mr. Birk
18 cited, if I recall correctly, was the possibility of
19 improved capital flows or certainly cash flow as a result
20 of the operation of the ECRM. You know, it's possible
21 that that could be translated into a benefit in ratemaking
22 terms, but I think we're getting awfully speculative.

23 CHAIRMAN CLAYTON: Is there any way to
24 track or monitor such a benefit to ratepayers?

25 MR. OLIGSCHLAEGER: Specific tracking or

1 monitoring? I think that would be somewhat impractical.

2 CHAIRMAN CLAYTON: Impractical?

3 MR. OLIGSCHLAEGER: Yes.

4 CHAIRMAN CLAYTON: Does it mean it's not
5 possible?

6 MR. OLIGSCHLAEGER: I would hesitate to say
7 anything's impossible. I think it would be very difficult
8 to do that kind of specific tracking.

9 CHAIRMAN CLAYTON: Okay. Does Staff
10 believe that the presence of an ECRM and the policy behind
11 it is consistent with the public interest?

12 MR. OLIGSCHLAEGER: To the extent one
13 determines that the -- or believes that the State
14 Legislature acts in the broad public interest, then I
15 would say yes.

16 CHAIRMAN CLAYTON: I'm not sure -- not sure
17 about that answer. Okay. I don't have any other
18 questions.

19 MR. OLIGSCHLAEGER: I'm not either.

20 CHAIRMAN CLAYTON: Got you. Thank you.
21 Judge, I do have a few questions for Ms. Mantle.

22 JUDGE DALE: Go ahead.

23 CHAIRMAN CLAYTON: Is she sworn?

24 MS. MANTLE: Yes, I've been sworn in,
25 Commissioner.

1 CHAIRMAN CLAYTON: You have. Good.

2 Ms. Mantle, I want to talk to you about the projects that
3 would be completed under such a rule. Does the Staff
4 believe that more environmental projects will be completed
5 because of the presence of an ECRM?

6 MS. MANTLE: We do not believe that more
7 will be completed. Some may be completed earlier than
8 they would have otherwise.

9 CHAIRMAN CLAYTON: So you believe this is
10 going to accelerate environmental projects?

11 MS. MANTLE: I think if it is approved, it
12 should be used as a tool by the utilities to determine
13 whether early implementation is a benefit to both the
14 consumers and the company. In some cases it is a benefit
15 for environmental equipment to be added early, if labor's
16 available, steel prices look like they're going to go up
17 and so forth. For these big capital projects, it may be
18 very prudent to implement some of these early.

19 CHAIRMAN CLAYTON: So you disagree with
20 Mr. Birk, then? His testimony was that it would not
21 accelerate any project. So the Staff thinks that this is
22 going to accelerate some projects?

23 MS. MANTLE: Well, I would say Mr. Birk's
24 speaking on behalf of Union Electric, and there are other
25 utilities in the state. I don't know for sure what Union

1 Electric or KCPL or Empire may do, but I can see the
2 possibility that it may accelerate implementation of some.

3 COMMISSIONER CLAYTON: I don't think I have
4 any other questions. Thank you.

5 JUDGE DALE: Let's go ahead with OPC.

6 MR. POSTON: Thank you, Judge. As
7 Mr. Dottheim pointed out earlier, we filed comments
8 earlier today, and Mr. Kind is here to offer some
9 additional comments and to answer any questions that the
10 Commissioner or Judge may have.

11 JUDGE DALE: Do you want to make any kind
12 of statement or will Mr. Kind begin?

13 MR. POSTON: Mr. Kind has comments to make.

14 JUDGE DALE: Are you going to make comments
15 or testify? Both?

16 MR. KIND: It depends on whether you swear
17 me in or not, I guess.

18 JUDGE DALE: Well, I'll swear you in.

19 (Ryan Kind was sworn.)

20 MR. KIND: Well, as has been noted earlier,
21 Public Counsel's already filed some comments in this
22 proceeding. We filed the comments in EFIS today, prior to
23 the hearing.

