

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

On-the-Record Presentation

July 27, 2004

Jefferson City, Missouri

Volume 3

In the Matter of the Tariff Filing)
Of The Empire District Electric)
Company to Implement a General Rate)Case No. ER-2004-0570
Increase for Retail Electric)
Service Provided to Customers in)
Its Missouri Service Area)

KEVIN A. THOMPSON, Presiding
DEPUTY CHIEF REGULATORY LAW JUDGE

STEVE GAW, Chairman,
CONNIE MURRAY,
ROBERT M. CLAYTON, III,
JEFF DAVIS,
LINWARD "LIN" APPLING,
COMMISSIONERS

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

2 JUDGE THOMPSON: Okay. Ladies and
3 gentlemen, if you will, go on the record now.
4 We are here for the continuation of the
5 on-the-record presentation in Case ER-2004-0570
6 in the matter of the tariff filing of the
7 Empire District Electric Company to implement a
8 general rate increase for retail electric
9 service provided to customers in its Missouri
10 service area.

11 We already have entries of appearance.
12 But to the extent there's been any changes of
13 personnel, perhaps we could take your entry of
14 appearance. Mr. Molteni?

15 MR. MOLTENI: Thank you, your Honor.
16 Ronald Molteni, Assistant Attorney General on
17 behalf of the Department of Natural Resources.

18 JUDGE THOMPSON: Very well. Thank
19 you. Mr. Boudreau?

20 MR. BOUDREAU: Yes. Thank you. I'd
21 like to enter my appearance at this point.
22 Paul A. Boudreau with Brydon, Swearngen &
23 England, Post Office Box 456, Jefferson City,
24 Missouri, appearing on behalf of the Empire
25 District Electric Company. Thank you.

1 JUDGE THOMPSON: Thank you. Any
2 first time entries? Hearing none, Mr. Conrad?
3 MR. CONRAD: Uh-huh.
4 JUDGE THOMPSON: You were about to
5 call a witness, I believe.
6 MR. CONRAD: Yeah. Are we ready to
7 go with that?
8 JUDGE THOMPSON: Yes, sir.
9 MR. CONRAD: Okay. Mr. Swearengen?
10 MR. SWEARENGEN: Are you calling me?
11 MR. CONRAD: I am.
12 MR. BOUDREAU: Am I to understand
13 that Mr. Conrad is calling Mr. Swearengen to
14 the stand? I'd lodge an objection on the
15 grounds that Mr. Swearengen is counsel of
16 record for the company, not a witness for the
17 company and that calling him as a witness to be
18 cross-examined by other counsel to the
19 proceedings is inappropriate. There's any
20 number of subsidiary objections. I don't know
21 what the purpose and scope of the purported
22 cross-examination is to be, and I'd reserve the
23 right to make additional objections.
24 JUDGE THOMPSONO: Excuse me.
25 Mr. Conrad?

1 MR. CONRAD: The purpose of the
2 examination of the witness would be very brief
3 and that is simply to establish and affirm what
4 the witness knows about how your Honor came to
5 be aware and when your Honor came to be aware
6 of it, of the nature of this proceeding.

7 JUDGE THOMPSON: Mr. Boudreau?

8 MR. BOUDREAU: Again, I'd repeat my
9 objection that Mr. Swearngen is counsel of
10 record in this -- in this case and not witness
11 for the company on this case. It would be
12 inappropriate to put him on the stand to be
13 cross-examined by other counsel of record in
14 the case with respect to any particular topic.
15 I don't know what else to say. It's
16 inappropriate to call counsel as a witness in a
17 case.

18 JUDGE THOMPSON: Okay. Do you have
19 any authority? In other words, I understand
20 what Mr. Conrad wants to establish. Do you
21 have any authority that he may not call
22 Mr. Swearngen for the limited purpose that
23 he's described?

24 MR. BOUDREAU: Well, I wasn't aware
25 until this time what the purpose of the calling

1 Mr. Swearengen as a witness to be. So, no, I
2 haven't researched the point because I didn't
3 know what the point was until now. I'd say --
4 I would additionally suggest it's not
5 particularly relevant to what's going on here.
6 The -- the order says what the purpose of the
7 hearing was. And I'm -- I just don't
8 understand what the relevance is. And given
9 some more time, I'm sure I could provide the --
10 the Commission with some authority if it wants
11 judicial authority for that proposition.

12 JUDGE THOMPSON: Tell you what I'll
13 do. We're going to go ahead and let Mr. Conrad
14 examine Mr. Swearengen, and then we'll go ahead
15 and let you file anything you want moving to
16 strike that if, in fact, you can find authority
17 for that. Okay?

18 MR. BOUDREAU: Well, I would request
19 the opportunity to find that authority first.
20 Because, otherwise, I don't think this is
21 permissible conduct. Mr. Swearengen is counsel
22 for the company in this case and is not a
23 witness in this case. And it's inappropriate
24 to put the attorney on the stand to be
25 cross-examined.

1 JUDGE THOMPSON: Well, I've already
2 ruled, Mr. Boudreau. Mr. Swearengen?
3 MR. BOUDREAU: Mr. Swearengen --
4 Mr. Swearengen will not be taking the stand
5 today. I apologize.
6 MR. SWEARENGEN: With all due
7 respect, I'm not going to take the witness
8 stand in this proceeding.
9 JUDGE THOMPSON: Well, we're at
10 something of an impasse. Are you sure this is
11 the avenue that you wish to go down?
12 MR. SWEARENGEN: Yes.
13 JUDGE THOMPSON: Okay. Tell you what
14 I'm going to do, though I'm loathe to do it.
15 But what I'll do is I will allow -- we will --
16 we will take up the legal argument that we've
17 been setting aside, and we'll give Mr. Boudreau
18 an opportunity to visit the Law Library while
19 that's going on. Unless you were planning to
20 make the argument?
21 MR. BOUDREAU: I was not -- I was not
22 planning on making the argument. So what time
23 do I have available to me to research this
24 point that I've just found out about?
25 JUDGE THOMPSON: Well, let's see.

1 It's 2:20 now. I think we'll need to see you
2 back by 4.

3 MR. CONRAD: If I understood
4 correctly from my colleague, from
5 Mr. Swearngen that he has no intention of
6 taking the stand in any event. So I wonder
7 whether that might be established at this point
8 or whether you want to go through asking
9 Mr. Boudreau to incur some time and expense to
10 research a point that may end up being moot.

11 MR. BOUDREAU: I can pretty much
12 assure you that Mr. Swearngen will not take
13 the stand other than under compulsion of a
14 court order if that helps narrow the topic.

15 JUDGE THOMPSON: Mr. Conrad?

16 MR. CONRAD: We have commissioners
17 here who are authorized to issue subpoenas. We
18 have supposedly an open hearing. I've called a
19 witness. The witness is present in the
20 courtroom and the future.

21 COMMISSIONER CLAYTON: Can I ask a
22 question?

23 JUDGE THOMPSON: Yes, sir.

24 COMMISSIONER CLAYTON: Mr. Conrad,
25 how does the calling of this witness affect or

1 relate to the interim energy charge, which is
2 the subject of this on-the-record presentation?

3 MR. CONRAD: Your Honor, it makes a
4 whale of a difference insofar as the validity
5 of this record for potential court review. My
6 obligation here as an attorney for my clients
7 is to attempt to protect that record and to
8 create the record that I might need.

9 JUDGE THOMPSON: I agree.

10 COMMISSIONER CLAYTON: What record do
11 you need to establish --

12 MR. CONRAD: That there has been an
13 ex parte communication.

14 COMMISSIONER CLAYTON: An improper ex
15 parte communication?

16 MR. CONRAD: That will be revealed
17 with facts. When we get the facts out, then
18 we'll find that out.

19 COMMISSIONER CLAYTON: Okay. So just
20 to help me through this, a suggestion of an
21 improper ex parte communication relating to
22 something beyond the procedure matter, whatever
23 it would be. But how does it relate to the
24 interim energy charge presentation that we are
25 discussing here today?

1 MR. CONRAD: It goes to the very
2 heart of the nature of the presentation, which
3 I raised and my objection continues to pend
4 before this Commission with respect to the
5 proceeding that we had yesterday. Your Honor
6 will recall that Mr. Coffman indicated that he
7 had been advised by Judge Thompson on Friday,
8 not only of the nature of the presentation that
9 was going to be made but that it was going to
10 be made in testimony, that it was going to be
11 made with witnesses taking the stand, that
12 witnesses were going to be subject to
13 cross-examination and the identity of the --
14 those witnesses.

15 Now, my questions to Mr. Swarengen would
16 basically be identified to -- directed to the
17 point of what the Judge knew and when he knew
18 it, to use the phrase.

19 COMMISSIONER CLAYTON: So it wouldn't
20 really relate to the substance of whether we
21 grant an interim energy charge while this rate
22 case is pending?

23 MR. CONRAD: Yes, sir, it does.
24 Because the substance is contaminated by the
25 procedure, in my view. If certain parties were

1 allowed to know ahead of time -- ahead of this
2 process what the nature of the process was
3 going to be but other people were not and there
4 was no public notice of the communication, nor
5 of the nature of this process other than that
6 the Commission issued some three or four weeks
7 ago, which as we discussed yesterday, it did
8 not say hearing. It said factual presentation,
9 not evidence. Yet evidence was taken over my
10 objection yesterday. So I need to protect the
11 record. Now, I can do that by an offer of
12 proof and I can do it by just simply standing
13 here and telling you on the record what I think
14 that evidence would show. And we can let it
15 rest with that. And if we need to, then we'll
16 have somebody look at it at an appropriate
17 point in time.

18 JUDGE THOMPSON: Well, I tell you
19 what, Mr. Conrad, why don't you go ahead and
20 state as an offer of proof what you believe the
21 testimony would show.

22 MR. CONRAD: Well, I believe that
23 based on what Mr. Coffman has told me and what
24 you yourself indicated on the record at the
25 commencement of the proceeding yesterday that a

1 communication between you and someone on behalf
2 of the company -- I'm suspicioning that that
3 may be Mr. Swearengen. That may not be.
4 That's part of the question. It occurred in
5 advance of Friday afternoon. Else you had to
6 have that information provided to you some way
7 somehow. And I have not seen a notification
8 that such a communication occurred. I do not
9 know the substance of that communication. I do
10 not know which -- who -- who activated the --
11 the telephone to place that. But it would seem
12 that that would come out through this.

13 And if that is, as I mentioned to the
14 Commissioner, it would indicate that some
15 impropriety had occurred in the context of that
16 exchange, then we would have that of record.
17 And I think that record as I would go back to
18 amplify impacts on how this proceeding started,
19 which has been conducted heretofore over my
20 objection, my continuing objection, which I
21 lodged yesterday and we'll lodge again if we
22 need to today. So that's -- that is the sole
23 purpose that I would ask Mr. Swearengen to take
24 the stand.

25 I have a great deal of respect and

1 admiration for Mr. Swearengen. He is, as far
2 as I know, maybe a year or two, my senior in
3 the bar. And I have no personal animosity
4 toward him nor do I wish to embarrass him or
5 cause him in any way to reveal any client
6 confidence. But I do think I am entitled to
7 explore that question because that question
8 goes to the heart of this proceeding.

9 JUDGE THOMPSON: Does that complete
10 your offer of the proof?

11 MR. CONRAD: Yes.

12 JUDGE THOMPSON: Thank you,
13 Mr. Conrad. Very well, then. Shall we proceed
14 to the legal arguments?

15 MR. STEWART: Good afternoon. My
16 name is Brent Stewart. For those of you who
17 don't know me, I used to be the Staff Director
18 Executive Secretary of the Commission up until
19 1993. I also held the position while I was
20 here that David Woodsmall currently holds as
21 assistant to the chairman. I've been in
22 private law practice since '93 up in Columbia.
23 And I'm here to speak today on the interim
24 energy charge tariff filed by Empire.

25 Basically, I want to do two things. I

1 want to first talk about the tariff itself and
2 I'm going to hand out copies of the tariff so
3 you can take a look at it. And, secondly, I'm
4 going to try to address some of the legal
5 issues that -- that have arisen with regard to
6 that tariff.

7 As you heard yesterday, what Empire is
8 proposing in this case is a simple,
9 straightforward regulatory mechanism, one which
10 has been approved by the Commission, both in
11 the past for Empire and currently in operation
12 for Aquila. And this mechanism is designed to
13 mitigate against market volatility to the
14 benefit of both Empire and its customers by
15 establishing a range of reasonableness for
16 fluctuating fuel costs. As you heard
17 yesterday, no one, Empire included, can
18 accurately predict exactly what the natural gas
19 market is going to do in the future. But we
20 can at least take a stab at setting up a
21 reasonable change of those costs based on the
22 best information we have available to us and
23 try to craft a regulatory mechanism that allows
24 for recovery of those costs.

25 Specifically, in this case, Empire is

1 asking for two things. First, in the -- in the
2 broader sense, that an interim energy charge
3 tariff like the one proposed be implemented as
4 part of the Commission's ultimate decision in
5 the permanent case as was done in the past.
6 And, second, for the Commission to consider in
7 its discretion given the current natural gas
8 market prices and Empire's rate of return,
9 which you heard about yesterday, allowing this
10 mechanism to be placed into effect as quickly
11 as possible by simply lifting the suspension on
12 the IEC tariff. Let me go ahead and hand out
13 this tariff. Jim -- where did he go? Have I
14 lost my witness and my co-counsel at the same
15 time?

16 MR. CONRAD: He was going to be my
17 witness.

18 MR. STEWART: You never know, Stu. I
19 might call him.

20 COMMISSIONER DAVIS: Oh, thank you.
21 This isn't an ex parte communication, is it?

22 MR. STEWART: I don't think. I think
23 I'm on the record here. What I just handed you
24 is the one-page tariff itself that was filed
25 when Empire filed its permanent rate case.

1 It's Sheet No. 17. It's entitled Interim
2 Energy Charge Rider IEC. This document -- this
3 one-page tariff is exactly the same in -- in
4 all substantive respects as the tariff that was
5 previously approved by this Commission for
6 Empire back in the 2000, 2001 time frame,
7 whenever that was, and also, in substantive
8 aspects, similar to the current IEC tariff on
9 file and approved by the Commission for Aquila.

10 There are three basic parts to this
11 tariff, but it's really quite simple. The
12 first is the base rate upon which the IEC
13 charge is added to. And you will notice it
14 says right there, In addition to the charges
15 which Empire makes for electric service set
16 forth in its approved and effective rate
17 schedules, the following amount will be added.
18 And that's four-tenths of a cent per kilowatt
19 hour.

20 What the Commission needs to recognize is
21 that those base rates that form the -- the crux
22 of this tariff are Empire's current approved --
23 Commission approved rates. Those are the rates
24 that are currently in effect. This tariff does
25 not change those rates, those base rates. What

1 it does -- and I think Mr. Swearengen mentioned
2 this yesterday. What it does, it says, Due to
3 the energy costs, the fuel costs, it adds to
4 those base rates a four-tenths of a cent per
5 kilowatt hour charge. The interim rider, I
6 think a question came up yesterday about the
7 duration of this tariff. By its terms as
8 currently proposed, it's to run through April
9 27th, 2009. That's a longer period of time
10 than the original Empire IEC tariff, which I
11 believe was two years.

12 But it also provides -- as a part of the
13 conditions, if you'll notice, it talks about
14 refunds. And -- and so we're all on the same
15 page, what -- what this does -- there's
16 something in the base rates. We -- we don't
17 know exactly which. Staff has indicated and I
18 think the other parties have indicated they
19 can't figure out -- nobody can figure out what
20 those fuel costs, those natural gas costs,
21 purchase power costs, what is that component in
22 the base rate.

23 Well, there is a component. Someplace --
24 even though it's in a black box, there is a
25 component, a number that constitutes the -- the

1 fuel costs, the natural gas and the purchased
2 power costs. Frankly, I think it's going to be
3 a fairly simple exercise if we have a technical
4 conference to determine what that number would
5 be. I believe if you go back to the rebuttal
6 testimony in the last case, staff had proposed
7 like an \$18 number and Empire had proposed like
8 a \$17 number.

9 To be honest with you, we'd probably go
10 ahead and agree with staff's number and take
11 the 17. The reason that component's important
12 is because that's the number off of which any
13 customer refund -- should they occur, that's
14 the number that we're going to use as the
15 floor. What we do, by adding the \$.04, we
16 create a range, a range of prudent -- what the
17 Commission would be deemed to have approved as
18 prudently incurred gas and fuel costs.

19 If the fuel costs actually go above that
20 range -- and I want to say the way the numbers
21 crunch out, that's probably above \$5. If they
22 go above \$5 -- maybe five and a quarter. I
23 don't remember. But if they go above that,
24 that's too bad. Empire does not get to recover
25 those costs under the IEC tariff. Again, I

1 think the natural gas number, just to take an
2 example, that's imbedded in the current rate is
3 somewhere around \$3. So if -- on the customer
4 end, if the natural gas rates go below the \$3,
5 well, that's too bad for the customer.
6 However, if those rates during the pendency of
7 the tariff fall within the range of \$3 and \$5,
8 five and a quarter, then that's -- that's --
9 Empire charges the range amount, the maximum
10 amount, the ceiling amount. And it -- in a
11 one-year period during true-up, prudence review
12 and all of the other things, they will -- they
13 will then refund if the actual cost was less
14 than what Empire had charged.

15 There's -- there's one other document that
16 the Commission should be made aware of that
17 goes with this tariff and would, I assume, come
18 out of the technical conference. In the Aquila
19 case, when the Commission approved -- when the
20 Commission approved the Aquila IEC tariff,
21 there was a stipulation and agreement dealing
22 with the entire case. There was an attachment
23 to the stipulation and agreement, I think it
24 was Appendix B, that dealt with exactly how the
25 numbers were going to be calculated, how the

1 refunds were to be calculated. It set forth
2 certain reporting requirements on -- on the
3 company to provide, you know, reports and all
4 of the sorts of things related to its natural
5 gas fuel purchase price. All of that is -- we
6 are anticipating would be part of this
7 particular interim energy charge tariff. And,
8 frankly, the -- the language that was used in
9 the stipulation for Aquila came from Empire's
10 previously approved stipulation for its IEC.
11 So what -- we'll take that. That's fine. And
12 we certainly are intending that that tariff
13 would function the way it has in the past and
14 it is currently functioning for Aquila.

15 I want to -- we were talking about the
16 emergency interim relief standard yesterday.
17 And I -- I do need to make a distinction here.
18 Under the traditional emergency interim relief
19 scenario, base rates actually go up pending the
20 resolution of the permanent case. Now, the IEC
21 tariff does not make any changes to Empire's
22 base rates that have already been approved by
23 the Commission. Those continue.

24 Now, those base rates in this tariff, I
25 will tell when you they will change. They'll

1 change up or down, one way or the other, at the
2 conclusion of the permanent case. Because the
3 Commission in considering all of its relevant
4 factors, whether we're paying our secretaries
5 too much, whether we pay too much for a -- some
6 rolling stock vans or whatever the adjustments
7 may be in the rate case, those rates will be
8 adjusted. And the tariff assumes that those
9 base rates then will form the base for the IEC
10 tariff from the period after the permanent rate
11 case. But for now, we're taking the
12 Commission's prior determination of all
13 relevant factors for its base rates. And
14 that's -- that's the base of the tariff.

15 I need to mention, too, the amounts -- all
16 the amounts collected under the tariff are
17 subject to an audit, prudent review and true-up
18 and possible refund under the terms and
19 conditions that the Commission approved for
20 Aquila and previously for Empire. The
21 Commission -- the Commission should also note,
22 I suppose, that had Empire not had an IEC
23 tariff in place a few years ago, there would
24 have been absolutely no customer refunds when
25 the cost of natural gas unexpectedly declined.

1 I might also point out that the additive number
2 in the prior Empire case was higher than the
3 number we're proposing here as part of our
4 interim and permanent proposal. I think it
5 was five -- five-tenths of a cent, maybe a
6 little bit more per kilowatt here hour. Here,
7 we're asking for four. My point here is to --
8 is to try to convey to the Commission that the
9 -- the base rates upon which this tariff is
10 based and the base rates upon which the future
11 IEC tariff would be based coming out of the
12 permanent rate case, they've already been
13 determined in -- in the case of the current
14 rates to -- they've gone through the regulatory
15 process with Mr. Conrad's help and all of the
16 other assistance that's normally provided in a
17 rate proceeding to come up with this those
18 numbers.

