

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS
Oral Argument

September 14, 2009
Jefferson City, Missouri

Volume 2

In the Matter of Union)
Electric Company, d/b/a)
AmerenUE's Tariffs to) File No. ER-2010-0036
Increase Its Annual)
Revenues for Electric)
Service)

MORRIS L. WOODRUFF, Presiding,
DEPUTY CHIEF REGULATORY LAW JUDGE.
ROBERT M. CLAYTON III, Chairman,
JEFF DAVIS,
TERRY JARRETT,
KEVIN GUNN,
ROBERT S. KENNEY,
COMMISSIONERS.

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

2 JUDGE WOODRUFF: Good afternoon,
3 everyone. We're here today in Case No. ER-2010-0036
4 for an oral argument on -- regarding AmerenUE's
5 request for interim rate relief. We'll begin today
6 by taking entries of appearance to see who's here,
7 beginning with Ameren.

8 MR. BYRNE: Your Honor, I'm Tom Byrne
9 representing AmerenUE. My address is 1901 Chouteau
10 Avenue, St. Louis, Missouri 63109.

11 MR. LOWERY: Your Honor, James B. Lowery
12 of the law firm of Smith Lewis, LLP, 111 South Ninth
13 Street, Suite 200, Columbia, Missouri 65201, also
14 appearing on behalf of Union Electric Company d/b/a
15 AmerenUE.

16 JUDGE WOODRUFF: Thank you. For Staff?

17 MR. THOMPSON: Kevin Thompson and Steve
18 Dottheim, Post Office Box 360, Jefferson City,
19 Missouri 65102, for the Staff of the Missouri Public
20 Service Commission.

21 JUDGE WOODRUFF: And for Office of
22 Public Counsel?

23 MR. MILLS: On behalf of the Office of
24 the Public Counsel and the public, my name is Lewis
25 Mills. My address is Post Office Box 2230, Jefferson

1 City, Missouri 65102.

2 JUDGE WOODRUFF: Thank you. And I
3 notice there are a number of intervenors here. Who
4 wants to go next?

5 MR. COFFMAN: John B. Coffman appearing
6 on behalf of AARP and the Consumers Council of
7 Missouri, 871 Tuxedo Boulevard, St. Louis, Missouri
8 63119.

9 MR. WOODSMALL: Thank you, your Honor.
10 David Woodsmall appearing on behalf of the Missouri
11 Energy Users Association. I've previously entered my
12 address on the record.

13 MS. VUYLSTEKE: Diana Vuylsteke for the
14 Missouri Industrial Energy Consumers, law firm, Bryan
15 Cave, LLP, 211 North Broadway, Suite 3600, St. Louis,
16 Missouri 63102.

17 MS. WOODS: Good afternoon, your Honor.
18 Shelley Ann Woods, Assistant Attorney General, and
19 Sarah Mangelsdorf, Assistant Attorney General, Post
20 Office Box 899, Jefferson City, Missouri 65102,
21 appearing on behalf of the Missouri Department of
22 Natural Resources.

23 MR. PENDERGAST: Good afternoon, your
24 Honor. Michael C. Pendergast appearing on behalf of
25 the Laclede Gas Company. My business address is 720

1 Olive Street, St. Louis, Missouri 63101.

2 JUDGE WOODRUFF: Thank you. Is there
3 anyone else out there that I've missed?

4 (NO RESPONSE.)

5 JUDGE WOODRUFF: Okay. I believe that's
6 everybody, then. As indicated, we'll start with a
7 presentation from AmerenUE, so if you'd like to
8 proceed.

9 MR. BYRNE: Thank you, your Honor. May
10 it please the Commission, Mr. Chairman and
11 Commissioners, I'm Tom Byrne, I'm an attorney for
12 AmerenUE. And I'd like to start by thanking the
13 Commission for scheduling this oral argument to
14 address our request for interim rate relief. We
15 believe this is an important issue for AmerenUE and
16 it is an even more important position from the
17 standpoint of addressing important policy
18 considerations for the State of Missouri.

19 This Commission has received numerous
20 filings from various parties addressing the legal
21 issues surrounding interim rate relief, but this
22 afternoon I'd like to take a step back from those
23 filings and all those legal issues and just briefly
24 explain why we're here asking for a rate relief and
25 why we think there is good cause for you to grant our

1 request in this case.

2 The simple explanation for the reason
3 that we're here is that under the current regulatory
4 framework in Missouri, AmerenUE has been and is
5 chronically unable to earn anywhere close to its
6 authorized rate of return on equity. Even though we
7 had filed three rate cases in the last three years,
8 our earned return on equity has consistently fallen
9 below the returns that this Commission has
10 authorized, and in many cases it's fall -- fallen far
11 below those returns month after month.

12 Mr. Lowery's putting a chart on the
13 overhead which was also provided as part of our CEO,
14 Warner Baxter's direct testimony in this case, and it
15 illustrates this problem better than I can explain
16 it.

17 The chart shows 24 months of earned and
18 authorized returns. It starts with June of 2007 on
19 the far left-hand side and it goes to May 2009. And
20 the blue -- the blue lines are the earned return and
21 the red line across the top is the authorized return.
22 And as you can see, over the past 24 months we've
23 hardly ever been able to earn our authorized rate of
24 return, and in many of those months, the earned
25 return falls far below the authorized return.

1 For example, in April of 2009, which is
2 the month after our last rate order took effect, we
3 earned a five and a half percent return on equity
4 compared to a 10.76 percent on equity that was
5 authorized by the Commission. And in many other of
6 the months -- that was the lowest month -- but in
7 many of the other months, the return is a lot lower
8 than was authorized.

9 I would note that -- that the chart
10 really doesn't show ups and downs above and below the
11 authorized return that might be -- might be
12 attributable to weather or conditions in a particular
13 month; rather, what it shows is a chronic inability
14 to earn our authorized rate of return in all
15 different months in all kinds of weather conditions.

16 The data from this chart was also
17 reproduced in a table which appears in the direct
18 testimony of AmerenUE witness, Gary Weiss. And I
19 don't know if you can see the numbers all that
20 clearly, but you have a copy of the chart.

21 The main reason I wanted to give it to
22 you is it shows an -- an average over the 24-month
23 period. And the average return on equity that we
24 earned over that 24-month period was 8.34 percent.
25 And that's almost two full percentage points or 200

1 basis points below the return that the Commission
2 authorized over that period.

3 Additional data that's become available
4 since Mr. Weiss filed this testimony shows that this
5 condition has not improved. We earned 6 --
6 6 percent -- about 6 percent in the two months
7 following which was 4.76 percentage points or 476
8 basis points below our authorized return. And those
9 percentages may not seem like much of a difference,
10 but, in fact, they are. Each percentage point or
11 each 100 basis points represents approximately
12 \$50 million per year of return that was authorized by
13 the Commission that we did not earn.

14 So over the entire period covered by the
15 chart and covered by the graph, the 24 months,
16 AmerenUE's pretax earnings were in rough terms almost
17 \$200 million less than those authorized by the
18 Commission. This is not a shortfall that AmerenUE or
19 any utility can sustain indefinitely. We believe
20 that something must be done to close the chronic,
21 consistent gap between the return authorized by the
22 Commission and the return the company is actually
23 able to earn.

24 You might ask yourself, and other
25 parties have raised the issue, why is this gap in

1 earnings occurring? Is AmerenUE being mismanaged to
2 this large degree that it isn't earning \$200 million
3 of the rates that have been authorized or is it the
4 result of the Taum Sauk failure which some of the
5 other parties have raised in their pleading or is it
6 the result of the loss of the Noranda Aluminum
7 smelter in last January's ice storm?

8 I guess my answer to all those questions
9 is no, no and no. AmerenUE is not being mismanaged.
10 In our last two rate cases, we've -- there's been no
11 adjustments that the Commission has approved based on
12 any kind of mismanagement, so I don't believe that's
13 an issue at all.

14 In terms of Taum Sauk, Taum Sauk does
15 affect our earnings. AmerenUE did agree to absorb
16 all the losses related to the Taum Sauk reservoir
17 failure, and those constitute about \$25 million a
18 year pretax. So it does have an effect, but it's
19 a -- but it's a minor effect on -- on this earnings
20 shortfall.

21 And then finally, the ice storm loss of
22 Noranda -- or ice-storm-induced loss of the Noranda
23 load last year accounted for about \$19 million as
24 well. So they had some minor impact on this, but
25 that's not what's causing it.

1 So what is causing AmerenUE's chronic
2 inability to earn its authorized rate of return? And
3 the answer is it's the significant lag of time
4 between when AmerenUE incurs costs and makes
5 investments in infrastructure for poles and wires and
6 transformers and substations and when those costs and
7 investments can be recovered in rates, what other
8 people have referred to as regulatory lag.