24 And I would just note that the comments and
25 recommendations from Public Counsel in this rulemaking are

1 very similar to the comments and proposed changes in the
2 rule that Public Counsel made in the prior ECRM
3 rulemaking. Our written comments are in some ways almost
4 identical to some of our written comments that we had
5 submitted in the prior proceeding, and for the most part
6 the track changes or red line strikeout copy of the rule
7 that we've included as an attachment to our comments are
8 identical to the proposed rule changes that we've
9 presented in the same format in the prior rulemaking.

10 The exception to that would have been those
11 instances, and I think there were just one or two, where
12 the Commission had accepted some changes that were
13 proposed by Public Counsel, so, of course, we wouldn't be
14 proposing changes when they'd already been made. But like
15 I said, there were probably very few occurrences of that,
16 but we have tried to reflect that in this track changes
17 document.

18 I guess I would just say that in general
19 our comments in this case and the -- in particular
20 actually the proposed rule changes that we're recommending
21 are intended to provide additional consumer protections
22 that we felt should be in the rule, felt that the
23 Commission had the discretion to put in the rule, and
24 changes that we thought would better reflect the intent of
25 the Legislature in passing SB 179, and changes that we

4 The only other thing I wanted to cover just
5 briefly is to provide some comments in response to the
6 comments that Mr. Lowery made about some of the provisions
7 in the -- that have been proposed in OPC's proposed
8 changes to the rule, and I -- I just have a few that I
9 wanted to address.

19 I would note that I don't think that
20 criticism is valid because this particular insertion here,
21 it merely deals with the filing requirements that pertain
22 to a utility's application to establish an ECRM, and so
23 this insertion really has nothing to do with the periodic
24 adjustment part of the -- of the rule.

1 respond to is on page 15 of the Public Counsel attachment
2 in section 2A. I think he was criticizing Public
3 Counsel's insertion three lines from the bottom of the
4 page to insert the words necessary. And this provision
5 has to do with -- let's see. This provision has to do
6 with the rule giving some guidance to the Commission in
7 how it exercises the discretion that it's been granted by
8 this new law to determine whether or not they would
9 approve an ECRM that's been proposed by a utility.

10 And I think that Mr. Lowery acknowledged
11 that the Commission has the discretion to approve or not
12 approve a proposed ECRM. And from Public Counsel's
13 perspective, what our proposed language does is to give
14 the Commission some guidance in how they would exercise
15 this discretion.

16 And then the -- let's see. A couple more
17 of Mr. Lowery's remarks that I wanted to comment on. The
18 next one's on page 16, and that's in section 2C. The
19 second to last line in 2C is the insertion of directly,
20 and it's -- so it's adding additional things that the
21 Commission should consider when determining which
22 particular environmental costs should be included and
23 allowed for recovery through an ECRM.

24 And Public Counsel's insertion of the word
25 directly here is in our view not -- not bringing up really

1 a new concept because the concept of just having the ECRM
2 rule apply to costs that are directly related to
3 environmental compliance, it already appears in the
4 definition of environmental cost that's in both Chapter 20
5 and Chapter 3. And I'll just refer back to the Chapter 20
6 definition in 1C. It says, environmental costs mean
7 prudently incurred costs, both capital and expense,
8 directly related to compliance with any federal, state or
9 local environmental law, regulation or rule.

10 And so all that Public Counsel is trying to
11 do with this change really is just to make sure that
12 whether these things are directly related is -- is one of
13 the considerations of whether a cost would be eligible for
14 recovery. We think it's consistent with other provisions
15 in the rule that define environmental cost.

16 The last concept I wanted to comment on
17 is -- that Mr. Lowery had discussed is on page 17, and
18 it's in 3A, at the top of the page. Mr. Lowery I think
19 was critical of our insertion there in the fourth line
20 where we inserted -- or I'm sorry. It starts in the third
21 line. We inserted or on any other grounds that would
22 result in a detriment to the public interest.

