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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS
Hearing
March 3, 2004
Jefferson City, Missouri
Volume 13

In the Matter of Aquila, Inc.,)
d/b/a Aquila Networks - L&P) Case No. ER-2004-0034
and Aquila Networks - MPS, to)
Implement a General Rate)
Increase in Electricity.)

In the Matter of the Request)
of Aquila, Inc., d/b/a Aquila)
Networks - L&P, to Implement) Case No. HR-2004-0024
a General Rate Increase in)
Steam Rates.)

KENNARD L. JONES, Presiding,
REGULATORY LAW JUDGE.

STEVE GAW, Chairman,
CONNIE MURRAY,
COMMISSIONERS.

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P R O C E E D I N G S

JUDGE JONES: This is hearing
No. ER-2004-0024. My name is Kennard Jones. I'm the
judge presiding over this matter.

I don't know if all of the attorneys here
received my e-mail yet. I take it you haven't. For those
of you who don't know, Judge Brown has set aside his order
prohibiting us from proceeding with regard to St. Joseph
Light & Power. With that in mind, I think we need to
rethink how we're going to go on in this matter.

In my e-mail, I suggested that we continue
on with the schedule we already have in place, simply
because I'm sure some work went into that. We've already
gone halfway through it. How we go back and recap
testimony and evidence that left out portions of L&P I
don't know. That's something that we need to think about.

How we go forward with evidence that's --
testimony that's already been redacted, I don't know if
you-all have with you the original versions of testimony
and the redacted versions or what.

I do think, however, we should go forward
with L&P in mind, meaning we should go back to the
original testimony that was filed. I know a lot of paper
and time went into filing redacted testimony. Sorry.
There's nothing we can do about that now. So. Who did --

1 I should ask by show of hands, who did get my e-mail
2 yesterday and had time at least to think about this issue
3 overnight?

4 Okay. Do any of you have any suggestions?

5 MR. SWEARENGEN: Judge, if I could speak to
6 that, I think I agree with the way you suggested that we
7 proceed, and that is from this point forward assume that
8 we are litigating both the L&P and the MPS cases. With
9 respect to the testimony, we have two versions now that
10 have been marked, and in some instances, I guess, offered
11 with respect to the various witnesses.

12 My suggestion would be that we proceed and
13 deal with both pieces, because I don't know ultimately how
14 this case is going to turn out, if Mr. Conrad and the
15 Public Counsel still have their lawsuit alive in the
16 Circuit Court of coal County, and there does exist the
17 possibility that at the end of that process, we will be
18 told that the Commission cannot make any decisions with
19 respect to the L&P properties.

20 And that being the case, I would think that
21 the Commission would want to have a record that dealt
22 simply with the MPS properties. And we're in a position
23 to do that with the two pieces of testimony with respect
24 to each witness. And I don't think that moving ahead and
25 putting into evidence both pieces for each witness would

1 create any particular problem.

2 With respect to the issues that we've
3 already litigated, at the conclusion I think the parties
4 can sit down and look at those and decide which ones are
5 MPS specific, and there are some that are that, and we can
6 decide which issues that we've already tried would have
7 some application to Light & Power, and at that point in
8 time, we can decide what, if anything, we need to do on
9 the record to deal with that situation. But that's
10 something I think that can be put off. Thank you.

11 JUDGE JONES: Thank you, Mr. Swearingen.

12 MR. DOTTHEIM: The Staff would generally
13 concur with what Mr. Swearingen suggested. It would seem
14 to be the most prudent thing to put in both sets of
15 testimony. As Mr. Swearingen indicated, there's no
16 telling what will happen in the next day or the next week.

17 as far as the testimony that has not been
18 addressed on the issues that have been tried, I don't know
19 whether, if witnesses have been making corrections,
20 whether that seemingly would need to be replicated for the
21 original set of testimony, and if corrections were being
22 made to numbers, for example, that might mean that
23 corrections need to be made to the L&P numbers that are
24 shown in the testimony. I don't know whether that could
25 just be done simply by errata sheets or, depending upon

1 what the numbers are, whether other parties might want to
2 conduct some cross-examination.

3 As far as the issues that are strictly for
4 L&P, offhand I think the Staff has identified two of those
5 which show up on the reconciliations that have been filed
6 prior to the events which have caused us to address
7 strictly the MPS part of the case. On the reconciliation,
8 there's an Appointing Authority Order, an AAO that's shown
9 for AMFM. That issue may have actually already been
10 heard. It was one of the very first issues that were on
11 the schedule, so possibly the witnesses that took the
12 stand and were available for cross-examination and that
13 L&P issue, that would need to be verified.

14 There's one other L&P only issue that I'm
15 aware of at this point, and that's an issue that's been at
16 times characterized as the steam subsidy issue. That
17 would definitely need to be added to the miscellaneous
18 issues and could be heard at a time that's mutually
19 convenient for the parties and the witnesses.

20 JUDGE JONES: Thank you, Mr. Dottheim.
21 Office of the Public Counsel?

22 MR. MICHEEL: I don't have a problem with
23 that, your Honor. With respect to the L&P issue regarding
24 the AMFM mapping AAO, both the company witness
25 Mr. Williams and the Staff witness Ms. Miller were

1 cross-examined on that issue before the stay was put into
2 place. The only witness that's outstanding to be
3 cross-examined for that particular issue is Mr. Robertson,
4 our witness. Other than that, I don't have any problem
5 with the procedures that both Mr. Dottheim and
6 Mr. Swearngen have indicated.

7 JUDGE JONES: Mr. Conrad?

8 MR. CONRAD: For our part, Judge, I think
9 we probably don't have a serious problem with that process
10 either. Mr. Swearngen correctly recognizes that the
11 written suit is still quite live and still quite kicking,
12 and anything that ends up being done with St. Joe may run
13 afoul.

14 The redacted testimony was never something
15 that was required by either the stop order or the writ
16 application. That was something the Commission came up
17 with. Nor was there ever anything in the stop order that
18 said that thou shalt not mention St. Joseph Light & Power.
19 I think it's clarity now.

20 So if the stop order has been lifted, which
21 it has been, then we're not at a problem with going
22 forward and continuing to process this case insofar as the
23 dealings occasionally St. Joe Light & Power.
24 Jurisdictional issues still remain, as Mr. Swearngen
25 points out. So going forward as you are suggesting I

1 don't think presents us with a problem. So let's just
2 leave it there.

3 What's gone in, what's done and the
4 cross-examination that's occurred and the admission of
5 schedules and so on it seems to me shouldn't be undone.
6 That's done. If something more beyond that needs to be
7 done in order to flesh out the record on those limited
8 other issues, that's fine, too.

9 JUDGE JONES: Thank you. Ms. Woods?

10 MS. WOODS: I don't have a problem with
11 what Mr. Swaengen has suggested and what everybody else
12 seems to feel would probably be the way to go. I do have
13 a couple of questions I would have asked the company's
14 weatherization witness, and it occurs to me that, for some
15 of them anyway that regard L&P, we might be able to
16 stipulate as to what the answers are and avoid dragging
17 the witnesses back down here. I imagine for some, we may
18 have to have the witness come back and cross-examined, but
19 we might be able to handle at least some of the more minor
20 issues that way.

21 JUDGE JONES: Thank you. Major Paulson?

22 MR. PAULSON: I recommend we press as
23 stated by the parties.

24 JUDGE JONES: The way I understand it,
25 then, is we'll proceed with two sets of evidence presented

1 on each witness through the schedule that we already have
2 established, and at the conclusion of the schedule go back
3 and sort out what issues need to be revisited. Is that a
4 fair statement? I see nods of heads.

5 MR. SWEARENGEN: Judge, before we go back
6 to the corporate restructuring issue, I have a
7 housekeeping matter, and that is company witness Bev Agut,
8 I believe, has finished her testimony in this proceeding,
9 at least with respect to this week, and she would like to
10 be excused.

11 JUDGE JONES: She may be excused.

12 MR. SWEARENGEN: Thank you.

13 MR. DOTTHEIM: Also, the Staff has a
14 housekeeping matter or two. It was indicated yesterday,
15 and I believe a document was marked as an exhibit, I think
16 possibly 164, the agreement that had been reached by the
17 company, the Staff and also with the inclusion of the
18 Office of the Public Counsel regarding service quality and
19 reliability recording. And at the time that that was
20 addressed yesterday, we only had one copy of that
21 document. We have additional copies if the Bench would
22 like copies for itself and the -- of course, the
23 Commissioners.

24 Also, too, the Staff would like to offer
25 the evidence of Staff witnesses on that issue, and there

1 was a company witness, too. The Staff witnesses were Lisa
2 Kremer and James Ketter. And Ms. Kremer's testimony was
3 20 and 1020 is her direct, 21 and 1021 as her rebuttal,
4 and 22 -- and for Staff witness James Ketter, 22 and 1022
5 was his direct testimony.

6 JUDGE JONES: Was this on the issue of
7 settlement and service quality and reliability?

8 MR. DOTTHEIM: Yes.

9 JUDGE JONES: Okay.

10 MR. DOTTHEIM: So at this time I'd like to
11 offer, if we're now offering the two sets of testimony,
12 20, 1020, 21, 1021, 22 and 1022. Again, I do have
13 additional copies of what I think was marked as
14 Exhibit 164.

15 MR. SWEARENGEN: The company has no
16 objection to the receipt of that evidence.

17 JUDGE JONES: Thank you. There was also
18 some question brought to mind as to whether or not
19 Exhibit 164 was actually received, and for the record, I
20 will state that 164 is received into the record, as is
21 Exhibit 165. There's also questions as to Exhibits 155
22 and 156. I'll also note for the record those two are
23 received into evidence.

24 (EXHIBIT NOS. 155, 156, 164 AND 165 WERE
25 RECEIVED INTO EVIDENCE.)

1 MR. SWEARENGEN: Judge, while we're still
2 on the service quality and reliability issue on the
3 settlement, the company witness on that issue was Brett
4 Carter, and I believe his surrebuttal testimony was marked
5 as Exhibit 19 and Exhibit 1019, and I would move the
6 admission of those exhibits at this time.

7 JUDGE JONES: Okay. Exhibits 19 and 1019
8 are admitted into the record, as are Exhibits 20, 21, 22,
9 1020, 1021 and 1022.

10 (EXHIBIT NOS. 19, 20, 21, 22, 1019, 1020,
11 1021 AND 1022 WERE RECEIVED INTO EVIDENCE.)

12 JUDGE JONES: And, Mr. Dottheim, there was
13 another witness you mentioned other than Kremer.

14 MR. DOTTHEIM: Yes. James Ketter. His
15 testimony is Exhibit 22 and 1022. He only filed direct
16 testimony.

17 JUDGE JONES: Okay.

18 MR. SWEARENGEN: Judge, if we're ready to
19 go back to the corporate restructuring issue, I have a
20 matter that I would like to bring to the attention of the
21 Commission.

22 JUDGE JONES: We are ready and you may
23 bring that matter.

24 MR. SWEARENGEN: Thank you. Yesterday when
25 we concluded that issue from the company standpoint,

1 Mr. Jon Empson was on the witness stand and finished his
2 testimony. Thereafter, he has advised me that he thinks
3 that perhaps he may have given an answer that will leave
4 the wrong impression on the record with respect to some
5 facts pertaining to that issue, and with the Commission's
6 permission and the consent of the other parties, I would
7 like to recall Mr. Empson and ask him to attempt to
8 clarify that situation.

9 JUDGE JONES: Does anyone have any
10 objection to that?

11 MR. DOTTHEIM: No objection from the Staff.

12 MS. WOODS: No objection from the
13 Department of Natural Resources.

14 MR. CONRAD: We don't have any objection,
15 your Honor.

16 MR. PAULSON: No objection.

17 MR. MICHEEL: Always happy to hear from
18 Mr. Empson, your Honor.

19 JUDGE JONES: Okay. Mr. Empson, you may
20 step forward and you remain under oath.

21 JON EMPSON testified as follows:

22 DIRECT EXAMINATION BY MR. SWEARENGEN:

23 Q. Mr. Empson, yesterday you were testifying
24 with respect to the issue of corporate restructuring and
25 you indicated to me off the record that you believe you

1 may have created a false impression with respect to some
2 of the facts with respect to that issue. Would you go
3 ahead and please amplify on the point that you wish to
4 clarify?

5 A. Yes, I will. Thank you. Yesterday we had
6 extensive discussion about how we assign the costs from a
7 payroll perspective. I described for the accounting
8 treatment of that how we keep our time and do some
9 exception reporting. It is my understanding while that is
10 the true facts for how we account for it, that Mr. Ron
11 Klote has made some normalization adjustments in this case
12 to address some of those payroll issues.

13 So I just wanted to clarify that while the
14 accounting treatment was the way I described it, there are
15 some normalization steps that we have taken in this case
16 to adjust those payroll assignments.

17 MR. SWEARENGEN: Thank you. And with that,
18 I would tender the witness for cross-examination.

19 JUDGE JONES: Is there any
20 cross-examination for Mr. Empson? Office of the Public
21 Counsel?

22 MR. MICHEEL: No.

23 JUDGE JONES: Staff of the Commission?

24 MR. DOTTHEIM: Yes.

25 JUDGE JONES: Go right ahead.

1 CROSS-EXAMINATION BY MR. DOTTHEIM:

2 Q. Mr. Empson, are 100 percent of salaries
3 payroll in the pool as a consequence of what you've just
4 testified to?

5 A. It's my understanding that in those
6 departments that were adjusted by Mr. Hyneman, that
7 100 percent of the payroll costs are in the pool to be
8 allocated out and then they're allocated between regulated
9 and non-regulated.

10 MR. DOTTHEIM: No further questions. Thank
11 you.

12 JUDGE JONES: Thank you. Is there any
13 redirect for Mr. Empson?

14 MR. SWEARENGEN: No redirect. Thank you.

15 JUDGE JONES: You may step down, Mr.
16 Empson.

17 Now we'll continue with Staff's witness,
18 Charles Hyneman. Mr. Hyneman, will you raise your right
19 hand, please.

20 (Witness sworn.)

21 JUDGE JONES: You may be seated. You may
22 proceed, Mr. Dottheim.

23 MR. DOTTHEIM: Thank you.

24 CHARLES HYNEMAN testified as follows:

25 DIRECT EXAMINATION BY MR. DOTTHEIM:

1 Q. Mr. Hyneman, do you have copies of what
2 have been marked as 1052, your direct testimony in this
3 proceeding, and 1053, your surrebuttal testimony in this
4 proceeding?

5 A. Yes, I do.

6 Q. Do you have any corrections at this time to
7 make to either Exhibit 1052 or 1053?

8 A. No.

9 Q. Do you also have with you, Mr. Hyneman,
10 copies of Exhibit 52 and Exhibit 53?

11 A. I don't have them with me on the stand, but
12 I have them available.

13 Q. So if there were any corrections -- excuse
14 me. If there were any questions directed to you
15 respecting the L&P division for which you would need
16 access to Exhibits 52 and 53, you have not brought those
17 with you this morning?

18 A. No, I haven't.

19 MR. DOTTHEIM: At this time I'd like to
20 offer into evidence Exhibits 1052, 1053, and even though
21 neither Mr. Hyneman nor I have copies of 52 or 53, we
22 might offer that, too, and see if there are any questions
23 for which Mr. Hyneman needs actual copies of 52 and 53.

24 JUDGE JONES: Is there any objection?

25 MR. SWEARENGEN: The company has no

1 objection.

2 MR. CONRAD: No objection.

3 MR. MICHEEL: No objection.

4 JUDGE JONES: Exhibits 52, 53 and 1052 and
5 1053 will admitted into the record.

6 (EXHIBIT NOS. 52, 53 and 1052 WERE RECEIVED
7 INTO EVIDENCE.)

8 MR. DOTTHEIM: Staff tenders Mr. Hyneman
9 for cross-examination.

10 JUDGE JONES: Thank you. Is there any
11 cross-examination from Sedalia Industrial Users
12 Association?

13 MR. CONRAD: No, sir, thank you.

14 JUDGE JONES: Any cross from Missouri
15 Department of Natural Resources?

16 MS. WOODS: No, thank you.

17 JUDGE JONES: Cross-examination from
18 Federal Executive Agencies?

19 MR. PAULSON: No, your Honor.

20 JUDGE JONES: Any cross-examination from
21 Office of the Public Counsel?

22 MR. MICHEEL: No.

23 JUDGE JONES: Cross-examination from
24 Aquila?

25 MR. SWEARENGEN: We have no questions, your

1 Honor. Thank you.

2 JUDGE JONES: Thank you, Mr. Hyneman. You
3 may step down.

4 All right. It looks like next on our list
5 will be the Aries purchased power agreement. I think at
6 this time we're going to take a short break. I know there
7 are questions from the Commissioners on this and I think
8 they want to be here for it, so we'll reconvene at a
9 quarter after nine. It's nine o'clock now.

10 (A BREAK WAS TAKEN.)

11 JUDGE JONES: Let's go back on record, Case
12 No. ER-2004-0034. The next issue we have to deal with is
13 the Aries purchased power agreement, and the company has
14 its first witness.

15 MR. ZOBRIST: May it please the Commission,
16 Carl Zobrist representing Aquila, the company. Aquila
17 would call Frank DeBacker to the stand.

18 (Witness sworn.)

19 JUDGE JONES: Thank you. You may be
20 seated.

21 FRANK A. DEBACKER testified as follows:

22 DIRECT EXAMINATION BY MR. ZOBRIST:

23 Q. Please state your name for the record and
24 spell it for the court reporter.

25 A. Frank A. DeBacker, D-E-B-A-C-K-E-R.

1 Q. Mr. DeBacker, do you have a copy of your
2 testimony that's been filed in this case and that's been
3 marked as Exhibit 62 and 63 and, I believe, redacted
4 versions 1062 and 1063?

5 A. I did not file a redacted version.

6 Q. Okay. So just Exhibits 62 and 63, your
7 rebuttal and surrebuttal?

8 A. That's correct.

9 Q. Do you have any corrections to your
10 testimony?

11 A. No, I do not.

12 MR. ZOBRIST: At this time, your Honor, I
13 would offer the company Exhibit 62 and 63 into the record.

14 MR. WILLIAMS: Staff has no objection.

15 JUDGE JONES: You're just offering 62 and
16 63?

17 MR. ZOBRIST: Well, I was advised that
18 there was a redacted version, and I'm going to go ahead
19 and offer it anyway. If it doesn't exist there's no harm.
20 But I'm going to offer 1062 and 1063 if it exists.

21 JUDGE JONES: Exhibits 62, 63, 1062 and
22 1063 are admitted into the record.

23 (EXHIBIT NOS. 62, 63, 1062 AND 1063 WERE
24 RECEIVED INTO EVIDENCE.)

25 MR. ZOBRIST: We will tender the witness

1 for cross-examination.

2 JUDGE JONES: Is there any
3 cross-examination from the Federal Executive Agencies,
4 Major Paulson?

5 MR. PAULSON: No, your Honor.

6 JUDGE JONES: Is there any
7 cross-examination from the Office of the Public Counsel?

8 MR. MICHEEL: Not on this issue, your
9 Honor.

10 JUDGE JONES: And will there be
11 cross-examination from the Staff of the Commission?

12 MR. WILLIAMS: Yes, your Honor.

13 JUDGE JONES: Please proceed.

14 CROSS-EXAMINATION BY MR. WILLIAMS:

15 Q. Good morning, Mr. DeBacker.

16 A. Good morning.

17 Q. My name is Nathan Williams and I'm
18 representing the Staff here.

19 I'd like to direct your attention to page 7
20 of your rebuttal testimony.

21 A. Yes.

22 Q. In particular lines 9 through 13.

23 A. Yes.

24 Q. Is it your position that the Commission's
25 order in Case No. EO-98-316 essentially forbade Aquila,

1 then named UtiliCorp, from constructing and including in
2 rate base new generating units?

3 A. I wouldn't go as far as to say the
4 Commission order forbade it. I would say that in
5 signing -- issuing that order, that the Commission agreed
6 with the company's position and the Staff's position that
7 with the condition on the marketplace at that time, that
8 companies should be leery of making long-term rate base
9 investment for power supply.

10 Q. I believe you've attached a copy of that
11 order as an exhibit to your testimony, have you not?

12 A. Yes.

13 Q. And is that not Schedule 6, FAD-6?

14 A. That's correct.

15 Q. Can you quote or point to where in that
16 exhibit what you're relying on for your statements that
17 you make on lines 9 through 13 of page 7?

18 A. Beginning on page 5 of the joint agreement,
19 which is page 9 of the schedule, changes in the electric
20 industry.

21 Q. So your support is the attachment that was
22 made to the order that was the parties' joint agreement?

23 A. And included as part of the order, yes.

24 Q. Thank you. Do you have any other support
25 other than the Commission's order in Case No. E0-98-316

1 for your position that the Commission disapproved of
2 utilities constructing regulated generating units?

3 A. You're speaking just strictly from the
4 Commission's point of view?

5 Q. With regard to with respect to the
6 Commission, I'll limit it to that, sure.

7 A. No. Well, there have been various studies
8 that I did not quote, one authorized by this Commission,
9 looking at impacts of retail competition in the industry.

10 Q. Let me ask it again. What I'm asking --
11 and I'll narrow it down -- is there anything that the
12 Commission stated that you're relying on for your support
13 other than the Commission's order in Case No. E0-98-316
14 for your position that the Commission disapproved of
15 utilities constructing regulated generating units?

16 A. First, Commissions in general don't try to
17 tell companies what to do, you know, put themselves in
18 place of company's management. But to answer your
19 question, there's -- this order is what I'm relying on for
20 the Commission's point of view on this issue.

21 Q. And do you have support for the company's
22 point of view that came from sources other than the
23 Commission?

24 A. I'm aware of other, as I mentioned, studies
25 that have been authorized by this Commission looking into

1 the issue of retail competition. I did not rely on those.

2 Q. Can you be more explicit as to what studies
3 you're referring to?

4 A. No, I can't, not at this time.

5 Q. And is there anything else?

6 A. No.

7 Q. Did Aquila have any contact with the
8 Commission outside of a contested case during the late
9 1990s that led it to conclude that the Commission
10 disapproved of the utilities constructing regulated
11 generating units?

12 A. No contact with the Commission directly.
13 Contact with Commission Staff in the implementation of the
14 order that the Commission issued that we referenced
15 earlier.

16 Q. Did Aquila have any contact with a
17 Commissioner outside of a contested case during the late
18 1990s that led it to believe that that Commissioner
19 disapproved of utilities constructing regulated generating
20 units?

21 A. Not that I'm aware of.

22 Q. I want to turn your attention to page 5 of
23 your rebuttal testimony.

24 A. Yes.

25 Q. In particular Table 1 that appears on that

1 page.

2 A. Yes.

3 Q. Regarding the utilities that you've listed
4 in that table, is it also your position that the
5 Commission essentially forbade them from building new
6 regulated generating units?

7 A. I believe I answered your question earlier
8 that the Commission did not forbid the construction of
9 generating units as rate based.

10 Q. Is it your position that the Commission
11 essentially directed them not to do so?

12 A. No.

13 Q. Why would the Commission seem to allow
14 Aquila and indicate to it that it should not build new
15 generating units but not do so for the other utilities
16 that are listed on that table?

17 A. I don't know.

18 Q. I want to turn your attention to page 11 of
19 your rebuttal testimony, and in particular, the first two
20 lines on that page. There you describe how Aquila
21 responded to the Staff's criticism of its initial request
22 for proposal draft for power in 1998.

23 Is it correct that the only action Aquila
24 took in response to the Staff's criticism was to remove
25 any mention of the MPS EWG option from the request for

1 proposal language?

2 A. No, we did not actually submit a bid in
3 response to the RFP, a formal bid.

4 Q. I'm asking about what changes were made to
5 the request for proposal.

6 A. Certainly we made that one. I don't know
7 if we made any other changes or not. I don't recall
8 without examining both the draft and the final.

9 Q. The MPS division of Aquila continued to
10 evaluate the option of itself building an EWG, did it not?

11 A. It did.

12 Q. And at one point in time in the request for
13 proposal process, self building an EWG was the MPS
14 division's recommendation as the least cost method to meet
15 its power needs, was it not?

16 A. It was.

17 Q. I'm going to turn your attention to the top
18 of page 10 of your rebuttal testimony. There you quote
19 parts of the letter from OPC's Ryan Kind regarding
20 Aquila's draft language for its initial request for
21 proposal for power initiated in 1998. Did Aquila follow
22 Mr. Kind's advice found in that quote?

23 A. No. We kept looking at the EWG option,
24 yes. If -- we did not -- I guess one could say we did not
25 follow Mr. Kind's advice.

1 Q. And what was his advice?

2 A. That UtiliCorp as a corporation, large
3 corporation, my interpretation of that quote is that the
4 OPC's position was that UtiliCorp should not be adding
5 generation, whether it's an EWG or a regulated facility
6 within its service territory.

7 Q. And when you say UtiliCorp, you're talking
8 about not a particular division but the company as a
9 whole?

10 A. That's correct.

11 Q. I'm going to turn your attention to page 33
12 of your rebuttal testimony, in particular lines 29 through
13 32 where you state, I can state unequivocally that MPS
14 signed the PSA without interference from its corporate
15 owners.

16 Isn't it true that Aquila rejected MPS
17 division's recommendation that itself build an EWG unit?

18 A. First I think there needs to be a
19 clarification of what the requirements are for ownership
20 of an EWG.

21 Q. My question is whether or not Aquila
22 rejected the MPS division's recommendation. MPS did make
23 a recommendation to self build an EWG unit, did it not?

24 A. But it -- that's true, but it doesn't make
25 any difference who -- MPS could not have managed or

1 operated or shared any expertise with EWG. It would have
2 to have been a totally separate, totally separately
3 operated unit of Aquila.

4 MR. WILLIAMS: Judge, I'd ask that the last
5 statement be stricken as nonresponsive to the question.

6 MR. ZOBRIST: Judge, I would oppose that.
7 I think that was trying to explain the answer to the
8 question, and the witness was actually cut off.