9 The lag in cost recovery for utilities
10 in Missouri is longer than the lag in most other
11 states. Missouri has an 11-month rate case process
12 which is longer than most states. I think the
13 average is about eight or eight and a half months.

14 Missouri relies on historic test year,
15 so we're always looking back at historic costs to set
16 rates for the future; whereas, a number of states use
17 projected costs to try to tie the costs closer to the
18 rates that -- that are based on them. But Missouri
19 doesn't use historic.

20 Missouri, as all Commissioners know,
21 also has a statute that prevents electric utilities
22 from recovering cost of construction work in progress
23 for construction projects until those projects are in
24 service, and I guess the standard in the statute is
25 until the property is fully operational and used for

1 service.

2 All of these factors and others combine
3 to make Missouri's regulatory lag among the worst in
4 the country -- among the longest in the country. I
5 guess worst is a subjective -- subjective statement,
6 but it's among the longest in the country. It
7 becomes just about impossible for an electric utility
8 in Missouri to earn its authorized return any time
9 the electric utility's costs are increasing and its
10 capital investment in its -- in its system exceeds
11 the depreciation cost that it is getting through
12 rates. This has been the case and it will be the
13 case for the foreseeable future for AmerenUE, given
14 the very large sums of capital that we've been
15 investing and we continue to invest in our system.

16 Let me give you an example of how
17 regulatory lag works. In our last rate case which
18 the Commission decided just last March, the cutoff
19 date for including cost changes and plant additions
20 was September 30th, 2008, so I guess a year -- about
21 a year ago. So any plant additions after that date
22 were excluded from consideration in that rate case.

23 The very next month in October 2008,
24 AmerenUE completed installation of a water discharge
25 line at the Callaway plant. And it was a fairly big

1 construction project that cost \$15 million. So --
2 but -- but unfortunately, because of the way cost
3 recovery works in Missouri, AmerenUE will have to
4 wait until this rate case is complete, probably until
5 June 2010 which is about 20 months after the water
6 discharge line was installed to begin recovering the
7 costs.

8 And even worse than that is the company
9 will never be able to recover the costs that it
10 incurred for the 20-month period between when the
11 line went into service and when the -- when the new
12 rates will take effect. Those costs will be lost
13 forever, and that's a very important point to us.

14 You know, when -- from -- from the
15 moment the line goes into service until the rates go
16 into effect, we lose all of those costs. And the
17 costs are the return on our investment for that
18 period of time. We don't get anything ever for --
19 for 20 months of investing that \$15 million.

20 The depreciation on the line, 20 months
21 of depreciation costs, we don't ever get in -- in
22 taxes associated with that line. And that applies
23 not just to that line, but for every item of rate
24 base that we add after -- after the cutoff date from
25 the last rate case. We'll never be made whole for

1 those costs.

2 As a second point of reference, AmerenUE
3 spent approximately \$187 million on capital costs
4 from October 1, 2008 until December 31st, 2008. So
5 that would include the line I was just talking about
6 and everything else that we did to our whole system.
7 \$187 million. Again, same deal. We have to wait
8 until June 2010 to begin recovering that \$187 million
9 that we paid, and we will never recover the amount
10 that we missed in the 17 to 20 months before rates
11 went into effect.

12 And we've tried to make a rough
13 calculation on \$187 million worth of plant, the
14 return taxes and depreciation. I know for sure
15 they're in excess of \$30 million for that -- for a
16 17-month period. We'll never recover that cost
17 again.

18 Some of you may remember the ice storm
19 that I referred to earlier that struck southeast
20 Missouri in January 2009. I know all the
21 Commissioners that were sitting on the Commission
22 remember it well. Commissioner Kenney, you may have
23 even read about it. It was a pretty famous storm.
24 That's a picture -- I guess I just decided to pick
25 one picture that would give an idea of the

1 devastation. That's a -- that's a electric pole
2 laying on a road with -- with ice, and it was like
3 that all over southeast Missouri. The storm shut
4 down our largest customer, Noranda Aluminum, which is
5 still recovering from that storm-induced shutdown.

6 It -- it -- it put every customer, just
7 about, in southeast Missouri out of service. We had
8 thousands of poles down and -- and -- and hundreds of
9 miles of lines that we had to replace. We went in in
10 January and did that. It was a huge undertaking, but
11 we got everybody back in service. I think we were
12 even -- people thought we did a good job, at least in
13 that storm. And -- but we put \$52 million of
14 investment into southeast Missouri.

15 And guess what. Just like the Callaway
16 line, just like the \$187 million that preceded it,
17 this \$52 million in investment, we've not recovered a
18 penny of it and we -- and we won't recover a penny of
19 it until our rate case is resolved. And then we'll
20 lose the interest -- or the return taxes and
21 depreciation for the -- for the interim period.

22 Basically, that's what's causing our
23 chronic earnings shortfall. The rate case process
24 simply cannot keep up with increasing levels of cost
25 and significant levels of capital investment that

1 we're making in our system. The company is forced to
2 file rate case after rate case faster and faster, one
3 after another, but we can never catch up because the
4 increasing levels of cost and investment go faster
5 than the rate case process and because rate cases
6 take 11 months to process.

7 And then I should note we filed this
8 current rate case just about as fast as we could
9 after the other one was resolved and got an order in
10 March and we filed in July. It -- it probably takes
11 almost that long to put a rate case together.

12 We believe that this state of affairs is
13 bad public policy for several reasons. First of all,
14 it's simply unfair that utilities should put in a --
15 be put in a position where they can never recover
16 their full cost of service and have no reasonable
17 opportunity to earn their authorized rate of return
18 while customers benefit from investment in plant that
19 they are not paying for.

20 This situation not only hurts the
21 financial health of utilities, but in the long run it
22 will hurt customers in the state as a whole.
23 Utilities that cannot recover their costs or earn
24 their authorized return have more difficulty
25 accessing capital. And where capital is available,

1 it is as more -- it is more costly ultimately for the
2 customers of those utilities.

3 Perhaps even more important, a system
4 that prevents the full and timely recovery of utility
5 investment costs discourages capital investment in
6 utility infrastructure. Lack of investment in
7 utility infrastructure ultimately hurts the utility,
8 its customers and the State of Missouri as a whole.

9 It is worth noting that this is not
10 simply a case where AmerenUE happened to earn below
11 its authorized return for some discrete period of
12 time. As other parties have correctly pointed out,
13 the utility's mere failure to earn its authorized
14 rate of return by itself does not justify interim
15 rates. But this is a systematic failure to allow
16 AmerenUE to recover its full costs of service and
17 have a reasonable opportunity to earn its authorized
18 return every month which does constitute, in our
19 opinion, good cause to provide interim rate relief.

20 What we are proposing today is that the
21 Commission take one modest step to help mitigate this
22 problem by allowing AmerenUE to place a small portion
23 of its proposed rate increase in effect on an interim
24 basis subject to refund with interest. We have been
25 as conservative as possible when requesting an amount

1 of the increase we are asking to put in effect on an
2 interim basis. We are asking for less than 10
3 percent of our proposed rate increase or about
4 \$37 million.

5 This represents only the actual cost of
6 plant that we have actually placed in service since
7 September 30th, 2008 that is serving customers today.
8 And we have offset that amount with the accumulated
9 depreciation on all of the company's plant. So all
10 of the accumulated depreciation on everything else is
11 an offset.

12 I should point out that customers are at
13 absolutely no risk under this arrangement. In the
14 unlikely event that the Commission determines that we
15 should not recover the costs of these facilities or
16 in the extremely unlikely event that the Commission
17 finds that other cost decreases have offset the cost
18 increases attributable to these facilities, the rate
19 increase will be refunded with interest.

20 But in the much more likely event that
21 these costs are allowed and they are not offset by
22 other decreases, approving the interim rates will
23 help mitigate the regulatory lag that is preventing
24 AmerenUE from recovering its full cost of service and
25 actually earning its authorized rate of return. In

1 other words, interim rates will simply allow us to
2 more timely recover the cost of our investments that
3 we've already made on behalf of customers; no more
4 and no less.

5 It will allow us to start recovering
6 costs of the Callaway plant water discharge line
7 that's been serving customers since last October and
8 the \$52 million of investment in wires and poles and
9 transformers that have been serving southeast
10 Missouri since February or March. There is simply no
11 justification for preventing AmerenUE from recovering
12 the known costs of these facilities that are serving
13 customers now.

14 I should also point out this is not a
15 proposal that AmerenUE invented. Several other
16 states in the Federal Energy Regulatory Commission
17 utilized interim rates in all cases, all rate cases
18 to help mitigate the gap between cost incurrence and
19 cost recovery.