23 And what I heard from Mr. Lowery as to why
24 he opposed this provision was that he believed that it was
25 adding additional language to the rule that was -- that

1 was not in the statute, and he believed that all the other
2 language in the rule at least in this area was reflecting
3 what was already in the statute. And I -- this provision
4 has to do with parties, their basis that they may have for
5 opposing discontinuation of an ECRM.

6 And I would just note that I really don't
7 believe there's any guidance in the statute in this area,
8 and if you would look at the third line of A, one of
9 the -- the guidance that's given here in the rule is a
10 party may be -- oppose discontinuation on the grounds that
11 a utility is likely to experience declining costs.

12 I don't think you will find that concept in
13 the statute, and I think that these -- this kind of
14 guidance is the sort of guidance that's appropriate for
15 inclusion in Commission rules. So just as the likely to
16 experience declining cost guidance is appropriate, we
17 believe that our additional guidance is appropriate as
18 well.

19 And that's -- that's all the things really
20 that I wanted to respond to at this time. So I would be
21 prepared to answer any questions from the Bench.

22 JUDGE DALE: Thank you. Commissioner
23 Clayton?

24 CHAIRMAN CLAYTON: Thank you, Judge.

25 Mr. Kind, how different are your comments

1 this time around compared to the last time, the last time
2 we had this rule?

3 MR. KIND: There really are pretty much no
4 differences. Some of the language may be changed slightly
5 just to bring it up to date. Where we -- there may have
6 been some references to -- previously to events that
7 occurred in the preceding year, now we might refer to
8 events in the preceding years.

9 And the other difference I would note is
10 that we have -- the comments that are filed have pretty
11 much combined two sets of prior comments that were filed,
12 and so that what you will find at the end of our comments
13 about the last, oh, three pages of these comments,
14 starting just a little bit before the bullets at the
15 bottom of page 9, there -- there are some comments there
16 that were not originally in our initial comments in the
17 prior rulemaking proceeding, but I think instead were in
18 comments that we filed after that proceeding. And so I
19 have -- I've added those to these comments.

20 And in terms of the changes in the rule
21 that we're proposing, I would -- I'd note that there is
22 nothing new that's being proposed here that we haven't
23 proposed in the prior rulemaking.

24 CHAIRMAN CLAYTON: So that would be a no?
25 You're not offering -- I mean, they're not verbatim, but

1 are you offering anything new substantively, any new
2 amendment or specific modifications compared to the last
3 proceeding?

4 MR. KIND: No, we are not.

5 CHAIRMAN CLAYTON: Okay. Did you read the
6 dissent that I issued in Case No. EX-2008-0105? That was
7 the last ECRM rulemaking case.

8 MR. KIND: I did read it, and -- but I have
9 not read it recently, I know.

10 CHAIRMAN CLAYTON: I think the Judge may
11 have a copy there.

12 MR. KIND: Yes. I think it's being
13 provided to me, and I have it.

14 CHAIRMAN CLAYTON: I mean, could you just
15 look that over? I don't want you to read it word for
16 word, but refresh your recollection. I'm interested in
17 your reaction to the dissent that I issued in the case.

18 MR. KIND: Well, I notice one of the
19 concepts that you discuss in there is the potential for
20 overearnings that comes from authorizing riders such as
21 this one and seems to be a, you know, a concern in there
22 and a concern with having the Commission promulgate and
23 approve a rule that doesn't address that concern.

24 CHAIRMAN CLAYTON: Does that concern still
25 exist in this rulemaking?

1 MR. KIND: Yes, it does.

2 CHAIRMAN CLAYTON: Okay. Thank you.

3 Anything else? Any other reactions or concerns or
4 observations?

5 MR. KIND: No. I would just note that I --
6 you know, Public Counsel has proposed the same language
7 with respect to overearnings that we proposed for the last
8 rule, and we still think it's an appropriate provision for
9 inclusion in this rule, and we think -- we think --

10 CHAIRMAN CLAYTON: How about the
11 treatment --

12 MR. KIND: I'm sorry. Go ahead.

13 CHAIRMAN CLAYTON: You're giving answers
14 that are a little longer. You're expanding upon your
15 answer a little longer than -- I was trying to get through
16 this quickly. I was just -- relating to eligible costs,
17 are you comfortable with the way this rule addresses
18 eligible costs for ECRM treatment?