19 We're going to do that again. We're going
20 to be doing that in December. And those base
21 rates will change. The Commission will
22 consider all relevant factors and those base
23 rates will change up or down one way or the
24 other. Again, we recognize in order for this
25 tariff to actually work as intended, we do need

1 to come up with a number that's imbedded in
2 those current rates. And, frankly, like I
3 said, we can do that with the technical
4 conference. The staff, fortunately, has in
5 their pleadings -- the way I understand it,
6 they're agreeable to sit down with us and try
7 to come up with that number. On the other
8 hand, Public Counsel and Mr. Conrad, very
9 surprisingly, is not. But we do believe that
10 the convening of a technical conference if the
11 Commission is interested at all in proceeding
12 with this proposal, the convening of a
13 technical conference should rest that issue of
14 -- and is definitely warranted and could be
15 conducted fairly quickly.

16 Turning now to the -- the lawfulness
17 issues, the questions about the legality of the
18 IEC tariff, Empire believes the implementation
19 of its proposed tariff is fully within the
20 Commission's discretion and is lawful as a
21 matter of state statute and case law. I would
22 note -- after I read the pleadings, I would
23 note at the outset that the question of whether
24 the IEC tariff, Empire's proposed IEC tariff,
25 is lawful or not is not dependent upon the

1 concurrence by Mr. Conrad as part of the
2 settlement in a permanent rate case. It's
3 either lawful or it's not regardless of what
4 Mr. Conrad may or may not agree to.

5 I would also note that Mr. Conrad and --
6 and Mr. Coffman have made the same arguments
7 about retroactive rate making, single issue
8 rate making, all relevant factors. They've
9 made all of those arguments with respect to the
10 Commission's use of the PGA clause in natural
11 gas company cases. And, of course, we know the
12 result of that. The Court said they were
13 wrong.

14 Empire does not deny that the UCCM case,
15 Utility Consumer Council's case of 1979 cited
16 by Mr. Coffman and Mr. Conrad in their
17 pleadings, that it's still good law. We agree
18 with that. That is still good law. We do not
19 deny that that case held that a formula type
20 fuel adjustment clause, what I would call a
21 more traditional fuel adjustment clause, that I
22 think you heard testimony yesterday they're
23 being used in some four or five or more states
24 that those clauses are unlawful in Missouri, at
25 least until obviously there would be a change

1 -- perhaps a change in state statute.

2 Empire would suggest, however, that the
3 courts have interpreted the UCCM case in a much
4 less restrictive manner than urged by
5 Mr. Conrad and that the UCCM case must be read
6 in light of the reasoning and holdings in the
7 Western District in the subsequent Midwest Gas
8 Users case, which, of course was Mr. Conrad's
9 appeal. Let me go head and give you those two
10 citations. I think they're in the pleadings,
11 but for the record if it would be helpful, the
12 UCCM case is found at 585 Southwest Second 41.
13 And it's Missouri Supreme Court 79. And the
14 second case is State, ex rel. Midwest Gas Users
15 versus PSC found at 976 Southwest Second 470,
16 Western District Court of Appeals, 1998.

17 The IEC as currently proposed does not
18 constitute single issue rate making because all
19 relevant factors have been taken into account
20 in setting the base rate because the same
21 factors were taken into account as the
22 Commission then considered and now considers
23 Empire's current rate of return and because as
24 -- as is the case permitted in the more
25 traditional interim emergency rate relief

1 cases, the Commission will shortly have the
2 opportunity to again review all relevant
3 factors in the context of setting permanent
4 rates and in true-up reviews.

5 I'd like to cite just a few parts of the
6 Midwest Gas Users case, the PGA case that
7 upheld the Commission's ability and right to
8 use that particular regulatory tool because I
9 think it's quite applicable to the interim
10 energy charge. It is thus evidence that the
11 PSC can comply with the requirements of Section
12 392.270.4. That's your standard notice and
13 hearing, which I'm sure Mr. Conrad will be
14 talking about later. Without holding a general
15 rate case -- excuse me. Without holding a
16 general rate hearing every time there's a
17 change in the amount to be charged to be
18 adjusted, whether that adjustment is for taxes
19 or for fuel costs, the PSC is not required to
20 treat all items of cost and expense in exactly
21 the same way. The page for that cite is the
22 Midwest Gas case at 479.

23 That case also involved not only the PGA
24 clause, but something we had in place at the
25 time, and that was the MGA -- MGE incentive

1 mechanism which in some respects is similar to
2 IEC type tariff.

3 There again, it was a range of
4 reasonableness set up deemed to be prudent by
5 the Commission and certain things happened, if
6 the costs went above or below, above the ceiling
7 or below the floor and what adjustments to be
8 made. They were similar to the IEC in that
9 there was an annual review in true-up and
10 possibly even refunds. But anyway, that was --
11 that was another portion of that -- of that
12 Midwest Gas Users case. And in there, the
13 Court went on to hold that the Commission
14 approved incentive plan for MGE, which also was
15 being challenged in that case, likewise was
16 lawful and noted that the PGA process is, in
17 fact, far less likely to result in excessive
18 profits or losses than a traditional rate case
19 for it allows the PSC to correct for
20 unanticipated errors in every yearly ACA
21 review. That's Midwest Gas Users at 482.

22 Again, to be clear, the IEC provides for
23 that same type of annual review and adjustment.
24 The same principles that the Court discussed in
25 Midwest Gas Users case, the principle of trying

1 to balance binding regulatory mechanism to
2 balance the interests of the utility and the
3 customer in a fair manner, the notion that
4 there needs to be ongoing regulatory oversight
5 of that mechanism, the lack of control over the
6 market costs of natural gas and purchase power,
7 lack of control issue, all holds true with
8 respect to the proposed IEC tariff.

9 With regard to the retroactive rate making
10 issue, when I first came to the Commission, I
11 -- I was surprised to learn that if a utility
12 hasn't been recovering enough in its rates, it
13 cannot in its next rate case go back and pick
14 up those losses. But that's pretty clear.
15 That can't happen. It's prohibited by statute
16 and the principle of retroactive rate making.
17 The question was raised in the context of the
18 PGA clause. Well, that's retroactive rate
19 making because the Commission has set a rate or
20 a range of rates. And it may not be exactly
21 the same number when it comes down to actual
22 costs.

23 Well, here's what the -- the Western
24 District said regarding retroactive rate making
25 in the context of the PGA mechanism. There is

1 no after the fact of recovery for costs
2 previously incurred but not -- I can't read my
3 writing here -- but not permitted to be
4 collected. The same holds true with the IEC
5 tariff. There are many similarities between
6 the IEC tariff and the PGA clause. There are
7 some -- admittedly some similarities between
8 the IEC tariff and a traditional fuel
9 adjustment clause, the one obvious being that
10 you're talking about fuel costs.

11 However, I think if you go through the
12 analysis, you will find that the IEC, the
13 proposed IEC tariff and the regulatory
14 mechanism it proposes is closer to the -- the
15 -- is closer to the PGA ACA process, which is
16 legal than it -- it's closer to that than it is
17 to the fuel adjustemtn clause. We do also have
18 kind of a problem here. And that is if that
19 clause is, in fact, unlawful, then it was
20 unlawful when when the Commission approved it
21 previously for Empire. And it's unlawful now
22 for Aquila.

23 Frankly, we think it's lawful. We think
24 it balances the interests. We think it
25 provides appropriate regulatory oversight, all

1 of the tests the Midwest Gas Users court looked
2 at. There are two statutes that go along with
3 this, and I'm going to go into those statutes,
4 the file and suspend statute and the requirement
5 for a hearing in just a minute. But before I
6 do that, I want to talk a little bit about the
7 -- what I call the interim relief line of
8 cases. I'll admit to you that what Empire's
9 proposing here with its IEC tariff and the
10 request that the Commission lift the suspension
11 before the conclusion of the permanent rate
12 case is -- it has some -- it's like an interim
13 relief, traditional interim relief case, but
14 it's also not.

15 Actually, I agree with the staff in its
16 May 26 pleading that the Commission has the
17 authority under Section 393.140(11) to grant
18 interim relief for reasons other than an
19 emergency. I've always believed the Commission
20 has had that amount of discretion. The seminal
21 case on that, of course, is the LaCledde Gas
22 Company case that's found at 535 Southwest
23 Second 561, Western District Court of Appeals
24 1976. The Commission under the terms of that
25 clase -- case, clearly was found to have the

1 discretion to approve an interim rate relief
2 case, whether or not the -- and, frankly,
3 whether or not the Commission's traditional
4 emergency criteria were met. In that
5 particular case, they hadn't met the standard.
6 But the Court was -- said that that doesn't
7 mean that the interim relief process is -- is
8 somehow flawed. And, again, with regard to
9 that interim case, I think you heard yesterday,
10 Empire has candidly stated we don't think we
11 meet the traditional emergency criteria that's
12 normally imposed by the Commission, was done
13 when I was -- was done the same way when I was
14 here for interim rate relief.

15 But just because it hasn't been done that
16 way before, that does not mean the Commission
17 doesn't have the discretion under the right
18 circumstances to do it now or in the future.
19 And I submit to you you do have that
20 discretion, and I submit to you we've tried to
21 present you at least with circumstances that
22 constitute a reason to do it. I believe
23 Commissioner Clayton asked the question, what
24 standard should we use if we're not going to
25 have an emergency standard? You go back and

1 look at the Commission cases. There were --
2 there were some arguments over whether the
3 Commission at one time had gone away from the
4 emergency standard over to something else
5 called a good cause standard. And then the
6 Commission, I believe in an Empire case, came
7 back and said, Well, we may have created
8 confusion by saying good cause. So we'll just
9 go back and say interim relief or emergency
10 standard. I do think, frankly, good cause -- a
11 good cause standard is allowed under the
12 statutes.

13 I think if it's properly crafted and
14 properly dealt with by the Commission, it's not
15 going to open the flood gate for every utility
16 in town to be coming in demanding to have some
17 sort of an interim rate relief. The Commission
18 has the discretion to say no. The Commission
19 has the discretion to say yes. That's what
20 discretion is all about.

21 Moving down to the statutes, in terms of
22 specific statutory authority -- guess what?
23 There exists no specific statutory provision to
24 address something called an interim energy
25 charge. Of course, there likewise exists no

1 statutory provision specifically authorizing
2 the PGA clause. However, there's some language
3 in that Midwest Gas Users case why the Western
4 District found this was no impediment for the
5 implementation of the PGA. The Court noted
6 that the legislature was aware that the
7 Commission might use such a mechanism which
8 specifically exempted from certain notice
9 requirements and statutes. Quote, rate
10 adjustment and the purchase price of natural
11 gas which were approved by the Commission.

12 The Court in that case, if -- it's kind of
13 confusing because I think the Court had a typo.
14 They cited Section 386.610. That's obviously
15 not what they meant. What I think they meant
16 was Section 393.275.1. The Court, along that
17 same line, went on to say that the legislature
18 thereby at least impliedly approved the
19 principle that the PSC has the authority to
20 adjust rates outside of the context of a
21 general rate proceeding. And that's at page
22 477.

23 Let's talk about the file and suspend
24 statute. I've always thought it was one
25 statute. That would be 393.150. But if you go

1 back in the case law and talk to people, they
2 might have you also include 393.140 in that
3 discussion. But, generally, those two
4 statutes, at least, are generally referred to
5 as the file and suspend procedure or file and
6 suspend statute. I was also -- when I first
7 came here, I was surprised to learn that that's
8 how rates were set. That was the process we
9 used. Because what the statute says, if you'll
10 read it, it says that -- and I'll -- Section
11 150, 393.150, says, When the utility walked
12 into this Commission and filed a proposed
13 tariff sheet, the Commission at the outset can
14 just let it go into effect. It doesn't have to
15 do anything. It can just say fine.

16 You'll notice -- I know the Commission's
17 familiar with similar time -- the way that also
18 works in the context of -- I hate almost to
19 bring this up, rate rebalancing and those
20 things and the telecommunications side, but
21 those are the -- that's the same principle that
22 the Commission by an action can allow a tariff
23 to go into effect. Well, that's the first
24 option. You can allow it to go into effect.
25 Second option is if you decide you want to

1 suspend it, the statute is set up in kind of a
2 two-part process. It says if you want to
3 suspend it, to look at it, to investigate, to
4 hold a hearing if you want, you can do it for
5 120 days. Then the statute goes on to say if
6 you don't think 120 days is enough to complete
7 your review and go through the process, well,
8 you can suspend it again for another six
9 months. That's what the statute says.

10 What's been the practice? Well, the
11 practice has always been, it seems to me, to
12 kind of ignore the -- the language of the
13 statute and automatically issue a suspension
14 order that says we're going to suspend you for
15 120 days plus of the additional six months
16 because that's what we've always done to
17 conduct a full blown rate case, let everybody
18 have their opportunity to come in and engage in
19 discovery and this, that and the other. But,
20 you know, when you look at that statute, you
21 have to go back to the very end of the statute.
22 It says -- if I can find it. The very last --
23 very last line of that statute says, And decide
24 the same as speedily as possible. If you read
25 the statute, you look at how it's constructed,

1 no action, let it go into effect, well, maybe,
2 if you don't want to do that, then 120 day
3 suspension but -- if you can't do it, then the
4 full six months. But in any event, you need to
5 act upon it as speedily as possible. That's
6 what the statute says. In practice, I'm not
7 sure that's what's always happened, but that's
8 what the statute says.

9 If you also look -- just so you don't
10 think I'm creating this out of whole cloth, the
11 same statute or policy of speed in a regulatory
12 process when a utility company is requesting a
13 rate increase, the same policy of trying to get
14 this process to work as quickly as possible,
15 again, likewise in normal practice is reflected
16 in Section 386.530. Because it says there that
17 PSC decisions go to the top -- are supposed to
18 go to the top of the docket of the courts to
19 get those new rates into effect or rate
20 reductions into effect as quickly as possible.

21 The policy there -- I submit to you, the
22 overall public policy there is to minimize, not
23 to maximize regulatory lag, what we've been
24 calling -- what most people call regulatory
25 lag. It's an attempt to prove the -- to tell

1 the Commission, to tell the parties, to tell
2 the public that this process should be as
3 expeditious -- be conducted as expeditiously as
4 possible. Now, the need -- the need for
5 expeditious treatment of rate request
6 proceedings, whether up or down, not
7 withstanding, I would submit to you that if the
8 Commission has the authority to not suspend a
9 proposed tariff or proposed rate, it has the
10 authority to lift a suspension after it's had a
11 chance to conduct some level of review of that
12 request. Can't find any case law on it. But
13 it would seem -- it would have to be the
14 correllary. If you've got the discretion to do
15 nothing or to -- in this case, to suspend, once
16 the Commission got some facts, got comfortable
17 with the situation, it could lift the
18 suspension.

19 Now, Mr. Conrad has argued in his pleading
20 that once the Commission suspends a tariff, it
21 necessarily must go through the entire 11-month
22 rate process or otherwise violate the rights of
23 interested parties such as his client. While I
24 -- I looked and looked, there are no cases
25 directly on point. I did find a fairly recent

1 Western District decision case that dealt with
2 the so-called requirement that the Commission
3 be required to hold a full-blown hearing upon
4 the request of a party, and that was in the
5 context of a telecommunications case. Some of
6 you might remember, that was the Sprint
7 rebalancing case. Last August, the Court in
8 that case held that, quote, In a file and
9 suspend case, the matter is a non-contested
10 case in which there is no automatic right to a
11 hearing, end quote, and that, quote, There is
12 no protected property interest in any
13 particular utility rate, end quote. So lacking
14 a specific statutory requirement for a hearing,
15 broader public -- general due process
16 considerations do not mandate the hearing. And
17 that case is State, ex rel. Acting Public
18 Counsel versus PSC, 121 Southwest Third, 534,
19 Missouri Appeals 2003.

20 Jumping back to that file and suspend
21 statute, I would direct the Commission's
22 attention to a case that is the seminal case on
23 interpretation of what that file and suspend
24 statute allows the Commission to do. And
25 that's State, ex rel. Jackson County versus

1 Public Service Commission, 532 Southwest Second
2 20, Missouri Supreme Court, December 1975.
3 Now, I'll admit, when I went back and read that
4 case to prepare for this discussion, I found it
5 as incomprehensible now as I found it when I
6 first read it. But if the Commission will look
7 at that case and especially read it and it
8 actually helps you go through what the Court
9 held, it will echo exactly what I told you as
10 to the file -- the Commission's discretion
11 under the file and suspend statute.

12 I think everybody would agree with the
13 fundamental rate making principle, that for
14 rates to be just and reasonable they have to be
15 both fair to customers and to shareholders and
16 that the rate making process used should treat
17 both customers and shareholders in a balanced
18 way. Mr. Coffman said so in his June 1
19 pleading, and I couldn't agree more.

20 Another generally accepted rate making
21 principle is that the prudently incurred costs
22 -- the prudently incurred costs should be
23 allowed recovery in rates to the extent that
24 those costs are necessary to provide safe,
25 reliable and adequate utility service to

1 customers, not imprudent -- imprudently
2 incurred costs. Not even all those past costs
3 that you can't go back and collect because you
4 -- you didn't set your -- your base rates
5 properly. But in Empire's case, this includes
6 the prudent costs Empire incurs for its
7 purchase of natural gas needed to fuel its
8 electric production facilities as well as
9 prudent costs incurred and needed for wholesale
10 purchased power.

11 As you've already seen yesterday, Empire
12 differs significantly from, for example, Ameren
13 UE and KCPL in terms of Empire's heavy reliance
14 on natural gas and wholesale power purchases.
15 The Commission can take that relevant fact into
16 account. The Commission is already well aware
17 of the volatility and upward spikes in the
18 natural gas market in recent years and again
19 yesterday was presented with specifics
20 regarding that market and its financial impact
21 on Empire.

22 I would submit to you that while the IEC
23 may not represent a traditional approach, it
24 represents a workable approach, one that has
25 worked and is currently working. And, frankly,

1 under the circumstances, it's the right thing
2 to do. That's really all I have. And I'll be
3 happy to try to answer your questions.

4 JUDGE THOMPSON: Questions from the
5 bench? Commissioner Murray?

6 COMMISSIONER MURRAY: Since I missed
7 yesterday's presentation and I haven't had a
8 chance to read the record, I'm going to pass
9 for right now. Thank you.

10 JUDGE THOMPSON: Very well.
11 Commissioner Clayton?

12 COMMISSIONER CLAYTON: Mr. Stewart,
13 the -- just looking at this matter on a
14 temporary basis or short-term process while the
15 rate case is pending, what is your client's
16 position with regard to what action we would
17 have to take in terms of a hearing process,
18 testimony, filing process to allow for the --
19 the tariff sheet to go into effect? And I'm
20 talking about the short term, not -- not the
21 end of the rate case.

22 MR. STEWART: But that's part of the
23 temporary -- yeah.

24 COMMISSIONER CLAYTON: Correct. The
25 interim --

1 MR. STEWART: Yeah. Let me -- let me
2 start by telling you that I -- I think the law
3 does not require you to hold a hearing. I
4 don't think -- I think the Jackson County case
5 is clear. And I think the statutes, both the
6 393.140 and 393.150, have no requirement, no
7 statutory requirement for a hearing. When it
8 comes to the -- whether to suspend or not
9 suspend the tariff. So from a legal
10 perspective, I would say it's --

11 COMMISSIONER CLAYTON: But it's
12 already -- but it's already suspended, so is
13 there a different process to lift a suspension?

14 MR. STEWART: There is no case law on
15 it. But I would suggest to you the same would
16 hold true. Now, that doesn't mean the
17 Commission in its discretion if it decided to
18 hold a hearing could not hold a hearing. I
19 think that's within your discretion.

20 COMMISSIONER CLAYTON: Well, what is
21 the -- what does your client recommend? Just
22 going to agenda tomorrow or Thursday and lift
23 the suspension and go from there? Your client
24 would feel comfortable with that?

25 MR. STEWART: We think you have --

1 based on what's been presented here and based
2 on your discretion to not suspend the tariff,
3 we think you could.

4 COMMISSIONER CLAYTON: Without taking
5 -- without allowing any other party to present
6 a witness or to provide any contrary testimony?