20 There are a couple of issues raised in
21 other parties' pleadings that I need to do -- need to
22 address briefly. A number of parties point out that
23 AmerenUE does not meet the dire emergency standard
24 that the Commission has applied in many but not all
25 of the previous cases dealing with interim rates, and

1 that's true. AmerenUE is not on the brink of
2 bankruptcy and we are not in jeopardy of being unable
3 to provide safe and adequate service to our
4 customers. We don't meet that standard.

5 But the -- but as every party to this
6 case must acknowledge, this Commission is not bound
7 by the dire emergency standard. The Commission is
8 unquestionably authorized to allow interim rate
9 relief in a -- on a non -- in a nonemergency
10 situation for good cause shown.

11 In fact, in a recent case involving
12 Stoddard County Sewer Company in an order issued in
13 October 2008, this Commission said, and I quote, The
14 Commission also has the power on a case-by-case basis
15 to grant interim rate relief on a nonemergency basis
16 where the Commission finds that particular
17 circumstances necessitated such relief. The standard
18 for granting interim relief on a nonemergency basis,
19 good cause shown by the company and determination of
20 good cause shown is at the Commission's discretion,
21 closed quote. That's in the Stoddard County Sewer
22 Company case which is Case No. SO-2008-0289.

23 In this case where AmerenUE's ability to
24 recover its costs of service is being seriously
25 compromised by the 11-month day in -- delay in

1 processing rate cases and where the company is
2 actually being penalized financially for continuing
3 to invest in its system, there is certainly good
4 cause to provide interim rate relief, and the
5 Commission should do so.

6 Second, a number of parties have pointed
7 out that in one past case, AmerenUE opposed -- one
8 past case involving the Callaway plant phase-in,
9 AmerenUE opposed interim rate reductions, and that is
10 also true. AmerenUE felt in that case that since
11 interim rate relief was not regularly awarded in the
12 many rate increases -- in the many rate increase
13 cases, the Commission had decided it should not be
14 imposed on a utility in a rate decrease case. In
15 other words, the Commission should be consistent in
16 its application of the rules in rate increase and
17 rate decrease cases.

18 It is noteworthy that Staff and I
19 believe Public Counsel have been on both sides of
20 this issue as well opposing interim rate increases
21 but advocating interim rate decreases. Regardless of
22 this history of inconsistent positions taken by
23 several parties, the Commission must decide this case
24 based on what the best policies of the state is now.
25 I submit that it is better policy to allow full and

1 timely rate recovery of a utility's capital
2 investments so long as consumers are protected
3 through refunds with interest rather than forcing
4 utilities to forego recovery of these legitimate
5 costs for months or even years and losing recovery of
6 a portion of the costs forever.

7 Not only is this more fair to the
8 utilities who are paying increasing costs and making
9 greater infrastructure investments, but it will also
10 promote their financial health and will ultimately
11 let them borrow necessary funds at lower rates. More
12 financially sound utilities can afford to invest in
13 infrastructure, creating jobs for citizens in the
14 state and providing other less tangible benefits.

15 Perhaps most importantly, allowing
16 utilities to fully and timely recover the cost of
17 their investments in their system provides an
18 incentive and I believe the right incentive for
19 utilities to invest in reliability enhancements,
20 Smart Grid and other infrastructure improvements that
21 will improve service to all customers. What utility
22 will be encouraged to make discretionary investments
23 if they know that the price that they will pay for
24 doing so will be chronic under-earnings and
25 years-long delays in cost recovery?

1 For this important reason as well as the
2 others I've discussed, I urge you to approve
3 AmerenUE's request for interim rate relief for a
4 small portion of our rate increase request.

5 The Commission also asked each party to
6 address three questions in these oral arguments.
7 First, the Commission wanted to know what standard
8 the Commission should use in evaluating AmerenUE's
9 request. Again, AmerenUE believes the Commission's
10 not required to use the dire emergency standard and
11 should not do so in this case. AmerenUE's interim
12 rate filing should be allowed to take effect or
13 should be approved based on good cause shown. That
14 should be the standard that the Commission uses in
15 evaluating this request.

16 Second, the Commission asked whether an
17 evidentiary hearing would be required before the
18 Commission could approve the interim rates. There is
19 no question that in Missouri the Commission has the
20 authority to simply allow rate increase tariffs to
21 take effect without any suspension or hearing. In
22 fact, interim rates are often approved without a
23 hearing in the context of purchased gas adjustments
24 and they've started to be in the context of fuel
25 adjustments. Consequently, it's very clear that no

1 evidentiary hearing is required by law.

2 In this case where the entire amount of
3 the increase is refundable with interest, we also
4 believe a discretionary hearing is not required. The
5 Commission can and should deal with any evidentiary
6 issues surrounding our interim rate increase request
7 at the regular hearing that has already been
8 scheduled in this case in March.

9 Third, the Commission asked the parties
10 to address what issues should be considered in an
11 evidentiary hearing if the Commission elects to hold
12 one. If the Commission does elect to hold an
13 evidentiary hearing, AmerenUE believes it should hold
14 a prompt one-day hearing focusing exclusively on the
15 calculation of the interim rate increase, and if
16 necessary, the accounting records underlying those
17 calculations.

18 I would note that AmerenUE filed all of
19 the work papers underlying its calculation of its
20 interim rates with its rate increase request on
21 July 24th, so all of the parties have had access to
22 all of our rate -- all of our work papers for that
23 period of time. We believe that this process could
24 certainly be completed over the next month with
25 interim rates taking effect November 1st.

1 In summary, I would urge the Commission
2 to approve AmerenUE's request for interim rate relief
3 because it's only fair to allow AmerenUE to recover
4 its legitimate costs of providing service that will
5 improve the company's access to capital at a lower
6 cost and it will provide the proper incentive for
7 AmerenUE and other utilities to invest in their
8 systems. Thank you.

9 JUDGE WOODRUFF: Thank you, Mr. Byrne.
10 Questions from the Commissioners? Chairman Clayton?

11 CHAIRMAN CLAYTON: Mr. Byrne, I have
12 several questions now and I may have several
13 questions later, but I wanted to ask you a couple
14 real quick.

15 MR. BYRNE: Sure.

16 CHAIRMAN CLAYTON: On the interim
17 request from Ameren, how would -- since -- since it
18 focuses on infrastructure and capital investment, how
19 different is the request for interim rates from what
20 would be eligible under the infrastructure system
21 replacement surcharge that is available to other
22 sector utilities?

23 MR. BYRNE: It's -- it's different
24 and -- and broader than it is for this request
25 because it includes all of our capital investments;

1 whereas, ISRS, I believe, is limited to highway
2 relocations and, like, replacements, modernization of
3 facilities. So our request is broader than an ISRS
4 request.

5 CHAIRMAN CLAYTON: Okay. So it's
6 broader than what other utilities would be able to
7 seek under the ISRS law?

8 MR. BYRNE: That's correct.

9 CHAIRMAN CLAYTON: Would you agree or
10 disagree with me that the legislature so far has
11 stated that an ISRS should not be available to an
12 electric utility, and wouldn't this request fly in
13 the face of that policy decision on the part of the
14 General Assembly?

15 MR. BYRNE: I agree that the General
16 Assembly has not enacted an ISRS for electric
17 utilities to use. I don't -- I don't -- I'm not 100
18 percent sure that's a policy decision. They
19 shouldn't have one, but it's not available now. I
20 certainly agree with that.

21 I think an interim rate increase is
22 different than an ISRS filing. I mean, ISRS is a
23 rider that can -- that can occur over -- I don't
24 remember how many years, but you go several years
25 between rate cases. This is an interim rate increase

1 subject to refund with interest and it -- and it'd be
2 resolved in the course of a rate case. So to my
3 mind, it's a -- it's a different kind of an animal.

4 CHAIRMAN CLAYTON: Okay. Even though
5 both of them relate to capital investments?

6 MR. BYRNE: Yes.

7 CHAIRMAN CLAYTON: Yeah. But -- but the
8 underlying subject matter for the suggested increase
9 would be capital investment in infrastructure for
10 both, just different types of investment?

11 MR. BYRNE: Yes, that's fair.

12 CHAIRMAN CLAYTON: Would you agree with
13 that?

14 MR. BYRNE: That's fair.

15 CHAIRMAN CLAYTON: Okay. I wanted to
16 also ask if you could again restate, Ameren is asking
17 for this Commission to -- to change policies that
18 prior commissions have made with regard to when an
19 interim rate increase would be appropriate. What --
20 what standard you're -- I think you said good cause
21 would be appropriate, but what constitutes good cause
22 is my question?