9 MR. WILLIAMS: I think he's anticipating
10 perhaps my next question.

11 JUDGE JONES: I'll let that statement
12 remain in the record.

13 BY MR. WILLIAMS:

14 Q. Didn't Aquila reject its MPS division
15 recommendation to self build an EWG?

16 A. That would be owned by MPS or -- yes, it
17 did. It transferred that responsibility to the Merchant
18 division.

19 Q. And wasn't it -- wasn't that decision made
20 by Aquila senior management?

21 A. It was.

22 Q. And didn't it direct that the EWG proposal
23 be transferred to Aquila Merchant?

24 A. It did.

25 Q. I want to turn your attention to page 5 of

1 your surrebuttal testimony. In that part of your
2 testimony, you criticize the Staff for not comparing the
3 cost of constructing a rate base facility to the option of
4 entering into a short-term purchased power agreement and
5 deferring construction of the generating facility for the
6 term of the purchased power agreement, do you not?

7 A. Could you help me, what lines are you
8 referring to?

9 Q. Basically --

10 A. Okay. You're looking at the -- I'm sorry,
11 the very top of the page, yes.

12 Q. Is it your position that at the time it
13 signed the Aries contract, Aquila planned to construct a
14 regulated generating unit and place it in rate base once
15 the Aries purchased power agreement expired in May of
16 2005?

17 A. I don't know the answer to that question.
18 I was not involved at that time. I retired from the
19 company in June of 2001.

20 Q. I'm going to turn your attention to pages 7
21 through 8 of your surrebuttal testimony. I'll give you
22 some time to read it, but on those pages you claim that
23 the cost of the Aries purchased power agreement is less
24 than the cost of the AmerenUE purchased power agreement
25 that it replaced. Do you agree with that?

1 A. On a cost of capacity basis, yes.

2 Q. Didn't the Aries purchased power agreement
3 also replace an agreement with Associated Electric Power
4 Cooperative and Kansas City Power & Light?

5 A. It did.

6 Q. You have not claimed that the cost of the
7 Aries purchased power agreement is less than the cost of
8 either of those agreements, have you?

9 A. I did not compare it to those because the
10 Ameren contract, the energy supplied out of that contract
11 was relatively close to the cost of energy that would come
12 out of the PSA at the price of gas at that point in time,
13 whereas the KCP&L and the associated contracts were
14 basically peaking contracts and the energy coming out of
15 those contracts was much higher priced, was not comparable
16 in price to the Ameren or to the PSA.

17 MR. WILLIAMS: No further questions of this
18 witness at this time.

19 JUDGE JONES: Thank you. Commissioner
20 Murray?

21 COMMISSIONER MURRAY: I have no questions.

22 JUDGE JONES: Will there be any redirect?

23 MR. ZOBRIST: Yes, there will be. Thank
24 you, your Honor.

25 REDIRECT EXAMINATION BY MR. ZOBRIST:

1 Q. Mr. DeBacker, in response to the issue that
2 Mr. Williams raised about the Commission's order in
3 ER-98-316, is that order found in Schedule 6 of your
4 testimony?

5 A. Yes, it is.

6 Q. Would you turn to that, please?

7 A. Which page?

8 Q. Page 3. Does ordered paragraph 2 on page 3
9 of the Commission's order dated June 25, 1998 state as
10 follows: That UtiliCorp United, Inc., doing business as
11 Missouri Public Service, is hereby ordered to comply with
12 the terms and conditions of the joint agreement?

13 A. That is correct.

14 Q. And in the last page prior to the ordered
15 paragraphs, at the bottom of page 2, does the Commission's
16 order state, quote, after review, the Commission finds the
17 joint agreement to be reasonable in that it is designed to
18 shift emphasis from the filing requirements of Chapter 22
19 of 4 CSR 240 and to go forward with issues that jointly
20 relate to electric resource planning and retail
21 competition in an efficient and effective manner, closed
22 quote?

23 A. It does.

24 Q. And if you would, sir, please turn to the
25 joint agreement itself, page 5. At the top of page 5 in

1 the first full sentence, where it says, MPS' preferred
2 resource acquisition strategy, would you read that into
3 the record?

4 A. MPS' preferred acquisition strategy is to
5 issue a request for proposal, RFP, to fill part of the
6 capacity requirements and to negotiate new lease
7 arrangements.

8 Q. What was MPS' preferred resource
9 acquisition strategy at that time?

10 A. To issue a request for proposals for
11 capacity, short-term capacity, not long-term, to meet its
12 resource needs in the most economical manner.

13 Q. Was it to build a rate base generating
14 plant?

15 A. No, it was not.

16 Q. Now, Mr. Williams asked you some questions
17 about Staff's criticism of the MPS EWG or electric -- what
18 does EWG stand for, electric wholesale generator?

19 A. Exempt wholesale generator.

20 Q. Okay. And why is it exempt?

21 A. Because it's exempt from the PUHCA rules,
22 is my understanding.

23 Q. And PUHCA is the Public Utility Holding
24 Company Act, the federal act, correct?

25 A. Correct.

1 Q. Now, why did the MPS division of Aquila
2 reject the self-build option?

3 A. If MPS would have built the EWG, it would
4 have been what I'll call a one-off type of investment in
5 that it would have been a stand-alone unit. MPS would not
6 have been able to leverage, according to law, its existing
7 expertise, operating capabilities, et cetera, in the
8 operating of that facility. So it would have been an
9 isolated investment that it would have had to operate
10 totally separate from existing operations. There could
11 have been no interchange of technical knowledge, operating
12 knowledge, between the regulated folks within MPS who run
13 the regulated generating plants and those people in
14 technical staff who would have run the EWG.

15 Q. Now, is that because PUHCA forbids a
16 regulated utility from owning --

17 A. That's correct.

18 Q. -- an exempt wholesale generator?

19 A. That is correct.

20 Q. So, in essence, if MPS was going to do the
21 self build as an EWG, it would have had to set up a
22 structure like it did on the Aries plant?

23 A. That is correct.

24 Q. Now, Mr. Williams mentioned your criticism
25 of the cost of the Aries plant in that Staff, in your

1 view, did not analyze those costs correctly; is that your
2 testimony?

3 A. That's correct.

4 Q. Now, as far as the pricing structure of the
5 MPS sales agreement, what was Staff's failure in your
6 view? What was their failure to properly analyze that
7 pricing structure?

8 A. When Staff attempted to, through
9 Mr. Oligschlaeger's testimony, to allocate a portion of
10 what it views as appropriate cost to own and operate
11 Aries, when it did an allocation of those costs to the MPS
12 contract to the PSA, it overstated the value, market value
13 of the total Aries capacity.

14 Q. Now, Mr. DeBacker, did you prepare a series
15 of charts that depict the pricing structure and what you
16 believe to be Mr. Oligschlaeger's view and what you
17 believe to be the proper view?

18 A. I did.

19 MR. ZOBRIST: Let me show you if I might --
20 and I believe, your Honor, that the next exhibit in number
21 is Exhibit 166.

22 (EXHIBIT NO. 166 WAS MARKED FOR
23 IDENTIFICATION BY THE REPORTER.)

24 MR. WILLIAMS: Judge, I believe Mr. Zobrist
25 is starting to go beyond the scope of the Staff's cross on

1 this witness. I don't recall asking any questions that
2 got into any of this material.

3 MR. ZOBRIST: Well, I believe he opened the
4 door, Judge. What he did is he asked about Mr. DeBacker's
5 testimony concerning the cost of the Aries plant, and I
6 believe that I'm entitled to go into that issue.

7 MR. WILLIAMS: The only cost I raised was
8 with respect to two other purchased power agreements, and
9 he made a comparison to the AmerenUE purchased power
10 agreement.

11 MR. ZOBRIST: I believe this would be
12 helpful to the Commission because the comparison -- the
13 initial questions that Mr. Williams asked about the cost
14 of the Aries plant, and this deals directly with the cost
15 of the Aries plant.

16 JUDGE JONES: I'll allow this.

17 MR. MICHEEL: Your Honor, I would just like
18 to object to the fact that you're putting -- this is being
19 marked as an exhibit. I recognize that Mr. Zobrist hasn't
20 offered it as an exhibit, but under Commission rules,
21 we're not going to get another chance to cross-examine
22 this witness with regard to this exhibit, and so I would
23 object to the due process violation that would occur if
24 we're not allowed an opportunity to, if we so choose, to
25 cross-examine regarding this proposed exhibit.

1 JUDGE JONES: In light of that, then,
2 Mr. Zobrist, would you have objection to them reexamining
3 your witness specifically on this exhibit?

4 MR. ZOBRIST: No, your Honor.

5 JUDGE JONES: Then that's how we'll do
6 that.

7 MR. ZOBRIST: Thank you, your Honor.

8 BY MR. ZOBRIST:

9 Q. Mr. DeBacker, would you describe
10 Exhibit 166, please.

11 A. Exhibit 166 is a graphical representation
12 of Section 5.1 of the PSA which lays out the pricing
13 structure for the contract.

14 Q. And the PSA has been previously introduced
15 into evidence as Schedule 19 to your testimony; is that
16 correct?

17 A. That is correct.

18 Q. And these specific provisions that are
19 reflected in Exhibit 166 are found in what section of the
20 contract?

21 A. Section 5.1.

22 MR. ZOBRIST: Your Honor, I would offer
23 Exhibit 166 at this time.

24 JUDGE JONES: Exhibit 166 is admitted into
25 the record.

1 (EXHIBIT NO. 166 WAS RECEIVED INTO
2 EVIDENCE.)

3 BY MR. ZOBRIST:

4 Q. Mr. DeBacker, would you explain to the
5 Commission what Exhibit 166 sets forth specifically as it
6 relates to the power supply agreement?

7 A. Under the terms of the PSA, MPS purchases
8 two blocks of combined cycle capacity. The first block
9 depicted there is 200 megawatts for 12 months of the year.
10 The price for that block is \$5.90 per kilowatt month for
11 12 months. The second block is 300 megawatts of combined
12 cycle capacity, which is purchased for six months of the
13 year, April through the end of September, and the price
14 for that is \$7.50 per kilowatt month.

15 Q. Now, you have entitled this exhibit as the
16 MPS Power Sales Agreement. So are we correct in that this
17 pricing structure really is just to the PSA?

18 A. That is correct.

19 Q. Let me hand you what I've next marked as
20 Exhibit 167.

21 (EXHIBIT NO. 167 WAS MARKED FOR
22 IDENTIFICATION BY THE REPORTER.)

23 MR. WILLIAMS: Judge, I'm going to renew my
24 objection to continue down this path. I don't see that
25 he's tied any of this to the purchased power agreements

1 that were referred to in the cross-examination. Those
2 two --

3 JUDGE JONES: Mr. Zobrist, you seem to be
4 going further and further away. I'm trying to keep this
5 fair, and within some reasonable outline.

6 MR. ZOBRIST: Your Honor, let me tell you
7 where I'm going to go with this. I've got one other chart
8 in addition to this. And what these charts depict is the
9 actual annual plant value of the Aries plant that has been
10 attacked by Staff. And Mr. Williams opened the door
11 because he asked about Mr. DeBacker's criticism of Staff's
12 testimony with regard to the Aries PSA. And when we talk
13 about the cost of the Aries PSA and the Aries plant, I
14 think I'm entitled to go through this, and I believe that
15 this will help the Commission understand why this
16 transaction was in the best interests of the ratepayers,
17 did not cause the ratepayers any harm and did not act to
18 the detriment of any of the regulated customers.

19 JUDGE JONES: Mr. Williams, does the
20 opportunity to cross-examine the witness on these exhibits
21 satisfy your concerns?

22 MR. WILLIAMS: No, Judge. I think that
23 this information should have been provided in
24 Mr. DeBacker's testimony earlier in the case, not at this
25 stage.

1 MR. ZOBRIST: Well, all of this depiction
2 that we're going into is contained in his testimony and
3 contained in the schedules to his testimony, and it has
4 been discussed with Staff during the prehearing
5 conference. It's been discussed with Staff off the
6 record. There's no element of surprise here. I know it
7 was discussed with Mr. Oligschlaeger yesterday. There is
8 nothing new in here that has not been presented either in
9 evidence or through responses to DRs.

10 MR. WILLIAMS: Then I would object to it as
11 being duplicative.

12 MR. ZOBRIST: Well, this is -- I do have an
13 opportunity to go through redirect. So it's certainly not
14 duplicative. It's helpful, and I would estimate that this
15 would take maybe about five more minutes.

16 JUDGE JONES: Okay. We'll allow
17 Exhibit 167 into the record.

18 (EXHIBIT NO. 167 WAS RECEIVED INTO
19 EVIDENCE.)

20 BY MR. ZOBRIST:

21 Q. Mr. DeBacker, would you explain
22 Exhibit 167?

23 A. Okay. 167 shows the annual value of the
24 500 megawatt of combined cycle capacity of Aries based on
25 the value of the 200 megawatt portion of the PSA.

1 Basically it shows 500 megawatts at \$5.90 a kilowatt month
2 for 12 months.

3 Q. Now, the Aries PSA sets the price for the
4 300 megawatts for the peak summer months at \$7.50; is that
5 correct?

6 A. Of combined cycle capacity, yes, that is
7 correct.

8 Q. Pardon me. Of combined cycle capacity.
9 And for the record, that excludes the 85 megawatts on top
10 of the 500 that is the so-called duct-fired capacity?

11 A. That is correct.

12 Q. Well, then explain if you would, please,
13 why Exhibit 167 shows \$5.90 for the 12 months for the
14 500 megawatts of the combined cycle portion of the plant.

15 A. The PSA establishes the value of capacity
16 purchases purchased on a 12-month basis of combined cycle
17 capacity establishes that price at \$5.90 per kilowatt
18 month.

19 Q. I take it there's no engineering difference
20 between what generates the 200 megawatt versus the
21 300 megawatts that total the 500 megawatts?

22 A. That is correct. It's all the same
23 capacity.

24 Q. Then finally let me show you the last
25 Exhibit 168.

1 (EXHIBIT NO. 168 WAS MARKED FOR
2 IDENTIFICATION BY THE REPORTER.)

3 BY MR. ZOBRIST:

4 Q. And finally, Mr. DeBacker, would you
5 describe Exhibit 168?

6 A. 168 is a graphical depiction of the total
7 value of the Aries facility, the 500 megawatt combined
8 cycle portion plus the 85 megawatts of duct-fired
9 capacity.

10 Q. And all you've done in Exhibit 168 is add
11 that top layer for the top 85 megawatts, the duct-fired
12 capacity; is that correct?

13 A. That is correct.

14 MR. ZOBRIST: Your Honor, I understand
15 we're not in an HC session, and I do believe that the
16 dollar figure there might be an HC number, so I'm not
17 going to refer to that on the record.

18 BY MR. ZOBRIST:

19 Q. But let me say this, Mr. DeBacker, without
20 referring to that specific number, the total annual value
21 of the combined cycle portion of Aries is what?

22 A. 36.8 million. I'm sorry. The combined
23 cycle is 35.4 million.

24 Q. I think we just made a number public.

25 A. I'm sorry.

1 Q. All right.

2 A. I apologize.

3 MR. ZOBRIST: I would offer Exhibit 168,
4 your Honor.

5 JUDGE JONES: I assume you have the same
6 objection, and I'll note that for the record.

7 MR. WILLIAMS: Yes.

8 JUDGE JONES: 168 is admitted into the
9 record.

10 (EXHIBIT NO. 168 WAS RECEIVED INTO
11 EVIDENCE.)

12 MR. WILLIAMS: And, Judge, I guess for
13 Mr. Zobrist's benefit, I don't see any designation on
14 Exhibit 168 of any HC material, and perhaps he might want
15 to do so.

16 MR. ZOBRIST: Well, I think we just waived
17 it, but I'll seek counsel from Mr. Swearngen on that if
18 I've done something terribly wrong. I appreciate the
19 advice. I would offer it as it is, your Honor.

20 I'm sorry, your Honor, has that been
21 admitted?

22 JUDGE JONES: Yes.

23 MR. ZOBRIST: Thank you. I have no further
24 questions.

25 JUDGE JONES: Between Staff and the Office

1 of the Public Counsel, do either of you prefer to go first
2 with reexamination?

3 MR. WILLIAMS: Judge, may we have a few
4 minutes?

5 JUDGE JONES: Sure.

6 MR. WILLIAMS: Like a 5- or 10-minute
7 recess? We weren't anticipating this.

8 JUDGE JONES: That will be fine.

9 (A BREAK WAS TAKEN.)

10 JUDGE JONES: We'll go ahead and go back on
11 the record, Mr. DeBacker, and we'll move on to
12 reexamination by Staff of the Commission, or does Office
13 of the Public Counsel want to go first?

14 MR. MICHEEL: I don't have any questions,
15 your Honor.

16 MR. WILLIAMS: I do have a few.

17 RECROSS-EXAMINATION BY MR. WILLIAMS:

18 Q. Mr. DeBacker, regarding Exhibit 166 --

19 A. Yes.

20 Q. -- does that reflect the contract that
21 Aquila actually engineered regarding the Aries purchased
22 power agreement which I believe is attached as Schedule
23 FAD-19 to your testimony?

24 A. It depicts the annual capacity cost for a
25 12-month period. It does -- the greater portion of the

1 capacity costs. There's actually a small adjustment
2 that's in addition to this 27.66 million per year.

3 Q. I guess --

4 A. About \$100,000.

5 Q. Essentially Exhibit 166 tracks the actual
6 contract; is that true?

7 A. The capacity portion for a one-year basis
8 period, yes.

9 Q. And is that capacity portion in the
10 contract, does that appear in Article 5 which begins on
11 page 18 of Schedule FAD-19?

12 A. That is correct.

13 Q. What was MPS' least cost proposal for
14 power?

15 A. You're talking about the self-build EWG
16 proposal?

17 Q. If that was the least case, then I'm
18 talking about the self-build proposal.

19 A. In August of 1998, I believe it was \$5.50
20 per kilowatt month for 12 months for the full 500.

21 Q. And that was for the self-build option?

22 A. That was our estimate of the price at that
23 time. Remember, we never submitted an actual proposal.

24 Q. Why is the contract structured so that
25 Aquila had six months of power at a set price and six

1 months -- of peak power at a set price and six months of
2 off-peak power at a set price?

3 A. The basic fundamental reason is this was
4 allowed under the reliability counsel of the Southwest
5 Power Pool rules for acquiring capacity, and that you
6 could have 25 percent of your required capacity as
7 seasonal capacity, and we took advantage of that in an
8 attempt to lower the fixed costs of the contract.

9 Q. And when we're looking at Exhibit 166, what
10 I'm referring to as peak power would be that 300 megawatts
11 you show at the top at \$7.50 per kilowatt month.

12 A. One could use the term "peak power." I
13 prefer the term "seasonal power," because peaking power
14 usually refers to a higher energy cost capacity, and this
15 particular capacity is supplied at the same efficiency of
16 conversion of natural gas to energy as the -- the
17 300 megawatts and the 200 megawatts all convert natural
18 gas to electrical energy at the same efficiency rate.

19 Q. When I use the term "peak power" in my
20 question, was your answer based upon the 300 megawatts
21 shown on Exhibit 166? You show an additional
22 300 megawatts out of the total of 500 megawatts.

23 A. Correct. It's for the April through the
24 end of September.

25 Q. I'll use the term "peak power" in my

1 question. My question to you is, in your response, were
2 you referring to that portion as shown on Exhibit 166
3 responding to my question regarding peak power?

4 A. I -- I suppose so. I --

5 Q. Well, did you think I meant something else?

6 A. As I explained, peaking power is usually
7 associated with higher cost energy rather than this --
8 than what we're referring to here, this, as the same as
9 the base load.

10 Q. I'm just trying to get clarification of
11 your response to my answer where I used the terminology
12 peak power.

13 A. Perhaps you should ask the question again.

14 Q. What I asked was -- and I used the term
15 "peak power" -- why was the contract structured so that
16 there were two components? And I believe one is referring
17 to the 300 megawatts at \$7.50 per kilowatt month, and the
18 other component would be 200 megawatts at \$5.90 per
19 kilowatt month for the full 12 months. And you responded
20 something about it was allowed up to 25 percent by some
21 authority?

22 A. Yes.

23 Q. And was your response based upon that
24 300 megawatt and 200 megawatt as shown on Exhibit 166?

25 A. Yes.

1 MR. WILLIAMS: Thank you.

2 JUDGE JONES: Will there be any redirect?

3 MR. ZOBRIST: I just have one question.

4 FURTHER REDIRECT EXAMINATION BY MR. ZOBRIST:

5 Q. Why didn't MPS submit the \$5.50 per
6 kilowatt month offer?

7 A. We had agreed that with -- Staff raised the
8 issue of MPS submitting a self-build option, and their
9 concern was how we would evaluate that and make sure that
10 there was a separation from -- between the folks preparing
11 the proposal and the folks evaluating the proposal within
12 the same entity. So MPS took that option off the table.

13 However, in my testimony, it's been pointed
14 out here today, we continued to investigate those costs
15 and we made that -- Staff aware of the fact that, at that
16 point in time, it appeared that the MPS self build
17 proposal was lower than any proposal that it had received
18 through the solicitation of the -- for power supply.

19 Remember this is in the summer of 1998. We
20 offered to Staff the option of rebidding the whole thing,
21 and they -- that was not done with the Staff's
22 concurrence.

23 Q. Did any of the other companies who
24 participated in the bidding process for what became the
25 Aries plant offer a lower pricing structure than what was

1 agreed to in the PSA?

2 A. No, not for the same type of capacity.

3 MR. ZOBRIST: Nothing.

4 JUDGE JONES: Thank you. Commissioner

5 Murray, do you have any questions?

6 COMMISSIONER MURRAY: I don't. Thank you.

7 JUDGE JONES: Mr. DeBacker, you may step

8 down.

9 Aquila call its next witness, please.

10 MR. ZOBRIST: Aquila would call Mr. Max

11 Sherman to the stand.

12 JUDGE JONES: Mr. Sherman, would you raise

13 your right hand.

14 (Witness sworn.)

15 JUDGE JONES: You may have a seat. Thank

16 you.

17 THE WITNESS: Thank you.

18 MR. ZOBRIST: Your Honor, before I start

19 with this witness, Mr. Swearngen reminded me that because

20 Mr. Sherman is coming from the Merchant side and I believe

21 that a lot of his testimony would be deemed highly

22 confidential, we probably ought to go into an HC session

23 and we ought to clear the room of the regulated side of

24 Aquila's personnel who are in the hearing room at this

25 time.

1 MR. WILLIAMS: Staff concurs.

2 JUDGE JONES: Does OPC feel the same?

3 MR. MICHEEL: I'd like to do as much in
4 public as we can, but if most of Mr. Sherman's testimony
5 is HC, then we'll have to go into HC.

6 JUDGE JONES: I'll leave it to you-all to
7 clear the room of who you don't think should be here.
8 Meantime, we'll go in-camera.

9 MR. MICHEEL: May I inquire, are we going
10 to do these entire questions and answers in-camera?

11 MR. ZOBRIST: Well, I'm -- after the
12 tendering of the witness, I'm really not sure where we're
13 going to go, but I know there are a lot of blanks in the
14 public version, Mr. Micheel, so I'm really not sure --

15 MR. MICHEEL: I guess what I'm searching
16 for is a commitment from Aquila, your Honor, if we're
17 going to do it all in HC, which I don't have a problem
18 with, if Aquila would go through the transcript after it's
19 been transcribed and let us know what is public so we can
20 make as much public as we can. I have no problem going
21 into HC as long as we do that.

22 MR. ZOBRIST: That's agreeable to Aquila,
23 and I would say that I did have an off-the-record
24 conversation with Mr. Sherman who advised me at one point
25 the \$4 million figure that had been deemed highly

1 confidential can now be in the public as it is. So we'll
2 be glad to do that.

3 (REPORTER'S NOTE: At this point,
4 an in-camera session was held, which is contained in
5 volume 14, pages 943 through 971 of the transcript.)

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1 JUDGE JONES: You may proceed.

2 BY MR. WILLIAMS:

3 Q. Were there two separate leases that were
4 included in the Aries financing arrangement when it was
5 initially set up?

6 A. No.

7 Q. Wasn't there an operating lease and a
8 capital lease?

9 A. The -- Counselor, I will tell you what I
10 know. The capital lease between the project and Cass
11 County is one. The number of lease agreements that were
12 to be in place was a total of four had it gone through.

13 Q. Could you elaborate on those four lease
14 agreements?

15 A. Yes. I'm debating whether to ask for
16 permission to use the flip chart, but let's try it without
17 it.

18 Q. If it will make things more understandable
19 for the parties, I'd prefer that we go ahead and do the
20 flip chart.

21 A. No problem with that.

22 JUDGE JONES: I need as much understanding
23 as I can get, so you can use this overhead projector if
24 you like.

25 THE WITNESS: All right. I will try to be

1 very careful not to say anything more than I know, so
2 we'll limit it to that. If I may, sir, may I refer you to
3 my Schedule MS-9 of my rebuttal testimony, which talks
4 about project structure, and in particular the last graph.

5 BY MR. WILLIAMS:

6 Q. Is that the extent of your knowledge?

7 A. No, it's not.

8 Q. The problem I have with my copies is I
9 can't read it.

10 A. We had a corrected one that was submitted.
11 That one, unfortunately, was in color and didn't copy well
12 in black and white. But if that's all you have, then I
13 should start with these so then we'll work forward.

14 JUDGE JONES: Do you-all want to project
15 this on that board?

16 MR. ZOBRIST: Judge, I think that will be
17 better. I checked this very quickly and there are no
18 blank pieces of paper on the flip chart.

19 JUDGE JONES: Mr. Williams, will you -- on
20 this camera here, there's a power button on the bottom.

21 You're making reference to a Schedule 9?

22 THE WITNESS: Schedule 9 in my rebuttal
23 testimony, the last two pages.

24 MR. WILLIAMS: Schedule MS-9, pages 2 and
25 3.

1 THE WITNESS: Yes, sir.

2 JUDGE JONES: Why don't we take a brief
3 break, long enough to get resituated here and make copies
4 of the Schedule 9 and make sure everyone who needs one has
5 one.

6 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

7 JUDGE JONES: Let's go ahead and go back on
8 the record.

9 BY MR. WILLIAMS:

10 Q. I believe, Mr. Sherman, you were going to
11 take your Schedule MS-9, pages 2 and 3, and provide more
12 elaboration on those as to your understanding of the Aries
13 structure.

14 A. Before I do, sir, would you please reask
15 your question.

16 MR. WILLIAMS: If the court reporter would
17 read back the question.

18 (THE REQUESTED TESTIMONY WAS READ BY THE
19 REPORTER.)

20 THE WITNESS: Those four lease agreements,
21 sir, do not exist because the permanent financing was not
22 consummated. I think what I'll do is just go to the
23 present structure, talk about the financing at present.