7 MR. STEWART: Well, again, the --
8 this goes back to Mr. Conrad and how you read
9 the Commission's order. But when we saw the
10 order six weeks ago, we came prepared to
11 present evidence. And we figured that this
12 would be the most expeditious way to do that.

13 COMMISSIONER CLAYTON: Did you come
14 prepared to cross-examine witnesses offered by
15 other parties?

16 MR. STEWART: Actually, we did. Of
17 course, like them, like Stu, we did not know
18 who they might be or what they might say.

19 COMMISSIONER CLAYTON: Have any of
20 the other parties submitted testimony on this
21 subject?

22 MR. STEWART: They have not. And --
23 and all in all candor, I can understand the
24 Commission's reluctance to proceed without
25 having that occur. And so I would say -- I --

1 again, it's in your discretion to hold that
2 hearing or to take additional evidence and to
3 allow whatever procedures you think you need to
4 do in the exercise of your discretion. And if
5 you did that, if you decide to go down that
6 line, all we'd ask is that you try to do it and
7 conclude it as quickly as possible. I don't
8 think we need to have a -- drag this out for
9 months and months and months to -- to do it. I
10 think certainly --

11 COMMISSIONER CLAYTON: Are the
12 elements or the variables that would go into
13 the interim energy charge identical in number
14 and type with the variables and elements
15 associated with the final rates that come out
16 at the end of a rate case? When you say all
17 relevant factors, how many different or -- or
18 -- how -- how different is the number and type
19 of numbers that go into the formula for the
20 interim energy charge versus the overall rate
21 making process? And how would we get that
22 through that in a short -- short amount of
23 time?

24 MR. STEWART: Well, I -- I think I
25 understand your question. I don't think you

1 have to have us come in and bring witnesses on
2 production cost models and heat rates and --
3 and all of that to determine the base rate that
4 -- that imbedded costs for the cost of natural
5 gas and the cost of purchased power. That will
6 -- it's already in the rates. I think that
7 number -- and, again, if we think we can do it
8 by technical conference, if they want to
9 present hearing on that, I guess that's fine.
10 Those numbers should be fairly easily arrived
11 at as to the -- that's on the base rate side.
12 As to the .04 cents or the four-tenths of a
13 cent, that number was based -- and we have
14 testimony that I suppose already filed that --
15 that talk about how that .04 cent additive was
16 calculated. It's in the testimony of Empire
17 witness Jill Tegen (ph.) and Brad Beecher.

18 And so I assume if -- if the parties
19 opposed to us decided to, they could use that
20 as basis to come in and say, well, you're wrong
21 on how you calculated -- how you got to that
22 .04 cents.

23 COMMISSIONER CLAYTON: So Empire has
24 filed all the necessary -- all the necessary
25 testimony to meet its prima faschia case

1 according to you, for the -- just the interim
2 energy charge; is that correct?

3 MR. STEWART: I think we have. I
4 know Mr. Conrad will want to engage in months
5 of discovery, but I think we have presented a
6 prima faschia case on that. Yes.

7 COMMISSIONER CLAYTON: Okay. So if
8 we wanted to do -- if we wanted to explore this
9 IEC further, then we'd need to start an
10 expedited hearing process -- well, you're
11 suggesting we don't even need to have a hearing
12 process.

13 MR. STEWART: I don't think you're
14 required to. Immediate is something within
15 your discretion. You have to make that call.

16 COMMISSIONER CLAYTON: Okay. Now,
17 this technical conference that you suggest that
18 would have to occur, explain to me how that
19 would work and considering that that is outside
20 of the hearing process how -- is that a forced
21 type of settlement situation? Is it a
22 mediation? Is it a work group? Exactly what
23 is a technical conference and how does it
24 actually arrive at a result?

25 MR. STEWART: I hadn't really given

1 it that much thought. I assume -- what I was
2 thinking --

3 COMMISSIONER CLAYTON: We all need to
4 think about this -- I think --

5 MR. STEWART: Yeah. What I was
6 assuming when I read staff's pleading that they
7 weren't opposed to a technical conference, I
8 assumed we would get together and we would talk
9 about what number they had in the base rates
10 from the last case and where we were, where
11 they were and hopefully arrive on -- on that
12 number, and then to discuss possibly even how
13 that .04 cent piece was calculated and
14 hopefully get some agreement on that. Now,
15 that's just the staff. And whether the staff
16 would agree to that, I don't know. I think
17 public counsel in its pleadings has said, Well,
18 we're not going to go because we're opposed to
19 it. And I'll let Mr. Conrad speak for what
20 he --

21 COMMISSIONER CLAYTON: Well, and if
22 they are opposed to it or if a party refuses to
23 participate and it's a non-unanimous -- I mean,
24 I don't know how you get any agreement on any
25 of the parties, frankly.

1 MR. STEWART: I think you're right.
2 I think you're right.
3 COMMISSIONER CLAYTON: What does the
4 technical conference accomplish?
5 MR. STEWART: It might at least allow
6 -- again, I don't think it would take very
7 long. It might at least allow the company and
8 the staff to arrive at --
9 COMMISSIONER CLAYTON: Well, why
10 can't you do that now? Why do we need to order
11 a technical conference take place?
12 MR. STEWART: We could. We could --
13 and if --
14 COMMISSIONER CLAYTON: You could have
15 an exchange of information and all that.
16 MR. STEWART: And I know Empire is
17 willing to do that with the staff and public
18 counsel and even with Mr. Conrad.
19 COMMISSIONER CLAYTON: Is it Empire's
20 position that that would be a productive
21 process to begin?
22 MR. STEWART: Well, after yesterday
23 and today, maybe not. We may need to just come
24 back in here and present our numbers.
25 COMMISSIONER CLAYTON: All right. So

1 if we wanted to pursue an interim energy
2 charge, your first suggestion would be to
3 convene some sort of technical conference.
4 And if the result of that is anything short of
5 a unanimous stipulation or a unanimous
6 agreement, what would be the next proposal from
7 your client in how we would proceed?

8 MR. STEWART: I think probably the
9 most productive approach would be to go ahead
10 and expeditiously have us all back in here to
11 present our numbers and why we think those
12 numbers are correct.

13 COMMISSIONER CLAYTON: And that would
14 require staff and all the parties to file
15 testimony, would it not?

16 MR. STEWART: Well, I don't know if
17 you have to file testimony or if you can do it
18 live. I don't think there's any requirement
19 that it has to be pre-filed necessarily. But
20 whatever the most efficient way to get that
21 information to the Commission, I think we would
22 be in favor of.

23 COMMISSIONER CLAYTON: To your
24 client, what type of time frame would be a
25 meaningful time frame in discussing this

1 temporary rate relief? And when I ask the
2 question, I mean, if -- we're going to be --
3 we're set for hearing for the full-blown
4 case --

5 MR. STEWART: In December.

6 COMMISSIONER CLAYTON: -- in the
7 month of December. It would have to be fairly
8 quickly.

9 MR. STEWART: Yes. And I think
10 yesterday there was a question of when could
11 additional testimony from -- from Empire if it
12 was needed when could that be filed, and I
13 believe we suggested that we could have, to the
14 extent we needed to, additional testimony
15 within a week. I would say with -- we're
16 talking, maybe, within a few weeks, a month
17 time frame if we -- if we tried. Again, I --
18 the other parties can speak to that. But --

19 COMMISSIONER CLAYTON: This may be a
20 really silly question, and forgive me. But I'm
21 going to ask it anyway. Would it make sense to
22 -- would it make any sense to your client
23 having some sort of interim rate relief,
24 meaning speedily in the short term to see how
25 it works to make a full decision later on at

1 the end of the rate case and withhold judgment
2 at that point? Is that possible?

3 MR. STEWART: Are you -- well, let me
4 see if I understand. You -- if there would be
5 some amount of immediate relief given?

6 COMMISSIONER CLAYTON: Right. Well,
7 that's what you're asking for. You're asking
8 for immediate relief by lifting this tariff
9 sheet. It would go immediately into effect and
10 you would have this surcharge or whatever it's
11 called would immediately go on the bills. What
12 I'm saying is -- is we would have an
13 opportunity to see how it works and actually
14 impacts rate payers.

15 MR. STEWART: Actually --

16 COMMISSIONER CLAYTON: Is that an
17 option that this Commission has?

18 MR. STEWART: Actually, I think
19 that's exactly -- if I didn't say it that way,
20 I meant to. That's exactly what we're
21 proposing. Because, frankly, let's say you
22 implement our -- our tariff on an experimental
23 basis. We run with it up until the time of the
24 permanent rate case decision. In the crucible
25 of that overall rate case, the Commission may

1 decide and -- and we would -- assuming we
2 didn't have a unanimous agreement which
3 probably we won't at this point, but let's say,
4 I would fully expect the Commission to be
5 hearing testimony on how the interim IEC tariff
6 has been working and whether or not to extend
7 it. I think the Commission, frankly, under our
8 proposal would, you know, say no at the point
9 of the permanent rate case, we've tried it, we
10 don't want it. We're going to argue strongly
11 that we think this on a going forward basis is
12 the greatest thing since apple butter. But
13 that would be subject to the permanent rate
14 case. And I think, frankly, that's what we
15 proposed.

16 COMMISSIONER CLAYTON: If one
17 actually likes apple butter.

18 MR. STEWART: Whatever.

19 COMMISSIONER CLAYTON: Now, the
20 tariff sheet you proposed -- and I don't know
21 what exhibit this is.

22 MR. STEWART: I didn't ask to mark
23 that. Can we just mark it as Exhibit 3.
24 Exhibit 3?

25 JUDGE THOMPSON: Very well.

1 COMMISSIONER CLAYTON: If you're
2 going to give it to us, it needs to be marked.
3 MR. STEWART: I apologize. I forgot
4 to do that.
5 COMMISSIONER CLAYTON: Looking at
6 Exhibit 3, you have a -- looks like a
7 four-tenths of a cent per kilowatt hour charge.
8 Is that what that is?
9 MR. STEWART: Right.
10 COMMISSIONER CLAYTON: Have you all
11 run numbers with that with an idea of what
12 impact that would have on an average
13 residential consumer?
14 MR. STEWART: I don't know if -- if
15 Empire has run any numbers. I did a quick
16 calculation based -- I think in Mr. Coffman's
17 pleading he had -- he had suggested and -- and
18 did a customer impact number. And I think he
19 came out with \$45 --
20 MR. COFFMAN: Yes.
21 MR. STEWART: -- over. and if I
22 understood, that was from the time of June
23 through March?
24 MR. COFFMAN: Yes. Yes. If we
25 assumed the weather of 2003 over the time

1 period that would have been June through the
2 end of the case from June of this year to March
3 of 2004 and calculated that it would collect
4 approximately \$6 million and approximately
5 \$45.85 from each customer.

6 COMMISSIONER CLAYTON: Over what
7 period of time? Over nine months?

8 MR. STEWART: June to March or --

9 MR. COFFMAN: June 15 through March
10 30th.

11 COMMISSIONER CLAYTON: Okay. So that
12 would be \$5 per month?

13 MR. COFFMAN: Yeah. It be would less
14 at this point if you -- but --

15 MR. STEWART: Since we didn't
16 implement in June, it would be less than that.

17 COMMISSIONER CLAYTON: Okay. So it
18 would be a little less than \$5 per month for
19 the average residential consumer.

20 MR. STEWART: For the average
21 residential consumer.

22 COMMISSIONER CLAYTON: How would this
23 impact other customers Empire would have? I'm
24 sure there are other classes, industrial and
25 commercial. Do you have any idea?

1 MR. STEWART: The only one I really
2 looked at -- believe it or not, Mr. Conrad has
3 a special contract. That would be Sheet No. 9.
4 And I don't know -- I haven't done the
5 calculation of that. I can tell you that those
6 -- his base rates are less than most. But in
7 terms of just the -- the small commercial -- or
8 exactly how those other rate calculations, what
9 impact that would have, I haven't done that
10 calculation. I don't know if Empire has
11 either. I keep turning back to see my
12 co-counsel, and he's not there.

13 COMMISSIONER CLAYTON: How many
14 classes of customers are there? How many
15 different classifications would there be?

16 MR. STEWART: I don't know the answer
17 to that question.

18 COMMISSIONER CLAYTON: Does anyone
19 know the answer to that question from Empire?

20 MR. STEWART: Mr. Gibson?

21 MR. GIBSON: We have commercial,
22 industrial and residential classes that are
23 under the jurisdiction of Missouri PSC.

24 COMMISSIONER CLAYTON: So three?

25 MR. GIBSON: Yes.

1 COMMISSIONER CLAYTON: Are you asking
2 that we -- that we reverse or overrule the
3 emergency standard and actually create a new
4 standard? Or are you asking just simply for an
5 exception to an existing rule?

6 MR. STEWART: I'm not -- I don't
7 believe Empire is asking the Commission to in
8 any way reject the emergency standard. What
9 we're suggesting to you is there may be other
10 circumstances in addition to that standard that
11 would allow you to provide interim regularly.

12 COMMISSIONER CLAYTON: Well, to
13 provide some certainty, wouldn't it be prudent
14 to set some standards so that everybody
15 operating in the state --

16 MR. STEWART: I think that would
17 probably be a good regulatory policy, frankly,
18 and I think a good cause standard perhaps with
19 some, you know, parameters attached to it. I'm
20 not sure what that would be, but yeah.

21 COMMISSIONER CLAYTON: Last question.
22 The four-tenths of one cent per kilowatt hour
23 in the three classes, it would affect everyone,
24 would it not, on a per hour kilowatt hour
25 basis?

1 MR. STEWART: It's across the board
2 on the kilowatt hour basis, right?
3 MR. GIBSON: That's right. That's
4 right.
5 COMMISSIONER CLAYTON: It would
6 affect everyone equally in the sense that even
7 if they have the special rate it goes up by the
8 same amount?
9 MR. STEWART: Exactly. It's an cross
10 the board.
11 COMMISSIONER CLAYTON: And where did
12 you say the floor and the ceiling are actually
13 listed for how this is calculated?
14 MR. STEWART: Well, it's not in the
15 tariff. What happens is once we come up with
16 that number in the base rates, that's the
17 floor. The -- the max is the -- the floor plus
18 that \$.04. And -- and in terms of natural gas
19 and looking back at Mr. Beecher's testimony and
20 the other testimony, I want to say it's
21 somewhere between \$3 and \$5 range.
22 COMMISSIONER CLAYTON: Okay. Thank
23 you.
24 MR. STEWART: Roughly speaking.
25 JUDGE THOMPSON: Thank you,

1 Commissioner. Commissioner Appling?

2 COMMISSIONER APPLING: I have no

3 questions, Judge.

4 JUDGE THOMPSON: Very well. Thank

5 you, Mr. Stewart.

6 MR. STEWART: Thank you.

7 JUDGE THOMPSON: Mr. Coffman?

8 MR. COFFMAN: Good afternoon. May it

9 please the Commission. Thank you for this

10 opportunity to respond to Empire's interim rate

11 requests through lifting of the suspension of

12 the IEC tariff. I guess, preliminarily, I -- I

13 guess I should restate what I know about the --

14 the issue regarding whether this is a hearing

15 not.

16 To clarify, I -- I did call Judge Thompson

17 late Friday afternoon to inquire about the

18 general procedure the order of the presentation

19 hearing. It was my assumption from reading the

20 order, my incorrect assumption, that this was

21 to be basically legal arguments and a factual

22 and legal argument as opposed to a hearing of

23 some sort. I was told that there would be two

24 witnesses coming from the company. And that --

25 that did surprise me. I called and I thought

1 that maybe this was a misunderstanding because
2 something else was going on on Friday and there
3 was some other presentation. I called
4 Mr. Swearengen and learned, in fact, that they
5 were going to be bringing witnesses and -- to
6 which I guess I called Judge Thompson back
7 again, and I said, Well, I understand, I guess,
8 how you're wanting to proceed.

9 Yesterday, I -- I did object to this being
10 considered a -- a hearing for the purposes of
11 establishing an interim rate request. My --
12 and that objection stands. But I guess my
13 concern has been somewhat alleviated by the
14 clarification yesterday by Chair Gaw that this
15 was -- to the extent that it is a hearing only
16 a hearing to determine if a hearing would need
17 to be held regarding an interim rate relief.
18 So my objection would stand with Mr. Conrad's
19 to the extent that this would be a hearing and
20 the last opportunity to present evidence before
21 an interim rate went into effect. If that's
22 not the case, then my concern is not as great.

23 I think that the Commission ought to
24 simply reject this interim rate relief as it
25 has many other requests by interim -- by Empire

1 District Electric Company over the years for
2 interim rate relief. Frankly, we think that
3 they have in this case, as they have many times
4 before, cried wolf and indicated that they need
5 something when, in fact, they really just would
6 like it very much. And we urge the Commission
7 to adhere to the emergency or near emergency
8 standard that it has consistently or almost
9 consistently applied over the past 30 years.

10 To my understanding in reading all the
11 cases it has -- this Commission has granted
12 interim subject to refund rate relief in a few
13 cases. But it has never granted interim rate
14 relief to any utility company without applying
15 strictly the emergency standard. The only time
16 that the Commission has ever deviated from its
17 emergency standard was in a -- an Empire case
18 -- a couple of requests back where it did say
19 that Empire would not even meet the good cause
20 standard. It rejected the case there and in
21 the following case did apply the emergency
22 standard again and clarify that it was
23 returning once again to the emergency -- near
24 emergency standard. And that was in the 2001
25 case.

1 And if I might just remind the Commission
2 what it said in -- in circumstances that I
3 believe were much more concerning as far as the
4 -- the utility company's financial situation
5 than they are now. Of course, they were coming
6 off of a failed merger, facing very high
7 natural gas prices in the \$9, \$10 range and
8 also facing a great deal of wide disparity in
9 the predictions at that time about where
10 natural gas prices were going. And in that
11 case, the order in which this Commission
12 rejected the interim rate request then stated
13 quote, Empire does not allege that it is not
14 earning a positive return or that its earnings
15 will be negative in the period before new rates
16 are determined. In case number ER-2001-299,
17 neither does Empire allege any risk that its
18 ability to provide safe and adequate service
19 will be impaired in that period. Finally
20 Empire does not allege any inability to finance
21 its operations. And I think that's consistent
22 with the testimony that you received on this
23 record here in this case which I don't think is
24 -- is as severe as the 2001 situation. I
25 believe you heard an admission from the

1 company's witness that the present facts would
2 probably not meet the emergency or near
3 emergency standard and that the situation was
4 not as severe as even the -- the situation in
5 2001.

6 You've heard no evidence alleging that
7 safe and adequate service would be in danger
8 absent a granting or a lifting of the
9 suspension of the IEC, although there was a
10 statement that perhaps some intervening event,
11 perhaps another storm or an extraordinary event
12 could occur. Of course, that would be another
13 event. Nothing absent the interim IEC being
14 granted. We heard no likelihood, I believe,
15 from the testimony yesterday that any credit or
16 equity agency would take any action to
17 significantly downgrade or adjust its analysis
18 of the company.

19 We heard that standard POORS currently
20 rates S&P -- or rates Empire as stable and that
21 most agencies do believe that whatever downward
22 situation is now being experienced in 2004 will
23 improve in 2005. So I just don't think that --
24 that the relief being requested could in any
25 way be granted without a -- a dramatic

1 departure from the 30-year plus standard that
2 this Commission has consistently applied. The
3 facts certainly so far do not come close to
4 meeting that standard. And the new standard
5 would have to be crafted with some exceptional
6 -- exceptionally different standard would have
7 to be applied. This would not be ignored.

8 If it were applied to the bills, this is
9 certainly a rate increase absent an audit and I
10 think would lead to confusion and frustration,
11 if not an outcry from the general public that
12 would be impacted by this. The public has been
13 notified through press releases and news
14 stories that this Commission has suspended this
15 case, set it for hearings in November and
16 stated that, actually, local public hearings
17 would occur as well, inviting public comment,
18 presumably before any rate change would occur.
19 And although we don't know exactly what the
20 rate impact would be, because that would depend
21 on usage and weather and gas prices and so --
22 or usage at least. It would be a significant
23 amount, possibly, you know, \$5 per month.