19 MR. KIND: I think we are, yes, and I'll
20 expand on that if you'd like me to.

21 CHAIRMAN CLAYTON: So that's different from
22 the last case, isn't it?

23 MR. KIND: No, I don't believe that it is.
24 I mean, we do have a provision that pertains to eligible
25 costs, a rule provision that we are proposing in this

1 case, just as we proposed in the last case, and that --
2 that rule provision really has to do with the part of the
3 proposed rule that discusses how the Commission exercises
4 its discretion in determining what types of costs are
5 eligible for recovery.

6 And there's a portion of the rule that
7 discusses considerations that should -- the Commission
8 should look at in making those determinations, and we have
9 really just added a little bit to that to say that the
10 Commission should also look at the volatility of the costs
11 that it's including as a consideration and the extent to
12 which the costs are directly related to compliance with
13 environmental regulations.

14 CHAIRMAN CLAYTON: Does Public Counsel
15 advocate in this rulemaking for language that would align
16 interests of ratepayers and shareholders more than what is
17 in the rule?

18 MR. KIND: Yes, we do, and we do that in
19 two ways. First of all, we note that the -- we give
20 the -- we change the rules so that the Commission could
21 approve an ECRM that allows the utility to recover some or
22 all of the costs. That's intended to permit incentives
23 where a utility would have some skin in the game, so to
24 speak, and where the Commission could approve a mechanism
25 that permits a utility to only collect, say, 90 percent or

1 95 percent of the change in their environmental costs that
2 has occurred subsequent to the last rate case.

3 And in addition to that provision, we've
4 also included a new section 11 in Chapter 20 which talks
5 about aligning the interests of ratepayers and
6 shareholders, and it's very similar to the incentive
7 mechanism or performance-based program language that
8 appears in the fuel adjustment clause rules.

9 CHAIRMAN CLAYTON: Do you believe that the
10 presence of an ECRM for a utility benefits the ratepayers?

11 MR. KIND: At this point, I really can't
12 envision circumstances where it could or where it would,
13 but we -- you know, I think the rule properly just sort of
14 defers to the Commission to make that decision on a
15 case-by-case basis.

16 CHAIRMAN CLAYTON: So is your answer it
17 depends, yes, no, maybe?

18 MR. KIND: Well, I think I would say maybe,
19 but I would be very skeptical because for there to be
20 benefits you would have to overcome what in Public
21 Counsel's mind is a very large detriment that's created by
22 having essentially a flow through mechanism for cost
23 recoveries which we think greatly diminishes the incentive
24 utilities to --

25 CHAIRMAN CLAYTON: Mr. Kind, I'm aware

1 of -- I understand that.

2 MR. KIND: Okay.

3 CHAIRMAN CLAYTON: What I'm asking is, does
4 Public Counsel support the concept of an ECRM? Is it in
5 the ratepayer benefit? Is it to the benefit of the
6 ratepayer, yes or no?

7 MR. KIND: Do we support an ECRM --

8 CHAIRMAN CLAYTON: You said maybe and it
9 depends but it has to overcome all these detriments. The
10 way the rule is drafted, do you believe the detriments
11 exceed the benefits to ratepayers, or do you not know? Is
12 it not -- is it a question that is not answerable?

13 MR. KIND: No, I think it's answerable, and
14 I think we would say that, the way the rule is written,
15 that it would be a detriment to ratepayers.

16 CHAIRMAN CLAYTON: Okay. So then the
17 answer to the question that I asked before, when I asked
18 is this ECRM to the benefit of the ratepayers, what is
19 your answer?

20 MR. KIND: Is your question with respect to
21 having a rule or specific cost recovery mechanism in place
22 for a utility?