24 Calpine, through its subsidiary, owns a 50
25 percent interest in the project, even though Cass County

1 owns title. Aquila Merchant, through MEP Investment,
2 similarly is a 50 percent partner. There's been -- Cass
3 County actually owns title under a Chapter 100 bond
4 arrangement in accordance with the Missouri statutes. The
5 capital lease that's been referred to is part of that
6 Chapter 100 bond arrangement in effect.

7 The project entity purchased the bonds that
8 were used in part to build the plant. County sold them to
9 MEPPH. MEPPH pays the interest on the bonds. So in
10 effect, the monthly interest payments are paid through
11 Cass County to itself. But that's what creates, for this
12 27-year term that's referred to at one point, the capital
13 lease. All the county's left with is the PILOT. That's
14 the cash they keep for payment in lieu of taxes.

15 There is a construction loan in effect at
16 the present time with the project entity that is the one
17 we've been discussing. The operating lease structure
18 never made it, did not happen, did not occur.

19 Q. You've got a reference on page 39 of your
20 testimony, in particular line 14, where you state the
21 plant is leased by Cass County to MEPPH under a capital
22 lease agreement?

23 A. That's what I just explained to you, sir,
24 yes.

25 Q. That's what you referred to on the bottom

1 line of MPS-9, 3 of 3, which is, I think, designated on
2 there as Aries capital lease to MEPPH?

3 A. That is correct.

4 Q. So those refer to the same thing?

5 A. They do.

6 MR. WILLIAMS: I offer Exhibit 171.

7 MR. ZOBRIST: No objection.

8 JUDGE JONES: Exhibit 171 is entered into
9 the record.

10 (EXHIBIT NO. 171 WAS RECEIVED INTO
11 EVIDENCE.)

12 MR. WILLIAMS: Judge, I would like to have
13 this witness to be called to answer those further
14 questions, those two questions that he -- or two topics he
15 indicated that he might be able to respond to later today,
16 given an opportunity to review some information.

17 JUDGE JONES: Okay. Are you finished with
18 him now?

19 MR. WILLIAMS: Otherwise I am finished with
20 him, but I would like to reserve the opportunity to do
21 that.

22 JUDGE JONES: That will be fine. Are there
23 any questions from Chairman Gaw for Mr. Sherman?

24 CHAIRMAN GAW: I'll defer right now to
25 Commissioner Murray. I just have a couple.

1 QUESTIONS BY CHAIRMAN GAW:

2 Q. Mr. Sherman, the reference to the Cass
3 County interest, is Cass County liable in any way in the
4 event of default on payment of the instrument that -- my
5 screen went down again so I don't know --

6 A. I'll put it back up.

7 To the best of my knowledge, sir, the
8 answer to your question is no.

9 Q. How do they escape liability and still
10 maintain something that isn't just a sham transaction in
11 appearance? I realize these transactions have that
12 appearance to begin with, but you're telling me that there
13 is no real liability there at all for Cass County?

14 A. It's my understanding that's correct, sir.

15 Q. In the payments that you referred to
16 earlier, the equity payments that have been made, where
17 did that money come from in that diagram that you have on
18 the Aquila side? Where did the money, the equity
19 infusions come from?

20 A. I can't tell you, sir, where in the
21 corporate hierarchy it was funded. Payments were made, I
22 believe -- well, I don't know. Let me just say it at
23 that.

24 Q. Okay. It could be -- could be that it was
25 from MEP Investments or it could be it was from Aquila,

1 Inc.?

2 A. It could be, and I don't know the answer.

3 Q. Do you know about on the Calpine side, how
4 that worked on their payments?

5 A. No, I do not.

6 Q. In your testimony on -- I guess it's your
7 surrebuttal testimony, page 4, beginning at line 16, you
8 say something to the effect that in particular Aquila
9 Merchant attempted to persuade MPS to agree to accept a
10 price adjustment for increases in the price of combustion
11 turbines. Do you see that?

12 A. Yes, I do.

13 Q. MPS refused and would only accept the
14 adjustment on increasing the 500,000 for combustion
15 turbine above Aquila Merchant's initial cost estimate. I
16 believe it said that also, right?

17 A. Yes, sir, it does.

18 Q. Can you document that for me? Where did
19 you get that information?

20 A. Well, it was a verbal exchange between the
21 Aquila Merchant negotiating team, of which I was a member,
22 and the regulated side negotiating team, of which
23 Mr. DeBacker was a member. I do recall that as a result
24 of discussion on this point, we offered to cap price
25 increases at that half a million dollars per combustion

1 turbine, and I believe that correspondence to that effect
2 is in with the exhibits to my rebuttal testimony.

3 Q. And your position at that point in time was
4 what?

5 A. I was just named project manager for the
6 job.

7 Q. Who was your employer?

8 A. The Aquila Merchant side.

9 Q. Okay. And your negotiations, who was your
10 negotiating team?

11 A. At this point, it was myself and Mr. Joe
12 Gilkey.

13 Q. And with MPS?

14 A. Mr. DeBacker was the primary contact.

15 Q. And at this point in time that you referred
16 to in that answer, what was the -- what was the corporate
17 structure regarding Aquila Merchant and MPS?

18 A. Well, let me go back to the chart I didn't
19 show. This is it on the screen, sir.

20 Q. Yes. Uh-huh.

21 A. It shows UtiliCorp United as the parent
22 corporate entity. Missouri Public Service was a regulated
23 division. We have, just to try to minimize confusion on
24 names, shown Aquila Merchant, which went by a variety of
25 names. It had a subsidiary known as MEP Investments.

1 Q. Right.

2 A. And the project entity was MEP Pleasant
3 Hill, LLC, which is shown here as MEPPH.

4 Q. And you worked for Aquila Merchant?

5 A. Yes, sir.

6 Q. And Aquila Merchant was a division or a
7 subsidiary of UtiliCorp?

8 A. I don't know the answer.

9 Q. Is that because you don't recall or because
10 you didn't know at the time?

11 A. I don't know what the legal -- I don't know
12 legally how it was organized. I can tell you how it was
13 run, and this is what this chart explains.

14 Q. Okay. When you say you can tell me how it
15 was run --

16 A. It was --

17 Q. -- what do you mean by that?

18 A. Well, it was an independent energy trading
19 and marketing business, beginning with the generation
20 business, and to the extent it dealt with the regulated
21 side of the business at all, did so under FERC codes of
22 conduct.

23 Q. Who did you report to then?

24 A. Ms. B.J. Horgan.

25 Q. Who again?

1 A. Horgan, H-O-R-G-A-N. She was president of
2 MEP Investments.

3 Q. I couldn't see your title. She was
4 president of MEP Investments?

5 A. Yes, sir.

6 Q. So you reported to her, but did you work
7 for Aquila Merchant or MEP Investments?

8 A. I was on the Aquila Merchant payroll.

9 Q. But you reported to somebody that was on
10 the payroll of a subsidiary?

11 A. I suspect she may have been on the Aquila
12 Merchant payroll also, but nevertheless, her title at the
13 time was president of MEP Investments.

14 Q. So while she may have been having a title
15 with MEP Investments, her actual paycheck came from Aquila
16 Merchant?

17 A. I believe that is correct, sir, as did
18 mine.

19 Q. Do you know if MEP Investments actually
20 wrote checks for payroll for anyone at that time?

21 A. I do not know. I would be surprised if
22 they did, but I just don't know the answer.

23 Q. Was MEP Investments basically a shell
24 corporation?

25 A. It was a holding entity for a number of

1 project companies, such as this. I can name other
2 projects that it owned. For example, MEP Clarksdale
3 Power, LLC, which is a peaking project in Clarksdale,
4 Mississippi. I led the development team on that one. And
5 that legal entity is owned by MEP Investments, LLC as
6 well.

7 Q. Okay. Was it -- are you familiar with what
8 cash infusions would have been made into MEP Investments
9 during its life?

10 A. No.

11 Q. Okay. Who would be?

12 A. I'm going to have to go back and ask. I'm
13 not trying to be evasive. It's just that there's been
14 enough of a wind down of staff on the Merchant side, I'm
15 going to have to inquire of the people who are left to get
16 an answer to your question.

17 Q. Okay. And what is your current position?

18 A. I'm an independent consultant.

19 Q. And how long have you been an independent
20 consultant?

21 A. Since last August.

22 Q. And just before that, what was your
23 position?

24 A. Was a member of a startup business formed
25 to acquire generating assets that were expected to come on

1 the market in this part of the generation business cycle.
2 I was a part of that from November until July, and in July
3 chose not to continue with it.

4 Q. That startup business was not in any way
5 affiliated with Aquila?

6 A. That is correct.

7 Q. When did you leave Aquila or its
8 affiliates?

9 A. Last day on the payroll was, I think,
10 November 2nd, 2002.

11 Q. And what was your last position with
12 Aquila?

13 A. Vice president project development.
14 Responsible for developing Merchant power plants in the
15 eastern U.S.

16 Q. How many people worked for you then?

17 A. Directly, three or four.

18 Q. Okay.

19 A. Several developers and an administrative
20 assistant.

21 Q. Do you consider the construction of the
22 Aries plant and the result of it a success?

23 A. Actually, I did.

24 Q. And explain to me how.

25 A. Well, several reasons why, trying to put

1 personal pride on leaving the development team aside from
2 this.

3 Q. Sure.

4 A. The project was bid to the regulated side
5 to be the least cost source and -- and I want to emphasize
6 this, sir -- to meet an absolutely mandatory in-service
7 date of June 1 of '01 to replace some expiring contracts
8 that the regulated side of the business had. We got it
9 done. We got it done at a reasonable price. We obviously
10 did win the bid.

11 It's a good solid plant. I'm now speaking
12 as an engineer who loves to hug the iron. It's had its
13 teething problems, like any plant does in the first year,
14 but it's a good solid performer.

15 Q. Obviously it's -- at least it appears that
16 it's no longer going to be a part of Aquila. Why do
17 you -- why in your assessment is that the case?

18 A. I can't answer the question, sir, as to why
19 that decision was made. I haven't been involved with that
20 part of it at all. That decision was made after I left
21 the company.

22 Q. I understand. I'm looking for just general
23 feedback.

24 A. Well, Aquila did announce -- I've forgotten
25 whether it was late '02 or early 2003 or for that matter

1 summer of '02. I've forgotten -- a decision to exit the
2 Merchant generating business. Clearly divestiture of this
3 half and 50 percent of that project is part of an
4 execution of that strategy.

5 Q. Were you -- are you familiar with the --
6 with how this plant interrelated in filling the load needs
7 of Aquila's regulated side?

8 A. No, sir. That would be for the regulated
9 folks to -- you mean in terms of where it fit in the load?

10 Q. Yeah.

11 A. The dispatch stack? I can guess, but no,
12 I'm not familiar.

13 Q. The plant is located -- is the plant
14 located close to Aquila's native load?

15 A. It's in the middle of it, sir.

16 Q. In the middle?

17 A. It's in it.

18 Q. Were there any transmission problems that
19 you had to deal with in placing that generation facility
20 there that were significant?

21 A. Nothing that wasn't manageable. Any time
22 you drop a 600-megawatt power source in the middle of an
23 existing power network, that's got to be looked at pretty
24 closely.

25 Q. From an engineering standpoint, is it

1 helpful to have generation near load?

2 A. From an engineering standpoint, yes, sir,
3 it is.

4 Q. Why is that?

5 A. Well, several reasons. If you are
6 purchasing power from a remote source, you do have
7 transmission risk that goes with it. You don't have that,
8 hopefully, for a generating source that is in the middle
9 of the purchasing utility's control area, as this plant
10 was. So you avoid the risk of transmission curtailments.

11 Q. That's a significant problem in some areas,
12 isn't it?

13 A. It depends on what part of the country
14 you're in.

15 Q. And what transmission -- what portion of
16 the grid you're dealing with?

17 A. Yes.

18 Q. Are there transmission constraints
19 around -- well, that's not a fair question.
20 Are you aware of transmission constraints
21 immediately around the Aquila service territory?

22 A. All I can -- all I can tell you to answer
23 that question, sir, is what the interconnection studies
24 told us at the time.

25 Q. Okay. And generally what do you recall

1 about that?

2 A. It did indicate, I was -- I was looking at
3 it -- well, let me back up.

4 We obviously had to request the
5 transmission owner, slash, transmission provider, which in
6 this case was the regulated utility, to perform an
7 interconnection study to see whether or not we could
8 inject that amount of power onto the grid at that
9 location, particularly since we wound up upsizing the size
10 of the plant from 500 to nominally 600.

11 My interest was not looking at imports to
12 MPS. It was looking at exports from MPS from this plant.
13 And in particular the question was, you know, were there
14 any material constraints to export power to other
15 utilities in surrounding areas. I don't recall the
16 detail, but the general answer was by and large no, that
17 the system appeared to be adequate for flows out.

18 Q. Were you a part of the cost studies, the
19 cost study analysis to determine whether or not it made
20 sense to construct this plant to begin with?

21 A. You mean by the regulated side or by the --
22 at the parent company?

23 Q. Yes.

24 A. No.

25 Q. In any way?

1 A. As project manager, my responsibility was
2 to manage, if you will, the project economics and pro
3 forma. So within the project team, within MEP
4 Investments, yes, I had that responsibility.

5 Q. What kind of things did you do in that
6 regard, in general?

7 A. Well, I'm not the finance person. I was
8 the project manager and an engineer by training. My role
9 was to make sure that all the appropriate costs associated
10 with this project over its life were identified, both
11 during construction and projections during operation were
12 put into the financial model. That obviously the bid
13 price that we were offering this project to the regulated
14 utility was includes, assuming we won, for the amount of
15 capacity we sold. There were projections that were
16 developed elsewhere in the Aquila Merchant organization
17 for what we thought we could sell power for after the
18 contract expired and for the blocks of power not being
19 sold to Missouri Public Service that went into the model.

20 So I had to make sure all that stuff was in
21 there, and to the extent there were any changes to the
22 plant design or configuration or scope, which there were,
23 there were a bunch, the project manager had the
24 responsibility of making sure that each individual change
25 was evaluated both technically and economically to see

1 whether it made sense. And if the consensus of the team
2 was to recommend we go with it, then to recommend that to
3 my management for approval.

4 Q. Help me out on the timing of the contract
5 to serve MPS and the construction of this project. How
6 did those two relate to one another?

7 A. The best and final bid to MPS from Aquila
8 Merchant went in January 12th of '99, so beginning of the
9 year.

10 Q. Okay.

11 A. We -- the contract -- let's see. We were
12 notified of award several days after that. The contract
13 was signed, I believe, in late February of '99. We got
14 the job into construction in late September of '99 after
15 getting all the permits and all the stuff you've got to do
16 to get a plant ready to build, including all the contracts
17 negotiated and executed, and the -- it was a staged
18 construction job, which complicates life.

19 Because of the delivery schedule for the
20 combustion turbines, we couldn't complete the plant as a
21 combined cycle plant in time for June of '01, so we just
22 had the combustion turbines ready first and then completed
23 it as a combined cycle plant after the summer. So there
24 was four months where it was sold utility in October 1,
25 plant was shut down, turned back over to the contractor

1 for completion.

2 Q. In the analysis of when there was a -- the
3 cost analysis was done, how important was the contract
4 with MPS in making the decision whether to go forward with
5 the plant?

6 A. We wouldn't have done the plant without the
7 contract.

8 CHAIRMAN GAW: That's all I have, Judge.
9 Thank you.

10 JUDGE JONES: Thank you. Will there be any
11 recross of Mr. Sherman?

12 MR. WILLIAMS: A question or two, Judge.

13 RECROSS-EXAMINATION BY MR. WILLIAMS:

14 Q. Commissioner Gaw asked you respecting the
15 Aries unit what type of usage that Aquila may have been
16 making of it. To follow up on that, given the type of
17 unit that the Aries unit is, a combined cycle unit, what
18 type of need would it typically be used? And in
19 particular I'm thinking of base load, intermediate load
20 and peak load.

21 A. Depending on the region of the country
22 you're in, a combined cycle plant would normally be used
23 for intermediate or base load duty.

24 Q. And given the contract that MPS entered
25 into -- or MEPPH entered into with respect to the Aries

1 unit for supplying power to MPS, would it have been used
2 for peaking power, in your belief or your opinion? You're
3 familiar with the contract, are you not?

4 A. I'm familiar with the contract. MPS had a
5 tremendous amount of flexibility under the contract to
6 dispatch it almost however they wanted. It was at their
7 choice. They had a number of free starts. That's in the
8 contract. I don't know how they chose to dispatch it, but
9 they had the flexibility.

10 MR. WILLIAMS: No further questions.

11 JUDGE JONES: Will there be any redirect
12 for Mr. Sherman?

13 MR. ZOBRIST: Judge, we have a couple of
14 questions, I think, that Mr. Sherman said he would look
15 up. So I wonder if we could take the lunch break right
16 now and then we'll try to wrap him up right after lunch.

17 JUDGE JONES: Okay. We'll do that. But
18 there are questions from the Bench for Mr. Phillip
19 Williams. I think we should get that out of the way first
20 and then we'll go to lunch.

21 MR. ZOBRIST: That's fine, your Honor. And
22 I do have some questions for Mr. Sherman, too.

23 JUDGE JONES: Oh, you do?

24 MR. ZOBRIST: Yes, sir.

25 JUDGE JONES: Step forward. You have

1 questions now on redirect of Mr. Sherman?

2 MR. ZOBRIST: Right, I do. It's probably
3 going to take more than just a couple minutes, but I can
4 begin.

5 JUDGE JONES: Well, let's wait and deal
6 with Mr. Sherman after lunch.

7 Mr. Sherman, you may step down.

8 THE WITNESS: Thank you, sir.

9 JUDGE JONES: And Mr. Philip Williams, will
10 you step forward, please?

11 MR. WILLIAMS: Could we have a moment,
12 Judge?

13 JUDGE JONES: Sure.

14 MR. WILLIAMS: Actually, another attorney
15 for Staff was going to cover that.

16 JUDGE JONES: Okay.

17 MR. WILLIAMS: Actually, could we just take
18 a brief recess or else take Mr. Williams immediately after
19 lunch?

20 JUDGE JONES: Okay. It sounds like
21 everyone wants to go to lunch now. So why don't we just
22 do that and we'll reconvene at 1:15.

23 (A BREAK WAS TAKEN.)

24 JUDGE JONES: Good afternoon,
25 Mr. Williams.

1 THE WITNESS: Good afternoon, sir.

2 JUDGE JONES: Do any of the parties --
3 first I should say, we should probably enter his direct
4 testimony.

5 MR. FRANSON: Actually, Judge, there's a
6 few other things we'll want to enter, but let's start --
7 it will be his direct and rebuttal of the modified direct
8 and rebuttal, and then two versions of the Staff
9 accounting schedules that we'll be doing, specifically
10 Exhibits 5 and 6, 1005, 1006, 144 and then 1144. And may
11 I proceed, your Honor?

12 JUDGE JONES: Yes, you may.

13 MR. FRANSON: Thank you.

14 PHILLIP WILLIAMS testified as follows:

15 DIRECT EXAMINATION BY MR. FRANSON:

16 Q. Sir, please state your name.

17 A. Phillip K. Williams.

18 Q. Mr. Williams, you prepared, I believe,
19 direct and rebuttal testimony in this case; is that
20 correct?

21 A. Yes, sir, I did.

22 Q. And let's start with your direct, which I
23 believe has been marked as Exhibit 5, and your rebuttal
24 testimony, Exhibit 6. Do you have any changes to those,
25 to that testimony?

1 A. Not to my knowledge, no, sir.

2 Q. Okay. 1005, your modified direct, and
3 1006, your modified rebuttal, do you have any changes or
4 corrections to that testimony?

5 A. No, sir.

6 Q. Also are you sponsoring other exhibits here
7 today?

8 A. Yes, sir, the accounting schedules.

9 Q. Okay. Would that be Exhibit No. 144, Staff
10 accounting schedules, and Exhibit 1144, the modified Staff
11 accounting schedules?

12 A. Yes, sir, that's my understanding.

13 MR. FRANSON: Your Honor, at this time I
14 would offer into evidence --

15 BY MR. FRANSON:

16 Q. Or let me ask you, Mr. Williams, do you
17 have any changes to Exhibits -- the Staff accounting
18 schedules, Exhibit 144 or Exhibit 1144?

19 A. Those are the correct filed schedules. No,
20 sir.

21 MR. FRANSON: Your Honor, at this time I
22 would offer into evidence Exhibits 5, 6, 1005, 1006, 144
23 and 1144.

24 JUDGE JONES: Thank you. Are there any
25 objections?

1 (No response.)

2 JUDGE JONES: Exhibits 5, 6, 1005, 1006,
3 144 and 1144 are admitted into the record.

4 (EXHIBIT NO. 5, 6, 144, 1005, 1006 AND 1144
5 WERE RECEIVED INTO EVIDENCE.)

6 MR. FRANSON: Your Honor, with that being
7 done, I would tender this witness for cross-examination.
8 And, your Honor, he will only be here this one time, I
9 believe was my understanding.

10 JUDGE JONES: Yes. We all understand. Are
11 there any questions for Mr. Williams from anyone?

12 MR. MICHEEL: I've got some questions now,
13 I guess, since I get a chance.

14 JUDGE JONES: Go right ahead, Mr. Micheel.

15 CROSS-EXAMINATION BY MR. MICHEEL:

16 Q. Mr. Williams, it's my understanding you're
17 the Staff witness who is sponsoring the Staff accounting
18 schedules; is that correct?

19 A. Yes, sir.

20 Q. And did the Staff on its accounting
21 schedules make any adjustments related to the manufactured
22 gas plant?

23 A. Not to my knowledge, no, sir.

24 Q. And does that indicate to you, based on
25 your years of experience as a Staff auditor, that the

1 Staff has accepted the company's adjustment and agrees
2 with it relating to manufactured gas plants?

3 A. What it means is that we take no position.

4 Q. Let me ask you this: Are the costs for the
5 manufactured cost plant in the Staff's accounting run?

6 A. Any costs that were incurred during the
7 test year would be included in the test year expense, yes.

8 Q. So those manufactured gas costs, if they
9 were in the test year expense, are in the Staff's
10 accounting run; is that correct?

11 A. Any portion that was there that would be
12 allocated to Missouri ratepayers, yes.

13 MR. MICHEEL: Thank you for your time, sir.

14 JUDGE JONES: Any cross-examination from
15 Aquila?

16 MR. BOUDREAU: Yes, please.

17 JUDGE JONES: You may proceed.

18 MR. BOUDREAU: Thank you.

19 CROSS-EXAMINATION BY MR. BOUDREAU:

20 Q. Good morning, Mr. Williams.

21 A. Good morning, sir.

22 Q. My name is Paul Boudreau. I'm an attorney
23 for Aquila. I just have a couple of questions, and I do
24 this with some trepidation because I did it with a notable
25 lack of success earlier. The question I have for you is,

1 earlier on in this proceeding I cross-examined Staff
2 Witness Alan Bax on the issue of the -- it was an
3 allocations issue?

4 A. Yes, sir.

5 Q. And specifically the jurisdictional
6 allocations associated with the Odessa, City of Odessa.
7 Does that ring a bell?

8 A. Yes, sir. That would be part of Alan's
9 calculations, not mine.

10 Q. And I notice that you, in your -- I believe
11 it's in your direct testimony -- indicate that demand
12 plant allocators were calculated and provided by
13 Mr. Bax to you?

14 A. That is correct.

15 Q. And I guess just a general question I want
16 to ask with respect to that, what was the relationship or
17 the roles with respect to Mr. Bax and your
18 responsibilities? Could you just explain generally? He
19 obviously did something and then you took what he gave you
20 and you did something?

21 A. Mr. Bax calculated the Staff's portion of
22 the demand allocator, the KWH allocator, the transmission
23 and distribution allocators. Those allocations were then
24 applied to the allocations factors that were reviewed by
25 me -- or by myself, that the company provided that we

1 found were okay, and those were put together to come up
2 with Staff's allocation to each of the accounts.

3 Q. So in what you did with that information,
4 you would be generally response -- or generally familiar
5 with how the dollars shook down in terms of how that
6 adjustment plays out in this rate case? And by that
7 adjustment I mean the Odessa contract.

8 A. I didn't look at the Odessa contract. It's
9 my understanding Mr. Bax did. The Odessa contract, as far
10 as I can tell, does not take effect until April 1st of
11 this year, which was outside Staff's known and measurable.
12 It was outside the test period, and to take that into
13 account would be my contention the same as Mr. Bax that
14 that would be a -- in the first place it would be outside
15 the known and measurable or test year update, and it would
16 also be a violation of the matching principle.

17 Q. And I understand that's -- and understand
18 that's where the dispute is as between the company. The
19 company's position would be that it would take place
20 before the rates go into effect and, therefore, it ought
21 to be allowed. So that's where the debate on the issue
22 is.

23 My question to you is, are you familiar or
24 have you had an opportunity to review the reconciliation
25 for the issues associated with the MPS electric division?

1 A. I've looked at the reconciliation. I did
2 not look at that portion of it because I didn't do the
3 allocation adjustment that took that into account. So I
4 did not review that, no, sir.

5 Q. So here's my question. Here's a follow-up
6 question. If neither Mr. Bax knows how much this issue is
7 worth and you don't know how much this issue is worth,
8 who's the Staff witness that knows how much this issue is
9 worth?

10 A. The Staff witness who filed the
11 reconciliation is Steve Traxler, and the allocation amount
12 was put in there and your allocation amount was put into
13 his reconciliation and that number calculates
14 automatically based on what's in that account.

15 Q. But your understanding is, however that
16 number appears in the reconciliation, that's how much that
17 issue is worth; is that correct?

18 A. That's correct.

19 MR. BOUDREAU: That's all the questions I
20 have. Thank you.

21 JUDGE JONES: Thank you. Is there any --
22 before we move on to redirect, there are questions from
23 the Commissioners on the issue of comparison to Missouri
24 regulated electricity -- electric company rates.

25 THE WITNESS: Okay, sir.

1 QUESTIONS BY JUDGE JONES:

2 Q. Why is it relevant to our ratemaking
3 consideration whether the company would have the highest
4 rates in the state, as it apparently did approximately
5 three years ago anyway?

6 A. Excuse me?

7 Q. Why is it relevant that the company would
8 have the highest utility rates or electric rates in the
9 state for ratemaking purposes?