24 For your average residential customer,
25 perhaps something less than \$6 million. The

1 specific facts that have been asserted as
2 reason to grant some exception from the interim
3 standard or to apply some new standard are not
4 facts that we believe are in any way justified
5 or in any way would justify taking the risk
6 that has been -- that the company has regarding
7 gas prices and placing it -- placing that risk
8 on the customers.

9 The -- the fact that this company is
10 significantly dependent upon natural gas or
11 more so than other companies is not a decision
12 that was made by its customers. This was a
13 resource planning decision of management. The
14 decision to hedge its natural gas for this year
15 at 60 percent level, which was the minimum in
16 the risk policy analysis as opposed to the
17 maximum or something closer to 80 percent which
18 was the maximum, is again a decision of
19 management, not a decision of customers. The
20 timing of this rate case was a decision of
21 management. Based upon the last settlement of
22 the rate case a moratorium was part of that
23 package. That moratorium expired before
24 September 2003. If, in looking at all the
25 factors that go into the financial performance,

1 this utility had decided to file a rate case in
2 September 2003, and even assuming it went the
3 maximum 11 month suspension period that this
4 Commission is permitted to go, new rates would
5 be in effect next week. Or next month at
6 least. So if a situation had been as
7 concerning back then, and I don't think much
8 about where natural gas prices are now, not
9 much of a concerning nature is known now than
10 was known last fall. And they may disagree
11 with that. But, certainly, the timing of this
12 case could have -- could have been differently
13 set up.

14 I need to address the legal issues. Of
15 course, the company argues that an interim
16 energy charge is similar to a purchased gas
17 adjustment, which has been found legal by the
18 Western District Court of Appeals. We believe
19 it has more similarity to a fuel adjustment
20 clause found illegal by the Missouri Supreme
21 Court. And there are many arguments you could
22 make. They're all -- they're three separate
23 mechanisms, and we could go on and on about the
24 various similarities and disparities. And
25 Mr. Stewart read you selected portions of the

1 Midwest Gas Users case which is the Court of
2 Appeals decision regarding purchased gas
3 adjustment. But I believe that there are other
4 parts of that case that are more relevant and
5 which are included in our pleadings.

6 The Court -- I'll just read you one
7 paragraph from that case as they were
8 distinguishing the PGA from the fuel adjustment
9 clause. The Court said, The fuel adjustment
10 clause at issue in Utility Consumers Council
11 was found to come dangerously close to the
12 advocacy of the PSC's rule-making authority
13 because it permitted the electric utilities to
14 simply pass on an amount they paid for fuel
15 costs. Moreover, the companies could control
16 much of these costs for electricity unlike
17 natural gas and unlike natural gas is not a
18 natural resource. Here -- I think the key
19 distinguishes -- distinguishing element of
20 these two mechanisms is the fact that one is
21 for natural gas, which is a natural resource
22 and simply passed on through and burned by the
23 end user. The electric company has a variety
24 of fuels and sources that it can use to
25 generate electricity. And many more inputs go

1 into that. Much more management discretion is
2 hovered and much more opportunity for abuse and
3 opportunity -- or concern about how off-setting
4 factors might not be credited to consumers.

5 In that case, the Midwest Gas Users case,
6 which found the PGA to be legal, this
7 Commission filed a brief emphasizing that
8 point. I am reading here from the respondent's
9 brief, The respondent, Missouri Public Service
10 Commission, before the Western District Court
11 of Appeals brief filed July 10, 1997. And I'm
12 quoting the Commission here. The PGA ACA
13 process is suegenerous (ph.) to the natural gas
14 industry. That is, the natural gas industry is
15 the only one in which the Commission isolates
16 or has the ability to isolate from all other
17 costs of the utility the cost of the very
18 product which the utility sells or transports
19 to its customers. And so this, in my mind, is
20 what distinguishes the fuel adjustment -- or
21 the PGA process, which at least thus far has
22 been found to be legal as to the -- a similar
23 -- or a fuel adjustment mechanism or an IEC
24 that applies to electric companies. It is true
25 that despite objections that -- that my office

1 has made, we have entered into an agreement
2 twice to waive these legal objections to allow
3 an interim energy charge to be used. And it is
4 -- it is not something that -- that would go
5 without a legal challenge if the Commission
6 opposed over our objection.

7 However -- and I do not believe that an
8 interim energy charge is something that should
9 be used as a crutch or an ongoing mechanism.
10 However, in 2001 with Empire and then more
11 recently with Aquila have found the facts and
12 situations involving fuel costs and the
13 particular resource situation of that utility
14 at least worth, including interim energy charge
15 as part of a settlement. And in those cases
16 key to that were concessions regarding the
17 floor, the ceilings, the term and the actual
18 way in which the interim energy charge would be
19 applied. Here in this case, you know, we do
20 not even have, I guess, an agreement at this
21 point as to where the -- where the base rate
22 is. And I think that if an IEC were applied on
23 an interim basis, I think it would simply
24 compound the legal -- the legal concerns.

25 Now, all that being said, I mean, we are

1 -- are very willing to sit down, roll up our
2 sleeves and talk with this company about a --
3 an IEC that might be part of a global
4 settlement or a settlement of this case. And
5 we know at least enough about what's going on
6 now with natural gas prices and with the
7 general state of this company to sit down and
8 talk about an interim energy charge and
9 absolutely would be wanting to go to technical
10 conference, workshop, what have you. We could
11 do that tomorrow to sit down and talk about an
12 interim energy charge that might be part of the
13 something that came out of a final rate
14 decision in this case. We simply stated that
15 we were opposed to a technical conference being
16 set up to talk about such a -- such a charge
17 being imposed on an interim basis because we
18 believe that the current financial situation of
19 the company is so far from the near emergency
20 standard that it wouldn't be appropriate or
21 legal, and it -- it didn't seem quite
22 productive to sit down and work out
23 implementation details of something that we
24 would just absolutely disagree about legally as
25 an interim basis before there had been a full

1 audit conducted.

2 So I think that gives you an idea of of

3 where I think the Commission is with this

4 request. We urge you to take -- take into

5 account the standard that has, I think, worked

6 well and been applied consistently for many

7 years. This is an interim rate request and

8 should only be granted in a situation where the

9 three elements of the emergency standard can be

10 found. And -- and I think by admission -- or

11 by complete lack of any evidence in this case

12 does not come close to even meeting that

13 standard.

14 Thank you very much. Any questions?

15 JUDGE THOMPSON: why don't you stay

16 at the podium there, Mr. Coffman? Commissioner

17 Murray?

18 COMMISSIONER MURRAY: I pass.

19 JUDGE THOMPSON: Commissioner

20 Clayton?

21 COMMISSIONER CLAYTON: Thank you,

22 Mr. Coffman. Is it your position that we have

23 the legal authority to grant this IEC while the

24 case is pending or not?

25 MR. COFFMAN: I -- I'm not sure that

1 you do. And I think it is true that the
2 Commission has the authority to allow a tariff
3 not to go into effect. The fact situations
4 have not been challenged or explored. What it
5 means to lift a suspension, I don't know if
6 that's ever been -- if that's --

7 COMMISSIONER CLAYTON: Well, if an
8 emergency was shown -- under the emergency
9 standard, if an emergency was shown through
10 evidence and through a hearing process, would
11 we have the ability to grant the relief
12 requested on this temporary basis until the
13 full-blown hearing?

14 MR. COFFMAN: I think you have -- you
15 have a possible legal issue as to the lifting
16 of the suspension. I'm not sure what that is.
17 You have an issue about whether this was filed
18 properly as an interim case. The only interim
19 rate requests that have been filed that I'm
20 aware of have a -- a -- a separate rate case
21 filed concomitantly and consolidated with a
22 permanent rate case. This was done after the
23 fact, after the suspension. And there may be
24 some procedural issues with that. But I would
25 argue that, no, we'd have to get past those

1 issues --

2 COMMISSIONER CLAYTON: Even if an
3 emergency was shown, you're saying we couldn't
4 grant the relief?

5 MR. COFFMAN: No. I think you could.
6 Under the -- the courts have said that when you
7 have applied that standard, it is appropriate.

8 COMMISSIONER CLAYTON: Okay. Now,
9 the emergency standard, is that set out in a
10 court case?

11 MR. COFFMAN: Yes. The LaCledé case
12 was the seminal case, and I think there were a
13 couple of others cases after that. This was a
14 --

15 COMMISSIONER CLAYTON: Does the
16 Commission have the ability to change the
17 standard, or is that a court mandated standard?

18 MR. COFFMAN: The Court says that was
19 an appropriate standard. No other standard has
20 been adjudicated.

21 COMMISSIONER CLAYTON: So it wasn't
22 an exclusive rule, meaning that it was the only
23 way we could do it or that no other standards
24 are impermissible?

25 MR. COFFMAN: As far as I know,

1 there's no reported --

2 COMMISSIONER CLAYTON: Standard?

3 MR. COFFMAN: -- standard that was

4 appropriate.

5 COMMISSIONER CLAYTON: Okay. And

6 you're not suggesting we're bound by any prior

7 Commissions, are you?

8 MR. COFFMAN: No prior Commission

9 case, no.

10 COMMISSIONER CLAYTON: Okay.

11 MR. COFFMAN: Although it is a

12 standard, I would urge to you adhere to given

13 the way it has been -- has worked over a period

14 of, I believe, 30 years.

15 COMMISSIONER CLAYTON: How has it

16 worked and how many instances has it come up?

17 MR. COFFMAN: I'm not sure I did a

18 full exhaustive study, but I believe it has

19 been used two or three times -- interim rate

20 relief has been granted two or three times.

21 There have been many requests for interim rate

22 relief where it has not been granted and no

23 disaster had subsequently come to occur.

24 COMMISSIONER CLAYTON: If -- if we

25 were to decide that we wanted to continue

1 pursuing more information or more study about
2 this issue, would -- would your client or would
3 you as the public counsel expect that a
4 full-blown hearing be held in the determination
5 whether we allow this temporary relief?

6 MR. COFFMAN: Yes.

7 COMMISSIONER CLAYTON: Okay. And
8 would you assume that you would -- your staff
9 would file testimony in response to previous
10 filings by the company?

11 MR. COFFMAN: I -- I believe we would
12 if -- if the Commission ordered a full blown
13 hearing on an interim request, yes.

14 COMMISSIONER CLAYTON: Okay. And how
15 many witnesses from your staff would be
16 included -- that you think would be necessary.
17 And you don't have to give me -- just an
18 approximate.

19 MR. COFFMAN: Potentially two.
20 Potentially two.

21 COMMISSIONER CLAYTON: Okay.

22 MR. COFFMAN: Although, I -- I
23 wouldn't rule out -- the possibility that we'd
24 file perhaps some sort of a default -- not
25 default judgment, but summary judgment. I

1 mean, I -- I believe that if no more evidence
2 is presented than what you heard yesterday, no
3 prima faschia case has been -- has been made to
4 you.

5 COMMISSIONER CLAYTON: Okay. Well,
6 have you -- have you and your staff reviewed
7 the testimony that's been filed by the company
8 with regard to the issue surrounding an IEC?

9 MR. COFFMAN: The testimony that was
10 received yesterday, you mean?

11 COMMISSIONER CLAYTON: I'm talking
12 about the testimony that was filed in the case
13 on April 30th, 2004.

14 MR. COFFMAN: In the permanent case.
15 We are in the process of discovery. We have
16 received -- as far as the -- we have received
17 some financial information. We are in the
18 process of auditing that. As far as natural
19 gas, we've asked numerous questions in
20 anticipation that we will be discussing an
21 interim energy charge as a possible permanent
22 settlement issue in the case. We have not yet
23 received any answer. I don't think that they
24 are due yet. But we are -- we are planning to
25 dig into that issue and --

1 COMMISSIONER CLAYTON: Well, but --
2 MR. COFFMAN: Maybe some information
3 was due today.
4 COMMISSIONER CLAYTON: Your staff is
5 in the process of reviewing all that testimony?
6 MR. COFFMAN: Yes. Yes.
7 COMMISSIONER CLAYTON: So you're not
8 -- you wouldn't be in a position to state
9 whether or not sufficient information is in
10 that filed testimony to support a prima faschia
11 showing of -- of a need for an IEC?
12 MR. COFFMAN: Assuming that the
13 standard is an emergency or near emergency, I
14 don't think a prima faschia case was made. If
15 the Commission wants to establish --
16 COMMISSIONER CLAYTON: How about if
17 we -- obviously, if we change that standard,
18 then you have no idea whether they've made a
19 prima faschia case?
20 MR. COFFMAN: That's right.
21 COMMISSIONER CLAYTON: How much time
22 would you and your staff need to respond to
23 those pleadings if we were to schedule a -- an
24 expedited hearing on this subject?
25 MR. COFFMAN: The most important

1 factor about the time is how quickly we can
2 receive data requests. You know, you like to
3 have two rounds of data request, you know, one
4 at a minimum based on what is initially filed
5 by the company. If the normal 20 day
6 turnaround time could be shortened, perhaps the
7 -- you know, what I would consider to be an
8 adequate time for due process could be
9 shortened as well. Sometimes -- and I guess
10 even in this case, we have talked about a
11 10-day turnaround after -- at the later stages
12 of this particular case.

13 COMMISSIONER CLAYTON: Do you believe
14 it's feasible for us to consider an expedited
15 hearing date like in 30 days to -- to go over
16 this issue? I mean, is that enough time? I
17 want to make sure -- I have a concern that --
18 that you and your staff have ample time to
19 review the testimony and be prepared to respond
20 if the Commission were to make that
21 determination.

22 MR. COFFMAN: The most important
23 interval is the time for which initial
24 testimony and perhaps work papers and -- and
25 such information is done and then in subsequent

1 what discovery we might want to do after that
2 maybe, you know, 20 or 10 days after that time
3 before we would file our perhaps responsive
4 testimony. So 30 days, maybe 45 days from the
5 beginning to the hearing might be sufficient
6 given expedited discovery.

7 COMMISSIONER CLAYTON: Okay. Have
8 you all already started discovery for the
9 overall case?

10 MR. COFFMAN: Yes.

11 COMMISSIONER CLAYTON: You have.
12 Okay. And in that discovery, were you
13 anticipating responding to the actual IEC
14 proposed for full rate making treatment at the
15 end of the case?

16 MR. COFFMAN: Yes.

17 COMMISSIONER CLAYTON: Okay. So some
18 of those data requests have already gone out.

19 MR. COFFMAN: Some have gone out and
20 nothing has come back yet. I think we're in
21 the --

22 COMMISSIONER CLAYTON: Okay. Well,
23 if we were to set a timeline for response for
24 data requests associated with this issue, would
25 that be helpful for you and your staff?

1 MR. COFFMAN: Yes. Yes.

2 COMMISSIONER CLAYTON: Okay. And are

3 there -- are there any other concerns with

4 regard to due process or having sufficient

5 amount of time to fully review this issue and

6 be prepared to respond?

7 MR. COFFMAN: Not other than what I

8 have stated just the -- the ability to -- to do

9 discovery on the initial testimony filing of

10 the company.

11 COMMISSIONER CLAYTON: Okay. Now,

12 it's been stated earlier that you made contact

13 with Judge Thompson in this case?

14 MR. COFFMAN: Yes.

15 COMMISSIONER CLAYTON: And was that

16 an improper ex parte communication?

17 MR. COFFMAN: Not in my opinion.

18 COMMISSIONER CLAYTON: Why is that?

19 MR. COFFMAN: Because I believe the

20 subject matter to be entirely procedural.

21 COMMISSIONER CLAYTON: And are

22 procedure matters excluded from -- from -- from

23 the ex parte -- the ban on ex parte

24 communications with the presiding officer in a

25 case?

1 MR. COFFMAN: That's my
2 understanding.

3 COMMISSIONER CLYATON: Okay. And is
4 that in statute or is that by rule or --

5 MR. COFFMAN: I would have to get
6 back to you on that. I guess I need to examine
7 the cases. But that's --

8 COMMISSIONER CLAYTON: But you felt
9 comfortable enough calling the Judge and asking
10 him --

11 MR. COFFMAN: Yes.

12 COMMISSIONER CLAYTON: -- how the
13 case would proceed?

14 MR. COFFMAN: Yes.

15 COMMISSIONER CLAYTON: Exactly what
16 did you ask the Judge?

17 MR. COFFMAN: I believe initially I
18 asked what would be the general procedural
19 order of the presentation and was told that
20 there would be a presentation that involved two
21 witnesses taking the stand. I think I may have
22 asked then that, you know, testimony that would
23 be on the record and subject to
24 cross-examination, to which I believe Judge
25 Thompson said yes. And that made me think that

1 perhaps there was some confusion because it
2 wasn't my understanding of what this hearing
3 would be.

4 COMMISSIONER CLAYTON: There was
5 definitely some confusion. I understand. But
6 you felt comfortable calling him and asking him
7 those questions --

8 MR. COFFMAN: Yes. Yes.

9 COMMISSIONER CLAYTON: -- with your
10 understanding of how ex parte communications
11 are prohibited in this venue?

12 MR. COFFMAN: Improper ex parte
13 communications. Yes.

14 COMMISSIONER CLAYTON: And how long
15 have you been practicing before the Commission?

16 MR. COFFMAN: Ten years.

17 COMMISSIONER CLAYTON: Ten years.
18 Okay. Now, you've been in the room when
19 there's been discussion about alleged improper
20 ex parte communications with the Judge in this
21 case?

22 MR. COFFMAN: Yes. I guess potential
23 -- I guess allegations that there may
24 potentially be improper communications.

25 COMMISSIONER CLAYTON: Well, the

1 information that you received, did they sound
2 proper or improper just from the information
3 that you've received?

4 MR. COFFMAN: I am not aware exactly
5 what took place in the conversation between
6 Mr. Swearngen and Judge Thompson.

7 COMMISSIONER CLAYTON: Would you feel
8 more comfortable if those were pursued and
9 Mr. Swearngen placed under oath? Would that
10 make you feel more comfortable?

11 MR. COFFMAN: I guess the -- the
12 issue is whether or not a decision would be
13 coming out of this Commission granting an
14 interim -- if this Commission believes it has
15 enough evidence to grant an interim rate
16 relief, that is, lift the suspension of the IEC
17 after only the due process that has been
18 granted thus far, yeah, I think that might be
19 relevant. If this is not the end of the
20 process that would be given before we got to
21 the point that the Commission might want to
22 take action on the IEC, then -- then I don't
23 know that that would be important to me.

24 COMMISSIONER CLAYTON: Okay.

25 MR. COFFMAN: If that -- I don't

1 know. Why was I clear enough for you?

2 COMMISSIONER CLAYTON: Clear enough.

3 Would it make you more comfortable if the Judge

4 recused himself in this case because of that

5 potential communication?

6 MR. COFFMAN: I guess it would depend

7 on what the substance of that communication

8 was. I -- I have not yet heard that -- I have

9 not heard any testimony or allegation of

10 communication that would necessarily be

11 improper. But I'm not sure I know exactly what

12 took place.

13 COMMISSIONER CLAYTON: Okay.

14 MR. COFFMAN: And so I -- I'm not in

15 a position to say yes or no on that yet.

16 COMMISSIONER CLAYTON: Okay.

17 MR. COFFMAN: I'm not moving to

18 recuse Judge Thompson at this point.

19 COMMISSIONER CLAYTON: Okay. Well,

20 are there any other issues associated with due

21 process, making sure that this hearing -- that

22 this -- so far that this hearing has been open

23 and -- and that all opportunities have a full

24 chance to present their case? Are there any

25 other issues that we need to be aware of or --

1 or concerns that you would have in evaluating
2 this issue?

3 MR. COFFMAN: I guess -- I think if
4 testimony and cross-examination is to occur, I
5 think it would be most helpful to -- to have
6 that described in the Commission order as a
7 hearing and -- and to the largest extent
8 possible have the expected procedure laid out
9 in the order. And then because the issues that
10 we deal with before you are so complex and
11 often involve a necessity to explore the
12 details in -- you know, pretty aggressively and
13 -- and often contain kernels within layers
14 within layers that involve a lot of auditing
15 and aggressive investigation, sufficient time
16 to do that investigation is, I think, an
17 important part of the due process that we need
18 given that we have limited resources and often
19 have to take opposite positions with parties
20 that have numerous attorneys and numerous
21 witnesses and sometimes what appears to be
22 almost unlimited resources. It is concerning.