23 MR. BYRNE: Well, I think two things.

24 One is, I'm not -- I'm not sure I'm asking the
25 Commission to change the standard. In -- in some

1 cases -- most -- most cases it has applied the
2 emergency standard, but there have been some cases
3 that they haven't. So I guess I'm asking them to use
4 the good-cause-shown standard which --

5 CHAIRMAN CLAYTON: Like the Stoddard
6 County that's the small sewer company --

7 MR. BYRNE: And --

8 CHAIRMAN CLAYTON: -- that has 100
9 customers or whatever --

10 MR. BYRNE: Right.

11 CHAIRMAN CLAYTON: Yeah.

12 MR. BYRNE: That's one example.

13 CHAIRMAN CLAYTON: Okay.

14 MR. BYRNE: And -- but -- I forgot the
15 rest of the question.

16 CHAIRMAN CLAYTON: Good cause, what --
17 what constitutes good cause?

18 MR. BYRNE: Oh. You know, I --

19 CHAIRMAN CLAYTON: Could you give me a
20 little more discussion of what Ameren suggests that
21 we use as -- as a -- as meeting the definition of
22 good cause?

23 MR. BYRNE: I'm not sure what good cause
24 would be. I guess that would be up to the discretion
25 of the Commission. I don't -- I don't have a good

1 overall definition. I guess all I'm saying is I
2 believe the circumstances here do constitute good
3 cause where AmerenUE hasn't been able to earn its
4 authorized return and where it's invested a lot of
5 money in the system and not -- not been able to
6 recover the cost.

7 CHAIRMAN CLAYTON: Okay. That's all I
8 have right now. Thank you, Mr. Byrne.

9 JUDGE WOODRUFF: Commissioner Davis?

10 COMMISSIONER DAVIS: Okay. Mr. Byrne,
11 going back to Commissioner Clayton's ISRS questions,
12 that legislation was passed in 2003, correct?

13 MR. BYRNE: I believe that's correct.

14 COMMISSIONER DAVIS: To the best of your
15 knowledge, were electric companies ever included in
16 that legislation?

17 MR. BYRNE: I don't think so. That
18 would be gas only. I don't --

19 COMMISSIONER DAVIS: Gas and -- gas and
20 water, correct?

21 MR. BYRNE: Gas and water, that's right.

22 COMMISSIONER DAVIS: And originally
23 water applied to the entire state; is that correct?

24 MR. BYRNE: That's correct.

25 COMMISSIONER DAVIS: And then it was --

1 then it was pared down to St. Louis County, correct?

2 MR. BYRNE: I believe that's right.

3 COMMISSIONER DAVIS: Okay. So the
4 General Assembly -- I mean, to your knowledge,
5 there's never even been a bill filed on -- on -- to
6 create an electric ISRS or -- or any other issue of
7 that nature, has there?

8 MR. BYRNE: I -- I don't know. It was
9 discussed last legislative session. I don't know if
10 a bill was filed or not.

11 COMMISSIONER DAVIS: Okay. Okay. So to
12 the best of your knowledge, the answer is no?

13 MR. BYRNE: I think that's fair.

14 COMMISSIONER DAVIS: Okay. Going back
15 to your for-good-cause-shown standard of reviewing
16 it, sir, is there any basis for -- for that standard
17 in statute or is it just case law?

18 MR. BYRNE: I believe it -- it -- the
19 derivation of that may be from the file-and-suspend
20 statute where -- where they -- might have been a case
21 under it. Honestly, I'm not particularly -- I'm not
22 100 percent sure.

23 MR. LOWERY: Judge, if it pleases the
24 Commission, I -- I could point out in our filing that
25 we made, I believe, last Tuesday on page 11,

1 Commissioner Davis, we set forth the law on that.
2 The good cause standard is found in the
3 file-and-suspend statutes, 393.140(11), I believe.
4 But the cases say that good cause lies largely in the
5 discretion of the officer of the court before which
6 the question arises. It is essentially -- it's a
7 substantial -- not a trifling, it's a reasonable -- a
8 reasonable determination on behalf of the tribunal.

9 The tribunal has a lot of discretion,
10 and it depends upon the circumstances, those cases,
11 say, of the individual. In this case it would be of
12 the entity. But it's really a matter of discretion,
13 and an abuse of discretion is the standard, I think,
14 that would apply to a good cause determination the
15 Commission would have to make.

16 COMMISSIONER DAVIS: Okay. Now, did --
17 anywhere in your -- in your brief that you filed last
18 Tuesday, did you -- did you make a reference to, what
19 was it, 393 -- to the file-and-suspend statute?

20 MR. LOWERY: 393.40(11), yes, we did.
21 And on page 11 we also cite some cases for what good
22 cause means, and they're cases the Commission, in
23 fact, has used.

24 COMMISSIONER DAVIS: Okay. All right.
25 So then going back to the other questions that --

1 that were posed in the -- on the order for today,
2 you've asked for an expedited decision on the merits?

3 MR. BYRNE: Yes.

4 COMMISSIONER DAVIS: And you said that
5 no evidentiary hearing is necessary, correct?

6 MR. BYRNE: We believe it's not.

7 COMMISSIONER DAVIS: Okay. All right.
8 So...

9 MR. BYRNE: We believe it's certainly
10 not legally required. If the Commission wants to
11 have one, of course they can.

12 COMMISSIONER DAVIS: Okay. All right.
13 So assuming we go back and do decide to have an
14 evidentiary hearing, you know, what -- could you
15 restate again what evidence you think we ought to be
16 considering?

17 MR. BYRNE: Yes. I think it's very
18 limited. I think it's -- it's the accounting records
19 that underlie the plant additions are -- are
20 relevant, and the -- and the calculation of the rates
21 that we've made on the interim tariff are relevant,
22 and that's it.

23 COMMISSIONER DAVIS: Okay.

24 MR. BYRNE: And I guess the -- the
25 offsetting depreciation.

1 COMMISSIONER DAVIS: Okay. And it's --
2 and is it your position that you have the burden of
3 proof in -- in meeting that request for interim rate
4 relief?

5 MR. BYRNE: Yes.

6 COMMISSIONER DAVIS: And then once
7 you've met that burden, then it's up to the other
8 parties to rebut it --

9 MR. BYRNE: Yes.

10 COMMISSIONER DAVIS: -- correct? Okay.
11 Okay, Mr. Byrne, moving on to -- to your -- back to
12 your opening statement. Early on you referenced the
13 use of a four-test year. How many states do you know
14 who use a four-test year?

15 MR. BYRNE: I have -- you know, if I can
16 get some papers, I can --

17 COMMISSIONER DAVIS: You don't -- I --
18 well --

19 MR. BYRNE: There's -- there's a --
20 there's --

21 COMMISSIONER DAVIS: Can he file it,
22 Judge -- can -- can --

23 MR. BYRNE: Sure.

24 COMMISSIONER DAVIS: I mean, I'm willing
25 to let all the parties file that. I mean, I --

1 MR. BYRNE: There are some other states,
2 but I -- I don't -- standing up here at the podium, I
3 don't know exactly how many of them.

4 COMMISSIONER DAVIS: Okay. Now, let me
5 ask you this: Do you know how many states have
6 restructured?

7 MR. BYRNE: Oh, quite -- quite a few
8 states have restructured, maybe -- close to half,
9 maybe. You may know better than me.

10 COMMISSIONER DAVIS: I don't think it's
11 that many, Mr. Byrne, but we'll go -- we'll go --
12 we'll go on. But Illinois has restructured to some
13 degree?

14 MR. BYRNE: Yes.

15 COMMISSIONER DAVIS: And Ameren's
16 subsidiaries, CIPS, CILCO and IP, operate in
17 Illinois, correct?

18 MR. BYRNE: Yes.

19 COMMISSIONER DAVIS: Now, those --
20 they're primarily distribution utilities, are they
21 not?

22 MR. BYRNE: Yes.

23 COMMISSIONER DAVIS: They serve
24 customers of, quote, last resort?

25 MR. BYRNE: They serve all -- all --

1 they distribute to basically --

2 COMMISSIONER DAVIS: Well -- and they
3 serve -- they serve everyone in their service
4 territory, but do they provide electricity to some of
5 those?

6 MR. BYRNE: You're -- you're right.
7 There's -- there are competitive alternatives
8 available to some of those customers.

9 COMMISSIONER DAVIS: Okay. Do you know
10 how many customers -- first of all, what is a
11 customer of last resort?

12 MR. BYRNE: Well -- or it's -- it's
13 really a supplier of last resort.

14 COMMISSIONER DAVIS: Okay. A supplier
15 of last resort.

16 MR. BYRNE: So if you can't --

17 COMMISSIONER DAVIS: That's right.

18 MR. BYRNE: -- for whatever reason you
19 can't -- or you can't get service, maybe a bad
20 credit --

21 COMMISSIONER DAVIS: Can't get
22 electricity from anyone else.

23 MR. BYRNE: -- then you can get it from
24 the supplier of last resort.

25 COMMISSIONER DAVIS: Okay. So do you

1 know how many people are served by CIPS and CILCO and
2 IPs that are -- where the distribution utility is, in
3 effect, a supplier of last resort?