10 A. It was -- the only reason this testimony is
11 put in is to show how the rate increase would affect the
12 rates and where they would stand in relation to other
13 customers within the state, and that's a direct relation
14 of -- or in direct relation of the cost associated with
15 the corporate that's being allocated and passed through to
16 the ratepayers.

17 Q. Don't the factors that determine rates
18 differ for each company we regulate?

19 A. There are lots of different factors that go
20 into makeup of that, and I think those have been pointed
21 out by other witnesses.

22 Q. Since those factors differ, doesn't a
23 company always fall somewhere on the continuum of highest
24 to lowest in the state?

25 A. It would be impossible to fall outside that

1 range.

2 Q. Your testimony compares the results in
3 rates with average rates for 2002. Do you know the
4 average Missouri utility rates for 2003?

5 A. I think it was -- I haven't seen the
6 updated one, no, sir.

7 Q. Well, wouldn't it be a more reasonable
8 comparison to compare them to 2003?

9 A. We did this, the data from the -- that we
10 used that was supplied to the company, that was supplied
11 to me did not have the year end 2003 data in it, and it
12 was filed before the end of 2003. So there was no way to
13 have filed it with that rate in it.

14 Q. Do you think that that average is higher
15 than what it was in 2002?

16 A. Without actually calculating it, I don't
17 have any way of knowing that.

18 JUDGE JONES: That's all the questions we
19 have from the Bench. Is there any redirect?

20 MR. FRANSON: No.

21 JUDGE JONES: Thank you, Mr. Williams. You
22 may step down.

23 THE WITNESS: Thank you, sir.

24 JUDGE JONES: And you may be excused.

25 THE WITNESS: Okay.

1 JUDGE JONES: I guess now we go back to
2 examination of Mr. Sherman. That's where we left off
3 prior to lunch.
4 MAX SHERMAN testified as follows:
5 RE-CROSS-EXAMINATION (CONT.) BY MR. WILLIAMS:
6 Q. Good afternoon, Mr. Sherman.
7 A. Good afternoon, sir.
8 Q. Before we broke for lunch, you indicated
9 there were a couple of questions I asked that you did not
10 have responses for, but if you had the opportunity to
11 conduct some review, that you might be able to provide
12 responses?
13 A. That's correct.
14 Q. Have you conducted that review?
15 A. Yes, sir.
16 Q. And are you now prepared to provide
17 responses?
18 A. I believe so.
19 Q. I believe the first question was, do you
20 agree that MEPPH's monthly interest payments associated
21 with the Aries unit prior to and including June 2003 were
22 significantly larger than the interest payments due after
23 that point in time?
24 A. And I do have an answer. The answer is no,
25 they were not.

1 Q. Were they larger?
2 A. They were not. Before the default?
3 Q. Yes.
4 A. No, sir, they were not.
5 Q. What were --
6 A. They were smaller before the default.
7 Q. What were those interest payments before
8 the default? And if that's going to entail HC
9 information, would you please so indicate before you
10 provide an answer.
11 A. I think I have to indicate that now, then.
12 MR. WILLIAMS: Can we go into in-camera
13 session for the purposes of responding?
14 JUDGE JONES: We are now going to go
15 in-camera.
16 (REPORTER'S NOTE: At this point, an
17 in-camera session was held, which is contained in
18 Volume 14, pages 1004 through 1007 of the transcript.)
19
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1 (EXHIBIT NO. 172 AND 173 WERE MARKED FOR
2 IDENTIFICATION BY THE REPORTER.)

3 BY MR. ZOBRIST:

4 Q. Can you identify Exhibit 172, please?

5 A. Yes, sir. This is the form of lease
6 agreement that was to be used for the operating leases had
7 they been consummated.

8 Q. And it was not consummated, correct?

9 A. That's correct, sir.

10 MR. ZOBRIST: I move the admission of
11 Exhibit 172.

12 JUDGE JONES: Any objection to Exhibit 172?

13 MR. WILLIAMS: No objection.

14 JUDGE JONES: Exhibit 172 is admitted into
15 the record.

16 (EXHIBIT NO. 172 WAS RECEIVED INTO
17 EVIDENCE.)

18 BY MR. ZOBRIST:

19 Q. I'd also like to show you what I've marked
20 as Exhibit 173, which is called a participation agreement.
21 Are you familiar with the participation agreement in the
22 Aries transaction?

23 A. Somewhat.

24 Q. Would you just generally define what the
25 participation agreement is?

1 A. The participation agreements, there were
2 two of them, were part of the documentation that defined
3 how the permanent financing was to be structured.

4 Q. And I've placed in front of you
5 Exhibit 173. Is this the participation agreement dated
6 September 8th, 2000 that governed the relations in these
7 parties, MEPPH, MEP Pleasant Hill Operating, LLC and the
8 other entities, including the banks, on this transaction?

9 A. It is.

10 MR. PAULSON: Excuse me, your Honor. I
11 don't think everyone got a copy of that. I don't think
12 all parties got a copy.

13 MR. MICHEEL: No, that's correct, your
14 Honor.

15 MR. ZOBRIST: That is correct.

16 JUDGE JONES: You can have my copy and I'll
17 get another copy later.

18 MR. ZOBRIST: I was going to say, for the
19 record I can certainly withhold offering it into evidence
20 until the parties get a chance to look at it. I
21 apologize. I thought I had at least 10 here, but I --
22 apparently I do not.

23 MR. PAULSON: It's difficult to follow the
24 witness' testimony without a copy.

25 BY MR. ZOBRIST:

1 Q. I think I got an answer to the question,
2 but I've forgotten it, so let me just ask it again. Is
3 this participation agreement, Exhibit 173, the document
4 that governed the relations of these parties with regard
5 to the construction loan, the preconversion to permanent
6 financing stage, if I can call it that?

7 MR. WILLIAMS: I'm going to object at this
8 point because I don't think any of these parties have been
9 identified to date by Mr. Sherman, certainly not on cross.

10 MR. ZOBRIST: I can go ahead and answer
11 that -- or I can go ahead and ask the witness questions
12 about that, Judge.

13 JUDGE JONES: That's fine. Is your
14 objection because none of the parties have been
15 identified?

16 MR. WILLIAMS: Relevance. He hasn't shown
17 any relevance because he hasn't identified that any of
18 these parties have any tie-ins with the preceding
19 testimony.

20 MR. ZOBRIST: Well, I think MEP Pleasant
21 Hill, LLC is the entity about which you asked a number of
22 questions on cross-examination, but I'll clarify that with
23 the witness.

24 BY MR. ZOBRIST:

25 Q. Mr. Sherman, can you identify what MEP

1 Pleasant Hill, LLC is?

2 A. That was the project entity that was formed
3 to initially own and then subsequently control the output
4 of the output from the Aries power plant.

5 JUDGE JONES: Mr. Williams, what parties
6 are you speaking about?

7 MR. WILLIAMS: My recollection of the
8 testimony is we discussed the partners to the Aries
9 agreement and there may have been MEPPH identified. I'm
10 not sure of that.

11 JUDGE JONES: They have been. I remember
12 that, at least.

13 MR. WILLIAMS: None of the other parties
14 that I'm aware of have been identified whatsoever. I'm
15 just -- unless Mr. Zobrist wants to illuminate as to what
16 relevance it has.

17 JUDGE JONES: What relevance does it have?

18 MR. ZOBRIST: Well, this tracks what
19 Mr. Williams, I thought, was asking questions about, which
20 was MEPPH, which is the entity in which Aquila and Calpine
21 investors have 50/50 ownership of the plant. I'd be glad
22 to have the witness explain that, because I'm not sure
23 what I'd say is testimony. That was up on the exhibit, I
24 think it's Schedule 9, to Mr. Sherman's testimony and it
25 was admitted into evidence, I think by Mr. Williams.

1 That's the -- MEPPH is the second box from the bottom. I
2 think it's Exhibit --

3 JUDGE JONES: Let's keep moving. I'll
4 overrule the objection.

5 MR. PAULSON: Is this a confidential
6 document, your Honor?

7 JUDGE JONES: I don't know. Is it?

8 MR. ZOBRIST: This is a confidential
9 document, but I'm not going to get into the details of the
10 document. I simply want to describe it and put it into
11 evidence as an HC document, but we're not going to go into
12 details.

13 MR. PAULSON: The copy I have is not
14 marked.

15 JUDGE JONES: Mr. Paulson, do you have a
16 pencil with you?

17 MR. PAULSON: Yes.

18 JUDGE JONES: Can you write HC on that
19 document?

20 MR. PAULSON: I can.

21 JUDGE JONES: Okay.

22 MR. MICHEEL: Your Honor, just to join the
23 fray, and I let 172 go, but apparently we're going to have
24 a parade of exhibits yet again in recross where we don't
25 have an opportunity -- I'm not suggesting that I may need

1 to cross, but I'm assuming that you're going to give us an
2 opportunity to cross-examine this witness with respect to
3 these documents since not allowing us to do so, I think,
4 would violate our due process rights.

5 JUDGE JONES: Mr. Zobrist, what do you
6 think about that?

7 MR. ZOBRIST: No objection, your Honor, and
8 this is the end of the parade, and I appreciate Mr.
9 Micheel's concern. This is simply to contrast the lease
10 document, which has been talked about in direct and in
11 cross, that was never executed with a document that was
12 actually signed and was in effect, and that's the purpose
13 of bringing this in, to fulfill the record and indicate
14 what was executed, what was in effect and what was not.

15 I do not intend to -- although the parties
16 are free to, I do not intend to ask Mr. Sherman any
17 detailed questions about this participation agreement.

18 JUDGE JONES: I know a lot of this
19 discussion happened with questions from the Bench, as you
20 recall, Mr. Micheel. In all fairness, however, I will
21 allow you an opportunity to reexamine the witness.

22 You may proceed, Mr. Zobrist.

23 BY MR. ZOBRIST:

24 Q. Mr. Sherman, would you tell us what MEP
25 Pleasant Hill, LLC is?

1 A. Yes, sir. That is the special purpose
2 entity that is owned half by Aquila Merchant, half by
3 Calpine, that initially owned the Aries power plant.

4 Q. And is that the entity that is depicted in
5 the second box from the bottom on the document that's
6 called Aries Project Structure 1999, which I believe is
7 page 2 to your Schedule MS-9 -- I'm sorry MS -- yeah,
8 MS-9?

9 A. It is.

10 Q. And who are the -- were the owners in
11 MEPPH?

12 A. The owner for the Aquila side is MEP
13 Investments, LLC. I frankly don't recall the name for
14 some reason. I don't have the slide that shows the name
15 of the Calpine entity that was the other owner.

16 Q. When you were responding to Commissioner
17 Gaw's questions, I believe other questions of counsel
18 about the 50/50 ownership within MEPPH, it was those two
19 entities you were talking about, the Aquila entity and the
20 Calpine entity that had those ownership interests; is that
21 correct?

22 A. Yes, sir.

23 Q. And does pages -- do pages 1 through 3 of
24 the participation agreement generally summarize the intent
25 of the parties behind the transaction -- transactions that

1 led to the creation of the Aries power plant as a Merchant
2 generating facility?

3 MR. MICHEEL: I'm going to object to that
4 question, your Honor. It's my understanding that this is
5 not an executed document, that this was not executed. So
6 I don't -- would call for speculation on, you know, what
7 the purpose of the document was. It was never executed

8 MR. ZOBRIST: I'm sorry. I meant to refer,
9 if I wasn't, to Exhibit 173, the participation agreement,
10 which has got a bunch of signed pages at the end. I
11 apologize if I made that confusing.

12 THE WITNESS: It does show with regard to
13 the financing.

14 JUDGE JONES: Just a moment. Mr. Micheel?
15 I mean, do you still argue?

16 MR. MICHEEL: Were you going to rule on the
17 objection or did he withdraw the question?

18 JUDGE JONES: I wanted to give you an
19 opportunity to verify what he just told you. Is that
20 true?

21 MR. MICHEEL: I don't see the signed pages
22 that he's referring to in 172.

23 MR. ZOBRIST: I'm sorry. It's 173?

24 MR. MICHEEL: I don't have a copy of 173,
25 so let me look at it and --

1 JUDGE JONES: That's fine.

2 MR. MICHEEL: Now it's okay. I thought we
3 were on 172, and I apologize.

4 BY MR. ZOBRIST:

5 Q. Mr. Sherman, would you go to the end of
6 Exhibit 173, the participation agreement. Are there
7 signature pages at the end of that document?

8 A. Yes, sir, there are.

9 Q. Okay. And are you familiar with the
10 signatories on any of those pages?

11 A. Yes, I am.

12 Q. And who are you familiar with?

13 A. Joe Gilkey.

14 Q. And he signed on behalf of MEP Pleasant
15 Hill, LLC?

16 A. He did.

17 Q. And I think you identified Mr. Gilkey as
18 being with you on the project development team?

19 A. That's correct.

20 Q. And am I correct that he also signed on
21 behalf of MEP Pleasant Hill Operating, LLC?

22 A. That's correct

23 MR. ZOBRIST: Your Honor, I won't offer the
24 agreement at this time to make certain that I distribute
25 the copies to the other parties, but I have no further

1 questions on these two documents at this time.

2 BY MR. ZOBRIST:

3 Q. Mr. Sherman, I believe you were asked by
4 Chairman Gaw about the cost studies that were done on the
5 plant, and you described in part some of the projections
6 for development of other sales beyond the Missouri Public
7 Service/MPS power supply agreement; is that correct?

8 A. That is correct.

9 Q. What happened in the passage of time with
10 regard to those projections? How did they turn out?

11 A. The actual sales to parties other than
12 Missouri Public Service turned out to be far, far lower
13 than what were projected at the time.

14 Q. And did the lower prices with regard to
15 those wholesale sales adversely affect MPS ratepayers?

16 A. No, sir.

17 Q. Or Aquila ratepayers in general?

18 A. No.

19 Q. And why is that? Why didn't it affect
20 them?

21 A. Missouri Public Service in the contract had
22 locked in a fixed capacity price for the duration of the
23 contract, and so as a result, they had no exposure from a
24 cost allocation standpoint to whatever sales we were not
25 able to make elsewhere.

1 MR. ZOBRIST: Thank you. No further
2 questions.

3 JUDGE JONES: Thank you. Mr. Micheel, do
4 you want to take an opportunity to reexamine the witness
5 on these exhibits?

6 MR. MICHEEL: Well, I don't have a copy of
7 Exhibit 173 to look at, but I don't think I have any
8 cross, your Honor, but I want to make sure I'm being
9 consistent with my objections so no one can say I've
10 waived the objection to introducing on recross. So no, I
11 have no cross.

12 JUDGE JONES: Mr. Williams?

13 MR. WILLIAMS: Staff has no further
14 questions.

15 JUDGE JONES: You may step down,
16 Mr. Sherman.

17 THE WITNESS: Thank you, your Honor.

18 MR. ZOBRIST: Judge, I want to make sure I
19 interpret the other lawyers' comments correctly, otherwise
20 I will offer this right now. Do you want an opportunity
21 to take a look at this and ask some questions, or can they
22 be admitted into evidence? Because I would offer them at
23 this time, 172 and 173HC.

24 JUDGE JONES: Well, your reason for not
25 admitting it was not whether he had questions but because

1 you don't have enough copies.

2 MR. ZOBRIST: That's true, Judge, but I
3 wanted to give Mr. Micheel an opportunity to ask
4 questions.

5 JUDGE JONES: I'm sure there is some way
6 you can get copies made and brought here. In the
7 meantime, Mr. Sherman can step down and come up later if
8 there are questions.

9 MR. ZOBRIST: Thank you. I think I owe
10 Mr. Conrad a copy, too.

11 JUDGE JONES: And you owe me a copy, also,
12 because I've given mine to Mr. Paulson.

13 MR. ZOBRIST: Thank you, your Honor. No
14 further questions of this witness.

15 JUDGE JONES: And does Aquila have a third
16 witness on this issue?

17 JUDGE JONES: Ms. Starkebaum, I'll remind
18 that you are you still under oath.

19 LISA STARKEBAUM, being previously sworn, testified as
20 follows:

21 DIRECT EXAMINATION BY MR. SWEARENGEN:

22 Q. Good afternoon. I understand your exhibit,
23 which is direct testimony, has been marked as Exhibit 9
24 and also a redacted version as Exhibit 1009; is that
25 correct?

1 A. That's correct.

2 MR. SWEARENGEN: And for the record, Judge,
3 has this exhibit been received into evidence?

4 JUDGE JONES: It doesn't look like it has.

5 MR. SWEARENGEN: I will offer it into
6 evidence at this time and I will tender the witness for
7 cross-examination.

8 MR. WILLIAMS: You're offering both 9 and
9 1009?

10 MR. SWEARENGEN: Yes. 9 is in and 1009
11 isn't, according to Mr. Micheel.

12 MR. MICHEEL: That's what my records
13 indicate.

14 JUDGE JONES: Okay. Just to be sure, we'll
15 admit 9 and 1009, and if 9 has been admitted, it's
16 admitted twice.

17 (EXHIBIT NOS. 9 AND 1009 WERE RECEIVED INTO
18 EVIDENCE.)

19 JUDGE JONES: Is there any
20 cross-examination for Ms. Starkebaum from the Federal
21 Executive Agencies?

22 MR. PAULSON: No, your Honor.

23 JUDGE JONES: Is there any from Sedalia
24 Industrial Users Association?

25 MR. CONRAD: No, your Honor.

1 JUDGE JONES: Office of Public Counsel?
2 MR. MICHEEL: No.
3 JUDGE JONES: Staff?
4 MR. WILLIAMS: No.
5 JUDGE JONES: I'm watching Aquila's
6 witnesses go by on this issue, because there's so many I
7 wasn't sure who to ask. It didn't sound like Mr. Sherman
8 was the right person, because he's not currently involved
9 with the company from, what I gather.
10 I need to understand what ratemaking
11 treatment this Aries project should be given. Can you
12 answer that question?
13 THE WITNESS: I believe that's beyond my
14 area of expertise.
15 MR. SWEARENGEN: We have one more witness,
16 Mr. Empson, who's on this topic, and I'm sure if you ask
17 him that question, he'll have an answer for you.
18 JUDGE JONES: Ms. Starkebaum, I suppose you
19 may step down.
20 THE WITNESS: Thank you.
21 MR. SWEARENGEN: Unfortunately, I don't see
22 Mr. Empson in the audience. If we could just take a
23 five-minute recess, I think I can produce him.
24 JUDGE JONES: Okay. We'll take a
25 five-minute recess until quarter after.

1 (A BREAK WAS TAKEN.)

2 JUDGE JONES: Mr. Empson, you still remain
3 under oath. You may have a seat.

4 THE WITNESS: Thank you.

5 MR. SWEARENGEN: Thank you, Judge, for
6 giving us a few minutes to get Mr. Empson here.

7 JON EMPSON testified as follows:

8 DIRECT EXAMINATION BY MR. SWEARENGEN:

9 Q. Mr. Empson, your testimony is previously
10 marked as Exhibit 1044 your rebuttal, and 1045 your
11 surrebuttal. An earlier version of that testimony was
12 marked Exhibit 44 your rebuttal, Exhibit 45 your
13 surrebuttal, and I believe you do have that testimony with
14 you this afternoon?

15 A. Yes, I do.

16 Q. Good. With respect to the Aries issue, am
17 I correct in understanding that your testimony in this
18 topic is contained in your rebuttal testimony?

19 A. That is correct.

20 MR. SWEARENGEN: Okay. Thank you. Your
21 Honor, I would offer into evidence Exhibits 44 and 45. I
22 understand 1044 and 1045 have already been received. I
23 would offer 44 and 45 and tender the witness. Thank you.

24 JUDGE JONES: Thank you. Exhibits 44 and
25 45 are admitted into the record.

1 (EXHIBIT NO. 44 AND 45 WERE RECEIVED INTO
2 EVIDENCE.)

3 JUDGE JONES: At this time we'll proceed
4 with cross-examination. Will there be any cross from
5 Federal Executive Agencies?

6 MR. PAULSON: No, your Honor.

7 JUDGE JONES: Office of Public Counsel?

8 MR. MICHEEL: Not on this issue.

9 JUDGE JONES: Staff of the Commission?

10 MR. WILLIAMS: Yes, Judge.

11 CROSS-EXAMINATION BY MR. WILLIAMS:

12 Q. Good afternoon, Mr. Empson.

13 A. Good afternoon, Mr. Williams.

14 Q. In your rebuttal testimony, you discuss
15 guidance that you state that you received from the
16 Missouri Public Service Commission Staff concerning
17 treatment of new generating plants, do you not?

18 A. In my testimony, I believe on page 2,
19 lines 23 and 24, I talk about the -- concerning the
20 potential for creating future stranded costs that would be
21 borne by our Missouri customers and the company
22 shareholders and any decision to build new generating
23 facilities, correct.

24 Q. And isn't there testimony by other Aquila
25 witnesses indicating that the Staff never made any

1 complaints regarding Aquila's decision to build the Aries
2 unit as an EWG?

3 A. I'm not aware of the details behind it. My
4 understanding is that EWG would be a non-regulated plant,
5 so it's a little different than building a regulated
6 generating plant that would be owned and operated by the
7 utility itself.

8 Q. Is it Aquila's position that Staff should
9 have indicated at some point earlier than in this rate
10 case that Aquila should have done something besides
11 construct Aries as an exempt wholesale generator?

12 A. I think we have -- my testimony primarily
13 focuses on the operating environment or the environment
14 that exists at the time we were making decisions to build
15 a plant. I think the other witnesses, in terms of
16 Mr. DeBacker and other witnesses could speak to that
17 better than I can.

18 Q. Does Aquila view the Commission's role to
19 provide any management input to what -- management
20 decisions by Aquila?

21 A. I think we would believe that the
22 Commission, the Commission Staff, at least from my
23 experience in the jurisdictions that we operate in, that
24 many times do provide guidance to companies on the policy
25 directions that might exist within their environments.

1 Q. Hasn't Aquila taken the position in a
2 recent case, EF-2003-0465, that the Commission has no
3 business telling the company how it should conduct its
4 internal affairs?

5 A. Could you translate that number into a --

6 Q. It was an encumbrance application case.

7 A. And would you repeat the question again,
8 please?

9 Q. Hasn't Aquila indicated in that case that
10 the Commission has no business dictating to the company
11 how it conducts its internal management affairs and
12 decisions?

13 A. I don't recall that testimony. Could you
14 point me specifically to testimony that I might have filed
15 in this case that deals with that?

16 Q. It may have been done in some pleadings.
17 Are you familiar with the pleadings in that case?

18 A. You might have to remind me of what those
19 pleadings are.

20 MR. WILLIAMS: Okay. We need to get an
21 exhibit marked, I think.

22 JUDGE JONES: Do you have sufficient number
23 of copies?

24 MR. WILLIAMS: I think so.

25 JUDGE JONES: Okay. This will be

1 Exhibit 174.

2 (EXHIBIT NO. 174 WAS MARKED FOR
3 IDENTIFICATION BY THE REPORTER.)

4 BY MR. WILLIAMS:

5 Q. I'm going to hand you what's been marked
6 for purposes of identification as Exhibit 174. Would you
7 please take a look at Exhibit 174?

8 A. Do you want me to read through the entire
9 exhibit, Mr. Williams?

10 Q. Let me direct your attention in particular
11 to pages 7 and 8.

12 A. Okay.

13 Q. And would you please read aloud -- well,
14 first of all, what is Exhibit 174?

15 A. Exhibit 174 is a legal memorandum of
16 Aquila, Inc. in support of its response to joint motion
17 for summary disposition and request for oral argument in
18 Case No. EF-2003-0465. This is the matter of application
19 of Aquila for authority to assign, transfer, mortgage or
20 encumbrance utility franchise works or system in order to
21 secure revised banking arrangements.

22 Q. Is it a copy of a pleading that Aquila
23 filed in that case?

24 A. Yes, it's a copy of a filing made by
25 Paul A. Boudreau of Brydon, Swearngen & England, P.C.,

1 attorneys for the applicant.

2 Q. And I'd ask you to begin reading on page 7
3 with the paragraph that begins "these regulatory
4 decisions." Would you read that aloud, please?

5 A. How far down? I'm sorry. Just continue
6 reading 'til --

7 Q. Continue reading until at least the end of
8 the first sentence of the next paragraph.

9 A. Okay. These regulatory decisions echo an
10 important constitutional principle enunciated by the
11 United States Supreme Court in Missouri ex el -- ex rel
12 Southwestern Bell Telephone versus Public Service
13 Commission of Missouri 262 U.S. 276, 43 SCT 544, paren
14 1923, end of paren, which concerns the Commission's
15 authority in regard to the necessity and reasonableness of
16 expenditures made in the operation of a public utility,
17 addressing the utility's important property rights in the
18 deployment and management of their assets to the best
19 financial advantage of the company. The Court held that
20 the Commission is not the financial manager of the
21 corporation and is not empowered to substitute its
22 judgment for that of the directors of the corporation.

23 And there's a Footnote 7 that cites 43 SCT
24 at 547; a utility's right to manage its property and
25 conduct its affairs and business is the blackest of black

1 letter law in Missouri.

2 Q. And then I'd direct your attention to
3 page 8. There's a quotation from a Missouri Supreme Court
4 case there.

5 A. Yes.

6 Q. And I would ask you to read into the record
7 beginning with the second sentence through the end of that
8 paragraph.

9 A. The company has the lawful right to manage
10 its own affairs and conduct its business in any way it may
11 choose, provided that in doing so it does not injuriously
12 affect the public. The customers of a public utility have
13 a right to demand efficient service at reasonable rate,
14 but they have no right to dictate the methods which the
15 company must employ in the rendition of that service,
16 paren, emphasis added, end of paren.

17 Q. Does Aquila agree with those statements
18 here today?

19 A. Obviously we would agree with those
20 statements, given they were filed by our counsel.

21 MR. WILLIAMS: I offer Exhibit 174.

22 JUDGE JONES: Any objection to Exhibit 174?

23 MR. SWEARENGEN: The company has no
24 objection.

25 MR. PAULSON: No objection.

1 JUDGE JONES: Exhibit 174 is admitted into
2 the record.

3 (EXHIBIT NO. 174 WAS RECEIVED INTO
4 EVIDENCE.)