23 To the extent that the Commission wants to
24 move to live testimony, expedited hearings,
25 that feels like a -- a movement that could

1 disadvantage my office and other parties that
2 don't have those -- those resource. And I
3 would hope the Commission takes those -- that
4 into account when it sets up the procedures --
5 whatever procedures it wants to --

6 COMMISSIONER CLAYTON: Would you
7 agree with the statement that the request by
8 the company for this temporary relief is a
9 fairly extraordinary request, extraordinary in
10 the sense of legal relief in this body? I
11 mean, in this venue?

12 MR. COFFMAN: Yes. I think interim
13 rate relief is an extraordinary request. I
14 think that this particular -- the particular
15 way in which the company is going about it is
16 unusual, unique and extraordinary in and of
17 itself. But --

18 COMMISSIONER CLAYTON: This is not
19 something that we see every day?

20 MR. COFFMAN: No.

21 COMMISSIONER CLAYTON: Okay. I can
22 tell you from my perspective as one -- only one
23 member of this Commission that I never
24 anticipated that it would be a full-blown
25 hearing, that there would only be a

1 presentation to give us an idea of exactly what
2 type of relief we are talking about here, why
3 is it appropriate in this limited instance and
4 then how we should go forward from here. And
5 so I guess from my perspective, it was just
6 supposed to be a presentation and discussion.
7 And, obviously, if we're going to consider
8 this, there would have to be, in my opinion, a
9 full-blown hearing. I think I agree with you
10 on that.

11 MR. COFFMAN: Well, I certainly -- if
12 that's the full Commission's belief, that
13 certainly alleviates most of my concern about
14 the process.

15 COMMISSIONER CLAYTON: Well, the full
16 Commission. Okay. Are there any other issues
17 -- any other due process items that you feel
18 the Commission should take into consideration
19 as we consider the -- the IEC in this temporary
20 relief request?

21 MR. COFFMAN: Not that I can think
22 of.

23 COMMISSIONER CLAYTON: Okay. Thank
24 you, Mr. Coffman.

25 JUDGE THOMPSON: Thank you.

1 Commissioner Appling?

2 COMMISSIONER APPLING: No.

3 JUDGE THOMPSON: You may step down.

4 We'll take a ten-minute break for the reporter,

5 and then we'll return here for Mr. Conrad and

6 anyone else that has anything for us. Thank

7 you.

8 (Break in proceeding.)

9 JUDGE THOMPSON: Let's come to order,

10 please, and go back on the record. Mr. Conrad?

11 MR. CONRAD: Please the Commission.

12 I'm glad to know I've become now a tariff

13 category for Empire.

14 MR. STEWART: I apologize, Stu.

15 MR. CONRAD: That's all right. If

16 that's the worst mistake you've ever made,

17 that's --

18 MR. STEWART: Yeah.

19 MR. CONRAD: We'll let you off with

20 that. Mr. Coffman has -- has covered, I think,

21 well, several points that I had noted that I

22 wanted to talk to you about. So I'm going to

23 try to avoid those and not duplicate. But

24 simply to set the stage briefly, it is our view

25 that this is really nothing more than an

1 interim rate request recast in a different and
2 unique form. The concept of lifting a
3 suspension was, by my reading, rejected in the
4 very case that they cite for purported
5 authority. That's the LaClede case, 535
6 Southwest Second 561.

7 Our analysis of the materials that we had
8 certainly prior to yesterday convinces us that
9 they have not met the standard emergency test.
10 That test is three-fold. The utility needs to
11 make a showing that they need funds, that they
12 need funds immediately. And that raises the
13 question, Well, why do they need funds
14 immediately? And the answer has typically come
15 that they need them in order to continue to
16 operate as a financial entity and to continue
17 to provide safe and adequate service.

18 The second part of that test you really
19 don't get to if the first part isn't met. But
20 if you got past that one, then the question
21 would be that they would need to show that the
22 need for the financial assistance cannot be
23 postponed. For stalling, deferring it, there's
24 just no way it's the -- the ogre, if you will,
25 is upon them. Like the little sign in your

1 rear-view mirror that says, Objects in your
2 mirror are closer than they may appear. The
3 ogre behind them is closer than they're able to
4 escape by postponing.

5 And the third point, which you also don't
6 reach if you don't get past the first one, is
7 that no other alternatives exist to the interim
8 rate relief. They're not able to borrow.
9 They're not able to reduce staff. They're not
10 able basically to save themselves. They have
11 to come to you and say, We've got to have an
12 infusion of cash quickly in order to continue
13 to operate as a utility in this state. In our
14 suggestions, I synthesized that -- and they're
15 my words. They're not the Commission's or the
16 Court's. But I think that three-part test
17 basically boils down to whether it is necessary
18 to preserve the utility as a financial entity
19 and to preserve its ability to provide safe and
20 adequate service.

21 And I think those three tests are wrapped
22 up in that. At least I've attempted to do
23 that. Rather clearly, Empire does not meet
24 that test. Why is that test salutary? Well, I
25 took a stab at that. I think that's a good

1 test. It's a balancing test, at best. And
2 Commissioner Clayton, I think, has rightly
3 asked, Well, what standard would we use? You
4 balance the interests of the public in having
5 the public process, in having the full-blown
6 rate hearing and the time that would
7 potentially be involved in that against the
8 public harm from having a utility suddenly be
9 unable to render safe and adequate service to
10 that public. There's a public interest on both
11 sides. And that test is designed to
12 accommodate that.

13 Public counsel quoted from I think that --
14 that Empire good cause case -- this happens to
15 appear on page 4 of their pleading, but it --
16 it refers to a footnote that Commission had
17 dropped in -- I believe it was, in the 19 --
18 excuse me -- the 2001 case. As Empire notes in
19 its pleadings, the Commission did partially
20 develop a good cause standard for interim
21 relief. And then the cite is to that 1997
22 case. However, the note continues. In that
23 case, the Commission bases its denial of
24 Empire's request on its conclusion that, quote,
25 there is no showing by the company -- in that

1 case, Empire -- that its financial integrity
2 will be threatened or that its ability to
3 render safe and adequate service will be
4 jeopardized if this request is not granted, end
5 quote. The differences, if any, between this
6 good cause standard and the historically
7 applied emergency or near emergency standards
8 were not clearly enunciated. And the
9 Commission now returns to its historic
10 emergency or near emergency standard. And
11 that's the end of that footnote.

12 We think that test is salutary. We would
13 have concerns, your Honors, frankly, I think
14 you would, too, of -- because it would be hard
15 to handle the influx of business that the
16 Commission would have if you adopted the
17 standard that was something less than the
18 financial integrity of the utility being
19 threatened and its ability to continue to
20 provide safe and adequate service threatened.

21 Let's take just a moment, too, and talk
22 about the Midwest Gas case. Mr. Stewart was
23 correct. I had some involvement in that case.
24 And it's interesting to me that it is now cited
25 as somehow precedent to get around the UCCM

1 decision. The thrust of that case, however, if
2 you read it, is that it distinguished the UCCM
3 case from a gas PGA. I'm working with the
4 Lexus printout. And I believe this is on page
5 479, 480, of 976 Southwest Second, 4 -- excuse
6 me -- yes. 479 and 480 of 976 Southwest Second
7 470 is where that case is found. And the Court
8 there begins to discuss why the PGA is like --
9 and you don't hear him use the term, but I'll
10 mention it, the FAC.

11 The fuel adjustment clause was
12 distinguished from the TAC. The TAC's
13 adjustment clause that the Supreme Court had
14 previously upheld in the case called Hotel
15 Continental. And the Midwest Gas court simply
16 said, This is more like a PGA, it's more like a
17 TAC. And why? Well, because it's -- and they
18 say this. The unique nature of gas fuel costs,
19 including the fact that natural gas is a
20 natural resource, not a product which must be
21 produce with labor and materials. The fuel
22 costs component of the rate must be treated
23 differently. And, certainly, they can go ahead
24 and say the fuel cost component of the rate,
25 that they're talking again about natural gas,

1 you're not changing for a gas distribution
2 company. You don't change the commodity as you
3 push it through. You buy it over here. You
4 put it through the transportation system. You
5 put it through your distribution system and
6 then you sell it. And, basically, you're
7 moving molecules of methane. And you don't
8 change their form or substance. And you -- you
9 may change the pressure. In fact, you'll
10 probably step it down. But here with an
11 electric utility, even as you heard yesterday
12 over our objection, the -- the fact is that the
13 -- the cost of generation, which is what we're
14 talking about here, not just the gas cost -- I
15 hope that came through yesterday. The cost of
16 generation is the result of a mix of a number
17 of different components, not just gas costs.
18 It involves transportation. It involves coal.
19 It involves the cost of transportation of that
20 coal. It involves perhaps No. 6 or No. 2 fuel
21 oil. It involves in some cases limestone,
22 which is used as a stabilizer for flame
23 start-up in -- in boilers. It may be a number
24 of things. It involves then the heat rate of
25 the units. It involves how the units are

1 managed. It involves how they're dispatched.
2 It involves the physical characteristics of the
3 units. It involves their maintenance
4 schedules. It involves their history for
5 unplanned maintenance. It involves the
6 purchase power market, which then takes you
7 into another panel of issues, availability of
8 transportation. What's the market for
9 purchased power? What's the nearby market?
10 Are there any other sources that can be used?
11 There's a whole panel of issues.

12 This utility uses a different computer
13 model than the staff does. It may be suggested
14 that their difference in numbers is due to the
15 computer monitors. It isn't. Experience in
16 recent history with the Aquila case tells us
17 that even if they're using the same models --
18 and even in that case, as I recall, we could
19 not find out where the differences were. The
20 two teams that were working -- working the same
21 computer model, even down to the release of the
22 software, could not fully harmonize the
23 results. They weren't far apart, but they were
24 still different. And they could not themselves
25 figure out exactly why. There are so many

1 variables that have to be plugged into that
2 model.

3 But anyway, Midwest Gas, I have some
4 familiarity with it, is simply not precedent
5 for this. You're dealing with natural gas,
6 which is not changed in form or substance.
7 You're dealing here with electrical energy
8 which is generated using a multiplicity of
9 interrelated factors and comes from many
10 different sources for a particular utility.

11 I believe Mr. Coffman also mentioned this,
12 but I'll -- I'll just touch on it very briefly
13 because there's one point that I did want to --
14 to lift up. Empire District basically controls
15 their fate here. My client, Praxair, was
16 agreeable to a package back in 2001 that
17 included a mechanism to allow them to better
18 balance what they felt was the risk of
19 acquiring natural gas. But we did that by
20 addressing the entire package. We did that by
21 addressing the entire general rate costs, not
22 just the single component of natural gas. But
23 we did that also as part of a settlement of an
24 overall settlement which was satisfactory to my
25 client, was satisfactory to all the other

1 parties, staff and public counsel and -- and
2 interestingly, to the company.

3 Now, despite that, they ended that
4 arrangement. It was to go for two years. They
5 ended it early. Why? Well, they found it to
6 be an albatross because they were collecting
7 money from their customers. They could not put
8 that money to revenue. They had to hold that
9 money subject to refund. And our sense is that
10 they got tired of doing that because the rating
11 agency started saying to them, Wait a minute,
12 you're getting this money in, why didn't you --
13 why can't you book it to revenue? They said,
14 Well, we can't. And it was easier for them
15 since fuel costs at that time -- gas costs and,
16 frankly, almost everything else at that point
17 was going down, it was easier for them to just
18 call it out. But they had an opportunity to
19 renew it in the 2002 case. Chose not to.

20 Now, they filed a case and said --
21 actually, past the point that their moratorium
22 expired. Had they filed back in September, I
23 think Mr. Coffman made reference to that, and
24 said, well, okay. They -- they didn't have
25 reason to do it. Well, when did the reason --

1 when did this emergency -- when did this need
2 arise? That's something that deserves to be
3 explored. If you look at even the objected to
4 materials from yesterday, the fluctuation of
5 natural gas prices did not just start when the
6 utility filed this motion. It's been here to
7 give us a problem, and we addressed the problem
8 in 2001. So they shouldn't be surprised by it.
9 But they chose not to go forward with that
10 arrangement.

11 Now, Counsel Stewart made the point that,
12 well, it's been lawful for this utility, it's
13 been lawful for Aquila. Actually, we would
14 dispute that. We don't think it has been --
15 since I've been in both those cases, we don't
16 think it's been lawful in either case. But as
17 a result of the settlement, in those cases, the
18 parties to those cases says, we won't raise --
19 we will not raise it. As a price of our
20 agreement, we will not raise the lack of
21 substance, lack of -- of legality of this
22 arrangement. You can accomplish a lot more
23 with a settlement than you can with what the
24 Commission can work with. Mr. Stewart also, I
25 believe incorrectly -- and he didn't apologize

1 for this one, by the way -- indicated that we
2 had said in our suggestions that no, you have
3 to take the entire 11 months. Well, first of
4 all, it's not 11 months. It's 10. They have
5 to file 30 days ahead. That's why we get to
6 11. But I don't think he will be able to point
7 me to where we have said that. And there is,
8 in fact, no reason why if all the processes can
9 be performed and everyone can get to an
10 acceptable level of comfort that we have to
11 wait until the last day in order to implement
12 tariff rates. We did not do that in 2001.
13 We did not do that in the 2002 case. And we
14 did not do that in the most recent Aquila case.
15 I think all three of those, which I was
16 involved, we had an early implementation. It
17 may not have been as early as the company would
18 have liked. But you also have to understand
19 that the utilities approach this as though this
20 pot of money out here in my client's pockets is
21 already theirs. They want their money. They
22 want their money now. And, oh, by the way, it
23 seems to be forgotten that somebody has to turn
24 on the switch in order for them to earn the
25 right to collect that money. But they see that

1 as their entitlement. That's kind of what -- a
2 sad thing.

3 Counsel also made the point that this is
4 not like the PGA. I'm referring to Exhibit 3,
5 what's been marked, because it does not have a
6 formula. Well, it does not have a formula like
7 the PGA does. I'll grant him that. But when
8 Commissioner Clayton astutely asked him, Well,
9 where's this ban? Where's this ban you're
10 talking about? We won't find it here. What
11 you will find is language in fineprint down at
12 the bottom that says, This rider will be
13 subject to an annual true-up audit to determine
14 if any portion of the revenues collected exceed
15 Empire's actual and prudently incurred cost for
16 fuel and purchased power during the interim
17 period and refunds if warranted will be issued.

18 Then they go on to say, Empire shall
19 refund the excess, if any, above the greater of
20 the actual or the base plus interest. I forgot
21 what the interest will be. There's a formula
22 here. It's just off the sheet somewhere. When
23 you go through that true-up process, you go
24 through a formula. You go through a
25 calculation process. It's whether the formula

1 is stated on the tariff or whether the formula
2 is somewhere out in the air to be dealt with
3 after the fact. But I assure you, there is a
4 formula.

5 There's one other point that I would make,
6 and then I'll try to deal with -- with what
7 questions you all would like to pose. And it's
8 implicit in both questions I think that was
9 glossed over earlier. But, again, on Exhibit
10 3, this is a per KWH charge. The concern that
11 my clients have -- and I'll just mention it,
12 Praxair, you've heard that name several times,
13 almost as many as mine here. Praxair is
14 perhaps -- I haven't done a study on this
15 recently. We may be the largest -- Praxair is
16 the largest customer, largest load on Empire
17 system, roughly, six to seven megawatts. By
18 Empire -- but they are also a 90 percent plus
19 load factor customer. Now, what that means is
20 that they use a lot of energy compared to the
21 demand that they impose on the system. You can
22 define load factor in several different ways.
23 You can define it on an annual basis or monthly
24 basis or whatever. But what it essentially is
25 is a ratio of the peak use to the average use.

1 And to give you a point of index, a residential
2 customer will typically have somewhere in the
3 30, 35 percent, perhaps a little bit above,
4 perhaps a little bit below load factor.

5 Now, to be surprised, they impose a high
6 load -- high demand on the system -- this
7 utility also has a winter peak. But primarily
8 it's a summer peaking utility. And then at
9 other times of the year, their load is much
10 less. So the costs of that capacity have to be
11 spread over a fewer number of units. As an
12 interruptible customer, Praxair says, We will
13 get off the system. Call us up. We'll go
14 away. If you need the capacity to serve
15 somebody else of a higher priority, we'll get
16 -- we'll go away. And yet we will be there
17 when you have the capacity to serve us and
18 we'll buy lots of it. So they use a lot of KWH
19 energy compared to the demand that they should
20 be allocated for in the system.

21 Explorer Pipeline is not an interruptible
22 customer. But they are also -- also are a high
23 load factor customer in somewhere I believe in
24 the range of 75 to 80 percent. They are a
25 petroleum pipeline. Their pipeline swings from

1 -- at least as far as I've been able to map it,
2 eastern -- northeastern Oklahoma, some of the
3 production area down there, up through joplin,
4 moving generally toward the -- the St. Louis
5 area. And they deliver on through St. Louis
6 and on up into Chicago.

7 The only installations that are impacted
8 by this utility, I believe, are three or four
9 pumping stations that they have, and they use
10 electric motors to pump petroleum product.
11 And they pump lots of petroleum and they pump
12 at a high load factor. Point being, that a KWH
13 increase has a dramatically different impact on
14 a high load factor, high energy customer than
15 does a more studied type of rate increase that
16 takes into account how capacity costs are
17 incurred.

18 In the objected to testimony yesterday,
19 you heard discussion that forward looking
20 Empire wants to build a generation plant.
21 Well, that may be. These are energy costs, and
22 they can make that argument. But it still has
23 a decided impact on my client.

24 You asked the question, Commissioner, and
25 I believe John Coffman responded \$45 for the

1 residential customer. The same impact from
2 Praxair is in excess of 300,000.

3 COMMISSIONER CLAYTON: Annually?

4 MR. CONRAD: Yeah. For that period
5 of time we're talking about, comparable period.
6 And I think without checking and without going
7 into AHC material, I think the number is fairly
8 similar to Explorer. If there -- they're close
9 to the same size. So that's why we're
10 concerned. To anticipate a question, what
11 should you do? That allows me to segway into
12 one thing that I did want to lift up because in
13 going through this actually the night before
14 last but I went through it again last night, I
15 noticed that there was an incorrect --
16 actually, it's a typo. I'm surprised and
17 embarrassed because of the type of stuff that
18 gets through. On page 26 of our suggestions, I
19 can certainly understand why Empire might very
20 well read that we are not eager to discuss
21 justified and appropriate relief in the context
22 of the rate case. That's a typo. We are. We
23 are eager to discuss justified and appropriate
24 relief in the context of the rate case and at
25 the appropriate time. What got dropped from

1 that sentence is the word but. We did not want
2 to be hustled or boot-strapped into such a
3 process ahead of the audit that a request or
4 approximation of Empire's current financial
5 status. And then I went on to say, And I will
6 conclude with this statement. If you have a
7 financial exigency, if they're at the doors of
8 the -- of the courthouse and saying, We've
9 exhausted all other opportunities, we have no
10 other way to -- to defer this, we need to have
11 relief and have it right now to continue to be
12 a viable financial entity and to continue to
13 provide safe and adequate service to the
14 customers, let them come forward and claim
15 that. There is an appropriate vehicle to do
16 that. And that's -- that's an interim case.
17 If they can show that, then they're entitled to
18 it. Thank you.

19 JUDGE THOMPSON: Thank you,
20 Mr. Conrad. Questions from the bench?
21 Commissioner Clayton?

22 COMMISSIONER CLAYTON: Thank you,
23 Judge. Mr. Conrad, you started off your
24 presentation regarding the standard under
25 lifting the suspension as being the Laclede

1 case.

2 MR. CONRAD: Yes, sir.

3 COMMISSIONER CLAYTON: And you set
4 out the elements associated the emergency test.
5 Do you recall that?

6 MR. CONRAD: Yes, sir.

7 COMMISSIONER CLAYTON: Does this
8 Commission have the ability to change that
9 test?

10 MR. CONRAD: Actually, that is --
11 that is the Commission's set test. Yes. I'll
12 give you a quick answer to that. You all set
13 it. You all can change it. You all had
14 indicated in that one case a -- a desire to
15 change -- whether you changed the test or not
16 is not clear, but you used the good cause. But
17 then looking at that in the second -- in the
18 following case, you said, Returned to the
19 historic emergency standard.