4 MR. BYRNE: I don't know.

5 COMMISSIONER DAVIS: Okay. Do you
6 know -- like when they purchase the electricity to
7 serve those customers, do you know whether those
8 rates are set prospectively or retrospectively?

9 MR. BYRNE: Well, they're -- they're --
10 I guess they are set -- they -- they buy the
11 electricity through a State program and --

12 COMMISSIONER DAVIS: There's an auction,
13 isn't there?

14 MR. BYRNE: Right. And it's a -- it's a
15 straight flow-through of the auction price, so it's
16 kind of simultaneous.

17 COMMISSIONER DAVIS: Okay. So there's
18 no lag there?

19 MR. BYRNE: There's no lag there.

20 COMMISSIONER DAVIS: For the cost of
21 electricity?

22 MR. BYRNE: Right.

23 COMMISSIONER DAVIS: And -- and that
24 price includes all the fuel costs, all the rail
25 costs, all the costs and risks associated with

1 generating the electricity?

2 MR. BYRNE: That's correct.

3 COMMISSIONER DAVIS: Is transmission --

4 MR. BYRNE: They don't -- they don't own
5 generation, they own --

6 COMMISSIONER DAVIS: Right, right. Is
7 transmission priced in there as well?

8 MR. BYRNE: I don't believe so.

9 COMMISSIONER DAVIS: You don't. Is --

10 MR. BYRNE: I mean, they -- I guess the
11 transmission to get the electricity to Illinois if it
12 comes from some other place, but if there's -- so
13 yes, there is some transmission built into that.

14 COMMISSIONER DAVIS: Okay. Do you know
15 like for -- for any other transmission costs, do they
16 have a rider or anything?

17 MR. BYRNE: I'm not sure. I have
18 trouble keeping up with Missouri, but yes. Now, I'm
19 not 100 percent sure of that. They do -- although,
20 in Illinois they do have quite a number of riders, I
21 know that. It got -- I think on the order of maybe
22 15 to 20 riders for all different kinds of costs
23 in -- you know, in addition to passing through the
24 cost of the electricity.

25 COMMISSIONER DAVIS: Uh-huh.

1 MR. BYRNE: There's no -- there's no
2 statutory prohibition for riders and the Commission
3 has approved a number of riders in Illinois.

4 COMMISSIONER DAVIS: Mr. Byrne, do you
5 know if -- does FERC allow interim rates subject to
6 refund?

7 MR. BYRNE: Yes. When you file at FERC,
8 they put the whole rate increase in effect. It's
9 subject to refund with interest after the case is
10 processed.

11 COMMISSIONER DAVIS: Do you know if any
12 other states have that -- have that same model of
13 allowing interim rate -- or a similar model allowing
14 interim rates subject to refund?

15 MR. BYRNE: Yes, there are some states
16 that do, yes. I think...

17 COMMISSIONER DAVIS: Do you know which
18 ones or how many?

19 MR. BYRNE: No. I can -- I have -- I
20 think I can file that information. I think Iowa is
21 one, I think there's -- it's -- it's not half, but
22 it's -- but there are several that do, you know.

23 COMMISSIONER DAVIS: Okay. All right.
24 Well, yeah. Judge, can you take care of collecting
25 that information?

1 JUDGE WOODRUFF: Certainly. Go ahead
2 and file it --

3 COMMISSIONER DAVIS: Thank you. No
4 further questions, Mr. Byrne.

5 JUDGE WOODRUFF: Commissioner Jarrett?

6 COMMISSIONER JARRETT: Good afternoon,
7 Mr. Byrne.

8 MR. BYRNE: Good afternoon,
9 Commissioner.

10 COMMISSIONER JARRETT: I wanted to ask
11 you, aren't we bound by the standards set out in the
12 Laclede Gas Company case as far as determining
13 whether an interim rate increase should be granted?

14 MR. BYRNE: Yes, I guess that is the
15 case that went to the Western District and I believe
16 it -- and I believe it does discuss the standard that
17 I've talked about.

18 COMMISSIONER JARRETT: Well, it talks
19 about -- the case talks about -- a lot about what you
20 talked about. First of all, it talked about earning
21 under the allowed rate of return and how that
22 necessarily isn't -- isn't proof or facts significant
23 enough to grant an interim rate increase.

24 It also talks about regulatory lag and
25 how that isn't necessarily -- again, necessarily

1 grounds for an interim -- interim rate increase.

2 And then it talks a little bit about
3 Laclede's facts in its case, and then it says, "Under
4 these facts, Laclede -- Laclede clearly failed to
5 carry the heavy burden of proof imposed upon it by
6 Section 386.430 to show by clear and satisfactory
7 evidence that the determination or order of the
8 Commission complained of is unreasonable or
9 unlawful."

10 And then later on, the last full
11 paragraph of -- of the case says, "It may be
12 theoretically possible even in a purpose --
13 purposefully shortened interim rate hearing for the
14 evidence to show beyond reasonable debate that the
15 applicant's rate structure had become unjustly low
16 without any emergency as defined by the Commission
17 having as yet resulted.

18 "Although some future applicant on some
19 extraordinary fact situation may be able to succeed
20 in so proving, Laclede has singularly failed to -- in
21 this case to carry the very heavy burden of proof
22 necessary to do so."

23 And I apologize to Mr. Pendergast for
24 reading those knocks on Laclede from the Western
25 District. That seems to be a lot more than just a

1 sort of discretionary good-cause-shown standard to
2 me. Can you reconcile that with what the court said
3 in Laclede?

4 MR. BYRNE: Well, I mean, I -- I -- I
5 think it's a matter of degree. You're right, the
6 court said it was a -- it was a very heavy burden
7 that Laclede didn't meet. I mean, I guess I would
8 suggest that we do meet that standard. And you're
9 right, I mean, we're bound by the Western District
10 Court of Appeals' decision, and that's the highest
11 court that's addressed this issue. But I guess I --
12 I believe we meet that standard here.

13 COMMISSIONER JARRETT: And I guess my
14 other -- my other point I'd like you to address on
15 that is, reading all of that, don't we have to have
16 an evidentiary hearing? I mean, you have witnesses
17 that are going to testify that you do meet this
18 extraordinary situation. Don't the other parties
19 have an opportunity to cross-examine your evidence?
20 Don't they have -- shouldn't they have an opportunity
21 to present their own evidence? You know, it talks
22 about carrying a heavy -- heavy burden of proof.
23 That means a factual evidentiary hearing to me.

24 MR. BYRNE: I -- I -- I see what you're
25 saying and I don't completely disagree with it. I --

1 I do think, though, that the Commission through the
2 file-and-suspend statute does have the legal
3 authority to allow rates to take effect without
4 suspending them or without holding a hearing. But
5 I -- you know, AmerenUE wouldn't necessarily oppose a
6 hearing if the Commission felt like it needed to, to
7 look at the facts in this case and to determine
8 whether appropriate good cause was shown. I
9 understand what you're saying.

10 COMMISSIONER JARRETT: Thank you,
11 Mr. Byrne. I don't have any further questions.

12 JUDGE WOODRUFF: Commissioner Gunn?

13 COMMISSIONER GUNN: Yeah, just a few.

14 So your chart --

15 MR. BYRNE: Yeah.

16 COMMISSIONER GUNN: Obviously you have
17 in -- since '09 you've had significant under-earnings
18 of your authorized ROE. But what -- what's different
19 in Missouri's regulatory environment from April of
20 '08 and May of '08, from April of '09 and May of '09?
21 How has the regulatory environment changed which
22 would have caused you to be able in April of '08 to
23 earn your -- earn above your -- your authorized rate
24 and not in April of '09?

25 MR. BYRNE: I don't think anything has

1 changed in the regulatory environment. It's just --
2 and it's -- there are ups and downs, and
3 occasionally -- I guess occasionally you can earn
4 your authorized rate of return under this regulatory
5 structure. It's just that almost all the time you're
6 not going to. And especially if you're --
7 particularly if you're investing in -- in -- in plant
8 at the rate that we are. I mean, it's possible you
9 could have some -- the weather could cause some great
10 amount of earnings in a particular month that might
11 overcome the investment in that month, and I guess
12 that's what happened.

13 COMMISSIONER GUNN: So -- so -- and
14 that -- and that's fine. That -- so that -- that
15 answers my question. So -- so those spikes might be
16 other external factors which you're arguing overcome
17 the handicap of the regulatory lag?

18 MR. BYRNE: Yeah, it's -- what we're
19 saying is it's a persistent handicap. It's not that
20 it can never be overcome. Sure, every -- every once
21 in a while I guess all the -- all the stars line up
22 and we earn above our authorized return for a month.