5 MR. WILLIAMS: I have no further questions.

6 JUDGE JONES: Commissioner Gaw, do you have
7 any questions of Mr. Empson?

8 CHAIRMAN GAW: Just one moment, Judge.

9 QUESTIONS BY CHAIRMAN GAW:

10 Q. Mr. Empson, there's a lot of testimony here
11 filed about this Aries plant and decisions made about it
12 and decisions or signals, other things that the company is
13 saying that Staff set about making decisions one way or
14 the other. What was your -- what was your position with
15 the company when the Aries plant was first contemplated?
16 Were you with the company at the time?

17 A. Yes, I was. I would have been senior vice
18 president responsible for the regulatory, legislative and
19 environmental activities within the company.

20 Q. And how much involvement would you have had
21 with the decision to construct this plant?

22 A. As far as the direct decision, my
23 involvement would not have -- I was not directly involved.
24 What my position was at that time was to give advice about
25 the regulatory environment and what impact that would have

1 if we took a, for example, long position on a gas
2 contract, a pipeline contract or building of generation
3 unit, given the potential for that environment to change
4 and go to retail choice and the opportunity that might to
5 be create stranded cost.

6 Q. Did the company have a vision at that point
7 in time about the direction that they believed that they
8 would be going in regard to unregulated activities?

9 A. Yes, we did have a vision. We published a
10 fairly lengthy position paper back about 1996, where we
11 saw the industry going with the pending deregulation in
12 both the gas and electric markets and what actions we
13 might be taking as a company to ensure we could still
14 adequately serve our customers yet protect the interests
15 of our shareholders.

16 Q. Did the company advocate to legislators,
17 legislatures, rather, to Congress, the direction that they
18 believed the country or states should go in in regard to
19 deregulation?

20 A. Yes. The company was involved back in
21 the -- probably as early as the 1994, '96 time frame,
22 before both Congress and actively participating in any
23 initiatives at the state level that were examining it. We
24 had, for example, people participate in the Commission's
25 Task Force on Electric Competition Restructuring. It had

1 both John McKinney from the electric side and Steve Jerrig
2 (ph. sp.) on the gas side, and our counsel, Jim
3 Swaengen, participated in those task forces to try to
4 address what the policy issues that each state should be
5 considering as they start moving into a restructured
6 environment.

7 Q. And was that involvement one that could be
8 characterized as monitoring what direction those -- the
9 policymakers might be going in, or was it one of lobbying
10 for those policymakers to go in a particular direction?

11 A. I think our company position at that point
12 in time was that moving toward a scheme of effective
13 competition could be beneficial to the customers. So we
14 were more supportive of that transition from an overall
15 corporate perspective, that we believed there was value
16 that could be created, as had been demonstrated perhaps in
17 other industries to create a competitive environment, but
18 to do so in a way to ensure that the customers were
19 protected.

20 Q. In looking at the company's position at
21 that point in time, I mean, would it not be fair to say
22 that the company was one of the leaders in the -- in the
23 country in advocating for a deregulated environment?

24 A. We were -- there was no doubt,
25 Commissioner, we were an advocate. I'm not sure we could

1 be characterized as the leader. We did not have really --

2 Q. I didn't say the leader, but one of the
3 leaders.

4 A. I know at the federal level that we were
5 involved, but we did not spend the -- nearly the time or
6 resources that many of the larger companies did. So yes,
7 we were a supporter of it. I'm just trying to -- I have a
8 hard time characterizing whether we'd be recognized as a
9 real leader back in Congress, for example, because we
10 were -- our service territory was not the populous service
11 territory that many others had that they could be much
12 more of a leadership position.

13 Q. And that would involve -- would have
14 involved representatives of the company testifying in
15 legislative hearings, Congressional hearings?

16 A. Yes, we did provide expert testimony at
17 both the state and federal level when asked to by, for
18 example, members of our Congressional delegation, if they
19 wanted to understand where we were coming from, or if
20 there were other interests, EEI or AGA , for example, that
21 might want member companies there, yes.

22 Q. During the proposed merger of St. Joe L&P
23 and UtiliCorp in the original proposed merger, was
24 there -- was there any -- was there any testimony about
25 the company's belief that we were headed toward a

1 deregulated environment in that case?

2 A. It's my recollection that one of the
3 reasons that St. Joe put itself basically on the market to
4 be sold is their concern that they could not survive in a
5 deregulated environment. So they went out and actually
6 put their company on the market and hired an investment
7 banking firm to go out and solicit bids.

8 So yes, there would have been testimony
9 both on the part of St. Joe on why they decided to sell
10 their property and probably supporting testimony by
11 UtiliCorp United or Aquila on their belief also that we
12 were moving toward that area, which is very consistent
13 with some of the comments in the task force reports that
14 were conducted by the Commission.

15 Given that that's the environment that we
16 could be approaching, what should all the various
17 stakeholders be doing, including state commissions and
18 companies, to prepare the constituents for that
19 transition?

20 Q. Again, if this -- if this were a train
21 moving down the track toward some unknown destination, if
22 Aquila believed that destination was a deregulated market,
23 they would be helping push the train along at that point
24 in time; wouldn't that be a fair characterization?

25 A. Yes, we did support the movement toward a

1 deregulated environment, that is correct, for the
2 commodity portion of the business.

3 Q. In assessing decisions that were made in
4 the company in that time frame, would the -- would the
5 fact that the company was advocating for that position
6 have had any influence in the decision-making of the
7 company in regard to its decisions about how to construct
8 plants and under what -- under what hat to put them; in
9 other words, as to whether or not to build as a part of a
10 deregulated division or subsidiary as opposed to a
11 regulated one?

12 A. I'm not sure the advocacy itself. It's
13 whether or not the company at that point in time believed
14 that the position that could be taken either in a state or
15 nationally was going to be a deregulated environment.

16 So from my perspective at that point in
17 time, I worked on the utility side of the business, and so
18 what I was trying to do was look at what the trends were
19 even within our states to decide, if they move in that
20 direction, and we do become deregulated, what's the best
21 positioning on the behalf of our customers and our
22 shareholders for whether or not we should sign long-term
23 contracts, either on gas or electric or build generation.

24 So my recommendations would have been
25 really more from the perspective of coming from the

1 utility side of the business, rather than looking at what
2 the Merchant direction was that was going at that point in
3 time.

4 Q. Could the decision to create a deregulated
5 retail market system in the state of Missouri have been
6 made by the Public Service Commission without legislation
7 having been passed by the Missouri General Assembly?

8 A. No, it could not. And I think that was
9 the -- there was two elements in the task force, I think,
10 that the Commission looked at. One was given that there
11 was the potential for that to happen -- and there's two
12 parts to that. One, there's national legislation proposed
13 that was going to mandate that states open up their
14 systems by date certain. One date certain was 1999.
15 Another date certain was 2000 in those bills moving. So I
16 think the state, then, was looking at there had been a
17 bill introduced, and my recollection, in the state
18 Legislature.

19 And what the task force was looking at,
20 given that movement, are the things that we should be
21 doing to prepare for it, and I think the task force even
22 recommended and the Commission Staff in their report, was
23 that maybe we should do some sample, for example, retail
24 wheeling projects, where instead of having utilities bill
25 power plants to meet their incremental needs, they instead

1 go out and bring a third party in.

2 So my recollection from the task force was
3 that the Staff itself was recommending that the Commission
4 advance legislation to do retail wheeling pilots in order
5 to start preparing itself for that market. So we were
6 also looking at sort of kind of that commitment and where
7 we thought the Missouri Commission was going in making
8 those decisions.

9 Q. Did you have some indication from the
10 Missouri General Assembly that you could get legislation
11 like that passed through the General Assembly at that
12 time?

13 A. No, we did not.

14 Q. The issue in regard to the decision to put
15 Aries under the unregulated hat -- and I'm sorry I keep
16 using that phrase. It's just easier for me.

17 A. Sure.

18 Q. But was that in any way based upon -- and I
19 know there's testimony here -- in any way based upon the
20 belief that Aquila had in regard to whether or not
21 Missouri was going to a retail -- a deregulated status on
22 retail markets?

23 A. I probably need to step back, if I could,
24 and kind of give a little background here. What we were
25 looking at at the time was would you, in fact, given

1 what's going on both nationally and at the state, build a
2 new generation plant in the state of Missouri that was
3 regulated. So at that point in time, the decision was
4 made that we would not consider building a regulated
5 generating plant because of the potential to create
6 incremental stranded costs.

7 So we went out and did competitive bids.
8 The winner of the competitive bid was the affiliate. So
9 the idea that there wasn't a -- there was a linkage there
10 that I think you were stating, I don't think that direct
11 linkage occurred, because if they would have not been the
12 successful bidder, then that plant wouldn't have been
13 built.

14 Q. Okay. But I'm going to back you up again
15 here, because I've got -- there's a -- there is a purpose
16 to my question. The issue in regard to the decision to
17 build, was it in any way based upon -- okay. Let me stop.
18 Strike that.

19 If you -- at the time that you were
20 evaluating whether or not new generation was needed for
21 the regulated side, what options were being explored?

22 A. I guess there's two options. You could
23 build it as a regulated generating facility, or you could
24 go -- maybe three -- go out and enter into a long-term
25 purchased power agreement, or go out and enter into a

1 short-term purchased power agreement.

2 Q. Were all of those options being explored at
3 that time, prior to the decision to build the Aries plant?

4 A. It is my understanding and recollection --
5 I know that the purchased power options were looked at. I
6 think there was some initial discussion about the
7 regulated side, but a concern about the stranded cost
8 potential, if we moved toward that deregulated
9 environment, but all I was doing -- and again, I wasn't
10 involved in that final decision. I was looking at the
11 environment and trying to give them assessment, given
12 federal legislation and state legislation, what might be
13 the most appropriate position to take. At that time I was
14 ad -- advising to take a short position.

15 Q. If that had not -- if the environment had
16 been different in regard to the possibility of going to a
17 deregulated market system, would that have changed or
18 impacted the decision of Aquila or UtiliCorp at that time
19 to build the generation facility under the regulated part
20 of the company?

21 A. It would be my recommendation from the
22 utility side, you would then really explore those three
23 options that I looked at. What would make the most
24 economic sense for our customers, do you build a
25 generating plant? Do you go to a long-term purchase power

1 agreement? Does that provide a greater benefit or do you
2 do a short-term, because your belief is maybe that prices
3 are going to come down or demand shape was going to
4 change?

5 So I think if the environment for
6 deregulation was not there, it would have probably changed
7 the dynamics of the decision that would be made, yes.

8 Q. Was it clear at that point in time that
9 something had to be done in regard to filling generation
10 needs to take care of Aquila's load requirements?

11 A. It's my understanding, yes, it was.

12 Q. So one of those three options had to be
13 exercised?

14 A. From the best of my knowledge, those are
15 the only three options. There might have been others they
16 could have considered, but the best of my knowledge, those
17 could have been the three options, yes.

18 Q. Something had to be done to fill those
19 needs?

20 A. That is correct.

21 Q. And that had to be completed by some date
22 in the fairly near future at that point in time; isn't
23 that correct? You were having to do something by sometime
24 in 2001, I believe I heard?

25 A. That is my understanding, that's correct.

1 Q. And in what year would we have been talking
2 about when that -- when those decisions were being made?

3 A. It would have been bid in the 1997-'98
4 time frame, I believe. Our initial position paper where
5 we talked about policies was issued in the mid 1990s and
6 updated in 1996.

7 Q. Was it possible for the company at that
8 point in time to hedge in regard to the potential for the
9 deregulated environment to be coming about as the decision
10 was being made about where to build or under what portion
11 of the company to build this Aries plant?

12 A. Yes, I believe that is the approach that we
13 took. We went out for short-term purchased power
14 agreement bids to say that, let's look at a short-term
15 contract over the next five years. That gave us the
16 flexibility, then, if things didn't materialize, we could
17 go one direction, but if they did, we would have protected
18 ourselves from potential stranded cost.

19 Q. Did the company believe that they had --
20 that there was sufficient demand on the market to -- for
21 the Aries plant to be built without it being a prince --
22 it having principal service to the Aquila native load?

23 A. I can't answer about the Aries plant per
24 se. I really wasn't on the Merchant side. What I do know
25 is that, as we are making this transition, we've had a lot

1 of opportunity to talk about we have not only the Aries
2 plant, we have other Merchant plants. And with the
3 Merchant business that we had, they did have the
4 opportunity beyond traditional native load to use a
5 facility. For example, they did sell call options to
6 other utilities at a set price. In order to do that, they
7 needed some hard assets to back it up, because you had to
8 give them electricity when they needed it.

9 We also sold other utilities what we called
10 guaranteed generation. So if they had an outage that was
11 not expected, that we had provided them a plan for that.
12 We received an up-front payment or demand payment. And
13 basically some of the positions, the long positions that
14 our Merchant was taking was based upon their ability to
15 have a portfolio of these products that we had a very
16 large staff on the Merchant side selling, because that has
17 been a question that has come up about some other Merchant
18 plants that we do have.

19 Q. The Aries plant, as you've already
20 testified, I believe, would not have been built were it
21 not for the fact that they were awarded this contract to
22 serve MPS?

23 A. I could not make that decision. All I know
24 is the Aries plant could be built since they were awarded
25 the contract. Now, whether or not they would have built

1 that like they have -- we have three other peaker plants
2 that were built as purely long positions -- it would have
3 been dependent upon their assessing what the market was
4 for that type of generation to be situated in that
5 location.

6 So all I know is that that -- with having
7 that contract, it gave them the ability to build it.
8 Whether or not they would have built it anyway, like the
9 other three peakers that we have, I can't say.

10 Q. The Aries plant is not a peaker plant
11 alone, is it? It's a cogeneration plant that can be used
12 for base load as well?

13 A. My understanding is it was originally built
14 as a CT peaker and it had a second -- I'm not sure of all
15 of the engineering, but it became more of an intermediate
16 load, but it could function initially as a peaker.

17 Q. It was always intended to be a cogeneration
18 plant in the end, though, was it not?

19 A. Yes, it was. It was just the timing of
20 when you would convert it.

21 Q. It was impossible to finish the job on the
22 cogeneration side within the time frame necessary to take
23 care of MPS' needs, and so it was -- the construction was
24 done so that the peakers could be up and running before
25 the steam generator was actually finished; isn't that

1 correct?

2 A. I'm not aware of that, Commissioner. I
3 couldn't say for sure.

4 Q. The issue of building this plant at that
5 time, then, if I understand this correctly, was at
6 least -- at least critically hinged upon the ability of
7 MP -- of MPS to have a contract with Aquila's Merchant
8 division prior to the construction being started. That
9 would be one critical element, wouldn't it?

10 Without that contract -- that contract was
11 an important element to the decision to go ahead and
12 construct the Aries plant?

13 A. For Aries itself, right. If we'd awarded
14 it to some other company, then they would not have had
15 that contract as a base to start building it.

16 Q. Well, there was another possibility.
17 You've been hitting on that a number of times. But go
18 ahead and answer my question. I'll go to that in a
19 minute.

20 The issue of the decision to build Aries
21 was critically tied to the contract between MPS and Aquila
22 Merchant to supply the energy from that -- from that Aries
23 plant over to MPS for that five-year contract?

24 A. I wasn't on the Merchant side, so I can't
25 understand exactly. I know that we competitively bid it,

1 we awarded the contract, but what the decision-making was
2 on the Merchant side, I really can't speak to.

3 Q. Who knows that?

4 A. I would assume that Max Sherman, the
5 previous witness would have known that, but I really can't
6 say for sure.

7 Q. I asked him some of those questions, but he
8 didn't seem to have all the answers to my questions that I
9 asked. Is there someone else with the company that has --
10 that was responsible for the decision-making?

11 A. Well, there were two individuals that I was
12 aware of -- or three individuals, and unfortunately those
13 three have left the company. That was B.J. Horgan, Harvey
14 Padewer, and probably Bob Green. I could go back in the
15 corporation to see who else, but at this point in time, I
16 couldn't say for sure. I believe Mr. Stamm at that point
17 in time was in Australia and would not have been directly
18 involved. So I'm not sure I can identify right at this
19 point who that individual would be.

20 Q. Who did you answer to during that time
21 frame? Who was your supervisor?

22 A. My supervisor was Bob Green.

23 Q. Was Bob Green. All right. And his
24 position at that time was what?

25 A. I think he was the chief operating officer

1 for Aquila, Inc.

2 Q. Okay. And the corporate structure at that
3 point in time, where did Richard Green fall?

4 A. I believe at that point in time he'd have
5 been the CEO and Chairman, so Bob would have reported to
6 Rick Green, Richard Green.

7 Q. All right. So Richard Green would have at
8 least had knowledge of the final decisions being made in
9 regard to the construction of the Aries plant?

10 A. I would assume so, yes.

11 Q. Okay. Now, you have touched on the fact
12 that one of the options that Aquila was considering and,
13 in fact, was considering from the regulated side in
14 filling its generation needs was a long-term contract or a
15 shorter-term contract with some unaffiliated company,
16 correct?

17 A. Correct.

18 Q. So when the decision is being made and the
19 process is being done under FERC rules in regard to
20 awarding contracts of that kind and one of your affiliates
21 is bidding, how does that process work in general? Is
22 there -- are there some protections in regard to ensuring
23 that affiliates do not get a preference over and above
24 something else and what are those -- what are those in
25 general?

1 A. I'll have to speak in general. We were
2 by -- we were required to first make a filing with the
3 Missouri Commission, and they had to provide assurances to
4 the FERC on I think there's four issues. I can't recite
5 them right now, but like in the public interest and stuff.

6 Q. It's in the testimony somewhere?

7 A. Right. And once they did that, then we
8 made an application with the FERC for approval to have the
9 contract between affiliates, between the Merchant Energy
10 Partners and the utility. So that's my general
11 understanding of what was required at that time.

12 Q. And did -- to your knowledge, did the --
13 was the contract awarded to the affiliate -- let me ask
14 you this: Were there a number of different proposals that
15 were submitted besides the one from the affiliate?

16 A. My understanding, there were several
17 different proposals, and as time evolved, it got down to
18 basically two that were the finalists, and I believe
19 Mr. DeBacker has detailed testimony about that. I was not
20 at that time directly involved in any of the review of
21 those contracts. That was really done by our resource
22 planning group.

23 Q. So Mr. DeBacker would be the one that would
24 have that information?

25 A. Yes, sir.

1 Q. Can you help me to understand how -- and I
2 know this isn't in your area, but maybe you can shed some
3 light on it. You've been -- you've been with this company
4 for a number of years. You've been involved in many
5 decisions that have been made by the company. Help me to
6 understand how the company was justifying, if you know,
7 the construction of the Aries plant which was critically
8 attached to the five-year contract with MPS in filling its
9 generation needs, but whose financing would go on for
10 20-plus years afterwards and need some revenue stream in
11 order to fund it on the deregulated side.

12 Who was responsible for that analysis about
13 how those payments were going to be made by the company,
14 and who do I ask those questions of, if you can tell me,
15 unless -- if you know the answers, I'd be glad to listen
16 to your testimony.

17 A. I cannot give the details on that. Again,
18 I think it goes back to, unfortunately, some of the people
19 that might have been involved in that decision making have
20 left the company, the three people that I mentioned. In
21 general, it goes back to the comments I made before. If
22 you are going to be an active player in the Merchant
23 environment, having hard assets behind some of the
24 products and services you are selling to other utilities
25 was an important strategy.

1 So some of them were built. We have three
2 other facilities that were built without any contracts. I
3 mean, they are in long positions and are not operating
4 right now. So they would have -- they were operating
5 before, some of them were, because we had the capability
6 of selling this guaranteed generation or we sold call
7 options, but since we have basically shut down that entire
8 Merchant trading part, we are left with, in this case, the
9 potential for stranded assets.

10 It will be the same thing on the Aries
11 contract. I mean, not knowing the details, they only had
12 a five-year agreement. It was Merchant after that. So
13 their belief would have been that they had other products
14 and services that they'd be selling into the market that
15 would have covered those costs, and now that we've shut
16 down that business, that is the exposure that does exist.

17 Q. Someone had to have made some calculations
18 at the time about how that -- how you were going to make
19 ends meet on paying the rest of that plant off after that
20 five years went by. Who was it that made that decision?

21 A. My recollection would have been it would
22 have been B.J. Horgan recommending to Harvey Padewer,
23 saying that this is how we're going to make not only this
24 hard asset work in the market environment, as we see it,
25 but all the other investments that they were making at

1 that time in the Merchant side of the business.

2 Q. And would their decisions have been the
3 final decisions? Could they have made that decision
4 themselves without any approval by anyone over them?

5 A. I believe it would have gone to Bob Green.
6 There's probably a -- all the major investments would have
7 been reviewed by him. That's the extent of what I would
8 know. But that -- those -- no, they would not -- neither
9 Harvey nor V.J. could have made that.

10 Q. Would Bob Green have made that decision
11 without talking to Richard Green?

12 A. I'm not sure what his approval
13 authorization level is. Most likely not. It would have
14 been in an environment where all the capital investments,
15 major ones would have been reviewed within the
16 corporation. There's probably a team of people that would
17 have looked at that, including the chief financial officer
18 at the time and things, but I'm not aware of who all was
19 in that team back in 1998.

20 Q. I saw some -- quite a bit of testimony
21 about about how obvious it was that we had two little
22 generation back then, and we had to build a lot of
23 generation, because there was an instance that keeps
24 popping up about some episode that happened one of these
25 summers and some huge amount of money being paid per

1 megawatt for electricity. Do you recall any of that? Do
2 you remember seeing any of that?

3 A. I know there was some high demand times
4 where, yes, when you went out onto the market to meet your
5 peak and if you didn't have adequate peaking reserves or
6 resources to do it, obviously, you had to go back into the
7 market and you would be paying whatever those prices were
8 at that point in time.

9 Q. Well, that can happen to you, too, in the
10 marketplace sometimes, can't it?

11 A. Yes, it can.

12 Q. If you leave yourself open to the
13 susceptibility of whims of the market?

14 A. And I think it's very difficult. We face
15 the same thing, I think, on the gas side of our business,
16 to anticipate -- to be able to plan for that ultimate
17 situation where either the weather gets so cold that you
18 don't have -- you haven't prepurchased or have in storage
19 enough to meet it and you have to go onto that market.
20 Typically there's some anomalies, no doubt, in the
21 marketplace.

22 What you try to do is minimize the exposure
23 for the customers continually paying for that opportunity
24 and maybe overpaying because you -- I'll call it the belt
25 and suspenders approach -- you're being very cautious

1 versus the few times you might have to go into the
2 marketplace to buy the supplies to meet the peak need, so
3 it is a balance that has to be achieved.

4 Q. All right. But at the time, there's
5 testimony that I've seen -- I see that testimony as at
6 least part of the rationale for why it was -- may have
7 been -- was that in the testimony? Because there's a
8 rationale that with that high price, that there needed to
9 be -- that there was going to be a need for generation to
10 be built in the -- in the wholesale mar-- excuse me -- in
11 the Mer-- on the Merchant side rather than in the
12 regulated side of the business. I'm trying to understand
13 what that testimony's supposed to mean to me.

14 A. I believe the testimony -- and I'm not sure
15 whose exactly you're referring to, but the testimony
16 probably relates to the incidence where generally in the
17 country there was not a lot of generation that was being
18 built. So when you hit that peak time, then you were
19 forcing prices up.

20 It's kind of what we're experiencing on the
21 gas side now. Supply and demand are out of balance.
22 Therefore, if you had some anomaly come up where it's very
23 hot weather or another generating unit tripped off, it
24 created a surge in prices.

25 And so there -- I think it was a general

1 view at that time from the wholesale side, which was
2 essentially going through deregulation, to build
3 generating plants to meet the needs where they could
4 participate in that market.

5 Q. It was kind of hard to get generation built
6 at that point in time in a quick way on gas generators,
7 wasn't it, because there was so many people building
8 generation plants that it was difficult to get the
9 companies to build them, they were on back order?

10 A. Yeah. A lot of turbines, my understanding
11 was, had been purchased, there was a lot of generation
12 that was being built in various regions of the country,
13 and some consultants believing that perhaps some regions
14 were going to be overbuilt and that you were going to
15 have, then, an oversupply which would drive prices down,
16 other regions were having more difficulty building.

17 And it wasn't just the gas. We're dealing
18 with coal-fired plants, too, that maybe someone building a
19 coal-fired assigning a long-term contract as a base load
20 unit to somebody.

21 Q. As we sit here today, is there any -- are
22 we short on generation in -- in the Midwest?

23 A. I'm probably not an expert in that, but my
24 understanding is, right now we do have adequate generation
25 that has been built in the Midwest, but I really can't

1 give you what the supply and demand balance is.

2 Q. Is it part of the reason that Aquila is at
3 least -- well, is it one of the reasons that Aquila is
4 getting out of the Merchant side on generation because
5 they don't see a high demand for the use of generators in
6 the wholesale market?

7 A. I think there's two issues there. First of
8 all, the financial situation that we're in requires us to
9 liquidate or to sell some of our non-regulated assets to
10 retire the debt.

11 The second, my understanding is that the
12 market -- the price you can get for electricity is low
13 compared to the price of gas coming in and the spread just
14 isn't there to get you to produce the asset, because there
15 is more supply maybe in the marketplace now, but yet high
16 gas prices, so you can't operate some of these gas-fired
17 generators.

18 Q. And a cogeneration plant may be cheaper to
19 run than if you -- once you have it up and running, than a
20 peaker, but it's not cheaper than a coal plant to run, is
21 it, once it's already constructed?

22 A. My understanding is it would not be, but
23 the capital costs up front for a coal plant -- and you're
24 operating them differently, is my understanding. The coal
25 plant's going to operate the majority of the year, where

1 as a peaker you're trying to meet those middle peak needs
2 that you have on your system. And the intermediate load
3 is kind of in between the coal-fired and the peaker.

4 Q. And what point in time was the decision
5 made to sell 50 percent of the interest in the Aries plant
6 to Calpine?

7 A. The exact date, I can't say. I know when
8 we made the decision that we had to basically exit the
9 Merchant side of the business, which would have probably
10 been, if I recall, about mid 2002, that they would be
11 looking at all the assets at that point in time and
12 saying, all right, assigning people to remedy the problem
13 to try to sell the assets and to reduce the financial
14 liability with the Aries plant. We had the long-term
15 tolling agreement that was a concern as a financial
16 liability that needed to be addressed, but I don't recall
17 the exact -- I'm not aware of and was not involved in the
18 decision on selling Aries.

19 Q. Was it in 2002 sometime, is that what
20 you're telling me?

21 A. I'm trying to recall when we made the
22 announcement that we were winding down. I thought it was
23 in 2002 when we announced that we were starting exit of
24 the Merchant business. It might not have been that that
25 was one of the first properties looked at. I don't know

1 the sequence of all the non-regulated properties that we
2 had and when the decision was made.