23 CHAIRMAN CLAYTON: Let's talk about what's
24 on the table right now.

25 MR. KIND: Okay. I just wanted to clarify.

1 CHAIRMAN CLAYTON: I mean, I'm not sure
2 what else I'd be talking about other than the present
3 rule.

4 MR. KIND: We think that the proposed rule
5 without the additional consumer protections proposed by
6 Public Counsel would be detrimental to ratepayers.

7 CHAIRMAN CLAYTON: Now, does Public Counsel
8 have a position of whether this rule will accelerate the
9 completion of environmental projects?

10 MR. KIND: We have no reason to believe
11 that it would do that.

12 CHAIRMAN CLAYTON: Does Public Counsel have
13 a position as to whether this rule will encourage more
14 environmental projects than would otherwise occur?

15 MR. KIND: I have -- Public Counsel has no
16 reason to believe that either.

17 CHAIRMAN CLAYTON: Does Public Counsel
18 believe that this rule is consistent with the public
19 interest?

20 MR. KIND: We believe that, as presently
21 proposed by this Commission, that the rule is not
22 consistent with the public interest.

23 CHAIRMAN CLAYTON: Okay. Thank you. No
24 other questions.

25 JUDGE DALE: Thank you. That takes us to

1 you, Mr. Downey.

2 MR. DOWNEY: Thank you. Mr. Chairman,
3 members of the Commission, if there are any on the call
4 besides the Chairman, Judge Dale, my name is Ed Downey.
5 I'm a lawyer with Bryan Cave in Jefferson City, in the
6 Jefferson City office, and I represent the MIEC, and as
7 you know, it's an association of corporations that consume
8 energy on a large scale, and thus acutely interested in
9 the cost of energy and in these regulations.

10 The MIEC will file written comments and
11 will file a red line of suggested changes to the
12 regulations. The red line will very closely track what
13 the Office of Public Counsel has filed. I haven't seen
14 it, but I understand that it will. I haven't seen the
15 Office of Public Counsel's red line, but I understand ours
16 will track it closely. Because of that, I'll be very
17 brief in my comments today.

18 The statute authorizing these regulations
19 is Section 386.266, as we all know, and I would submit
20 that that statute was intended to strike a balance between
21 the interests of utilities and of consumers, and that
22 balance is reflected in a number of provisions in the
23 statute. The environmental costs must be prudently
24 incurred. That's in subsection 2. The annual increase in
25 rates may not exceed 2 and a half percent. That's in

1 subsection 2. The Commission must consider all costs and
2 revenues in a general rate case. That's in section 4.
3 The Commission must find that the ECRM is designed to,
4 quote, provide the utility with a sufficient opportunity
5 to earn a fair return. That's section 2, paren 1. And it
6 does not say at least a fair rate of return. It says a
7 fair rate of return.

8 The Commission must allow for an annual
9 true-up to remedy over and under-collections. That's in
10 section 2, paren 2. The ECRM must be reviewed in a
11 general rate case at least every four years. That's in
12 section 2, paren 3. The Commission must conduct regular
13 prudence reviews of costs. That's section -- subsection
14 2, paren 4. And the Commission may consider changes in
15 risk associated with the ECRM in determining an allowed
16 rate of return. That's subsection 2, paren 7, I believe.

17 The Commission's regulations should be
18 faithful to these consumer protections and to the
19 legislative intent striking a balance between consumers
20 and utilities. I agree with and the MIEC agrees with both
21 of Office of the Public Counsel and the Staff of the
22 Commission that the intent of the Legislature was not to
23 create a mechanism here for utilities to earn more than
24 their authorized rate of return.

25 And respectfully I would submit that what

1 the proposed ECRM regulations do is tip the scale in favor
2 of utilities. Rather than use an ECRM to raise revenues
3 to meet the approved rate of return on equity, these
4 regulations allow the ECRM to raise revenues above what is
5 necessary for the utilities to meet that return. In fact,
6 under certain circumstances a utility that is already
7 exceeding its approved rate of return will receive
8 additional revenues under the ECRM. That circumstance was
9 not sanctioned by the Legislature and should be rejected
10 by this Commission.