23 COMMISSIONER GUNN: Well, then, in the
24 absence of -- of regulatory lag, that now April '08
25 and May '08, then, under -- under that argument would

1 be significantly higher than your -- your authorized
2 rate because -- because these happen under -- under
3 significant handicaps when there's regulatory lag.

4 MR. BYRNE: I -- I mean, I guess it
5 depends. You know, what we're asking for is to put
6 the money that we invest in our infrastructure into
7 rates early through the interim rates. So I guess it
8 would depend -- I assume we invested some money in
9 infrastructure, and so yes, that would raise it
10 high -- more high above the authorized return.

11 COMMISSIONER GUNN: And -- and -- and
12 since that time, there have actually been some things
13 that have come into effect which has -- have lessened
14 regulatory lag like a fuel adjustment clause which
15 was received in the last -- in the last case.

16 MR. BYRNE: It does. It's -- and the
17 fuel adjustment clause has been a positive for us,
18 but there's -- but there's a lot of lag still built
19 into that full adjustment clause, you know, but --

20 COMMISSIONER GUNN: But just so -- so --
21 but I'm trying to get -- I understand your argument
22 that there is a systematic issue here that -- that --
23 that the way that -- this is not a case-by-case --
24 case basis, this is a systematic issue. But if in
25 the system we have given things to Ameren which are

1 supposed to decrease that regulatory lag and there's
2 no corresponding increase in earnings, doesn't that
3 indicate that there is something outside of that
4 systematic regulatory lag which is causing that
5 problem?

6 MR. BYRNE: I don't think so. I mean, I
7 think the fuel adjustment clause is a very good
8 thing, and we argued for it a lot in the past and --
9 and we'd like to -- we'd definitely like to keep it.
10 But there's a lot of lag built into that fuel
11 adjustment clause too. You -- you don't recover ups
12 and downs in fuel costs. It's -- it's like 15 or 16
13 months.

14 When you -- when you have a up or down
15 in a month in fuel costs, it takes 15 or 16 months
16 before that -- for that fuel adjustment clause. And
17 I mean, that's better than -- it's better than not
18 having a fuel adjustment clause and it's a lot better
19 than not having a fuel adjustment clause, but there's
20 still a bunch of lag associated with those fuel
21 costs.

22 COMMISSIONER GUNN: So the argument is
23 this chart does not reflect the -- doesn't really
24 reflect the implementation --

25 MR. BYRNE: Well, we only --

1 COMMISSIONER GUNN: -- of the fuel
2 adjustment clause?

3 MR. BYRNE: Right. We only got the fuel
4 adjustment clause right in March of 2009.

5 COMMISSIONER GUNN: Right. So --

6 MR. BYRNE: So we're just -- we're just
7 now starting to implement the fuel adjustment clause.

8 COMMISSIONER GUNN: Right. And
9 that's -- and so that's what I want to make --

10 MR. BYRNE: Okay. That's -- that's
11 true.

12 COMMISSIONER GUNN: -- clear. This
13 is -- this isn't -- so -- so those things haven't --
14 the things that have been put -- when did the
15 environmental cost recovery mechanism...

16 MR. BYRNE: We don't have one. We're
17 asking for one in this current rate case.

18 COMMISSIONER GUNN: That's what I
19 thought. Okay. All right. So --

20 MR. BYRNE: And I would point out the --
21 it does, you're right, it would have -- maybe affect
22 earnings, but it doesn't affect -- the piece that
23 we're looking at is the infrastructure investment
24 for --

25 COMMISSIONER GUNN: Right.

1 MR. BYRNE: We're not asking for --

2 COMMISSIONER GUNN: Right. No, and I
3 understand. I'm -- I'm trying -- I mean, these
4 are -- so this isn't just infrastructure, right, this
5 is --

6 MR. BYRNE: That's everything.

7 COMMISSIONER GUNN: -- this is
8 everything.

9 MR. BYRNE: Right.

10 COMMISSIONER GUNN: So it would take --
11 it would take that in -- into account.

12 MR. BYRNE: Yes.

13 COMMISSIONER GUNN: So I'm -- I'm going
14 to kind of get back -- get back to this question.
15 Is -- is -- you -- you cited three major issues
16 that -- that reason for -- for this kind of
17 systematic problem, and it's that you've got
18 essentially a two- to three-month difference in the
19 length of a rate case. You said the average was
20 about eight months or -- or 11 months, and we'll give
21 you some -- some wiggle room on that.

22 MR. BYRNE: Sure.

23 COMMISSIONER GUNN: So we're talking
24 about some significant time for it to be implemented.
25 The use of the historic test year, and then the CWIP

1 prohibition.

2 MR. BYRNE: Yes.

3 COMMISSIONER GUNN: The -- and the CWIP
4 prohibition is nothing -- we can't do anything about
5 it, you'd concede that?

6 MR. BYRNE: That's correct.

7 COMMISSIONER GUNN: The statute, the --

8 MR. BYRNE: Okay.

9 COMMISSIONER GUNN: -- the legislature
10 down the street --

11 MR. BYRNE: Yes.

12 COMMISSIONER GUNN: So then we -- we can
13 do -- we can deal with the other two things. So --
14 so why aren't you coming in here and arguing for a --
15 a -- a future test year rather than interim rates?

16 MR. BYRNE: Well, I'm not sure that we
17 won't be in here arguing for an interim test -- or I
18 mean a future test year. It's -- it's -- it's harder
19 to do a future test year. It -- the states that have
20 it, you have to line up your accounting system,
21 you've got to have -- you've got to have things in
22 place that aren't necessarily in place, for -- for us
23 at least, and -- and probably for the Staff.

24 The other problem with future test year
25 is such a big part of this cost is investment in

1 poles and wires and substations, and Proposition 1
2 prevents you from projecting rate base. In other
3 words, if you have a future test year in Missouri,
4 you can't project rate base. And that -- and that
5 really undercuts the value of future test year.

6 COMMISSIONER GUNN: So once again, one
7 of the prongs of your -- of your attack, it's not
8 something that we really --

9 MR. BYRNE: That's right.

10 COMMISSIONER GUNN: -- wouldn't
11 necessarily be able to do a whole lot about.

12 MR. BYRNE: I -- I mean, one of the
13 reasons we're in here asking for interim rates is a
14 lot of those alternatives are foreclosed by the CWIP
15 legislation. This is -- this is one thing that
16 the -- that is within the Commission's power;
17 whereas, a lot of those -- you're right, a lot of
18 those other things are not within the Commission's
19 power.

20 COMMISSIONER GUNN: Well, let me -- let
21 me move on to this -- this subject to -- to refund
22 issue. Explain to me how it would work if -- if,
23 say, for example -- I mean, you're asking for about
24 one and a half percent increase, whatever --

25 MR. BYRNE: Right. About 1.6 I think it

1 was, yeah.

2 COMMISSIONER GUNN: -- whatever that
3 number is. Now, would that mean in order for
4 anything to be -- if -- if no -- the plant service
5 was not allowed but other -- other factors allowed a
6 more than 1.5 percent increase, there would be no --
7 there would be no refund?

8 MR. BYRNE: So you're saying the -- for
9 whatever reason, the cost of the plant that we've put
10 in service got disallowed?

11 COMMISSIONER GUNN: Let's say we were
12 generous on some other things and that -- and that
13 cost -- and that -- and this -- so you get -- you get
14 a net 2 or 3 percent increase.

15 MR. BYRNE: But not any of the plant --

16 COMMISSIONER GUNN: But not -- but --

17 MR. BYRNE: I mean, yes.

18 COMMISSIONER GUNN: How would, then --
19 how would, then --

20 MR. BYRNE: I mean, I guess --

21 COMMISSIONER GUNN: -- the refund part
22 work?

23 MR. BYRNE: -- I guess in theory what
24 we're saying is there would be no refund.

25 COMMISSIONER GUNN: Be no refund.

1 MR. BYRNE: But -- but, I mean, part
2 of -- part of what underlies this is our belief that
3 it's so -- it's -- it's very unlikely the plant that
4 we put in service is -- is going to be significantly
5 disallowed. I mean, it's -- it's steel in the ground
6 that's serving customers. And I mean, it -- it
7 could. I'm not --

8 COMMISSIONER GUNN: And it -- no, no,
9 and I will grant you that. So -- so let me ask you
10 this: How does the refund work if we allow the plant
11 service because it's perfectly acceptable to do but
12 then the R -- the ROE gets lowered?

13 MR. BYRNE: So what would the end
14 rate -- what would the end result of the rate case be
15 in your example, no increase, say?

16 COMMISSIONER GUNN: Let's -- let's
17 assume that for --

18 MR. BYRNE: Then we have to -- then we
19 have to refund all the money with interest. You
20 would just compare --

21 COMMISSIONER GUNN: You'd do the
22 difference?

23 MR. BYRNE: -- whatever's at the end --
24 whatever's at the end with what the interim rate
25 increase was. That's our proposal.