3 Q. Was it pretty clear at that point in time
4 that deregulation was not going to be occurring in
5 Missouri in the near future?

6 A. In the year 2002, I would say yes.

7 Q. And why at that point in time did the
8 company not examine -- or maybe it did. You can tell me
9 that also -- the possibility of the Aries unit being
10 utilized as a part of the regulated side of the company by
11 sale of that plant?

12 A. I'm just not aware of what options were
13 explored at that point in time on that relationship. It
14 was in a partnership at that time, and whether or not the
15 plant could have been purchased, I'm not sure what the
16 negotiations were with Calpine.

17 Q. Maybe I better back up. You just said
18 something, and I need to make sure I'm on -- in the right
19 date pattern here. I'm talking about the time frame
20 before Calpine's interest came with, and I want to make
21 sure I'm in the right year approximately. If you think
22 that happened in 2002, I'm okay. I'm following you. But
23 if it happened earlier, I need to know that.

24 A. The Calpine 50 percent interest?

25 Q. Yes.

1 A. I'm not -- I cannot remember that date. It
2 wasn't something that -- really from my perspective as a
3 utility, our purchased power agreement maintained its
4 status at the same price, same terms, so the ownership
5 interest wasn't something that I really took a lot of
6 interest in or noted the date.

7 Q. Okay. But am I in the general area about
8 when that 50 percent area was transferred?

9 A. I really can't say, Commissioner. I
10 just -- I really -- it wasn't something that was an
11 important date to me, and I really didn't pay too much
12 attention to it.

13 Q. Well, it's sort of important to me, so
14 maybe I'll find out. Someone else can tell me, I'm sure,
15 when we get another witness.

16 But what I'm looking for from you is, is
17 whether or not you're aware of whether or not there was
18 any consideration made, if you're aware of it, of the
19 possibility of that asset being sold into the MPS division
20 or to the regulated part of Aquila?

21 A. My recollection is that we had
22 conversations, in fact, with the Staff about what options
23 could be available, because we knew this was a concern of
24 theirs on the purchased power agreement and, in fact, we
25 had, I believe, Denny Williams involved in some

1 discussions of -- with that, but I personally wasn't
2 directly involved. I just know there were some
3 discussions of what the options were, but I don't know a
4 lot of detail.

5 Q. Okay. Do you know of any reason why that
6 could not have occurred from a legal standpoint, if you
7 know? I'm not trying to --

8 A. From a legal standpoint, I could not
9 address it, no.

10 Q. Okay. That's fine. Had it become -- had
11 it gotten to a point at that point in time where Aquila
12 could not afford, whether it was in regulated base or not,
13 or could not get the financing in order to continue to
14 have ownership in that Aries facility, if you know?

15 A. To the best of my knowledge, no, that would
16 not have been an issue, because I think as we have looked
17 at going forward and without kind of breaking the
18 confidentiality of the IRP process, that we've already
19 addressed that internally and said that if we get to the
20 point where we need to build plants, would the financing
21 be available? I think we looked at project financing
22 capabilities, and so to the best of my knowledge, that
23 would not have been an issue.

24 In fact, if we're to look at it from a pure
25 utility perspective, the way a utility company grows

1 earnings is to rate base power plants and other
2 investments. So from a pure utility perspective, if that
3 is the best answer for our customers, then we would
4 obviously entertain doing that.

5 Q. Yeah, and I guess my question is whether or
6 not, because of the current status of affairs or the
7 status of affairs back then, that it just -- that it was
8 just possible to get the financing to do -- to do what
9 needed to be done to finance that plan on a normal
10 financing arrangement through issuance of debt or of
11 equity, if that's even possible.

12 A. I cannot -- and I can't answer that
13 directly. I just know that we have looked at moving
14 forward and asking that question, and the answer was they
15 would be able to move forward and do some type of
16 transaction.

17 CHAIRMAN GAW: Maybe somebody else can
18 explore that for us, Mr. Empson. I'm done. I appreciate
19 your patience. Thank you, Judge.

20 JUDGE JONES: Mr. Empson, if you'll bear
21 with me, I should probably say first, in all the ocean of
22 testimony both written and oral on this issue, my
23 understanding is probably knee deep. So if my questions
24 are too basic, bear with me. I just need to know.

25 QUESTIONS BY JUDGE JONES:

1 Q. First of all, there's a cost associated
2 with this Aries issue; is that true?

3 A. Yes, there is.

4 Q. And how much is that?

5 A. My understanding, the current difference
6 between our position and Staff?

7 Q. No, I want to know what your position is,
8 Aquila's position.

9 A. That 100 percent of the contract should be
10 included in rates.

11 Q. Okay. How much is that? I need a number,
12 a dollar figure. If you don't know, tell me where to go
13 to find it.

14 A. I believe it's in Mr. DeBacker's testimony,
15 what the total value of the contract is that we have with
16 the partnership.

17 Q. And you're wanting to pass that cost on to
18 ratepayers?

19 A. Yes. That contract was competitively bid
20 and it was the lowest bid and so we're -- as any other
21 purchase, the power agreement, we are passing that through
22 to the ratepayers, yes.

23 Q. By qualifying your answer, I take that to
24 mean with all purchased power agreements the cost is
25 passed on to ratepayers?

1 A. That is correct.

2 Q. Now, I'm looking at the diagram that's
3 included with Mr. Sherman's testimony. It's a pretty
4 simple diagram. It looks like Aquila, Inc. owns MPS on
5 one side and Aquila Merchant on the other, and then
6 further down the line Aquila Merchant owns Aries. Aquila
7 Merchant from my understanding is not regulated, is it?

8 A. That is correct.

9 Q. And they're not a party to this case?

10 A. That is correct.

11 Q. MPS is a party in the case and is seeking
12 reimbursement for the cost of Aries, but from this chart,
13 they have no interest in Aries except for the contract
14 that they have with Aquila Merchant. Is that where all
15 this ties in?

16 A. That is correct. The utility just has a
17 purchased power agreement with Aries. Five-year purchased
18 power agreement, expires mid 2005.

19 Q. So the contract hasn't expired, but Aries
20 is going to be sold, is that --

21 A. The contract will be maintained through the
22 2005 time frame. So the 50 percent ownership that the
23 Merchant has in the Aries plant is being sold to Calpine,
24 but Calpine is maintaining the purchased power agreement
25 with MPS.

1 Q. So MPS will basically own Calpine?

2 A. No. MPS will only have the purchased power
3 agreement with Calpine. We have no ownership interest,
4 MPS, in either the Merchant side or the partnership. That
5 was done through a non-regulated affiliate subsidiary.

6 JUDGE JONES: That's all the questions I
7 have. Are -- is there any recross?

8 MR. MICHEEL: Yes, I have some, your Honor.

9 JUDGE JONES: Go right ahead, Mr. Micheel.

10 RECROSS-EXAMINATION BY MR. MICHEEL:

11 Q. Mr. Empson, Chairman Gaw asked you about
12 Aquila's advocacy regarding deregulation. Do you recall
13 those questions?

14 A. Yes, I do.

15 MR. MICHEEL: May I approach the witness,
16 your Honor?

17 JUDGE JONES: Yes, you may.

18 BY MR. MICHEEL:

19 Q. And I'm going to hand you a copy of
20 UtiliCorp United's 1997 annual report. And would you
21 agree with me that it was the 1997-1998 time frame when
22 Aquila was discussing entering into the Aries agreement,
23 deciding whether or not to purchase Aries or to build
24 Aries; is that correct?

25 A. My understanding would be that was the time

1 frame the utility was looking at what their future power
2 requirements would be and how we would meet those future
3 power requirements. I don't know if Aries was something
4 that was going to be built at that time or not,
5 Mr. Micheel.

6 Q. I want to ask you a couple of questions
7 about a couple things that appear. First, if you would,
8 just take a look at the cover. Is that indeed the 1997
9 annual report of UtiliCorp United, sir?

10 A. Yes, it is.

11 Q. If you could, turn to page 7 of that annual
12 report. Does that appear to be a letter from Richard K.
13 Green, who I think you've identified as the Chairman,
14 chief executive officer?

15 A. Yes, it is.

16 Q. And is that is dated in February of '98?

17 A. February 23rd, 1998, yes.

18 Q. And I'm focusing there, sir, on the first
19 paragraph in the center column on page 7. Do you see that
20 first paragraph there, sir, in the center column?

21 A. Yes, I do. The one that starts, "for all
22 these reasons"?

23 Q. Yes. Could you read that into the record?

24 A. For all these reasons, UtiliCorp has been a
25 vocal advocate of customer choice for several years. We

1 have spoken out before regulators, legislators and others
2 to push for opening the barriers for choice sooner rather
3 than later, and we will continue to do so.

4 Q. Just that paragraph. So does that letter
5 to the shareholders indicate that Aquila had for several
6 years been a vocal advocate for customer choice?

7 A. Yes.

8 Q. And during that time, I believe you
9 testified in response to questions from Mr. Gaw that you
10 were the senior -- or Chairman Gaw, excuse me -- you were
11 the senior vice president in charge of regulatory affairs
12 and legislative services and things like that; is that
13 correct?

14 A. That's correct.

15 Q. So you would have been the individual that
16 would have directed the work there on page 7 about
17 informing legislators and pushing legislation and things
18 like that; isn't that correct?

19 A. Well, at that point in time, my job was
20 more on the utility side of the business. We did have
21 some involvement, but there were also some at the
22 corporate level that would have been actively involved in
23 that process. So I would not have been the only one
24 involved. I was really on the utility side.

25 Q. Okay. Why don't you turn to page 14 of

1 that annual report, sir.

2 MR. MICHEEL: And if I could approach the
3 witness, because this is kind of on the fly, so I don't
4 have a copy, so I need to look at the annual report
5 again --

6 JUDGE JONES: All right.

7 MR. MICHEEL: -- to direct where I need him
8 to be.

9 BY MR. MICHEEL:

10 Q. Sir, have you had an opportunity to turn to
11 page 14 of the 1997 annual report?

12 A. Yes, I have.

13 Q. And does that page indicate deregulation
14 customer choice at the top?

15 A. Yes, it does.

16 Q. And does that indicate that UtiliCorp has
17 been a vocal advocate for deregulation?

18 A. Yes, it does.

19 Q. And then there's a quoted paragraph right
20 below that. Could you read that quote into the record for
21 me, sir?

22 A. Sure. Quote, customers will benefit from
23 lower prices, enhanced technology and better service as a
24 result of competition, says Jon Empson, UtiliCorp's senior
25 vice president for senior regulatory, environment service.

1 Quote, we're willing to allow competitors in our
2 territories in return for having a crack at the rest of
3 the country ourselves. We feel what's best for the
4 customers will also benefit the suppliers who can provide
5 the best combination of service and cost, end of quote.

6 Q. And that's your quote, is it not, sir?

7 A. That is.

8 Q. And that indicates your whole-hearted
9 support for deregulation, does it not, sir?

10 A. Yes, it does.

11 MR. MICHEEL: Also in that annual report --
12 if I could approach the witness again?

13 JUDGE JONES: Feel free to approach the
14 witness, unless there's an objection.

15 BY MR. MICHEEL:

16 Q. Does this -- does this annual report
17 indicate that it is Aquila's philosophy to be a first
18 mover? Do you recall that?

19 A. I think the heading on page 1 says first
20 mover, and then it has a subheading that says introducing
21 first mover.

22 Q. And could you tell me, is that first mover
23 philosophy, would you agree with me that Aquila wants to
24 be ahead of the curve and be a first mover on things like
25 deregulation, competitive energy markets and things like

1 that, sir?

2 A. I don't know all the aspects of it. At
3 that point in time we were looking at first mover in a lot
4 of different aspects on how we deliver services to our
5 customers, how we become more efficient and effective in
6 our operations, that we were trying to be real focused on
7 how to enhance the value our customers receive from our
8 services.

9 Q. Could you read again -- I am on page 4 of
10 the 1997 annual report. It's the chairman's letter,
11 Mr. Richard C. Green, Jr.'S letter. Could you read that
12 first paragraph in there under what it means to be a first
13 mover? Could you read that into the record, sir?

14 A. The heading on this is what, quote, first
15 mover, end of quote, means to me, and as Mr. Micheel said,
16 this is a -- the letter from Richard Green. The title of
17 this annual report magazine refers to a "be ahead of the
18 change" philosophy UtiliCorp has practiced since the
19 company was created in 1985. We strive to be a first
20 mover, if not the first, in any aspects of our business
21 where changing ahead of the times brings strategic value.
22 We don't use first mover as a buzz word. It simply sums
23 up our track record.

24 MR. MICHEEL: Thank you very much,
25 Mr. Empson. If I could retrieve that document, that's all

1 I have.

2 JUDGE JONES: Will there be any recross
3 from Staff of the Commission?

4 MR. WILLIAMS: Yes, Judge.

5 RE-CROSS-EXAMINATION BY MR. WILLIAMS:

6 Q. Mr. Empson, do you recall that you had some
7 discussion with Chair Gaw regarding the sale of Aquila's
8 interest in the Aries plant?

9 A. Yes, I do.

10 Q. Do you know whether or not Aquila is
11 selling its interest at a loss? I'm asking you whether or
12 not you know at this stage.

13 A. I do not know.

14 MR. WILLIAMS: No further questions.

15 JUDGE JONES: Will there be redirect from
16 Aquila?

17 MR. SWEARENGEN: Just a couple, your Honor.

18 Before I inquire of the witness, we do have
19 Mr. Max Sherman here, who is still available to come
20 forward and answer questions that Chairman Gaw may have or
21 the Bench may have with respect to the Merchant side of
22 the business. And he's available and he can answer some
23 of the questions, I think, that Mr. Empson was unable to
24 answer, and we would be more than happy to make him
25 available to do that.

1 REDIRECT EXAMINATION BY MR. SWEARENGEN:

2 Q. Mr. Empson, you've had a lot of questions
3 about the environment that existed in the electric utility
4 industry in the mid 1990s. Let me ask you this question
5 with respect to that. In your opinion, would that
6 environment have existed and have been moving in the
7 direction in which it was moving whether or not
8 UtiliCorp/Aquila was out promoting its view as to the
9 direction that those changes ought to take?

10 A. Yes, it would.

11 Q. Were other utilities, to your knowledge,
12 making known to state and federal legislators their views
13 with respect to the direction that those should take?

14 A. Yes, both Merchant and utility companies
15 were.

16 Q. Mr. Williams referred you to page 2 of your
17 rebuttal testimony, lines 22 and 23, where you made the
18 statement that you were receiving policy guidance from the
19 Missouri Commission Staff concerning the potential for
20 creating future stranded costs that would be borne by the
21 company's Missouri customers and/or its shareholders, and
22 I think in response to that you indicated that
23 Aquila/UtiliCorp, as a general practice, seeks out and
24 receives guidance from the state commissions in those
25 jurisdictions in which it operates?

1 A. Yes, we do.

2 Q. Could you expand on that for a minute,
3 please?

4 A. Sure. I mean, typically what we'll try to
5 do is go in -- for example, when we made the decision of
6 how we were going to approach trying to mitigate
7 volatility in the gas market, we put together a team of
8 people that would come, make presentations both to Staff
9 and those Commissioners that wanted to participate to
10 explain what our strategy was and to give feedback.

11 We have different personalities we'll call
12 each one of our states. We have a couple of states, for
13 example, like Iowa that wants to maximize whatever we can
14 do to reduce volatility in the markets, and they so gave
15 us that guidance and we do things a little differently in
16 the gas markets there. In Minnesota they want to have
17 individual customers be more in control. So we try to
18 design what we're doing to meet those what I'll call
19 unique personalities in each one of the states and get
20 that feedback.

21 Some Staff, some Commissions are willing to
22 give that guidance and feedback. Others would refrain and
23 just listen and say, we understand where you're going and
24 we'll address it at a later date.

25 Q. With respect to the issue that's before the

1 Commission this afternoon, is it your testimony that the
2 company did receive some policy guidance from the Missouri
3 Commission Staff?

4 A. My interpretation, when you read the
5 documents that were being produced by the task force, is
6 that it was the guidance from the general direction of the
7 Staff would be recommending, not that we had it directly
8 from the Commission. But using the Staff as kind of the
9 spokesperson or for potential direction, yes, in reading
10 these documents, there was a lot of implications for how
11 they viewed a deregulated environment, and not knowing for
12 sure when that would occur, it made it difficult for us to
13 say, we should make that investment, and that would be our
14 assessment of those documents.

15 Q. One last question. In seeking that sort of
16 guidance from either the Missouri Commission Staff or the
17 Commission here or perhaps any other similar state agency
18 or its staff, and I realize you're not a lawyer, but in
19 your mind, is that the same thing as turning over the
20 judgment, the financial management of the corporation to
21 the Commission or its staff and taking away that authority
22 from the company's board of directors?

23 A. Absolutely not. I mean, what we're trying
24 to do is view that we believe that we have some common
25 interests, and the common interest is to address the needs

1 of the customers in our jurisdictions. So if we can come
2 in and meet with the Staff to get what their perception is
3 on certain things and we can incorporate that into the
4 direction that we're taking, we believe then we're working
5 together to those common interests. So it is not turning
6 over the management but basically going over to the
7 stakeholders, whether it's Commission Staff or customers,
8 Commissioners, legislators even, to determine what they
9 believe is important for the constituents in their area.

10 MR. SWEARENGEN: Thank you. That's all I
11 have.

12 JUDGE JONES: Thank you, Mr. Empson. You
13 may step down.

14 I'm not sure how long we've been going, but
15 it would probably be a good time to take a break here
16 until 3:20, and then we'll come back and go until 5 and
17 see if we can finish this issue for today. We're
18 adjourned.

19 (A BREAK WAS TAKEN.)

20 JUDGE JONES: We'll go back on the record
21 now. There were questions asked earlier of Mr. Empson.
22 It was indicated by him that Mr. Sherman is best to answer
23 those questions, I suppose, concerning Aquila Merchant.
24 Is Mr. Sherman still here?

25 MR. ZOBRIST: He is, your Honor.

1 JUDGE JONES: Mr. Sherman, will you
2 approach the witness stand? And you'll remain under oath.

3 THE WITNESS: Yes, sir.

4 JUDGE JONES: Commissioner Gaw?

5 CHAIRMAN GAW: Thank you, Judge.

6 MAX SHERMAN, having been previously sworn, testified as
7 follows:

8 QUESTIONS BY CHAIRMAN GAW:

9 Q. Mr. Sherman, I apologize for having you
10 come back up. I'm really not sure that you'll be able to
11 help me much more than you already have. I was asking
12 questions of Mr. Empson in regard to the decisions that
13 were made to construct the Aries plant in part and what
14 calculations or what factors went in to making the
15 decision that it was a good business decision to build
16 that plant at the time that those decisions were made.

17 A. I can address some of that, sir.

18 Q. Go ahead.

19 A. All right. What I can address is the
20 decision to proceed with the plant as a project that would
21 be owned by the Merchant side of the business. I was
22 named as project manager in December of '98. By that
23 time, the decision had been made to transfer it to the
24 Merchant side, but nevertheless --

25 Q. Who made that decision?

1 A. That I can't tell you, other than it was my
2 understanding it was UtiliCorp senior management.

3 Q. Okay. And who would that have been at the
4 time?

5 A. You'll have to ask some of the folks on the
6 regulated side that. I don't know that either.

7 Q. Mr. Empson?

8 A. Well --

9 Q. Go ahead.

10 A. That's fine. I wasn't in on that one, sir.

11 Q. Okay.

12 A. For better or worse, but that's just how it
13 was.

14 Q. Sure. I'm sorry to interrupt. Go ahead.

15 A. Quite all right. I apologize for
16 interrupting you. When we were bidding the -- bidding
17 the -- participating in the bidding process to the
18 regulated side, the business case was presented along with
19 an update on where we were in the process to Bob Green on
20 January 5th of '99, and the ultimate decision -- I'm going
21 to answer a question you asked Mr. Empson you haven't
22 asked me yet.

23 Q. Go ahead.

24 A. Who approved it, who made the decision.
25 The decision to proceed with the project as a -- proceed

1 with the plant --

2 Q. Yes.

3 A. -- was made by Mr. Green and approved by

4 the UtiliCorp board of directors.

5 Q. And when you say Mr. Green, which

6 Mr. Green?

7 A. Robert Green. Bob Green.

8 Q. I thought that's what you meant, but I

9 wanted to make sure.

10 A. It is.

11 Q. Okay. And that would have been done

12 approximately when again, '99?

13 A. Well, the approval by the board was

14 February 3rd of '99. Presumably the decision itself was

15 made after we made our presentation and before we were

16 notified that we had been selected for the award.

17 Q. Okay. And when you say "we," you're

18 talking about who?

19 A. Merchant.

20 Q. Well, now I'm a little confused. Probably

21 my fault. The decision was made prior to or subsequent to

22 you knowing that you had the contract?

23 A. Subsequent.

24 Q. Subsequent? Okay.

25 A. Had to be subsequent.

1 Q. Okay. That's what --

2 A. Had to be subsequent.

3 Q. I misunderstood you. That tracks with what
4 you said earlier, that it was -- that you do not believe
5 that construction would have gone forward if it were not
6 for that contract, correct?

7 A. That is my belief.

8 Q. Now, in -- with that as a basic building
9 block here, what was the analysis that was done in regard
10 to the construction of that plant and how it would be paid
11 for beyond that five-year contract?

12 A. We expected to make sales of capacity and
13 energy from that plant into the wholesale market, both
14 after this contract expired for the rest of its operating
15 life and for the unsold blocks, the blocks that were not
16 sold to MPS during the life of the contract. As I believe
17 I indicated earlier, there were projections as to what
18 that would be.

19 To elaborate, we looked at the need for
20 capacity in a number of regions of the country that we
21 believed we could reach with transmission access. FERC,
22 as you're aware, had opened that up with Order 888 two or
23 three years before that, and we expected to be able to
24 compete in those markets with power from this plant. So
25 we were going on projections as to what we thought we

1 could sell it for.

2 Q. And whose projections were those?

3 A. They were prepared by Aquila Merchant, by
4 what was then called the structure desk, a bunch of
5 analysts that did that kind of thing for a living, valuing
6 transactions.

7 Q. That wouldn't have included you, that part
8 of the analysis, right?

9 A. No. That's correct, and that's deliberate.
10 One never -- one should not have one's project pro forma
11 controlled by the developer, because the developer always
12 wants to do a project. So you want to keep control of the
13 input data as firmly as possible.

14 Q. It's sort of important to remove the
15 decision maker from someone who has an agenda, isn't it?

16 A. That's certainly in the case of feeding in
17 cost projections and market projections, yes. You try to
18 keep it as neutral and dispassionate as you can.

19 Q. Because you want the decision to be based
20 upon facts, not desired results?

21 A. That's correct.

22 Q. The -- once you've got -- if you recall,
23 once you got beyond that first five years, how did
24 those -- how did those projections look in regard to
25 whether -- who the customers potentially would be for that

1 600 megawatt facility?

2 A. Specific customers were not projected or
3 identified.

4 Q. Yes.

5 A. Instead, what was projected was a market
6 clearing price that we expected to be able to sell the
7 capacity at and the energy at.

8 Q. Was there any assumption made at all in
9 regard to the potential to renew or extend the contract
10 with MPS?

11 A. We -- the assumption was there would not be
12 a renewal.

13 Q. Was there any assumption that there would
14 be an extension?

15 A. There was no -- there was no assumption of
16 any kind in our modeling that assumed any contract
17 extension of any kind with Missouri Public Service.

18 Q. Was there any assumption in regard to
19 whether or not it would be a need by MPS for generation to
20 meet its native load requirement that would be met in the
21 wholesale market?

22 A. To the extent any assumptions or those
23 projections would have been made, it would have been on
24 the regulated side of the business, sir, not on ours. We
25 did not have that information.

1 Q. So -- and those projections and the
2 analysis for that, for that -- for the anticipated demand,
3 are those numbers in any of the testimony or those
4 calculations or results?

5 A. There's a fair bit of it is. There is a
6 response to the Staff Data Request No. 301 that was
7 provided to Staff, and I believe it's Mr. Featherstone has
8 provided most of that, certainly much of it in one of the
9 schedules to his surrebuttal testimony. So a lot of it's
10 there.

11 Q. Do you know whether or not those
12 projections have turned out to be accurate?

13 A. They have turned out to be inaccurate so
14 far.

15 Q. And is that in the record that you referred
16 to earlier about how far off or how inaccurate those
17 projections were?

18 A. I don't know that a quantifiable statement
19 was made. I do recall making a statement in one of my
20 testimony, either rebuttal or surrebuttal, about the risk
21 of relying on projections, including my own.

22 Q. Yes. Was it ac-- was the projection
23 accurate even within the first five years in regard to the
24 potential for -- I hate to use the word "off system
25 sales", that's not regulated, but for sales to others

1 outside of the contract with MPS?

2 A. The projections were not accurate within
3 the first -- you know, up until that.

4 Q. And even on the front end of that, were
5 they accurate from the get-go?

6 A. I doubt it. No.

7 Q. And if we were gauging which way they were
8 inaccurate, which way were they inaccurate? Did it make
9 it more or less likely that Aries was financially viable?

10 A. It would have been -- would have made it
11 less likely.

12 Q. Now, if you could, and if you know, jump
13 forward with me to the time when the 50 percent interest
14 was sold to Calpine. And I guess what I need to know,
15 first of all, is whether you were at all involved or knew
16 anything about that transaction.

17 A. I was. Let me be clear, because I'm not
18 sure I understood your question earlier today.

19 Q. Sure.

20 A. This is the initial sale of the first
21 50 percent to Calpine?

22 Q. Yes. That's what I'm referring to.

23 A. I can testify to that.

24 Q. Okay. When did that happen?

25 A. January 12th, 2000.

1 Q. Of 2000?

2 A. Of 2000.

3 Q. All right. And in January 12th of 2000,
4 how long had negotiations been going on prior to
5 consummating that action, if you know?

6 A. I do to a certain extent. The initial
7 solicitation process for partners started in the summer of
8 '99. The selection of Calpine as the partner to negotiate
9 with began in earnest that fall as they went through their
10 due diligence. And the final decision to do the
11 transaction with Calpine was the first week in January of
12 '99 -- of 2000. Excuse me.