20 COMMISSIONER CLAYTON: Okay. So we
21 do have the ability to set a new standard -- if
22 the Commission decides this is something it
23 wants to pursue, we could change the standard?

24 MR. CONRAD: Sure.

25 COMMISSIONER CLAYTON: We could.

1 Okay.

2 MR. CONRAD: I agree. I would go on
3 to say, Judge, that you probably need to think
4 a little bit about beyond this case and the
5 impact that it would have on both the
6 Commission's case load and the staff and, for
7 that matter, attorneys.

8 COMMISSIONER CLAYTON: Would you
9 agree that it would probably be improper for
10 this Commission to simply review cases on a
11 case by case basis without establishing some
12 standard?

13 MR. CONRAD: I think you -- you
14 almost need to have a standard. You need to
15 have -- and I think the case used the term
16 anunciated. I used the term enunciated as far
17 as filing with an E. I think you need to have
18 a standard. I think you need to announce that
19 standard. I think you need to articulate it.
20 And then you probably need to follow it. You
21 asked, I think, a very pertinent question a few
22 moments ago to one of the predecessors here at
23 the stand. Is the Commission bound by
24 precedent.

25 COMMISSIONER CLAYTON: Bound by

1 Commission precedent.

2 MR. CONRAD: You're going to get a
3 different answer from me. I think you actually
4 are. Let me -- let me explain the context in
5 which I think that is -- that is often
6 misunderstood. You are clearly not bound by
7 precedent, Commissioner Clayton, in the sense
8 that because this utility came in a year ago
9 and got a rate relief award that you are by
10 virtue of that precedent precluded from ever
11 giving them another rate relief award.
12 Obviously. The facts change. And when facts
13 change, you know, you go off all the facts.

14 But at the same time, if you -- and I'm
15 using the term, but I don't mean any derogatory
16 aspect of it.

17 COMMISSIONER CLAYTON: Sure, you
18 don't.

19 MR. CONRAD: If you flip back and
20 forth from one standard to the next between
21 this case and that case, then what you have is
22 a government of laws -- or government of man,
23 not of law, or women, and you run the risk of
24 being arbitrary and capricious.

25 COMMISSIONER CLAYTON: I've been

1 accused of being a flip-flopper before. Not in
2 this context.

3 MR. CONRAD: So I think in that sense
4 -- and in that sense I would answer that, yeah,
5 I think there is some impact and some
6 significance to prior Commission decisions.
7 Parties -- all of us, utilities, everyone who
8 appears before you, need to have some guidance
9 as to where we're going.

10 COMMISSIONER CLAYTON: The figure --
11 the \$300,000 figure that was for the nine-month
12 period that I believe Mr. Coffman used stating
13 the \$45 residential rate period of time?

14 MR. CONRAD: Yes. I believe that's
15 -- yes. I believe that is correct. I haven't
16 -- I will check that, but I think that is
17 roughly comparable.

18 COMMISSIONER CLAYTON: I ran -- I
19 just divided it by nine months, it would be
20 roughly \$33,000 a month. Does that sound
21 like --

22 MR. CONRAD: That could be close.

23 COMMISSIONER CLAYTON: -- what the
24 financial increase would be to your client?

25 MR. CONRAD: That could be close.

1 COMMISSIONER CLAYTON: You said that
2 your client, Praxair, I think you said six to
3 700 megawatts. Was that what -- what did you
4 say that is?

5 MR. CONRAD: No. Six to seven. They
6 used the term seven. I'm not sure exactly what
7 the meters would read. But let's -- let's say
8 seven megawatts. That's 7,000 kilowatts.

9 COMMISSIONER CLAYTON: Right.

10 MR. CONRAD: But not 700.

11 COMMISSIONER CLAYTON: That's what I
12 was -- that's a lot of power in there.

13 MR. CONRAD: I'm sorry -- yeah. That
14 would be.

15 COMMISSIONER CLAYTON: Go tell an
16 entire city to shut down to take care of that.

17 MR. CONRAD: Armco only had a
18 connected load of 52 megawatts.

19 COMMISSIONER CLAYTON: Have you had
20 an opportunity to review the testimony on this
21 issue filed by the company?

22 MR. CONRAD: We have been in the
23 process of doing that, sir. I have not
24 reviewed all of it. I have reviewed some of
25 it.

1 COMMISSIONER CLAYTON: How much time
2 would you need to review the testimony that's
3 been filed on this issue and to also have your
4 own testimony filed in response to afford you a
5 full opportunity for hearing on the matter?

6 MR. CONRAD: Yeah. A couple of
7 answers to that question. One, we, I'm
8 presuming, would want to some in some manner,
9 way, shape or form deal with the material that
10 came in albeit under objection yesterday.
11 We have not seen work papers or anything that
12 -- that comes out of that. And I can
13 anticipate that even when those work papers are
14 supplied that there would need to be some data
15 requests for clarification.

16 COMMISSIONER CLAYTON: Have you
17 submitted data requests to the company?

18 MR. CONRAD: The process has started,
19 yes. In fact, it started probably two or three
20 weeks ago.

21 COMMISSIONER CLAYTON: Do those data
22 requests relate to this IEC? Have you made it
23 to that section of your case preparation yet?

24 MR. CONRAD: Commissioner, I'm not
25 entirely sure because I have not been tracking

1 them, but I think probably some do, some of the
2 ones that we have asked do. But we've also
3 been following what other parties have been
4 doing and asking for copies of those materials,
5 too, that come in. So it's a little -- little
6 difficult to answer your question precisely.
7 But I'm -- I'm attempting to.

8 COMMISSIONER CLAYTON: Well, let's
9 ask the question, how much time do you think it
10 would take, I guess the first step would be for
11 you to prepare your data requests and then the
12 next step would be how much time the company
13 would be given to respond. And then I guess
14 the next step would be preparation of your
15 testimony. I don't want to tell you -- I don't
16 know how you prepare a case like this. So I'm
17 making a -- an assumption here.

18 MR. CONRAD: Well, typically, when we
19 have had an interim request, they've been --
20 it's been presented as a separate package that
21 was collateral to -- and I think -- well, I
22 can't remember the term now that the courts
23 have used. Incidental to I think is not the
24 right term, but it's somewhere in -- the same
25 kind of a concept. Inter-related with a

1 permanent case. And so when you -- when you
2 addressed -- and we got those pretty much,
3 Commissioner, at the same time.

4 COMMISSIONER CLAYTON: The two cases?

5 MR. CONRAD: Yes. And so one was
6 going on one track and the -- and the other was
7 going on the other where you had, as I was
8 talking about, this emergency standard where
9 you were focusing on what it is that's making
10 up this emergency, this -- this emergency that
11 you're claiming.

12 COMMISSIONER CLAYTON: Somebody made
13 reference to that. I'm not sure if it was
14 Mr. Coffman or Mr. Stewart. But there was talk
15 that the two cases were then consolidated. And
16 I'm not sure that makes a difference whether or
17 not you've got two separate cases that are
18 filed or one.

19 MR. CONRAD: That has often been the
20 response of the Commission was to put those
21 together, although I think the docket numbers
22 have been preserved. But they've put them on a
23 consolidated hearing schedule with maybe some
24 accommodation for if there was a showing of --
25 need for emergency relief. That's -- that's

1 what I recall. But my point is that we got
2 both things, Judge, at the same -- at the same
3 time within a matter of -- of a day or two.

4 You know, they -- and they frequently
5 would -- would get assigned by the folks
6 downstairs or wherever they were, sequential
7 numbers, just bam, bam, you know. And so you
8 knew right off the bat where to focus discovery
9 on one area or another, permanent issues or --
10 or interim emergency issues.

11 COMMISSIONER CLAYTON: Okay. Well,
12 if we -- if we just make the assumption --

13 MR. CONRAD: Sure.

14 COMMISSIONER CLAYTON: -- that we had
15 to take this up first, regardless of whether it
16 was actually filed as a separate case, are you
17 -- are you able to give me a -- a time period
18 that would allow you sufficient time to prepare
19 to file your own responses and testimony and
20 establish what your position would be?

21 MR. CONRAD: I was discomforted when
22 public counselor indicated that he could do it
23 tomorrow. I would hope that would not be --

24 COMMISSIONER CLAYTON: Did he say
25 that?

1 MR. CONRAD: -- not be on that day.

2 COMMISSIONER CLAYTON: Did you say

3 tomorrow?

4 MR. COFFMAN: I don't think I said

5 tomorrow. 45 days.

6 MR. CONRAD: Well, good. It would

7 take us a little longer than that.

8 COMMISSIONER CLAYTON: I remember 30

9 days, 45 days was kind of --

10 MR. CONRAD: Right. And I think the

11 45 days was something we could work with,

12 Judge. That assumes that we had some

13 acceleration. And, quite honestly, I cannot

14 remember. We built into the procedure schedule

15 that we had placed before your Honors

16 originally and I believe was approved an

17 acceleration of the turnaround, the 20-day

18 turnaround for data requests. But I cannot

19 remember as I stand here when that kicked in.

20 I think perhaps some modification of that, some

21 understanding at least to respond more quickly

22 might help because that's the same problem that

23 we had that Mr. Coffman mentioned.

24 COMMISSIONER CLAYTON: Okay. And I

25 don't want to ask anything that is privileged,

1 so I'm sure that you'll not be shy of telling
2 me that.

3 MR. CONRAD: I'll just refuse to
4 testify.

5 COMMISSIONER CLAYTON: I assume that
6 -- I assume that -- that you would -- you're
7 going to want the ability to file responsive
8 testimony to the testimony that's already been
9 filed?

10 MR. CONRAD: Sure. On -- on --

11 COMMISSIONER CLAYTON: On this issues
12 that we're talking about.

13 MR. CONRAD: That's part of the
14 problem. We've got a schedule that sets us up
15 for when we would file, Commissioner,
16 responsive testimony, but in the context of the
17 permanent case. Now, if we're going to have a
18 new set of issues -- and I -- and I know the --
19 the financial information would be the same,
20 but if -- again, if we're going to stay on this
21 emergency thing and we're going to make some
22 allegations of that, then that's kind of a new
23 thing. So it -- are we going to set up a new
24 schedule on that or would we stay on the -- I
25 mean, would one be exclusive of the other?

1 Would we have two filings showing --

2 COMMISSIONER CLAYTON: I think the

3 procedure schedule would obviously have to be

4 changed. I mean, if the Commission decides

5 that it wants to move forward and is fully

6 going to contemplate the request made by the

7 company in this instance, I think to afford

8 them due process we need to have a full-blown

9 hearing if the Commission so decides that. I

10 -- I don't know about the joint -- I know you

11 all file a joint procedural schedule. I don't

12 know -- I don't know what has been submitted.

13 I know that there's one out there. But I

14 assume that we would have to -- either a

15 supplemental procedure schedule would have to

16 be prepared or there would have to be an

17 amendment to the schedule that's been

18 established, don't you think?

19 MR. CONRAD: The reason for my

20 credullessness is whether we would be talking

21 about moving that permanent -- the responses to

22 the permanent up or whether we'd have some --

23 as you're saying, some collateral schedule with

24 it. And please understand as you think about

25 that, that as you all have just been through

1 with MGE, the utility gets a chance to come in
2 and ask for their costs to be included in
3 rates. Staff has paid for it. Public counsel
4 has paid for it. I'm sympathetic to those
5 concerns. But have some sympathy for us
6 because our folks have put budgets before my
7 client that presumed the case as it was when
8 they put those budgets there. So this has --
9 if you're -- if you're talking about a round or
10 possibly two rounds --

11 COMMISSIONER CLAYTON: Are you
12 suggesting that we should -- we should deny an
13 IEC because it's going to cost attorneys fees?

14 MR. CONRAD: I'm not saying that at
15 all. I'm suggesting that you -- I was saying
16 that you --

17 COMMISSIONER CLAYTON: How do we take
18 that into consideration?

19 MR. CONRAD: Just float it around out
20 there. The fact that you and I have had this
21 discussion is probably enough.

22 COMMISSIONER CLAYTON: Not during
23 this case. Dear Lord. Not during this case.

24 MR. CONRAD: No. I mean right now,
25 right here on the record.

1 COMMISSIONER CLAYTON: Okay. All
2 right. In terms of affording your clients due
3 process in evaluating an IEC, are there any
4 other procedural steps or concerns that you
5 would have with regard to setting a schedule
6 for filing testimony and procedural schedule,
7 that type of thing? Are there any other
8 concerns that you would have regarding having a
9 full opportunity to -- to go over these issues?

10 MR. CONRAD: Uh-huh. Let me answer
11 that on the back end. I think -- I think no if
12 those things -- I think the answer to your
13 question is no because I see due process as
14 being basically notice and an opportunity,
15 reasonable opportunity, to put together a
16 response and to have your positions heard and
17 to make it a presentation to them. You know, I
18 don't know that we would -- I don't think, for
19 instance, due process requires that I have
20 technologically astute people run power point
21 or something like that.

22 COMMISSIONER CLAYTON: I understand.
23 As I mentioned to Mr. Coffman, as one member of
24 this Commission, I don't see that we would have
25 the legal ability to authorize this IEC just

1 after this on-the-record presentation, and I
2 saw it as just a discussion in this instance.
3 So I say to you what I said to him, that I
4 never saw this as -- as a full-blown hearing.
5 Now, having said that, and some of the
6 allegations that have been made, would it make
7 you and your client more comfortable if we
8 asked the Judge to recuse in this case?

9 MR. CONRAD: I thought about that
10 while you were asking Mr. Coffman. And we -- I
11 can tell you, we harbor no animus. I have high
12 regard for -- for the Judge here. I -- I think
13 things happen sometimes. And, obviously, he
14 doesn't control the calls that come into his
15 telephone. There's two aspects of this. I
16 quite agree with Mr. Coffman, and I would agree
17 with you. And I think the answer to the
18 question you asked him is by Commission rule --
19 there's a discussion of Commission rules about
20 ex parte communications, what constitutes them.
21 Maybe even some examples there.

22 There's also the ethical considerations
23 that we all work under as attorneys. Part of
24 the problem here, I think, is one that really
25 reflects on notice. We were completely

1 blind-sided yesterday morning. Like as you
2 have indicated, I looked at this order and
3 said, present legal and factual arguments.
4 Well, argument is what I'm doing. Factual
5 argument, legal argument is what my
6 predecessors have done. You know, I came
7 prepared for that, not to do cross, not to do
8 testimony. If I was able to make a few points
9 yesterday, then so be it. But that was
10 entirely -- entirely out of the -- out of the
11 hip pocket, so to speak.

12 COMMISSIONER CLAYTON: I appreciate
13 that.

14 MR. CONRAD: And that's what we're --
15 that's my concern.

16 COMMISSIONER CLAYTON: I understand.
17 But did you answer the question? Would it make
18 you feel better if he recused himself?

19 MR. CONRAD: Since I don't know -- I
20 really would like to know the facts of what
21 happened.

22 COMMISSIONER CLAYTON: Do you
23 anticipate calling Mr. Coffman as a witness
24 since he made a phone call as well?

25 MR. CONRAD: No. Because he's

1 already disclosed what he knew. The question
2 is when the Judge became aware of it, how he
3 became aware of it and what action he took
4 after he became aware of it. And now, to that
5 point, I -- I really would honestly like --
6 because it's -- it deals with a very serious
7 matter, and I -- again -- and am comfortable
8 about these things as I know the bench is, I
9 know you are. But I have a responsibility.
10 And --

11 COMMISSIONER CLAYTON: I appreciate
12 that. And, frankly, I'm beginning to think
13 that -- that you should have the -- much to the
14 chagrin of other people in this room, I'm
15 beginning to think that you should have the
16 opportunity on the limited basis of exploring
17 this. I just wonder if the Judge recuses
18 whether that would remove the -- remove the --
19 the need to do that. And also with the
20 understanding that -- that the Commission -- I
21 don't believe the Commission -- I can't speak
22 for everybody, but I -- I don't think anyone on
23 the Commission anticipated lifting this
24 suspension without affording full opportunity
25 for staff and -- and -- I never saw that

1 coming. And that may remove the need for it or
2 it may rest your concerns. I don't know if it
3 would. But I want to make sure that you have
4 full opportunity, that you have full ability,
5 due process to fully question everybody to make
6 sure that this is a fair proceeding. Because
7 any time there is a -- there is a challenge to
8 the openness and -- and the fairness of this
9 proceeding, I take it very seriously.

10 MR. CONRAD: And I appreciate that.

11 COMMISSIONER CLAYTON: So I want to
12 make sure whatever you need to assure that,
13 please, what can we do?

14 MR. CONRAD: Well, what perhaps
15 that's something that you should -- you should
16 consider. I had not even -- even now had not
17 contemplated making such a motion.

18 COMMISSIONER CLAYTON: Do you
19 believe --

20 MR. CONRAD: Judge Thompson might be
21 the happiest person in the room if I were to
22 say that. But I -- I do have a -- a high level
23 of respect for him, and I have respect for his
24 integrity. And what I need to do is I need to
25 think about -- I need to look at the

1 transcript, I think, first of all, to see what
2 was -- what was said. Because as we both know
3 from our experience as lawyers, sometimes the
4 printed -- what gets down on the printed side
5 is not always the same as what we think was
6 said. I'd like to look at that. I'd like to
7 reflect on that. Your point, though,
8 Commissioner, about the -- the announcement
9 that Judge Thompson made when we came back from
10 noon that -- that there had been confusion, the
11 acknowledgment from the bench that there was
12 confusion, ambiguity maybe. I'm not trying to
13 stick harpoons here. But just that there was
14 some confusion about what we were doing.

15 COMMISSIONER CLAYTON: Well, please
16 contemplate that.

17 MR. CONRAD: It does comfort -- it
18 does give me some comfort because that was
19 exactly the concern that I had going into that.
20 The remaining concern that I have about what we
21 did yesterday is what -- what is the residual
22 effect of that. And the -- the company has --
23 has, bluntly, had an opportunity to put on a
24 fine, polished presentation before four members
25 of the Public Service Commission and the

1 administrative law judge, for which I was
2 really not prepared by notice or -- or
3 witnesses to respond at that time, other than
4 as I was able to do over objection.
5 If there is residual effect, it is residual
6 effect on all four of you, plus the Judge. So
7 that enters into the consideration. Do you see
8 what I'm --

9 COMMISSIONER CLAYTON: Certainly.

10 MR. CONRAD: That's what my concern
11 is.

12 COMMISSIONER CLAYTON: Certainly.

13 And I'll --

14 MR. CONRAD: I don't know how to fix
15 that.

16 COMMISSIONER CLAYTON: I would
17 encourage you to think about it. And please
18 file something or -- and I would say
19 communicate with the judge, but I don't think
20 that would be such a good idea to suggest that.

21 MR. CONRAD: No. I do think
22 procedural communications are quite in order
23 and occasionally very necessary.

24 COMMISSIONER CLAYTON: You know,
25 the --

1 MR. CONRAD: The problem goes where
2 you go beyond that.

3 COMMISSIONER CLAYTON: The guidelines
4 for -- the rules on ex parte communications
5 which are specific to the Commission and -- and
6 keep us from having any contact with the
7 outside, which certainly is a good thing, but
8 we all know that there are certain courthouses
9 that things operate very differently. You
10 don't believe that the contact that Mr. Coffman
11 made was an improper ex parte communication?

12 MR. CONRAD: No, no. No, I do not.

13 COMMISSIONER CLAYTON: Procedural
14 matters such as that shouldn't require a piece
15 of paper for an order directing filing and all
16 that other business. Would you agree with
17 that?

18 MR. CONRAD: Yeah. I agree.

19 COMMISSIONER CLAYTON: Okay. Okay.
20 I don't believe I have any other questions.
21 I'll leave it up to Commissioner Appling.

22 JUDGE THOMPSON: Thank you,
23 Commissioner. Commissioner Appling?

24 COMMISSIONER APPLING: Looking at
25 everybody's eyes and looking at the clock, I

1 think my question is probably -- probably
2 limited. I'd just like to say to you,
3 Mr. Conrad, and the rest of the individuals in
4 this room here that thank you for your
5 challenges because this is a learning process
6 for me. Hopefully, one day I will be able to
7 challenge you on what you are saying. And
8 that's coming up pretty soon, but in a very
9 positive way. I appreciate your concerns. I
10 appreciate my colleague R. C. who asked the
11 right questions, who seems to be on the right
12 track. This is the only way we can do this.
13 It's a difficult job for the five people that
14 sit up here. If it was easy, I probably
15 wouldn't want to be here. But the point is I
16 appreciate this subject and the way you all
17 addressed it here in the last couple of days.
18 Thank you.