1 COMMISSIONER GUNN: Then would end up
2 with a -- would that end up as a net loss?

3 MR. BYRNE: You mean if --

4 COMMISSIONER GUNN: If all this stuff --
5 in all the -- if all of it went into service but the
6 RO -- but the ROE was lower? I mean, does that make
7 sense from a company standpoint? I don't know the
8 answer to the question. I'm asking the question.
9 I'm just trying to figure this stuff out.

10 MR. BYRNE: No, I mean, we'd -- we'd
11 have to refund the money. It would be a horrible
12 rate case result --

13 COMMISSIONER GUNN: Right.

14 MR. BYRNE: -- and I'd be fired.
15 It's -- you know, I mean, it's -- if that's -- if
16 that's what happened, we'd have to refund the money.

17 COMMISSIONER GUNN: All right. And --
18 and just to be clear, you're conceding we're not --
19 we don't have an emergency here if -- if -- if we
20 decide that the standard that we're going to use is
21 an emergency standard or it's -- it's -- that's --
22 that's good cause, it has to be an emergency, then
23 Ameren's conceding that it's -- would probably --
24 that it shouldn't be granted the interim rate?

25 MR. BYRNE: Yes, we do not have an

1 emergency.

2 COMMISSIONER GUNN: Okay. All right.

3 Well, look, I appreciate that. I think that -- I
4 think that you -- there are -- there are some
5 interesting kind of policy issues that -- that --
6 that you brought up here, and it's at least worth us
7 thinking about and -- and trying to figure out how --
8 how to best approach that -- that we take to these.
9 So I appreciate -- appreciate the time.

10 And -- and don't -- and I caution
11 everyone here not to read into my questions. I'm
12 asking the questions because I don't know the answer
13 to the questions, and that -- that's why I'm asking
14 them. But don't -- don't read anything into them.
15 So -- but thank you very much for your time.

16 MR. BYRNE: Thank you, Commissioner.

17 JUDGE WOODRUFF: Commissioner Kenney?

18 COMMISSIONER KENNEY: Commissioner Gunn
19 took my threshold question which was really, we're
20 being asked to apply one of two standards, and if
21 it's the emergency standard, Ameren loses?

22 MR. BYRNE: But we don't meet that
23 standard.

24 COMMISSIONER KENNEY: Okay. And the
25 Laclede case discusses that standard of good cause

1 shown, but doesn't it really amount to restating the
2 emergency standard in a different way?

3 MR. BYRNE: I don't think so. I -- I
4 think it's broader than the emergency standard.

5 COMMISSIONER KENNEY: Well, if we apply
6 that second standard of good cause shown, that's what
7 I'm not clear about because it almost seems like it's
8 standardless. I mean, it's ultimately at our
9 discretion or you have to demonstrate that there are
10 some extraordinary set of facts, right?

11 MR. BYRNE: Yeah. I -- like a lot of
12 things, it's -- it's left to the Commission's
13 informed discretion.

14 COMMISSIONER KENNEY: Is it Ameren's
15 position, then, that its current rate of return is
16 somehow confiscatory or it somehow meets some other
17 standard by which an extraordinary set of facts now
18 exist?

19 MR. BYRNE: I think I would not -- I
20 would not go so far as to say for sure it's
21 confiscatory. We have not -- that's not the standard
22 that we believe needs to be met. And -- but --
23 but --

24 COMMISSIONER KENNEY: Isn't that the
25 standard -- standard that the Laclede case discusses

1 in discussing good cause shown?

2 MR. BYRNE: I don't believe they're the
3 same. I -- you know, in terms of a Constitutional
4 confiscation, I don't believe it's the same standard
5 that's in the Laclede case. I believe there's a --
6 there's a good cause shown that's different than the
7 confiscatory standard, and that's the standard we
8 believe we can meet.

9 COMMISSIONER KENNEY: But then isn't the
10 only way for Ameren to demonstrate that, then,
11 through submission of evidence, and don't we have to
12 have an evidentiary hearing?

13 MR. BYRNE: Commissioner Jarrett is
14 convincing me that maybe we do have to have a
15 evidentiary hearing.

16 COMMISSIONER KENNEY: I mean, I --
17 assuming we don't just go ahead and apply the
18 emergency standard.

19 MR. BYRNE: I -- I think that's probably
20 correct.

21 COMMISSIONER KENNEY: I will likely have
22 additional questions after the other parties present,
23 but thank you.

24 MR. BYRNE: Thank you.

25 JUDGE WOODRUFF: Okay. Anything else?

1 COMMISSIONER DAVIS: Can I -- can I go
2 back and ask -- ask Mr. Byrne just a couple of more
3 quick questions?

4 JUDGE WOODRUFF: Go right ahead.

5 COMMISSIONER DAVIS: Okay. Mr. Byrne, I
6 know you were -- you were referencing this -- this
7 chart, this bar graph from Mr. Baxter's direct
8 testimony, and -- and you said that there was -- and
9 correct me if I'm wrong here -- that there wasn't any
10 correlation between anything. You know -- there's
11 no -- I mean, there -- there's no -- I mean, in
12 response to questions from Commissioner Gunn, you
13 were saying that, you know, there's no -- there's no
14 intervening circumstances or anything else, correct?

15 MR. BYRNE: Well, I mean, you know,
16 my -- the point I was trying to make is it doesn't go
17 above or below the authorized rate of return because
18 of weather or some -- it's just almost always below
19 the authorized return, you know. Of course, there
20 are individual circumstances that affect what return
21 you earn each month, but it pretty consistently is --
22 is below the authorized.

23 COMMISSIONER DAVIS: Okay. I guess --
24 can I ask Mr. Dottheim and Mr. --

25 MR. THOMPSON: Thompson.

1 COMMISSIONER DAVIS: -- Thompson a
2 question here?

3 MR. THOMPSON: How quick we forgot.

4 COMMISSIONER DAVIS: Sorry -- sorry,
5 Mr. Thompson. You -- you've got a copy of this
6 graph?

7 MR. THOMPSON: Yes, Commissioner.

8 COMMISSIONER DAVIS: Would it -- would
9 it be -- and it may -- it may end up that this may
10 have to be a highly confidential graph, but if we
11 could do one that -- that wasn't highly confidential,
12 that might be nice, but could -- could you do a
13 comparison month by month of AmerenUE's off-system
14 sales margins with this graph and could you somehow
15 file that?

16 I mean, I'm just curious to see if there
17 is a correlation, you know, if, for instance, power
18 prices were real high in April of 2008, May of 2008,
19 you know, if there is some correlation between the
20 amount of off-system sales and the price of
21 off-system sales versus, you know, AmerenUE's earned
22 and allowed ROE. Does that -- can you -- can you...

23 MR. THOMPSON: I can tell you,
24 Commissioner, there -- there are Staff experts who
25 can do that, and we will undertake to do that and

1 file it in the case. If, in fact, the information is
2 highly confidential, we will so designate it.

3 COMMISSIONER DAVIS: Okay. And
4 certainly, if anybody else has got evidence on that
5 issue, if they want to present it, they're certainly
6 welcome to and just, you know...

7 MR. BYRNE: One -- one --

8 COMMISSIONER DAVIS: And Mr. Byrne, you
9 can file something again as well, but I just want to
10 get --

11 MR. BYRNE: That's okay. Just -- just
12 one point of clarification. You know, once the --
13 once the fuel adjustment clause took effect which was
14 at the tail end of this April, May and, of course,
15 the June, July of 2009 that were 6 percent, that --
16 those would not have been -- well, except for --
17 those would not have been affected by the off-system
18 sales because that flows through the fuel adjustment
19 clause now, so...

20 COMMISSIONER DAVIS: Okay. Okay.
21 That's all. Thank you.

22 JUDGE WOODRUFF: Thank you. Anyone else
23 have any other questions for Mr. Byrne at this time?
24 He will be back later.

25 (NO RESPONSE.)

1 JUDGE WOODRUFF: All right. We'll take
2 a ten-minute break and come back at -- well, let's go
3 ahead and say ten after 2:00.

4 (A RECESS WAS TAKEN.)

5 JUDGE WOODRUFF: All right. Let's come
6 back to order, please. During the break I spoke with
7 Mr. Schwarz for the Commercial Group, I believe it
8 is, and he would like to enter his appearance at this
9 point.

10 MR. SCHWARZ: Tim Schwarz with the firm
11 of Blitz, Bardgett & Deutsch, representing the
12 Missouri Retailers Association.

13 JUDGE WOODRUFF: Okay. Sorry for
14 misidentifying your client. All right. Now, for
15 responses, I was -- intended to just go down the list
16 from the same way -- order that I took entries of
17 appearance, so we'll begin with Staff.