13 Q. At that point in time, had Aquila made any
14 decisions to exit from the Merchant power business?

15 A. No, sir.

16 Q. What was the rationale for seeking a
17 partner?

18 A. That's easy. There are really two answers
19 to the question, sir. One is why seek a partner? The
20 second question is, why pick this partner? So if I may
21 take them in that order.

22 Q. Go ahead.

23 A. The rationale for seeking a partner is not
24 unlike investing in the stock market, diversity. To the
25 extent you have so many dollars to invest and you want to

1 share the risk of an individual investment, you bring in a
2 partner that can co-invest with you. It was literally
3 that simple, and that strategy was contemplated on the
4 Merchant side as early as very early in '99, possibly
5 December of '98, just as a general business principle, in
6 terms of how the Merchant side was going to pursue
7 development of generating plants. It's very common in the
8 independent power business for multiple parties to own a
9 plant as a way of sharing the risks and diversifying your
10 investment.

11 The second question is, why this partner?
12 Calpine was and is the largest operator of combined cycle
13 power plants in the country. They had managed the
14 construction of a number of them. They were obviously
15 going to be the operator of a huge number. So from the
16 standpoint of technical qualification and operating
17 expertise that they had, they brought something to the
18 table that Aquila Merchant did not have, and that was that
19 operating skill set for that particular type of
20 technology.

21 The other thing, of course, that they
22 brought to the table, as were others, was a willingness to
23 pay a fee, a premium if you will, for buying into
24 50 percent of the project.

25 Q. Okay. At that -- that was done after the

1 decision to move forward and to construct the plant had
2 been made, this partnership arrangement?

3 A. 11 months later.

4 Q. So at the time the decision was made, the
5 relationship with Calpine was in no way a certainty?

6 A. Did not exist, had not even been contacted.
7 We were well into development, five or six months into it
8 before potential partners were even solicited for
9 expressions of interest.

10 Q. So if they -- if no partner would have been
11 found, what would have occurred, if you know?

12 A. We would have gone on and built it and
13 owned it.

14 Q. All right. Was there ever any discussion,
15 to your knowledge, and in regard to the possibilities
16 prior to the transfer of that -- or the first 50 percent
17 of that plant becoming a part of regulated rate base on
18 the MPS side?

19 A. Not that I -- not to my knowledge.
20 Certainly not on the time I was involved in the project,
21 which was from mid December '98 until I rolled off at the
22 time of Calpine closing. No, not during that window.

23 Q. Do you know why that would have been?

24 A. Well, the decision had already been made
25 that it was going to be on the Merchant side, if it was

1 going to happen at all. That decision was made before I
2 was assigned to the project, fall of '98.

3 Q. So as far as you know, there was just no
4 reevaluation done at that point in time regard to whether
5 or not there might be -- there might be some difference in
6 the assessment based upon the passage of time since the
7 original decision to construct the plant?

8 A. No, sir. I can tell you that the issue of
9 stranded investment was still out there and circulating
10 both nationally and in Missouri, because I wound up as a
11 Merchant guy testifying before a joint committee of the
12 General Assembly on one of the issues associated with
13 that, and that was in November of '99. So I mean, it was
14 certainly alive then as an issue and had been for a while.

15 Q. Mr. Sherman, I hate to ask you this, but do
16 you know how many bills are filed every year --

17 A. I have no clue, sir.

18 Q. -- In the Missouri General Assembly?

19 A. No.

20 Q. Do you have any idea what percentage of
21 them pass?

22 A. No, I don't.

23 Q. Okay. Just checking. At that point in
24 time, there had been -- there was -- when did the
25 California energy crisis occur?

1 A. The --

2 Q. The latest one, last one?

3 A. The last one was either summer 2000 or

4 summer 2001 or both.

5 Q. It was really two years in a row, wasn't

6 it?

7 A. I believe those were the two summers. It

8 was a result of a market -- it was a result of a market

9 design that kicked off starting in the mid '90s.

10 CHAIRMAN GAW: I believe that's all I have,

11 Mr. Sherman. Thank you.

12 JUDGE JONES: Commissioner Murray, do you

13 have questions?

14 COMMISSIONER MURRAY: No.

15 JUDGE JONES: Will there be any recross of

16 Mr. Sherman?

17 MR. MICHEEL: Yes, I have a couple.

18 JUDGE JONES: Go right ahead, Mr. Micheel.

19 RECROSS-EXAMINATION BY MR. MICHEEL:

20 Q. Mr. Sherman, Commissioner Gaw asked you a

21 couple of questions about the 50 percent sale the interest

22 in the Aries plant to Calpine. Do you recall those

23 questions?

24 A. The first 50 percent.

25 Q. The first 50 percent, yes, sir.

1 A. Yes, sir.

2 Q. Not the 50 percent that you're trying to
3 sell now, but the first 50 percent?

4 A. That's correct.

5 Q. And is it -- and you said there are two
6 reasons why you want to seek a partner. Do you recall
7 those questions?

8 A. I pointed out reasons why to do a partner,
9 and then why this partner.

10 Q. And would you agree with that strategy was
11 consistent with at that time UtiliCorp United's overall
12 corporate philosophy, the value cycle philosophy?

13 A. That I can't answer. Don't know.

14 MR. MICHEEL: May I approach the witness,
15 your Honor?

16 JUDGE JONES: Yes, you may.

17 BY MR. MICHEEL:

18 Q. What I'm showing you, sir, is a slide from
19 a presentation that UtiliCorp United made to the folks in
20 New York. It indicates a value cycle philosophy. Let me
21 give you a little bit to read over that slide, and if I
22 could just stand here and look over your shoulder, let me
23 know when you're ready, sir.

24 A. Okay. Am I allowed to look at other slides
25 to get a sense of what this was and to who it was?

1 Q. It's the only slide on there, sir. You can
2 see it says at the top year end 1999.

3 A. Okay.

4 Q. If you read the slide, I think I can take
5 you through it. It indicates the Aries power plant and
6 various items on there. So why don't you read it to
7 yourself and then we'll try to see what we can get?

8 A. Okay. All right.

9 MR. WILLIAMS: Has that been marked as an
10 exhibit?

11 MR. MICHEEL: It is attached to Mr. Kind's
12 rebuttal testimony in this case. So his -- his rebuttal
13 testimony in this case has been marked as Exhibit 95, and
14 it is Attachment 1 to that testimony.

15 THE WITNESS: Yes, sir.

16 BY MR. MICHEEL:

17 Q. Does that slide indicate that UtiliCorp had
18 a value cycle philosophy?

19 A. Apparently it does.

20 Q. That they're going to invest and then
21 optimize and monetize, does it not, sir?

22 A. Yes, it does.

23 Q. And does it indicate under the investment
24 portion, you see that the Aries power plant is part of the
25 investment portion?

1 A. Yes, I do.

2 Q. And then do you see under the section that
3 says optimize, reduce cost, add new revenue sources,
4 transfer operating model, develop new opportunities, do
5 you see that?

6 A. Yes, I do.

7 Q. And that's -- that's tantamount to selling
8 the 50 percent interest in the Aries operating deal, isn't
9 it?

10 A. No. I actually would say it's under
11 monetize, which has a reference to J.V. Aries plant.
12 That's what I would assume it means.

13 Q. We're going to get to that. You're
14 optimizing your investment, as you said to Commissioner
15 Gaw. What you do is reduce your risk in the investment by
16 taking on a partner; isn't that correct?

17 A. You do.

18 Q. And that's optimizing that investment;
19 isn't that correct? That would be another term for it?

20 A. It's one way you could characterize it.

21 Q. And then you monetize also that investment,
22 and on this slide it indicates that Aquila monetized that
23 investment by selling part of its interest in the Aries
24 plant; is that correct?

25 A. That's correct.

1 Q. And would you agree with me that -- I think
2 you indicated in response to a question from Chair Gaw
3 that Aquila was able to monetize that investment at a
4 premium?

5 A. Yes.

6 Q. And what do you mean when you say premium?

7 A. Well, at the time, in effect, another way
8 to characterize it is as a development fee. In effect,
9 the party that's taken the risk, made the effort, taken on
10 the aggravation, if you will, of getting the project
11 developed, getting all the permits, acquiring the site,
12 getting all the contracts done, getting the thing into
13 construction and has incurred costs by that point, the
14 premium is what you get paid over the new purchaser share
15 of cost for buying into a project that has been
16 considerably advanced.

17 Q. And after looking at that -- and I'll
18 indicate to you if you read the 2000 annual report, Aquila
19 touted its building and sale of its 50 percent interest in
20 the Aries plant as part of its value cycle philosophy.

21 A. I don't recall, but subject to check, I'll
22 take your word for it.

23 MR. MICHEEL: I have nothing further.

24 JUDGE JONES: Thank you. Is there recross
25 from the Staff of the Commission?

1 MR. WILLIAMS: Staff has no questions.

2 JUDGE JONES: Will there be redirect from

3 Aquila?

4 MR. ZOBRIST: I just have one or two

5 questions.

6 REDIRECT EXAMINATION BY MR. ZOBRIST:

7 Q. At the beginning of Chairman Gaw's

8 questions, you talked about the analysis and the business

9 case projections. Has that information been available for

10 inspection in the data room?

11 A. Yes, since late October.

12 Q. And with regard to the inaccuracy of the

13 projections with regard to non-PSA sales from the Aries

14 plant, did that have any adverse effect upon the

15 ratepayers?

16 A. None.

17 Q. Why not?

18 A. Ratepayers had signed up -- well, Missouri

19 Public Service had signed up for a fixed price contract.

20 So if costs to build and operate the plant increased,

21 which they did, and if revenues from sales to third

22 parties from the plant were not what was forecast, the

23 ratepayer was totally isolated from it.

24 MR. ZOBRIST: Nothing further.

25 JUDGE JONES: Thank you, Mr. Sherman. You

1 may step down.

2 Next, will Staff call its first witness?

3 MR. WILLIAMS: Staff calls Mark

4 Oligschlaeger.

5 JUDGE JONES: Mr. Oligschlaeger, when you

6 get a moment, will you raise your right hand.

7 (Witness sworn.)

8 JUDGE JONES: Thank you, you may be seated.

9 MR. WILLIAMS: Judge, I distributed what is
10 indicated on it as errata sheet for Mark L. Oligschlaeger.
11 I believe it will be Exhibit 175.

12 MARK OLIGSCHLAEGER testified as follows:

13 DIRECT EXAMINATION BY MR. WILLIAMS:

14 Q. Mr. Oligschlaeger, did you prepare direct
15 testimony that's been marked as Exhibit No. 64, both NP
16 and HC versions, that was prepared in December 2003 and
17 that was prefiled in this case?

18 A. Yes, I did.

19 Q. And did you also prepare rebuttal testimony
20 that's dated January 26, 2004 that's been marked for
21 identification as Exhibit No. 65?

22 A. Yes, I did.

23 Q. Additionally, did you prepare surrebuttal
24 testimony, both HC and NP versions, that's been marked for
25 identification as Exhibit No. 66HC and NP that was

1 prepared on February 13th of 2004?

2 A. Yes, I did.

3 Q. Have you also prepared subsequent to that
4 date redacted versions of those earlier testimonies?

5 A. Yes.

6 Q. And is the direct testimony dated or shown
7 to have been prepared on December 9th, as modified on
8 February 27th, and it's been marked as -- for
9 identification as Exhibit No. 1064HC and 1064NP, that
10 would be direct testimony?

11 A. Yes.

12 Q. And redacted rebuttal testimony which has
13 been marked for identification as Exhibit 1065, which
14 indicates it was prepared on January 26, 2004 and modified
15 on February 27, 2004?

16 A. Yes, I did.

17 Q. And did you also prepare redacted testimony
18 which has been marked as Exhibit No. 1066HC and NP,
19 which is surrebuttal testimony that indicates it was
20 prepared on February 13th, 2004, as modified on February
21 27, 2004?

22 A. Yes.

23 Q. Do you have any -- well, also what's been
24 marked as an ex-- as Exhibit 175 indicates it is an errata
25 sheet from Mark L. Oligschlaeger. Does that contain

1 changes that you would make to these exhibits?

2 A. Yes, it does.

3 Q. And would those changes need to be made to
4 both versions of your direct testimony, your rebuttal
5 testimony and your surrebuttal testimony?

6 A. Yes, they would.

7 Q. With those changes -- do you have any
8 further changes to those testimonies?

9 A. No, I do not.

10 Q. And with those changes as shown in
11 Exhibit 175, are Exhibits 64HC and NP, 65, 66HC and NP,
12 1064HC and NP, 1065 and 1066HC and NP your testimony here
13 today?

14 A. Yes, they are.

15 MR. WILLIAMS: Offer Exhibits 64 HC and NP,
16 65, 66HC, NP, 1064HC, NP, 1065 and 1066HC and NP.

17 JUDGE JONES: Are you also offering --

18 MR. WILLIAMS: And Exhibit 175.

19 JUDGE JONES: Are there any objections to
20 these exhibits?

21 MR. ZOBRIST: No objection.

22 MR. MICHEEL: No.

23 JUDGE JONES: Exhibits 64, 65, 66, 1064,
24 1065 and 1066 and Exhibit 175 are admitted into the
25 record.

1 (EXHIBIT NOS. 64, 65, 66, 175, 1064, 1065
2 and 1066 WERE RECEIVED INTO EVIDENCE.)

3 MR. WILLIAMS: Tender the witness for
4 examination.

5 JUDGE JONES: Thank you. Is there
6 cross-examination from the Office of the Public Counsel?

7 MR. MICHEEL: No, your Honor, not on this
8 issue.

9 JUDGE JONES: Is there any
10 cross-examination from Aquila?

11 MR. ZOBRIST: Yes, your Honor.
12 Can I first complete a housekeeping matter?
13 Exhibit 172 and 173 that have been previously described
14 have been copied and distributed to the parties, and I
15 believe that everybody's had a chance to see them, and I
16 would offer them into evidence.

17 JUDGE JONES: Exhibits 172 and 173 are
18 admitted in the record.

19 (EXHIBIT NOS. 172 AND 173 WERE RECEIVED
20 INTO EVIDENCE.)

21 MR. WILLIAMS: Is 173 an HC exhibit?

22 MR. ZOBRIST: I believe it is.

23 JUDGE JONES: Yes, it is.

24 MR. WILLIAMS: Thank you.

25 CROSS-EXAMINATION BY MR. ZOBRIST:

1 Q. Mr. Oligschlaeger, can I ask you a
2 preliminary matter? Do you have copies of Exhibit 166,
3 167 and 168 that came into evidence this morning before
4 you? They were the charts, and I've got an extra copy
5 here if you don't have them.

6 A. I don't believe that I do.

7 Q. I believe everybody else has copies of
8 those, but if you don't, I actually have copies of them
9 available.

10 Mr. Oligschlaeger, let me draw your
11 attention to Exhibit 166. Does this describe the pricing
12 structure of the MPS power sales agreement as it relates
13 to the Aries plant? And by that, I mean Section 5.1, just
14 the pricing portion of it.

15 A. It appears to.

16 Q. And Section 5.1 of the PSA provides that
17 MPS purchases 200 megawatts for the duration of the year,
18 all 12 months, priced at \$5.90 per kilowatt month, and
19 then for the period April 1 through September 30th,
20 300 megawatts at the price of \$7.50 per kilowatt month; is
21 that correct?

22 A. Yes, it is.

23 Q. And I think I'm eliminating that startup
24 before we get to the combined cycle, but in your opinion,
25 does Chart 1 accurately depict that portion of the power

1 supply agreement?

2 A. Yes, it does.

3 Q. Now, moving to the annual value, is what we
4 have termed it, inviting your attention to Exhibit 167, it
5 characterizes the total value of the combined cycle
6 portion of the Aries plant -- and I'm speaking of
7 Exhibit 167 -- as \$5.90 per kilowatt month for the entire
8 500 megawatts. Do you agree or disagree with the analysis
9 of that combined cycle portion of the plant and its value
10 as depicted in Exhibit 167?

11 A. I'm not sure I would either agree or
12 disagree. For example, I don't know why \$5.90 a kilowatt
13 month would be the relevant price for all 500 megawatts
14 for all 12 months.

15 Q. And what is your -- what is the basis for
16 your disagreement or at least questioning the fact that
17 the \$5.90 would be the appropriate value to assign to the
18 entire combined portion of the Aries plant?

19 A. Well, because for a portion of those
20 500 megawatts, the plant or its owners have entered into a
21 contract with Missouri Public Service in which some of
22 those megawatts could be sold, as we discussed before, at
23 a price of \$7.50 a kilowatt month.

24 Q. And the reason for that is that during the
25 southern -- during the summer months, the price of power

1 is sold at a premium normally, correct?

2 A. That's my general understanding.

3 Q. And if you look at Exhibit 166, when we see
4 the 300 megawatt increment early in the year and later in
5 the year, the so-called shoulder months, isn't it true
6 that if power were just sold at that time of year, that it
7 would be sold at -- not at a premium, but perhaps at even
8 a loss, but clearly at a lower figure?

9 A. It is my general understanding the power is
10 cheaper in the off months than it would be during peak
11 periods.

12 Q. Would it be reasonable that because the
13 200 megawatts has been priced under this contract at
14 \$5.90, that the additional 300 megawatts, if priced on an
15 annual basis, would also be reasonably sold for that \$5.90
16 figure?

17 A. I believe that my -- the adjustment the
18 Staff is sponsoring related to the Aries purchased power
19 agreement assumes that in the off months those additional
20 300 megawatts can be sold for \$5.90.

21 Q. And what's the basis of Staff's opinion on
22 that figure?

23 A. Because that was the valuation and the
24 contract for a kilowatt hour a month for MPS.

25 Q. Only for the shoulder months?

1 A. Well, for the -- for the 200 megawatts the
2 entire year, yes.

3 Q. Well, and I guess that's what I'm trying to
4 focus in on. If the 200 megawatts is priced for the whole
5 year at \$5.90, it would make sense then, would it not, for
6 the 300 megawatts which are generated from the same plant,
7 correct, generated by the same plant?

8 A. Yes.

9 Q. It would be reasonable to price the
10 300 megawatts at \$5.90 for the total year?

11 A. I'm afraid you're going to have to run that
12 one by me again.

13 Q. You said that, if I understand your
14 position, that the shoulder months, these months here, you
15 know, January up to -- January through March and then
16 October through December, that you priced those two
17 shoulders at \$5.90, correct?

18 A. Yes.

19 Q. And you said that the basis of that pricing
20 was that the 200 megawatts sold throughout the year was
21 sold at a price of \$5.90, correct?

22 A. Well, the basis for the pricing comes from
23 the contract, but yes, during the off months the
24 200 megawatts is valued at \$5.90, and that value carries
25 through, through the peak period under the contract.

1 Q. And when you say peak period, you mean that
2 summer period, correct?

3 A. Yeah, the April through September period.

4 Q. Where the demand is going to be greater
5 and, therefore, the price for that power would logically
6 be higher, correct?

7 A. As a general rule, I believe that is true.

8 Q. But if I understand your testimony,
9 you're -- you think it is not reasonable to value the
10 entire combined cycle megawatts, the 500 megawatts, at
11 \$5.90?

12 A. Well, I believe that the valuation of the
13 plant as presented in the schedules, Schedule 4 to my
14 direct testimony and Schedule 6 to my surrebuttal
15 testimony, are reasonable because they are based upon the
16 values found in the MPS purchased power agreement
17 contract.

18 Q. All right. But now let me ask you this:
19 There is no pricing in the contract for the shoulder
20 months for the 300 megawatts, correct?

21 A. That's because MPS is not purchasing that
22 capacity under the contract, yes.

23 Q. And so it's not in the PSA, right?

24 A. No, because MPS is not purchasing that
25 power.

1 Q. And isn't there any other document that you
2 have seen that prices independently in those shoulder
3 months from January to March, October through December?

4 A. Not that I have seen, no.

5 Q. Now, if we did value the combined cycle
6 portion of the Aries plant at \$5.90, Exhibit 167 does
7 properly indicate the total annual value of \$35,400,000,
8 correct, if we did that?

9 A. I would probably have to do some
10 calculations on my adding machine here, if you wanted me
11 to verify that.

12 Q. Sure. Go ahead.

13 A. Yes, I believe the math is correct on
14 Schedule 167 -- or Exhibit 167. I'm sorry.

15 Q. Now, have you made any independent attempts
16 to value just the shoulder months that would have been
17 available for sale from the combined cycle part of the
18 plant?

19 A. No, I have not.

20 Q. Do you have any basis to disagree with the
21 figure \$4.30 per kilowatt month?

22 A. I'm sorry. You're going to have to
23 specify. What period does that number apply to?

24 Q. Just for the shoulder months, and what I
25 did was take the \$5.90, which is for the 200 megawatts

1 throughout the year, and if you've got what you call the
2 peak time, what I call the summertime, at 7.50, if you
3 were to average that to get to the 5.90, the balancing
4 figure, the counter-balance to the \$7.50 figure would be,
5 according to my calculations, \$4.30. You could choose to
6 do that calculation. However, again, that's not
7 consistent with the contract.

8 Q. But I thought we agreed that the contract
9 did not set a price for the shoulder months for the
10 300 megawatts?

11 A. Well, no, but I believe you're trying to
12 assign just one value to the peak portion of the contract
13 and another single value to the non-peak or the 12 months
14 or -- I'm sorry, the non-peak portion of the contract.
15 And again, you can run it through that calculation, but
16 that's not how the contract was stated.

17 Q. Well, but again -- and I'll belabor the
18 point one more time -- the contract itself does not deal
19 with 300 megawatts for the winter months?

20 A. They are not priced out in the contract.

21 Q. Now, if you'd turn, please, sir, to
22 Exhibit 168, it adds a layer on some of the combined cycle
23 part of the plant for the duct-fired 500 megawatts. Do
24 you see that, sir?

25 A. Yes, I see that.

1 Q. Based upon the information that you've
2 heard here today and that I believe was provided by Aquila
3 in a response to a Staff DR, do you understand that the
4 value of the additional 85 megawatts generated on top of
5 the 500 megawatts was roughly \$1,400,000, as updated
6 through September 30 of 2003?

7 A. I have not seen any such Data Request
8 response that supports that number.

9 Q. Were you here when Mr. Sherman testified to
10 that this morning?

11 A. I was.

12 Q. Do you have any reason to doubt that?
13 Well, let me take a moment here. I think I've got the
14 data response here. I don't think I do, but I know that
15 Mr. Sherman testified to that this morning.

16 Assuming that his testimony was accurate,
17 do you have any reason to disagree with that figure of
18 1.4 million that was for which the 85 megawatts was sold
19 through September 30th, 2003?

20 A. I have no reason to agree or to disagree
21 with this. I'm an auditor and I like to look at the
22 supporting numbers before I would sign off on them.

23 Q. So you have not had a chance to look at the
24 Aquila response to Staff Data Request 706?

25 A. I'm getting seriously confused. I think I

1 received a response to 706, but I don't recall this
2 number. And perhaps I'm mistaken.

3 Q. Well, let's proceed on that basis, and I'll
4 try to clarify that later, if I need to. Were you aware
5 that the 85 megawatts that is generated above the combined
6 cycle is generated by a different kind of physical portion
7 of the plant?

8 A. That is my general understanding based on
9 Mr. Sherman's rebuttal testimony.

10 Q. Do you have any basis to disagree with
11 that?

12 A. No, I don't.

13 Q. If we factored the \$1.4 million for the
14 duct-fired capacity in with the other figures that I gave
15 you, in terms of just the mathematics, adding the
16 1.4 million to the 35.4 million, that would give us a
17 figure of 36.8 million as a value to be assigned to the
18 Aries plant in total; is that correct?

19 A. That would be the math. Again, I don't
20 vouch for the duct-fired number.

21 Q. Now, in -- in your Schedule 6, which I
22 think you mentioned just a few minutes ago -- I do have
23 some extra copies up here -- did you make a separate
24 calculation for the 85 megawatts?

25 A. No, I did not.

1 Q. Let me just distribute that so other folks
2 can take a look at that if they don't have one handy.

3 I've handed you a copy of what appears to
4 be Schedule 6 to your surrebuttal testimony, is that
5 correct, sir?

6 A. Yes.

7 Q. Now, in your calculation of the capacity
8 charges, you didn't make any special allowance for the
9 85 megawatts; is that true?

10 A. That is correct.

11 Q. Have you done any more recent calculations
12 based upon the information that you have learned about how
13 that 85 megawatts is generated?

14 A. No, I have not.

15 Q. If we use the calculations as depicted in
16 Exhibits 166, 167 and 168, is it fair to say that that
17 would change your figure about halfway down the page of
18 total capacity charges of 45,114,000 to the figure on
19 Chart 3, which is 36.8 million, if we made those changes?

20 A. I ran some numbers using information
21 provided by Mr. Dennis Williams of Aquila that appeared to
22 be very similar and perhaps identical to some of the
23 suggestions you're making now in terms of their impact on
24 the number. None of those numbers reflected any attempt
25 to value the so-called duct-fired portion of the plant any

1 differently than the others.

2 If I were to utilize that methodology that
3 was suggested by Mr. Williams and that you appear to be
4 bringing up again today, it would change the bottom line
5 number of the Staff adjustments.

6 Q. Okay. Let me -- have you prepared
7 anything? Let me give you a version that we have prepared
8 of what I would call a modified Schedule 6.

9 MR. ZOBRIST: And is our next exhibit -- is
10 it 175?

11 JUDGE JONES: 176.

12 (EXHIBIT NO. 176 WAS MARKED FOR
13 IDENTIFICATION BY THE REPORTER.)

14 BY MR. ZOBRIST:

15 Q. Mr. Oligschlaeger, if we put Exhibit 176,
16 which is based upon your Schedule 6, to your surrebuttal
17 testimony side by side, if we use that different figure
18 for the MPS capacity valuation -- pardon me -- for the
19 Aries capacity evaluation, we would use the
20 38.8 million -- I'm sorry -- it should be 36.8 as the
21 denominator, rather than the 45.114 figure; is that
22 correct?

23 A. Could I have a second?

24 Q. Sure. Sure. Absolutely.

25 MR. ZOBRIST: Your Honor, I see a

1 typographical error. It's in the line about halfway down
2 the page, where it says, MPS share Aries capacity value,
3 it has a paren, and it has 27,666,000, and then the next
4 figure says 38. Should be 36,800,000 to match the other
5 figure that's in the column.