11 Our proposed changes to the ECRM, and as
12 I've indicated, they largely copy OPC's, are designed to
13 rebalance the scales so that utilities will receive
14 additional revenues for environmental costs when necessary
15 but only when necessary for them to achieve their
16 authorized rate of return on equity.

17 And I would like to just comment about a
18 couple other things related to this statute. When in
19 subsection 2 the Legislature uses the term may with regard
20 to costs not recovered under the 2 and a half percent cap,
21 that gives this Commission discretion.

22 And so the language offered by the OPC as
23 well as the MIEC that addresses this recovery in
24 subsequent years is something within the discretion of
25 this Commission to adopt. The word in the statute is may.

1 It is not shall.

2 Elsewhere in this statute, I believe it's
3 subsection 7, the Legislature said the Commission may take
4 into account any change in business risk as a result of
5 the ECRM. Both the OPC and the MIEC have suggested that
6 in this regulation the Commission impose a requirement
7 that it consider in its setting of the authorized rate of
8 return the fact that a utility does or does not have an
9 ECRM.

10 Yes, the statute uses the term may, but
11 this Commission has the right to exercise that discretion
12 in favor of the requirement in every case, and we suggest
13 that the Commission do that.

14 Other than those few comments, I'm -- I
15 have nothing further to add. Be happy to answer
16 questions.

17 JUDGE DALE: Commissioner Clayton, do you
18 have any questions of Mr. Downey?

19 CHAIRMAN CLAYTON: My only question is, has
20 MIEC reviewed the dissent that I issued in that case I
21 mentioned earlier?

22 MR. DOWNEY: Yes.

23 CHAIRMAN CLAYTON: Does it have a reaction,
24 agree, disagree?

25 MR. DOWNEY: It was the centerpiece of the

1 litigation that we filed over the last adoption of these
2 regulations, and we believe the dissent is dead on
3 correct.

4 CHAIRMAN CLAYTON: When you say the
5 litigation, how did the dissent play into the litigation?

6 MR. DOWNEY: I think the fact that a
7 Commissioner accepts and agrees with our interpretation of
8 the law adds validity to our position.

9 CHAIRMAN CLAYTON: Has anything changed in
10 this rulemaking from the last that would -- that would
11 negate the need for the provisions referenced in the
12 dissent?

13 MR. DOWNEY: Not that I am aware of.

14 CHAIRMAN CLAYTON: I don't think I have any
15 other questions. Thank you.

16 JUDGE DALE: Thank you, Commissioner
17 Clayton. With that, I believe that this proceeding is
18 concluded.

19 Let me reiterate that the parties --
20 participants, excuse me, will have until midnight tonight
21 to make any additional filings you wish to make, and that
22 if you want to reiterate comments you made in your last --
23 in the last round of this rulemaking in 2008-105, if you
24 will please refile it with a new cover pleading into this
25 matter, those comments will then be considered in full.

1 With that, I believe we are concluded and
2 off the record. Thank you.

3 WHEREUPON, the public hearing in this case
4 was concluded.

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3) ss.
4 COUNTY OF COLE)

5 I, Kellene K. Feddersen, Certified
6 Shorthand Reporter with the firm of Midwest Litigation
7 Services, and Notary Public within and for the State of
8 Missouri, do hereby certify that I was personally present
9 at the proceedings had in the above-entitled cause at the
10 time and place set forth in the caption sheet thereof;
11 that I then and there took down in Stenotype the
12 proceedings had; and that the foregoing is a full, true
13 and correct transcript of such Stenotype notes so made at
14 such time and place.

15 Given at my office in the City of
16 Jefferson, County of Cole, State of Missouri.

17 _____
18 Kellene K. Feddersen, RPR, CSR, CCR
19 Notary Public (County of Cole)
20 My commission expires March 28, 2009.
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