19 MR. CONRAD: Thank you, sir.

20 JUDGE THOMPSON: Mr. Conrad, I have
21 some questions for you from Commissioner
22 Murray, and I have one from Commissioner Davis.

23 MR. CONRAD: Okay.

24 JUDGE THOMPSON: Commissioner Murray
25 would like to know how is it that the IEC would

1 be retroactive?

2 MR. CONRAD: You would base the

3 refund on what the usage was, and the use --

4 cost of that usage would vary based on what

5 some external factor would be. So contrary to

6 what was said here, people would not know how

7 much they were paying. And the adjustment

8 would of necessity be retroactive.

9 JUDGE THOMPSON: And you believe

10 impermissably retroactive?

11 MR. CONRAD: I think that's a factor

12 in it, yes. It's not the only thing that's

13 wrong with it.

14 JUDGE THOMPSON: And is it your

15 opinion that the previous IEC for Empire was

16 retroactive?

17 MR. CONRAD: As I think I indicated

18 earlier, my position is that both that and the

19 Aquila IEC that we have would be without the

20 agreement of the parties not to challenge them

21 would be subject to challenge and would be

22 properly overturned by the courts.

23 JUDGE THOMPSON: Okay. So in other

24 words, you essentially waived illegality for --

25 MR. CONRAD: Yeah.

1 JUDGE THOMPSON: -- in order to reach
2 a decision, an agreement.

3 MR. CONRAD: Like, Officer, I'll stop
4 twice at the next stop sign.

5 JUDGE THOMPSON: Does it ever work?
6 Finally, Commissioner Davis's question, what
7 contacts, if any, did you have with John
8 Coffman prior to the hearing regarding John's
9 ex parte communications with Judge Thompson?

10 MR. CONRAD: None.

11 JUDGE THOMPSON: Very well. And my
12 own question, I simply wanted to -- to make
13 sure I understand is I -- your concern with the
14 discussion with Mr. Swearengen primarily goes
15 to the issue of lack of notice to you?

16 MR. CONRAD: Well, again, not knowing
17 what was said or the context, I'm going to make
18 a couple of assumptions here. And as you know,
19 the -- the word assume can be broken down into
20 some other components. If he called you with
21 respect to the -- what I think is a substantive
22 issue, and that is what my presentation is
23 going to be, who is going to make it, what it's
24 going to consist of, that, to me, is perhaps
25 over the line. Now, having -- since you didn't

1 perhaps know or you probably didn't call him,
2 I'm going to assume that, I think -- let me
3 answer your question this way. Had I been in
4 your shoes, maybe that's not a fair way to do
5 it, but I think I would have done somewhat like
6 the Commission typically does when it receives
7 a letter from a legislator or from a -- a
8 public party or somebody or whatever and -- and
9 at a minimum, I think I would have notified the
10 other parties by fax or a phone call or e-mail
11 or whatever. That way, we would have had at
12 least -- maybe it wouldn't have been very
13 adequate, but I at least wouldn't have walked
14 in here Monday morning expecting apples and be
15 faced with oranges. That's -- that's candid,
16 but that's, I guess, where I would be on it.

17 JUDGE THOMPSON: Fair enough. Thank
18 you, Mr. Conrad. Mr. Frey?

19 MR. FREY: Yes. Thank you, your
20 Honor. May it please the Commission. Perhaps
21 to just anticipate a couple of questions that
22 Commissioner Clayton has apparently been asking
23 the various attorneys, I'd just mention that if
24 the staff is ordered to file testimony for an
25 interim proceeding, the staff would want

1 expedited responses to its DRs. Empire has not
2 shown a -- made out a case here for an
3 emergency situation. So we need to -- we would
4 like to receive those DRs --

5 COMMISSIONER CLAYTON: Mr. Frey, can
6 I ask a question before you leave the subject?
7 Is that all right, Judge? Because I know the
8 hour is late, and I appreciate what you have to
9 say. But do they have to show that emergency
10 exists considering that we can change the
11 standard?

12 MR. FREY: No. But that may affect
13 the timing of --

14 COMMISSIONER CLAYTON: Okay.

15 MR. FREY: -- of the entire
16 proceeding with respect to this interim
17 request. Staff needs to talk about how soon we
18 could file testimony. We would need some time
19 to huddle -- huddle over that. And it's
20 possible that such a filing could hinder our
21 efforts, which are ongoing in preparing
22 testimony to the permanent rate case. We would
23 point out, however, that the staff intends to
24 file direct testimony on the IEC on September
25 20th in this case. And that is almost 45 days

1 from now, which is kind of of the outside
2 number that Mr. Coffman mentioned so that maybe
3 the Commission would -- would want to keep that
4 in mind in the event that it decides to pursue
5 this matter further with -- with a full
6 hearing.

7 Okay. I will try not to hit on some of
8 the other -- some of the points that have been
9 touched on prior from other counsel certainly,
10 in the interest of time, but I will go through
11 the points that I intended to make. Empire
12 filed this rate case on October -- excuse me --
13 April 30th, 2004 including an interim energy
14 charge. A mere 20 days later, the company
15 filed a motion to lift the suspension and -- of
16 the IEC tariff. And nothing such as testimony
17 presented yesterday in support -- accompanied
18 Empire's motion on May 20th.

19 On the date directed by the Commission,
20 the State filed its response to the motion.
21 And although we noted in our response what we
22 considered to be some inadequacies with regard
23 to Empire's filing as well as its request, the
24 staff recommended that the Commission schedule
25 a technical conference as proposed by Empire.

1 As you know, the Office of the Public Counsel
2 and the intervenors, Praxair and Explorer
3 Pipeline Company, filed their responses then on
4 June 1st opposing Empire's request. Empire
5 responded to these filings -- to these filings
6 by renewing its request for technical
7 conference and also to schedule an oral
8 presentation, which, of course, was begun here
9 yesterday.

10 Initially, staff was agreeable to a
11 technical conference to see if the parties
12 other than Empire were amenable toward working
13 toward a positive resolution of Empire's
14 requests. In general, the staff is willing --
15 is always willing to see if an agreement is
16 possible. And we felt that -- that it was
17 likely the only possible way to resolve this
18 matter prior to a Commission order regarding
19 the general rate case is for the parties to
20 reach an agreement.

21 If the Commission should order an IEC as a
22 result of a contested case, the intervenors in
23 this case may seek a stay of the Commission's
24 decision or they may -- the intervenors and
25 public counsel may seek a Writ of Prohibition.

1 The staff thought that a technical conference
2 early on might be beneficial in -- in this
3 environment.

4 On June 1st upon the filing of the
5 responses by public counsel and the industrial
6 intervenors, subsequent to the staff's filing
7 of its response, obviously, it became clear
8 that the other parties had no interest in
9 participating in a technical conference. In
10 light of this and given the passage of a
11 considerable amount of time since Empire's
12 initial request, and Empire not having shown
13 anything in addition in support to its -- in
14 support of its initial request, the staff is
15 now in agreement with public counsel and the
16 intervenors that the motion should -- to lift
17 the suspension should not be granted.

18 There appears to be no dispute after two
19 days dealing with this matter that this is in
20 essence -- what we have is, in essence, a
21 request for interim rate relief. Even though
22 no interim case has been filed, which is the
23 normal procedure, that is their -- there has
24 been no tariff filing and no supporting
25 testimony has been filed. In a long line of

1 cases, this has been mentioned. The Commission
2 has set out this emergency standard, basically,
3 requiring that a utility requesting this type
4 of relief interim relief show an emergency or a
5 near emergency situation. And that is
6 essentially that its ability to render safe and
7 adequate services has been impaired or that
8 it's unable to main -- somehow to maintain its
9 financial integrity. And it has been -- as has
10 been pointed out, the company -- excuse me --
11 the Commission reiterated, and if it ever
12 deviated, it returned to this requirement in
13 the last two requests for interim rate relief
14 by Empire in the 2001 case and 2002 case, both
15 of which were denied.

16 Empire has not offered evidence that it
17 meets any of these requirements. Indeed, it
18 does not assert that it faces an emergency
19 situation. The most recent financial results
20 of the company which were released last
21 Thursday showed that they have quarterly
22 earnings of -- in the most recent quarter
23 ending June 30th of eight-tenths of a share.
24 And moreover, the company's position is
25 sufficient to allow -- to continue to pay,

1 excuse me, its cash position is sufficient to
2 allow it to pay its regularly quarterly
3 dividend of 32 cents a share.

4 In addition, we -- we've heard evidence on
5 Empire's current hedging program, which
6 provides it with considerable protection
7 against gas price volatility during the time
8 period from which Empire -- for which Empire
9 requests an interim IEC.

10 Yesterday, Empire presented evidence
11 showing that -- that it has locked in
12 approximately two-thirds of its natural gas
13 requirements for the remainder of this year and
14 -- at a price of \$3.27 and 40 percent of its
15 2000 requirements at a price of \$4.15. Empire
16 filed its rate case on April 30th. So any
17 increase in permanent rates ordered by this
18 Commission will presumably go into effect
19 sometime around the end of the first quarter of
20 next year.

21 Empire does not appear to have attached
22 any urgency, really, to this request. They
23 requested a June 15th effective date, which was
24 less than four weeks after they filed the
25 motion on May 20th. They did not see fit to

1 file a request for expedited treatment. And
2 has -- as has been noted under the prior -- on
3 the unanimous stipulation and agreement, the
4 company could have filed as early as September
5 1st of last year, a full eight months earlier
6 in order to address its concerns about gas
7 price volatility. However, the company chose
8 not to do so.

9 And as other counsel have mentioned here,
10 the decision not to do -- to file a rate case
11 earlier was entirely Empire's. The staff would
12 point out that had they filed back in September
13 of last year, they would have been in a
14 position now to at least be reasonably close to
15 recovering -- to beginning to recover in rates
16 the \$55 million investment, and for those
17 energy center units -- the 2 units, gas fired
18 units which were placed in service back in the
19 spring of 2003. A September filing would have
20 also placed the company in a position to
21 address the possibility of higher gas and
22 purchased power prices within the context of
23 the general rate case when all relevant factors
24 could be addressed.

25 Empire's urging, as has been mentioned of

1 the Commission to apply something other than
2 the traditional emergency or near emergency
3 standard, in its motion, it claimed that the
4 natural gas prices arising in, quote,
5 sufficient -- or significant financial harm may
6 come to Empire if the request isn't granted.
7 Yesterday, we heard testimony that in order to
8 help assure availability of future financing at
9 a reasonable cost, Empire needs to, quote, send
10 a message to the financial community that it's
11 able to recover its fuel costs in a timely
12 fashion. In the staff's view, Empire has not
13 shown that such a rationale provides sufficient
14 justification for the Commission to, in this
15 case, not apply its traditional standard and to
16 instead adopt a lower standard for granting
17 interim rate relief in this proceeding.

18 The Commission should continue to adhere
19 to its emergency standard for a simple reason.
20 And that is in order to adhere to the short
21 timelines that typically attend such requests,
22 the staff and other parties are unable to
23 conduct anything like the full-blown analysis
24 that they do in connection with a general rate
25 case. And as a result, the Commission has to

1 decide whether or not to order or impose --
2 impose on -- on consumers or customers an
3 increase in rates without the benefit of
4 thorough analysis by the parties.

5 Under certain -- under such circumstances,
6 the staff believes that it's simply sound
7 policy to continue to set the bar high by
8 requiring a showing of an emergency situation
9 before interim rate relief is granted.

10 COURT REPORTER: Excuse me, your
11 Honor. I need to change paper real quick.

12 JUDGE THOMPSON: Very well. Why
13 don't we go ahead and take a few moments now so
14 you can change your paper?

15 (Break in proceedings.)

16 JUDGE THOMPSON: Please resume.

17 MR. FREY: Thank you. Even if the
18 Commission were inclined to apply a lower
19 standard than the emergency or near emergency
20 standard and to grant the requested interim
21 relief based on natural gas and purchased power
22 costs alone, as a practical matter, may prove
23 impossible to develop an interim IEC. Here we
24 are today more than two months after Empire
25 filed its motion and six weeks after the

1 company -- company's requested effective date
2 with Empire not at any time in this proceeding
3 having filed for expedited treatment. And this
4 is not the only pending case requiring staff
5 resources. The staff is currently conducting
6 its comprehensive audit in accordance with the
7 procedural schedule adopted in this case which
8 calls for a filing on September 20th of this
9 year. Empire agreed to this procedural
10 schedule having jointly filed it with the other
11 parties, post procedural schedule on June 10th.
12 And it's the only procedural schedule governing
13 this proceeding. That may not be the case,
14 obviously, a few days down the road, depending
15 on the Commission's decisions.

16 Contrary to Empire's suggestion, it is not
17 a simple matter to determine how much fuel and
18 purchased power expense is built into current
19 rates since these results -- rates resulted
20 from a global settlement of the previous rate
21 case. Had an IEC been part of that case, then,
22 presumably, we would know what those rates --
23 how much fuel and purchased power had been
24 built in. But the IEC was not a part of the
25 previous settlement. Under the circumstances,

1 it seems quite certain that an agreement among
2 the parties concerning that base amount would
3 take considerable time and a lot of effort to
4 reach. And in the end, it may not even be
5 achievable. Empire's request also raises a
6 little concern, which the staff believes is not
7 implicated in the case of its previously
8 authorized IEC. Or the one more recently
9 approved by Aquila. Both of those IEC's were
10 the product of weeks of extensive negotiations
11 among the parties and both received the
12 Commission's approval in the context of
13 agreements that were to go into effect at the
14 conclusion of permanent rate case proceedings.
15 In other words, all relevant factors were
16 considered.

17 But by contrast, in this case, Empire
18 seeks an interim increase in rates on the basis
19 of its assertions regarding only the cost
20 element of -- of fuel and purchase power and in
21 particular on the basis of natural gas cost
22 increases. No attempt is made to address --
23 address other factors, other aspects of cost,
24 other items or elements of cost which may
25 demonstrate offsetting of facts. Thus in

1 granting the company's request, the Commission
2 would fail to consider all relevant factors and
3 would be engaging in single issue rate making.

4 For the record, the staff would like to
5 clear up what it believes might have been a
6 mischaracterization of its position by
7 Mr. Swearingen when he made his opening
8 comments. The staff's May 26th pleading
9 recommended a technical conference, that a
10 technical conference be convened and indicated
11 that the staff would file its recommendation
12 thereafter on June 11th. The pleadings do not
13 agree that the Commission should grant the
14 company's motion to lift the suspension of the
15 IEC. Nor did it agree that the Commission has
16 the authority to grant the requested relief as
17 -- as proposed by Empire.

18 Under present circumstances, the
19 Commission is authorized for -- for the
20 Commission to authorize Empire to utilize an
21 IEC when the company has not shown an emergency
22 or -- that an emergency or a near emergency
23 constitutes single issue rate making. Also, in
24 the LaClede case, which has been quoted -- or
25 mentioned rather liberally in this proceeding,

1 535 Southwest Second 561, there -- the Court
2 indicates that al -- although an emergency or
3 near emergency is not necessary -- necessarily
4 the same as an interim rate relief, it appears
5 that evidentiary hearing must be held,
6 particularly if no emergency exists. The staff
7 would direct the Commission's attention to the
8 last paragraph of the -- of the LaClede
9 decision on 574, which states as follows: It
10 may be theoretically possible, even in a
11 purposefully short interim rate hearing -- I'll
12 start again. It may be theoretically possible
13 even in a purposely short interim rate hearing
14 for the evidence to show beyond a reasonable
15 doubt that the applicants or age structure has
16 become unjustly low without an emergency as
17 defined by the Commission having as yet
18 resulted, although some future applicant on
19 some extraordinary fact situation may be able
20 to succeed in so proving LaClede has singularly
21 failed in this case to carry the very heavy
22 burden of proof that's necessary to do so.

23 The preceding paragraph on that same page
24 of the LaClede decision deals with the
25 desirability of permanent rate cases relative

1 to interim rate cases. The Court stated as
2 follows:
3 LaClede seemingly realizes the inconclusiveness
4 of the proof offered by it in its -- in this
5 interim rate proceeding, and it attempts to
6 flush out its proof by making reference to
7 evidence submitted and findings made in -- in
8 the permanent rate proceeding. Case No.
9 18-015. Thus, it points out in its reply brief
10 that, quote, The Commission in the permanent
11 rate case decided only a few months after the
12 rejection of the interim rates found a rate of
13 return in excess of 8.7 percent to be just and
14 reasonable, end quote.

15 Rather than helping LaClede, this
16 reference simply emphasizes the desirability of
17 leaving the whole question of just and
18 reasonable rate, unless imperative facts
19 required to the contrary to the permanent rate
20 proceeding in which all facts can be developed
21 more deliberately with full opportunity for an
22 auditing of financial figures and a mature
23 consideration by the Commission of all factors
24 and all interests.

25 Empire's request reflects the company's

1 concern about its reduced earnings performance.
2 The staff would cite also State, ex rel.
3 Missouri Public Service Company versus Frost,
4 627 Southwest Second, 882, Missouri Appellate
5 1982, where the Western District Court stated
6 in footnote 3 on page 8 -- 887 as follows: A
7 -- a rate tariff is intended only to permit an
8 opportunity to make the percentage of return
9 determined by the Commission to be reasonable.
10 As put by one authority, quote, The utilities
11 return allowance might be compared with a
12 fishing or a hunting license with a limit on
13 the catch. Such a license does not guarantee
14 that the holder will catch anything at all. It
15 simply makes the catch legal up to a specified
16 limit provided the holder is successful in his
17 own efforts.

18 And a citation of one priest, Principles
19 of Public Utility Regulation 202, 1969, quoting
20 Welch Cases in Text on Public Utility
21 Regulation 478, Revised Edition 1968. The
22 company's approach in seeking interim rate
23 relief is unusual. No tariff, no separate
24 file, no supporting testimony. Empire in its
25 motion to lift the suspension and the

1 industrial intervenors in their response
2 discuss the appropriate procedure for a utility
3 to file for interim rate relief. Both refer to
4 Footnote 2 at 568 of the aforementioned LaClede
5 case, but neither one of them notes that it is
6 a Louisiana case cited in Footnote 2 that
7 identifies how the interim rate relief is
8 generally sought in Missouri.

9 The Kansas City Court of Appeals stated as
10 follows: Reflecting the same basic concept of
11 the ancillary nature of the application for an
12 interim rate increase, South Central Bell
13 Telephone Company versus Louisiana Public
14 Service Commission, 272 Southern Second 667, LA
15 1973. Affirm the action of the Commission in
16 consolidating an application for an interim
17 increase with a pending application for a
18 permanent increase. I probably should have
19 just read the words there, Reflecting -- I'll
20 read it again. Reflecting the same basic
21 concept of the ancillary nature of the
22 application for an interim rate increase,
23 affirm the action of the Commission in
24 consolidating an application for an interim
25 increase with a pending application for a

1 permanent increase. So there's a discussion of
2 two applications and consolidation. The
3 LaClede case and the Louisiana case cited in
4 the LaClede case are discussed in another case,
5 State, ex rel. Fisher versus Public Service
6 Commission, 670 Southwest Second 24, Missouri
7 Appellate 1984 wherein the Missouri Western
8 District Court of Appeals on page 27 held as
9 follows: Thus, in the case of, Bar the interim
10 rate proceeding as ancillary to the permanent
11 rate proceeding and review of the permanent
12 rate case includes review of the order made in
13 the interim proceedings, such review does not
14 constitute a collateral attack on those orders
15 made in the interim proceedings.

16 The staff would also like to point out
17 some perhaps technical problems with the IEE --
18 IEC tariff sheet itself. I think you have
19 received this before. But there are a couple
20 of -- couple of other --

21 JUDGE THOMPSON: Thank you, Mr. Frey.
22 Do you want this marked?

23 MR. FREY: Yes.

24 JUDGE THOMPSON: Okay.

25 MR. FREY: It doesn't really make any

1 difference.

2 JUDGE THOMPSON: Okay. It will be

3 Exhibit 4. Did you give one to the reporter?

4 MR. FREY: Oh, yeah.

5 MR. STEWART: Denny, could I have

6 one?