6 MR. WILLIAMS: Judge, I have a request with
7 regard to this exhibit, just to avoid confusion, because
8 based on what's contained in the exhibit itself, it could
9 appear to be something that Staff had sponsored, as
10 opposed to something that's come from the company, and I
11 understand it's been given a different exhibit number, but
12 I request there be some designation put on to the document
13 itself.

14 MR. ZOBRIST: I think that's fair. It is
15 entitled -- below the heading is corrected Schedule 6, and
16 it's clear that this is the company's version of how
17 Mr. Oligschlaeger's schedule should be corrected.

18 JUDGE JONES: Is this -- well, there are a
19 couple of things now that the document's brought into
20 question. Is this something that is submitted by
21 Mr. Oligschlaeger?

22 MR. ZOBRIST: No, this is something that
23 Aquila has prepared.

24 JUDGE JONES: So it's not a corrected
25 schedule of Mr. Oligschlaeger?

1 MR. ZOBRIST: Well, it is the company's
2 version of how his schedule should be corrected, and I
3 think Mr. Williams makes a good point, that we ought to
4 clarify that this is not --

5 JUDGE JONES: Why did you-all put that on
6 there?

7 MR. ZOBRIST: Well, I don't know.

8 JUDGE JONES: It is misleading.

9 MR. ZOBRIST: I agree.

10 JUDGE JONES: If I looked at it tomorrow, I
11 would think that Mr. Oligschlaeger corrected his
12 Schedule 6, and I would think this was, in fact, their
13 evidence.

14 MR. ZOBRIST: I agree. And I assure you,
15 there was no intent to do that. I'm not trying to trick
16 the Commission. We ought to change that right now.

17 JUDGE JONES: Well, who titled it? I'm
18 sure you didn't.

19 MR. ZOBRIST: I did not.

20 JUDGE JONES: Do you know who did?

21 MR. ZOBRIST: I don't know. Probably
22 somebody in the back of the room, but it was not -- I'll
23 take full responsibility. I offered it to the Commission.
24 It was not intended to trick anybody, and we ought to
25 strike corrected and perhaps put Aquila's -- if you want

1 to put Aquila's suggestions or Aquila's recalculation of
2 Schedule 6.

3 MR. WILLIAMS: I think it's more than a
4 recalculation. I think it's a modification.

5 MR. ZOBRIST: That's fine. Aquila's
6 modification. I've got no problem with that.

7 JUDGE JONES: Also at the bottom, it's
8 labeled highly confidential. Is it?

9 MR. ZOBRIST: Yes, because -- Schedule 6 to
10 Mr. Oligschlaeger's testimony I believe.

11 JUDGE JONES: Should we go in-camera to
12 discuss it?

13 MR. ZOBRIST: That's probably wise, your
14 Honor, although I think the figures so far that we have
15 testified to have been discussed in open session, but I
16 think probably some of the bottom numbers will be HC.

17 JUDGE JONES: Okay. We will go in-camera.

18 MR. WILLIAMS: Just a moment, Judge.

19 MR. MICHEEL: Your Honor, just one thing.
20 I have Schedule 6 in Mr. Oligschlaeger's NP version of his
21 testimony.

22 MR. WILLIAMS: I don't believe that is HC,
23 at least as to the numbers that Mr. Oligschlaeger has, and
24 I don't see any indication that 167, 168 or 166 are HC.

25 JUDGE JONES: So it's not HC?

1 MR. ZOBRIST: It's not. It was on his HC
2 version, but it's not HC. So we're fine staying in open.

3 JUDGE JONES: Okay.

4 THE WITNESS: I'm ready.

5 BY MR. ZOBRIST:

6 Q. Okay. Now, let me make clear again,
7 Exhibit 176 is Aquila's modification to Schedule 6 of
8 Mr. Oligschlaeger's surrebuttal testimony. If we use the
9 36.8 as the denominator, would that change the percentage
10 that in your Schedule 6 was 61.31 percent?

11 A. If you substitute that number in the
12 denominator, it would change certainly the percentage that
13 results. However, I would disagree with the use of the
14 36.8. I think it's incorrectly calculated.

15 Q. If we use the 36.8, we would result -- it
16 would result in a percentage of 71.163 or thereabouts,
17 correct?

18 A. As a matter of mathematics, that looks
19 roughly accurate.

20 Q. Now, if we used that percentage to apply to
21 the capacity costs that you examined per the Cass County
22 lease, that is the \$28.4 million figure; is that right?

23 A. That's what appears on Schedule 6. There's
24 a different number that appears there on the document you
25 just handed me.

1 Q. Now, the document that I just handed you is
2 based upon responses to Staff Data Request 295.2, and do
3 you happen to have that with you? Otherwise I've got
4 copies of that.

5 A. I do not have it with me.

6 (EXHIBIT NO. 177 WAS MARKED FOR
7 IDENTIFICATION BY THE REPORTER.)

8 MR. ZOBRIST: Judge, I'll mark this as
9 Exhibit 177.

10 BY MR. ZOBRIST:

11 Q. Does 177 appear to be a response by Aquila
12 to a Data Request of the Staff labeled MPSC-029.2?

13 A. Yes, it does.

14 Q. If we took the figures from the lease for
15 December '02 on page 2 of that exhibit through
16 September '03 --

17 MR. WILLIAMS: Judge, I'm going to object
18 to use of the exhibit without any foundation being laid
19 for it at this point.

20 JUDGE JONES: Do you want to lay -- he
21 hasn't offered it.

22 MR. WILLIAMS: I understand.

23 JUDGE JONES: But your questions aren't
24 directed towards foundation at this point either. So you
25 may want to lay a foundation first before you ask

1 questions.

2 BY MR. ZOBRIST:

3 Q. Did you have an opportunity to review
4 these figures, Mr. Oligschlaeger?

5 A. Yes, I have.

6 Q. Did you review them prior to just a moment
7 ago?

8 A. I have reviewed this Data Request response
9 prior to today, yes.

10 Q. And did you confirm that these were the
11 lease payments that were provided for under the lease if
12 it had gone into effect?

13 A. The amounts that appear on this Data
14 Request appear to be almost identical to the amounts of
15 the lease payments we have seen in other Data Requests in
16 the past MPS rate case and in this one.

17 Q. Well, subject to check, would you accept
18 those?

19 MR. WILLIAMS: I'm going to object to any
20 question on subject to check. He either knows or he
21 doesn't.

22 BY MR. ZOBRIST:

23 Q. Well, you said they were consistent with
24 the lease that you have examined, correct?

25 A. For example, I think in past Data Request

1 responses the 2003 lease payment was given as 28 -- or
2 28,400,000. Here it shows as 28,418,000. They're in the
3 ballpark.

4 Q. If -- let me just ask you, because I could
5 have Mr. Sherman come back and lay a foundation, but I
6 won't do that right now. But let me ask you to assume for
7 purposes of my questioning that these are the lease
8 payments as opposed to the 28.4 million. If we
9 substituted those for the 28.4 million, we would get the
10 figure in Exhibit 176, correct, the \$29.416 million?

11 A. I will have to use the calculator again.

12 Q. Okay.

13 MR. WILLIAMS: Judge, I'm inclined to
14 object to going forward with this line of questioning,
15 because Mr. Sherman's been up on the stand a number of
16 times. He's prefiled testimony. He's had ample
17 opportunity to put this information into the record if he
18 so desired.

19 MR. ZOBRIST: Judge, I can ask this in the
20 form of a hypothetical question with an expert witness.
21 And I'm glad to proceed that way.

22 JUDGE JONES: Is there a reason you didn't
23 address it when Mr. Sherman was on the stand?

24 MR. ZOBRIST: I didn't think it would be
25 contested. I'm perfectly comfortable to go through a

1 hypothetical.

2 JUDGE JONES: It looks like, Mr. Williams,
3 this is a request from Mark Oligschlaeger.

4 MR. WILLIAMS: But if the information he's
5 relying upon is a response from Aquila, and Staff believes
6 that Aquila's just aggrandizing the record in this case
7 through this exhibit, or attempting to.

8 JUDGE JONES: Are you trying to send us on
9 a paper chase?

10 MR. ZOBRIST: I'm not sure what
11 aggrandizing means. All I'm trying to do is give an
12 accurate -- I'm just trying to give an accurate figure,
13 Judge. That's all I'm trying to do. I'm perfectly
14 willing for purposes of this examination either to phrase
15 it as a hypothetical or to go with Mr. Oligschlaeger's
16 28.4, because I'm trying to make a point here about what
17 you do really if you change the denominator. And I think
18 we've established that, although we disagree with that,
19 you do get a different figure if you change the
20 denominator from 45.1 million to 36.8 million.

21 MR. WILLIAMS: If that's the point, I think
22 you've made it.

23 MR. ZOBRIST: Well, good. I will offer
24 then, if I may, Exhibit 176.

25 JUDGE JONES: Any objection to Exhibit 176?

1 (NO RESPONSE.)

2 JUDGE JONES: Hearing none, Exhibit 176 is
3 entered into the record.

4 (EXHIBIT NO. 176 WAS RECEIVED INTO
5 EVIDENCE.)

6 BY MR. ZOBRIST:

7 Q. Now, Mr. Oligschlaeger, to cut to the
8 chase, if we change the denominator and use the fixed O&M
9 cost of \$7.5 million, and then the Aries PILOT payment of
10 \$200,000, plus the MPS share of the Aries PILOT payment --
11 I'm sorry -- just the PILOT payment, that would get us to
12 a different figure in 176 than you had in your Schedule 6,
13 correct?

14 A. If you change the numbers in my schedule,
15 you will reach a different result, that is correct.

16 Q. And if the Commission agrees with the
17 calculations in Exhibit 176, that would have the effect of
18 valuing the MPS share of the Aquila plant at a different
19 level; is that correct?

20 A. That is correct, though I would certainly
21 recommend the Commission not accept this valuation. I
22 think it undervalues the total capacity of Aries, of the
23 Aries plant, uses too low a per megawatt hour price for
24 that average price.

25 Q. And if the figure at the bottom of

1 Exhibit 176, roughly 27.9 million, is accepted by the
2 Commission as representing the fixed cost allocation to
3 MPS, that is actually more than what MPS pays under the
4 power supply agreement, which is 27.66 million; is that
5 correct?

6 A. The number that appears at the bottom of
7 the document you handed me a short while ago is slightly
8 greater than the amount of the MPS capacity payment for
9 Aries, that is correct.

10 Q. Now, Mr. Oligschlaeger, in your direct
11 testimony, you stated, I believe at page 7 and 8, in
12 response to this question which was to the effect that,
13 was Aquila's -- and I'll give you a moment to get there.
14 It's pages 7 and 8, beginning at the bottom.

15 The question was to the effect, is Aquila's
16 selection of Aries to supply the power needs to MPS
17 reasonable, and you essentially said, yes, if MPS is
18 charged a fair portion of the costs incurred to serve its
19 power needs. Is that what you testified?

20 A. Yes, it is.

21 Q. Now, but when you did your cost analysis of
22 the Aries plant, you did not use the cost information that
23 was made available by Aquila; isn't that true?

24 A. There was certain information contained in
25 Mr. Sherman's rebuttal testimony that could be found among

1 the boxes and boxes of materials that we have reviewed and
2 were given some opportunity to review during the audit and
3 in the so-called data room. So to the extent your
4 question is, having had the opportunity, a limited
5 opportunity to review the material during the audit, did
6 we use all of the right numbers in our direct testimony,
7 the answer is no, we did not.

8 Q. And in fact, what you did is you chose a
9 proxy based upon the annual lease payments that were to be
10 made pursuant to a lease that did not -- was not
11 consummated; is that correct?

12 A. Yes. That was a deliberate choice and one
13 I still -- one the Staff still supports.

14 Q. Now, did you do any kind of an analysis of
15 Aries as a rate base plant? Did you try to hypothecate
16 what it would have looked like had it been rate base
17 plant?

18 A. Did we do any formal studies of the revenue
19 requirements that would have resulted if Aries had been
20 included in rate base? No, we did not.

21 Q. Now, am I correct that if you did such an
22 analysis, you would use the cost of long-term and
23 short-term debt on the net plant? Would that be one of
24 the elements?

25 A. The typical treatment of rate base

1 investment is to apply an overall rate of return based
2 upon the utility's overall debt and equity cost to the
3 entirety of their rate base.

4 Q. Are you familiar that in Schedule 23,
5 Mr. David Murray had recommended that the Commission adopt
6 a 4.92 percent figure for the cost of long and short-term
7 debt on the net plant?

8 A. I've not made a particular point to note
9 that, no, but --

10 Q. Let me just ask you to assume that as we go
11 forward.

12 A. Sure.

13 Q. Do you recall what the mid point of Staff's
14 recommendation for an after-tax return on equity was in
15 this case? And I'll just suggest that in Schedule 23 of
16 Mr. Murray's testimony, it said at 3.23 percent. Does
17 that sound right?

18 A. 3.23 percent?

19 Q. After tax ROE, the mid point?

20 A. Doesn't sound right, but --

21 Q. Now, do you recall what the income tax
22 gross would be, based upon Staff's recommendation, if you
23 assume that to be 3.23 percent, again, after tax?

24 A. The current tax gross up is in the
25 neighborhood of 1.6. Maybe 1.61, 1.62, in that ball part.

1 Q. Would you accept a figure of 2.01 or do you
2 think it's closer to the 1.6?

3 A. I think it's closer to the 1.6.

4 Q. And do you recall, would it be reasonable
5 to use an annual depreciation rate based upon a 40-year
6 life of 2.5 percent?

7 A. If the life is 40 years, 2.5 would be
8 correct, again, assuming our current policy of no
9 recognition of net salvage in the depreciation rate.

10 Q. Would you accept a property tax rate of
11 1.53 percent?

12 A. That sounds high. In most cases I've
13 looked at, the general property tax rate is applied to
14 total plant services is around 1 percent.

15 Q. If I suggested to you an annual fixed cost
16 of 14.19 percent on the net plant, would you accept that
17 as a reasonable figure?

18 A. No, I do not.

19 Q. What would be your figure if you used one?

20 A. I have not made that calculation, sir.

21 Q. And so in terms of the total cost of the
22 plant, you have not made any kind of a calculation on what
23 it would have been like had it been rate based for
24 purposes of comparing the power supply agreement and the
25 other aspects of Aries plant; is that correct?

1 A. No, I have not.

2 Q. Now, Mr. Oligschlaeger, you recall that I
3 think Mr. Sherman in his testimony recommended that
4 certain debt costs and certain equity costs be recovered
5 as part of this proceeding. Do you recall that?

6 A. Yes, I do.

7 Q. And as I recall, Staff took the position
8 that payment under the lease, which was never entered
9 into, that the debt -- that the cost of debt was included
10 in those lease amounts. Is that your testimony?

11 A. It's my testimony that generally it's
12 understood that lease payments should reflect both a
13 return on and a return of the investment covered by the
14 lease.

15 Q. And on the basis of that position, you do
16 not recommend that the Commission adopt Mr. Sherman's
17 figure in his rebuttal testimony, that figure of
18 21.3 million be allowed?

19 A. That is correct.

20 Q. Now, that's even though this is a cost to
21 MPS; in other words, it's not MPS' debt, it's -- this is a
22 cost to running the Merchant Aries plant?

23 A. Well, first, again, the lease payments
24 should reflect what a normalized expectation would be of
25 the interest payments and the repayment of principle

1 related to the Aries project. No. 2, the specific number
2 in Mr. Sherman's testimony of I think you said
3 21 -- 20, 21 million apparently reflects some impact of a
4 default in terms of an additional adder to the interest
5 rate, and we would strongly disagree that the Commission
6 should reflect the impact of default in its valuation of
7 the Aries unit for purposes of setting rates.

8 Q. Now, why would you reject an event that has
9 occurred? Why would you reject that?

10 A. I think a corporate default is certainly --
11 or I'm not -- the default related to the Aries financing I
12 think would classify as a somewhat extraordinary and
13 unique event that certainly, in the context of this
14 instance, should not be reflected in the ongoing rate
15 levels.

16 Q. I guess what you're saying is that even if
17 we didn't have the default, you still would be against
18 factoring any type of expense for debt as part of the
19 aries costs?

20 A. No, we believe that the debt is in -- the
21 debt costs are implicit within the lease payment.

22 Q. What is your authority for that? What's
23 the basis for that statement?

24 A. Well, hold on just a second. I'm looking
25 in a filing made before the Federal Energy Regulatory

1 Commission that was made by an entity called PH Generating
2 Statutory Trust A that is entitled application for
3 determination of exempt wholesale generator status. And
4 my reading of this document is this was the application by
5 the lessors that were intended to be the parties to the
6 operating lease with MEPPH following consummation of the
7 permanent financing of the unit.

8 In describing the lease agreement between
9 the capital lease that I believe is in effect between Cass
10 County and MEPPH that would later be superseded by another
11 lease, this document states the lease agreement provides
12 that the rental to the county shall be equal to the
13 principal of and the interest due on the industrial
14 revenue bonds, in accordance with the bond indenture, plus
15 certain payments in lieu of taxes, which are determined
16 under a separate economic development performance
17 agreement with the county.

18 Q. Have you produced a copy of that? This is
19 something that the EWG application contained in this case?

20 A. This was a FERC filing made by -- well, it
21 wasn't made in this case. This, I believe, dates to April
22 2002. I'm not sure I understand your question.

23 Q. Well, I'm not familiar with the document.
24 What I'm trying to find out is, was this a document made
25 or a filing made with regard to the Aries plant?

1 A. Yes, it is.

2 Q. All right. And so that's the basis for
3 your including or not including any debt as a component?

4 A. Again, we believe the debt is part of lease
5 payment.

6 Q. Is that also your position with regard to
7 equity?

8 A. No, that is not our position with regard to
9 equity.

10 Q. Now, as I understand it, you did not
11 include any return on the investment of the partners in
12 the Aries plant as a reasonable expense for MPS entering
13 into the PSA; is that correct?

14 A. We are not recommending that the Commission
15 include any valuation of return on equity as part of a
16 costing of the purchased power agreement to MPS.

17 Q. Now, I believe it's -- did you state in
18 your surrebuttal that the operating restructure of the
19 permanent Aries financing represents the actual financing
20 costs of the capital investments in the entire Aries
21 units? Was that your understanding

22 A. Can you point me to that site?

23 Q. Well, I'm having trouble. I wrote it down,
24 and I can't find my reference. But let me just ask you
25 generally, and I'll be glad to do that if I find it here,

1 was it your opinion that the operating lease structure was
2 designed to represent all of the costs of the whole unit
3 or just the combined cycle costs?

4 A. I think, as I've stated, it's my belief
5 that the operating lease payments would have reflected
6 both a return of and a return on the investment in the
7 Aries unit. Specifically, debt costs and depreciation.

8 Q. I found the citation. It's on page 31 of
9 your surrebuttal, line 3.

10 A. Yes. I see that.

11 Q. Was your position that the operating lease
12 was to cover the whole unit or just the combined cycle
13 unit?

14 A. I thought the whole unit was a combined
15 cycle unit.

16 Q. Well, we've got those 85 megawatts of duct
17 fired. They're not combined cycle. And I thought you
18 accepted that earlier in my cross-examination.

19 A. I'm not an engineer. To me it's a combined
20 cycle unit. I don't divide it into 500 megawatts of one
21 and 85 of the other.

22 Q. Well, I believe that there's evidence in
23 the record what shows that that's powered through a
24 different physical plant system.

25 Now, the participation agreements in this

1 case, did you have an opportunity to look at any of those
2 in your review of material provided by Aquila?

3 A. As a participation agreement, are you
4 talking about, for example, the document I believe you
5 passed out as Exhibit 173?

6 Q. Right.

7 A. I may have -- there are a lot of agreements
8 associated with Aries and we've looked at a lot of them.
9 The name rings a bell. I can't tell you that much
10 specifically about it.

11 Q. You're familiar with roughly that the --
12 amount that was loaned and it was part of the construction
13 cost was roughly \$270 million, correct?

14 A. I'm familiar with the fact that the debt on
15 the plant prior to the default was at a level of
16 \$270 million.

17 Q. And there was an additional amount, and I
18 think that's still an HC number, but we don't need to get
19 into what that number is, assuming it's still HC. There
20 was an additional amount of equity invested by the equity
21 partners, including the Calpine and Aquila entities that
22 we talked about, correct?

23 A. Prior to default there was a small amount
24 of equity, yes.

25 Q. And you're not recommending that any cost

1 allocated with that investment be recovered in this case,
2 correct?

3 A. Be included in the Commission's valuation
4 of the contract for rate purposes, yes.

5 Q. Okay. And as I understood the reasons that
6 you set forth in your surrebuttal, the first one was that
7 they weren't paying the debt costs; is that correct?

8 A. That is correct.

9 Q. Now, do you have any others that they're
10 not paying the debt cost today?

11 A. Well, they're in default. I believe
12 Mr. Sherman testified they are still paying interest on
13 it. However, I believe that the repayment of the
14 principal was what was expected as of June and perhaps
15 that amount to be refinanced.

16 Q. But you understand there's a difference
17 between being in default and then not making your debt
18 payments?

19 A. Apparently so.

20 Q. And the default in this case occurred
21 because of the failure to convert from the construction
22 financing to the permanent financing, correct?

23 A. I think the default occurred because Aquila
24 or the partners did not meet the required interest
25 coverages that were set out in the construction loan

1 agreement and, therefore, there was an expectation they
2 would, among other remedies, need to infuse more equity
3 into the project.

4 Q. But as I understand it, it is the fact that
5 there was a default by the partners that you believe is a
6 reason not to allow any costs for a return on equity?

7 A. That is one of the reasons listed, yes.

8 Q. Now the second reason, and I think this is
9 from page 34 of your surrebuttal, you state that the
10 ownership -- that Aquila does not intend to have an
11 ownership interest on an ongoing basis; is that correct?

12 A. That's correct.

13 Q. Now, why does the fact that one of the
14 partners may be selling its share of the unit, why does
15 that have an effect on why the other partner who may take
16 over should be deprived of return on its investment?

17 A. Well, we looked at this as a case of with
18 Aquila's interest in selling its share of the plant at
19 what would appear to be, at least on its face, a loss,
20 that some portion of the invested return on equity or some
21 portion of the book retained earnings of Aquila may have
22 to be written off, and we believe that that was improper
23 to give a return to amounts that may ultimately have to be
24 written off by the company. We did not look at this
25 specifically in terms of both Aquila and Calpine.

1 Q. And the third reason that you stated was
2 that the disallowance of an equity return should occur
3 because of Aquila's imprudence related to the
4 decision-making concerning the Aries project correct?

5 A. That is correct.

6 Q. Now, why is that a reason to impose a
7 penalty on behalf -- upon two partners, one of whom didn't
8 even make that decision?

9 A. Well, I believe that, first of all,
10 proposing to reduce or eliminate an equity return is
11 somewhat of a common approach if imprudence is being
12 alleged. From a ratepayer perspective, we believe that
13 the decision that Aquila -- decision-making that Aquila
14 made was flawed, and it's that decision-making that is the
15 focus here. Calpine did not play a role in that.

16 Q. So you'd be willing to recommend that the
17 Calpine portion of an ROE be granted by the Commission?

18 A. Well, no, because we believe that the
19 situation we are faced with in terms of here with the
20 loss -- potential -- loss of potential use of the Aries
21 unit to Missouri customers can be tied back to what we
22 believe was Aquila's imprudence, in terms of its
23 decision-making. They made the decisions that basically
24 resulted in what we believe is harm or damage to the
25 customers. They made a subsequent decision after that

1 time period to bring in a partner and invest 50 percent --
2 or sell 50 percent of the Aries unit to Calpine, but in
3 our mind that's irrelevant in terms of cost consequences
4 to the customers of the state.

5 Q. Now, Mr. Oligschlaeger, when Aquila, then
6 known as UtiliCorp, Inc., came before the Commission in
7 Case No. EM-99-369 and submitted its application to enter
8 into the Aries power supply agreement, you were part of
9 the Staff team that reviewed that application, correct?

10 A. Well, I think as stated in our -- in my
11 testimony and Mr. Featherstone's testimony, we had a very
12 limited to non-existent ability to do a substantive review
13 of the application itself. However, I did participate in
14 drafting and submitting a memorandum to the Commission on
15 the case.

16 Q. Did Staff oppose the application?

17 A. No, we did not.

18 Q. Did Staff ask for more time?

19 A. I was brought in at a fairly late date of
20 the Staff review process, which in the context of this
21 case was weeks, not months, and I don't know whether Staff
22 sought more time or not in the earlier stages.

23 Q. Now, it is true, though, that the
24 memorandum that you prepared with Mr. Dottheim did not
25 contradict Dr. Mike Proctor's memorandum which stated that

1 the power supply agreement benefits the customers; isn't
2 that true?

3 A. That is true.

4 Q. And you did not disagree with Dr. Proctor's
5 statement that the power supply agreement did not provide
6 MEPPH with any unfair competitive advantage by virtue of
7 its affiliate relationship with then Missouri Public
8 Service division of UtiliCorp; isn't that true?

9 A. Well, no, it wouldn't contradict that
10 because I did not have the same scope as Dr. Proctor and
11 did not review his work.

12 Q. And similarly, in the memorandum which you
13 co-authored with Mr. Dottheim, you did not disagree with
14 Dr. Proctor that the power supply agreement was in the
15 public interest?

16 A. It wasn't the purpose to agree or disagree.
17 It was the purpose to suggest additional conditions for
18 Commission approval.

19 Q. But the fact of the matter is that you did
20 not disagree with Dr. Proctor, did you?

21 A. The memorandum does not contain any
22 disagreement with Dr. Proctor.

23 MR. ZOBRIST: That's all I have.

24 JUDGE JONES: Thank you. Next we'll have
25 questions from the Bench. However, it is five o'clock.

1 It's probably a good place to stop. So tomorrow morning
2 at 8:30, we will pick up right here.

3 MR. ZOBRIST: Judge, I have two
4 housekeeping matters. Can Mr. DeBacker and Mr. Sherman be
5 excused?

6 JUDGE JONES: Yes, they may.

7 MR. ZOBRIST: And, Judge, I -- with the
8 Commission's indulgence, we will prepare a new version of
9 I think it's the one with the -- that we corrected by
10 handwriting, just so it's clear that that was not a
11 corrected version by Mr. Oligschlaeger, that it was a
12 suggested modification by Aquila to Mr. Oligschlaeger's
13 schedules.

14 JUDGE JONES: Okay.

15 WHEREUPON, the hearing was adjourned until
16 8:30 a.m. on Thursday, March 4, 2004.

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