7 MR. FREY: Sure. The only thing we

8 would note are three items here. The units

9 under Rate where it says per kilowatt hour,

10 there are no units stated. Under Conditions,

11 it says the interim rider shall be in effect

12 from April 27th, 2004, which is three days

13 prior to the company actually filing its rate

14 case, so that appears to be erroneous. And the

15 third thing, perhaps that's the most important,

16 is the reference under Application where it

17 says that the IEC is applicable for all

18 electric services billed under any electric

19 rate schedule. And later -- later in the

20 sentence it says it's reflected separately on

21 each rate schedule. And you'll see on -- on

22 page -- on the next page how it is reflected in

23 the rate schedule. The problem is if the -- if

24 this Sheet No. 17 were to be -- the suspension

25 on sheet 17 were to be lifted, then the third

1 page shows that it's not on the rate schedule
2 of the existing residential service, which is
3 an example of rate schedule. So there's a
4 little bit of a -- sort of an inconsistency
5 there.

6 And if the Commission were simply to lift
7 the suspension of this IEC rider tariff sheet,
8 it would not be consistent with the remaining
9 rate schedule sheets that are in effect
10 currently. Do you understand that, follow me?
11 I know it's a little bit --

12 JUDGE THOMPSON: You don't get to ask
13 us questions.

14 MR. FREY: I'm sorry. I just --

15 MR. CONRAD: It's getting late.

16 MR. FREY: Okay. I apologize.

17 COMMISSIONER CLAYTON: We're with
18 you, brother.

19 MR. FREY: Okay. Thank you. Just
20 one other comment. Empire urges the Commission
21 to create innovative solutions to deal with
22 changing circumstances. And the staff would
23 suggest that both the staff and the Commission
24 as well as other parties have been innovative
25 decades ago. There was a mechanism called the

1 forecast of fuel, which was developed by the
2 staff, agreed to by the parties and accepted by
3 the Commission. This was back in the '80s.
4 And it had to do with a forecast of fuel costs
5 which were later trued up. It was a device
6 utilized long before the development of the
7 IEC. And, actually, the staff continued to
8 propose it until the Commission held in the
9 Kansas City Power and Light Company Wolf creek
10 case, Case Nos. EO-85-185 and EO-85-225 -- I
11 guess I'll give you the cite to the reporter.
12 228 MOPSC and MS228-404 1986.

13 Anyway, the Commission said in -- in that
14 case, Low inflation rates and stabilizing fuel
15 prices indicate that there is no need for the
16 forecast of fuel in that particular case. The
17 Commission noted that the allowance of forecast
18 of fuel was an extraordinary remedy for highly
19 inflationary times, which protected the company
20 in paying costs that were beyond its control.
21 More recently, in cases involving electric
22 utilities that are more dependent on gas fired
23 generation as opposed to coal and nuclear, the
24 staff has shown its willingness to propose
25 under the right set of circumstances and the

1 Commission has been willing to authorize,
2 again, under the right set of circumstances,
3 use of the innovative IEC mechanism in order to
4 address the problem of natural gas price
5 volatility.

6 Presumably, the Commission would again be
7 willing to consider an IEC in this proceeding.
8 However, Empire's current circumstances do not
9 justify implementation of an IEC during this
10 interim period. The staff, therefore, urges
11 the Commission to deny Empire's motion. That's
12 all I have. I'm sorry if I took too long.

13 JUDGE THOMPSON: Thank you, Mr. Frey.
14 Any questions from the bench? Commissioner
15 Clayton?

16 COMMISSIONER CLAYTON: How many pages
17 was that? That was a thorough --

18 MR. FREY: Ten pages.

19 COMMISSIONER CLAYTON: Ten pages.
20 Very thorough. You covered everything and I
21 only have a few questions. And I'll -- every
22 time you said something, I thought of a
23 question and you turned around and answered it.
24 You made reference early on regarding a
25 technical conference that -- that had -- that

1 either you suggested or somebody had suggested
2 that the parties meet and try to talk about
3 this IEC. Do you recall that?

4 MR. FREY: Yes.

5 COMMISSIONER CLAYTON: Was the staff
6 agreeable to convening such a technical
7 conference?

8 MR. FREY: Yes. In fact, the
9 pleading we filed on May 26th recommended the
10 convening of that.

11 COMMISSIONER CLAYTON: Now, what
12 would -- what would the product of that
13 technical conference be?

14 MR. FREY: That's unknown. I mean,
15 it would -- we could have come up with a
16 determination, for example, as to whether or
17 not it was even feasible to offer them the
18 relief or to provide the relief that the
19 company sought because of this -- certainly
20 because of this question of, you know, how much
21 is in the -- how much is it in the fuel and
22 purchase power and the current rates and the
23 exact mechanisms for how this would be handled
24 with regard to refunds and --

25 COMMISSIONER CLAYTON: I mean, has it

1 been made known that -- that it is highly
2 unlike -- and I'm not stating this as fact.
3 But has it been made known that -- that a
4 technical conference would not achieve any
5 consensus or settlement.

6 MR. FREY: I think the company kind
7 of came to that conclusion, that there wasn't
8 sufficient interest to pursue the matter any
9 further, except through the Commission. Again,
10 the staff was willing to meet.

11 COMMISSIONER CLAYTON: Do you agree
12 with that assessment?

13 MR. FREY: And if -- I'm sorry?

14 COMMISSIONER CLAYTON: Do you
15 agreement with the company's assessment? You
16 said it was the company's assessment that it
17 wouldn't be fruitful to move forward. My
18 question was do you agree with that assessment?

19 MR. FREY: Based on what I've heard
20 in this proceeding, yes, I -- I do agree with
21 that assumption.

22 COMMISSIONER CLAYTON: And I guess to
23 -- to offer context to that question, the
24 company has suggested that we should from here
25 order a technical conference ordering the

1 parties to meet. And I just question whether
2 that would be worthwhile to order the parties
3 to go sit in a room. I mean -- and I guess I'm
4 asking your assessment of that.

5 MR. FREY: Well, anything is
6 possible. And --

7 COMMISSIONER CLAYTON: That gives me
8 a lot of confidence.

9 MR. FREY: So if -- if a technical
10 conference were to be held, I suppose it's
11 possible that --

12 COMMISSIONER CLAYTON: Okay.

13 MR. FREY: -- something fruitful
14 could come out of it.

15 COMMISSIONER CLAYTON: Anything's
16 possible. Yes. We're all optimists. Okay.
17 Now, has staff had an opportunity to review the
18 testimony filed in the overall case by the
19 company, especially with regard to IEC
20 information?

21 MR. FREY: I can't really speak for
22 the staff members on that. But I would assume
23 that they certainly read the testimony.

24 COMMISSIONER CLAYTON: So you don't
25 know if they've read it or not?

1 MR. FREY: No.

2 COMMISSIONER CLAYTON: Okay. Then
3 how do you know whether or not they've plead
4 sufficient factual information to support
5 whether or not an IEC is appropriate in the
6 interim?

7 MR. FREY: Oh, I guess what I was
8 referring to is they haven't filed anything in
9 the interim indicating that -- well, I guess
10 the need for interim relief. That kind of --
11 wasn't that what my comment was addressing?

12 COMMISSIONER CLAYTON: Well, I'm not
13 sure what your comment was addressing. I'm
14 just asking -- I'm assuming that -- and I'm --
15 I may be doing the same thing by making these
16 assumptions. My question is I would assume
17 that the prima faschia case to support the
18 tariff sheet that was filed is included with
19 the testimony -- the direct testimony filed by
20 the company and that if -- if the parties have
21 not reviewed that testimony, how do they know
22 whether they've made a prima faschia case on
23 whether the IEC should be approved?

24 MR. FREY: Again, I think my comments
25 were directed at the company has not made a

1 prima faschia case that relief is required on
2 an interim basis.

3 COMMISSIONER CLAYTON: You're making
4 reference to the emergency standard in that
5 regard?

6 MR. FREY: Yes. Yes.

7 COMMISSIONER CLAYTON: Okay. So
8 their testimony doesn't make any reference to
9 an emergency?

10 MR. FREY: That is correct.

11 COMMISSIONER CLAYTON: But you said
12 you hadn't read it. Nobody's read it.

13 MR. FREY: No. I'm saying there is
14 no testimony to support a -- an emergency or an
15 interim rate request.

16 COMMISSIONER CLAYTON: So staff has
17 read all the testimony filed in the case? It's
18 late, Mr. Frey.

19 MR. FREY: I don't believe there's
20 any testimony supporting the request for an
21 interim rate because the last time the company
22 filed an interim, they filed testimony with the
23 request for interim relief.

24 COMMISSIONER CLAYTON: So is it
25 possible that that testimony has already been

1 filed as part of the overall rate case?

2 MR.FREY: I suppose it's possible. I

3 don't believe that's the case.

4 COMMISSIONER CLAYTON: Okay.

5 MR. FREY: Having -- having read the

6 testimony sometime back, I don't believe that's

7 the case.

8 COMMISSIONER CLAYTON: I've got the

9 same problem. Okay. I asked this question of

10 the other parties. What is -- well, let me

11 work logically through this. First of all,

12 does staff believe that we have the legal

13 ability to grant this interim IEC, this

14 temporary IEC while the case is pending? Do we

15 have the legal ability to do that in your

16 opinion?

17 MR. FREY: I think there is some --

18 some issues that have been raised that -- that

19 need to be looked at. I don't think the staff

20 is prepared --

21 COMMISSIONER CLAYTON: You can't give

22 me a yes or no?

23 MR. FREY: Correct.

24 COMMISSIONER CLAYTON: Okay. Does

25 staff believe that the Commission has the

1 ability to change the emergency standard that's
2 established or approved in the LaClede case?
3 Do we have the ability to -- to change that?
4 MR. FREY: We agree wholly with
5 Mr. Conrad on that.
6 COMMISSIONER CLAYTON: Okay. and
7 it's staff's position that we should -- we
8 should not change the standard and that they
9 have met the standard?
10 MR. FREY: Correct. In fact, I think
11 we have company testimony to that effect in
12 this proceeding.
13 COMMISSIONER CLAYTON: Okay.
14 MR. FREY: That they haven't met the
15 standard.
16 COMMISSIONER CLAYTON: If the
17 Commission were to decide to move forward with
18 some sort of hearing process on a temporary
19 IEC, how much time would staff need to prepare
20 for that hearing?
21 MR. FREY: As I tried to suggest in
22 my preliminary remarks, we would -- if -- I
23 would think that certainly if -- if we could --
24 if we weren't required to file before the same
25 time we were going to file direct testimony on

1 September 20th, we could do that. A
2 significant amount of time earlier than that,
3 we would have to -- as I suggested earlier, we
4 would have to respond after meeting on that
5 question.

6 COMMISSIONER CLAYTON: Okay. Would
7 the testimony be the same, that you would file
8 on a temporary -- for the temporary filing
9 versus the overall rate case? On this issue,
10 wouldn't it be the same? Or would the
11 arguments -- testimony be different?

12 MR. FREY: Well, if we're filing
13 testimony on the IEC, we're also filing
14 testimony in the interim case on the need for
15 interim rate relief. So to that extent,
16 certainly, it would be -- it would be
17 different. As to the nuts and bolts or the
18 mechanism of the IEC, that may look quite the
19 same.

20 COMMISSIONER CLAYTON: Is staff aware
21 of whether this type of relief is available in
22 any of our neighboring states? Do you know?
23 You may not know.

24 MR. FREY: Well, as was mentioned,
25 there are a number of states, I'm not sure how

1 many, that do these fuel adjustment clauses. I
2 don't know about anything that's specifically
3 matched an IEC mechanism.

4 COMMISSIONER CLAYTON: Are you aware
5 of whether they have provisions for interim
6 relief while a case is pending? And if you
7 don't know, you don't know.

8 MR. FREY: Other states?

9 COMMISSIONER CLAYTON: Yeah.

10 MR. FREY: I believe they do.

11 COMMISSIONER CLAYTON: Okay. So like
12 there was testimony earlier, actually
13 yesterday, about Oklahoma, Kansas, Arkansas
14 having some sort of fuel adjustment clause
15 while also having a shorter time period for
16 concluding an overall rate case. And I was
17 wondering how that's possible, how they're able
18 -- how like Oklahoma's able to do a rate case
19 in six months and do the fuel adjustment clause
20 in the interim when we have almost double the
21 time and don't have the interim relief.

22 MR. FREY: I think that's a good
23 question, sir. And I do not know the answer.

24 COMMISSIONER CLAYTON: Okay. Does
25 staff have any concerns along the lines of due

1 process, any other modifications in the process
2 to ensure that staff is satisfied that -- you
3 all are a little different I think. But are
4 there any concerns to ensure that due process
5 would be achieved for all parties in looking to
6 a hearing process?

7 MR. FREY: I don't believe so beyond
8 -- we do support the idea of an evidentiary
9 hearing.

10 COMMISSIONER CLAYTON: So you all do
11 want a hearing?

12 MR. FREY: No. I'm not saying that.
13 I'm saying prior to the decision in this
14 matter, if the Commission is not going to --
15 prior to a decision to implement it, we're in
16 favor of an evidentiary hearing.

17 COMMISSIONER CLAYTON: Okay. And
18 does staff have any concerns with the ex parte
19 communications that have been implemented
20 earlier today? Are there any concerns that you
21 want to raise at this point?

22 MR. FREY: I don't believe so. No.
23 Thank you.

24 COMMISSIONER CLAYTON: All right. I
25 don't think I have any other questions. Thank

1 you.

2 JUDGE THOMPSON: Commissioner

3 Appling?

4 COMMISSIONER APPLING: No questions.

5 JUDGE THOMPSON: You may step down,

6 Mr. Frey. Ms. Woods, do you have any remarks?

7 MS. WOODS: Only to just let the

8 Commission know that the Department of Natural

9 Resources is not taking a position on this

10 motion to lift the suspension.

11 JUDGE THOMPSON: Thank you.

12 COMMISSIONER CLAYTON: Can I ask one

13 question?

14 JUDGE THOMPSON: You may.

15 COMMISSIONER CLAYTON: What is your

16 -- who are you representing?

17 MS. WOODS: Missouri Department of

18 Natural Resources.

19 COMMISSIONER CLAYTON: And which

20 division?

21 MS. WOODS: Division of Energy.

22 COMMISSIONER CLAYTON: Energy. So

23 you --

24 MS. WOODS: Huh-uh.

25 COMMISSIONER CLAYTON: So you're not

1 representing the Department of Environmental
2 Quality?

3 MS. WOODS: No.

4 COMMISSIONER CLAYTON: Okay.

5 MS. WOODS: Well, primarily, the
6 Division of Energy. We're focusing on their
7 issues, which are renewable energy, energy
8 efficiency and low income weatherization. And
9 those are all encompassed in that division.

10 COMMISSIONER CLAYTON: What do you
11 mean renewables? How is your interest in
12 renewables?

13 MS. WOODS: That's the biomass, the
14 wind energy.

15 COMMISSIONER CLAYTON: And you're
16 also doing the low income programs?

17 MS. WOODS: Yes.

18 COMMISSIONER CLAYTON: Okay. How do
19 you balance that? How do you balance each
20 division over the other in terms of if a
21 renewable is more expensive than a particular
22 type of energy generation?

23 MS. WOODS: That's something that the
24 department has to look at internally and make a
25 call on.

1 COMMISSIONER CLAYTON: Not you,
2 right?
3 MS. WOODS: Not me. All -- well, and
4 then I think the Attorney General also has an
5 opinion on that. But --
6 COMMISSIONER CLAYTON: They've always
7 got an opinion.
8 MS. WOODS: Yeah. They tell me, and
9 that's the position I take.
10 COMMISSIONER CLAYTON: Got you.
11 Okay. Thank you.
12 JUDGE THOMPSON: Mr. Appling, any
13 questions?
14 COMMISSIONER APPLING: No questions.
15 JUDGE THOMPSON: Anything else?
16 MR. STEWART: Judge, if I might, two
17 things. I'm prepared today that if -- to say
18 that if the Commission determines ultimately to
19 proceed with the hearing on this interim matter
20 -- matter, Empire will resolve its best efforts
21 to comply with all discovery requests within
22 three to five days provided the DRs are on
23 point and are focused on the issues relating to
24 the IEC tariff. And I -- Mr. Boudreau would
25 like to address the issue regarding the ex

1 parte communication, and I think he may be able
2 to clear this up quickly.

3 JUDGE THOMPSON: Please, Mr.
4 Boudreau, clear this up for us.

5 MR. BOUDREAU: Yeah. I was given to
6 understand that I might have an opportunity to
7 address the legal issue as far as the objection
8 to the testimony of Mr. Swearengen. I'd like
9 to say it's genuinely regrettable that we found
10 it necessary to advise the Commission that an
11 attorney of record in this case, my respected
12 partner, Mr. Swearengen, would not take the
13 stand and would not subject himself to
14 cross-examination by Mr. Conrad and the other
15 attorneys in this case.

16 We have the utmost respect for this
17 Commission and its statutory responsibility.
18 And I think our law and practice in this field
19 bears that out. This refusal should not be
20 construed as an implication that something
21 improper may have happened. To the contrary.
22 It merely evidences the seriousness with which
23 we view this unprecedented request and the
24 surprising grant of relief of this request.

25 Now, you asked for legal authority. Our

1 concern revolves primarily around the clear
2 policy enunciated in the Code of Professional
3 Responsibility governing attorney ethical
4 responsibilities and, specifically, Ethical
5 Rule 4-3.7 entitled Lawyer As Witness, which
6 prohibits an attorney from testifying except
7 only in very narrow circumstances, none of
8 which apply in this case.

9 The bottom line is that it's our view that
10 it's inappropriate to compel attorneys to
11 violate the rules of ethics. This is not a
12 permissible process available even to this
13 Commission. As to the purpose stated by
14 Mr. Conrad for his -- his asserted inquiry, it
15 should be clearly stated that casual
16 conversations with the administrative law
17 judges about matters of procedure are
18 relatively common and not prohibited by
19 Commission rule.

20 Commissioner Clayton asked about this,
21 where it appeared, and it appears in Commission
22 Rule 4 CSR 240-4.020. It's entitled Conduct
23 During Proceedings. Subsection 2 states in
24 pertinent part, In all proceeding before the
25 Commission, no attorney shall communicate or

1 cause another to communicate as to the merits
2 of the cause with any commissioner or examiner
3 before whom proceedings are pending. There are
4 certain exceptions for -- for dis -- for
5 discussion about the merits of the cause,
6 again, none of which are applicable.

7 Do you need any further -- if there's any
8 further confirmation of -- that this is common
9 practice, I only need to refer you to
10 Mr. Coffman who called and inquired about the
11 procedure to be employed yesterday, and I think
12 Mr. Conrad when he was making his statement
13 said -- he said procedural matters -- either
14 procedural matters or inquiries are in order, I
15 think was his statement. And I would suggest
16 to you that although Mr. Conrad views that --
17 that a conversation that may indicate that
18 there's been -- there may be a factual witness
19 to address factual arguments is -- is
20 substantive, I would suggest to you that that
21 is purely procedural. It's procedural in its
22 purest form. It does not go to the merits of
23 the issue in discussion.

24 Now, let me conclude with this. Every
25 licensed attorney in this room should feel a

1 real sense of apprehension if it's -- if this
2 is to become part of the Commission's regular
3 practice. This is nothing to be made light of.
4 We are a profession of advocates for our
5 clients. The line between advocate and witness
6 is one that should not be crossed other than in
7 strict accordance with the Code of Professional
8 Conduct. And with that, I respectfully offer
9 that as the explanation and the rationale and
10 an important one for -- for this unfortunate
11 turn of events.

12 Again, we have nothing but the highest
13 regard for the Commission and its important
14 responsibility under the statutes of this
15 state. Nevertheless, we are officers of the
16 court and subject to the Code. And with that,
17 I conclude my remarks.

18 JUDGE THOMPSON: Thank you,
19 Mr. Boudreau. Does anyone else have anything
20 else? Thankfully, not. We are adjourned.

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EXHIBITS

EXHIBIT	DESCRIPTION	MARKED	RECEIVED
3	Interim Energy Charge Rider IEC	287	287
4	IEC Tariff Sheet	381	381

(Exhibits returned with original transcript.)