18 MR. THOMPSON: Thank you. May it please
19 the Commission. In its order setting this argument,
20 the Commission advised the parties that it wanted
21 guidance on how to proceed with this matter. In
22 particular, the Commission informed the parties that
23 it would like to hear about the standards that it
24 should apply in determining this interim rate
25 increase request. The Commission also indicated that

1 it would like to know whether it must take evidence,
2 and if so, on what issues. Staff will address those
3 questions in the course of its remarks.

4 This matter comes before the Commission
5 on AmerenUE's request for an interim rate increase to
6 partially mitigate the chronic under-earnings being
7 experienced by the company and to provide incremental
8 cash and earnings that will provide additional
9 support for the company's continuing efforts to
10 invest in the system. Those purposes are quoted from
11 Ameren's response.

12 Ameren has not asserted that in the
13 absence of an immediate increase, its financial
14 integrity will be jeopardized or that there's any
15 danger of an interruption of service. In fact, you
16 heard Mr. Byrne today twice admit that Ameren does
17 not face any emergency. Consequently, Staff urges
18 the Commission to deny Ameren's request.

19 When a review in court takes up an
20 action or a decision of this Commission, it looks to
21 see whether the Commission's -- has -- has acted in a
22 lawful and reasonable manner. If the Commission has,
23 then its action -- its decision must be upheld.

24 And a Commission action is lawful, we
25 know, if the Commission has acted within the scope of

1 its statutory authority. A Commission action is
2 reasonable if it's supported by competent and
3 substantial evidence of record. These standards we
4 are told also encompass all of those standards of
5 review that are set out at Section 536.140 which
6 provides that the inquiry may extend to a
7 determination of whether the action of the agency is
8 in violation of Constitutional provisions; is in
9 excess of a statutory authority or jurisdiction of
10 the agency; is unsupported by competent and
11 substantial evidence on the whole record; is for any
12 other reason unauthorized by law; is made upon
13 unlawful procedure or without a fair trial; is
14 arbitrary, capricious or unreasonable or involves an
15 abuse of discretion.

16 With those standards in mind, we look at
17 Ameren's interim rate increase. With respect to
18 lawfulness, the Public Service Commission law does
19 not expressly authorize this Commission to grant an
20 interim rate increase. Nonetheless, in 1976, the
21 Western District of the Missouri Court of Appeals
22 held that the Commission has power in a proper case
23 to grant interim rate increases within the broad
24 discretion implied from the Missouri file-and-suspend
25 statutes and from the practical requirements of

1 utility regulation. The case is State ex rel. Laclede
2 Gas versus Public hService Commission. We've all
3 read and heard a lot about that case coming up to
4 today.

5 Further, the Laclede court held that
6 since no standard is specified, the determination as
7 to whether or not to do so necessarily rests in the
8 Commission's sound discretion. The Missouri Supreme
9 Court approved and perhaps narrowed the Laclede
10 holding in 1979 in the Utility Consumers Council case
11 stating, "An interim rate increase may be requested
12 where an emergency need exists."

13 In 1984 in State ex rel. Fisher versus
14 Public Service Commission of Missouri, the Western
15 District reviewed this line of cases summarizing it
16 this way: "The Commission's authority to grant an
17 interim rate increase is necessarily implied from the
18 statutory authority granted to enable it to deal with
19 a company in which immediate rate relief is required
20 to maintain the economic life of the company so that
21 it might continue to serve the public."

22 In summary, Missouri courts have held
23 that this Commission may grant interim rate relief on
24 an expedited basis as may be required in order to
25 meet the need imposed by exigent circumstances.

1 Missouri courts have not held that this Commission
2 may grant interim relief in other circumstances.
3 This authority is perhaps similar to that of a court
4 in issuing a temporary restraining order or TRO.

5 It is the exigency of the circumstance
6 that authorizes the court's action so that an order
7 that is lawful in the face of an emergency is
8 unlawful where no emergency exists. The Commission's
9 power to grant an interim rate increase is ancillary
10 to the express authority to grant a permanent rate
11 increase.

12 A rate increase may be accomplished
13 either by an order of the Commission or by simply
14 allowing a proposed tariff to become effective.
15 Ameren has urged -- urged you to do just that in this
16 case, to simply allow its interim rate tariff to
17 become effective on October 1st. But whichever way
18 the Commission increases rates, whether by action or
19 by inaction, it must first consider all relevant
20 factors.

21 In the Utility Consumers Council case,
22 the Missouri Supreme Court stated, "Even under the
23 file-and-suspend method by which a utility's rates
24 may be increased without requirement of a public
25 hearing, the Commission must, of course, consider all

1 relevant factors, including all operating expenses
2 and the utility's rate of return in determining that
3 no hearing is required and that the filed rate should
4 not be suspended." The court repeated this warning
5 twice in that lengthy decision. The message is that
6 a rate increase, however accomplished, is not lawful
7 unless it is founded upon the Commission's
8 consideration of all relevant factors.

9 In the present case, Ameren invites you
10 to grant an interim rate increase based upon
11 consideration of only a limited set of factors
12 favorable to the company's request. This is what we
13 call single-issue ratemaking. You must resist this
14 temptation. The lesson of Utility Consumers Council
15 is that you must consider all factors or your action
16 will be found to be unlawful.

17 Turning to the issue of reasonableness,
18 it is Staff's position that you may grant an interim
19 rate increase where facts are established that
20 support that action. I've already noted that Ameren
21 has not alleged that it faces any emergency; in fact,
22 Mr. Byrne has admitted as much today. Ameren has
23 alleged it faces regulatory lag. Well, this
24 Commission and the Laclede court has stated that
25 regulatory lag in and of itself is not sufficient to

1 justify extraordinary rate relief.

2 Ameren has also said that it's not
3 earning its authorized rate of return. Again, both
4 this Commission and the Laclede court have stated
5 that failure to earn the authorized return is not in
6 and of itself sufficient to justify extraordinary
7 rate relief.

8 Staff has noted in its written
9 suggestions that Ameren seems to ignore the impact of
10 its loss of the Noranda load when discussing its
11 failure to earn its authorized rate of return. I was
12 gratified to see Mr. Byrne discuss that this
13 afternoon. Ameren did discuss the impact of this
14 loss extensively in the pleading that it filed on
15 February 5, 2009 in Case ER-2008-0318 entitled
16 "Application For Rehearing and Motion For Expedited
17 Treatment."

18 On pages 2 and 3 of that pleading,
19 Ameren explains that the loss of Noranda due to an
20 ice storm means the loss of \$73 million in pretax
21 earnings over a 12-month period, fully 45 percent, so
22 Ameren characterized it in its pleading of the annual
23 rate increase granted in that case.

24 Taking Ameren at its word, surely the
25 loss of the Noranda load must be understood to be a

1 significant driver of any failure to meet an
2 authorized level of return. In its written
3 suggestions, Staff also alluded to Ameren's loss of
4 Taum Sauk revenue. Again, Mr. Byrne touched on that
5 today.

6 In 1958 the Missouri Supreme Court
7 described this Commission this way: "The Public
8 Service Commission is essentially an agency of the
9 legislature. Its powers are referable to the police
10 power of the state. It is a fact-finding body
11 exclusively entrusted in charge by the legislature to
12 deal with and determine the specialized problems
13 arising out of the operation of public utilities.

14 "It has a staff of technical and
15 professional experts to aid it in the accomplishment
16 of its statutory powers. Its supervision of the
17 public utilities of this state is a continuing one.
18 Its orders and directives with regard to any phase of
19 the operation of any utility are always subject to
20 change to meet changing conditions as the Commission
21 in its discretion may deem to be in the public
22 interest."

23 The point of that quote is it's all
24 about facts. Everything that this Commission does in
25 its exercise of its authority is all about facts.

1 And with that in mind, I turn to the Commission's
2 questions.

3 The standard that you must employ is a
4 fact-based standard. Has the company shown that
5 facts exist such that the extraordinary relief that
6 it requests is justified? Like a TRO, has it shown
7 facts that require, that justify an extraordinary
8 level of relief from this agency? Staff suggests
9 that the answer is no, Ameren has not shown any such
10 facts.

11 Secondly, must the Commission hold an
12 evidentiary hearing on Ameren's request for interim
13 rate relief? Here, my answer is -- is twofold.
14 Given that Ameren has not even alleged facts that
15 meet the exigent circumstances standard, I don't
16 think you have to have a hearing to deny the request.

17 On the other hand, if you nonetheless
18 want to take it up and determine whether facts exist
19 such that relief would be reasonable, then I think
20 you have to have a hearing. Those facts have to be
21 established. And how else does an administrative
22 agency establish facts but by having an evidentiary
23 hearing and allowing the other parties to rebut, to
24 cross-examine.

25 Remember, this is a contested case. The

1 permanent rate increase tariffs that Ameren filed to
2 initiate this case have been suspended. Contested
3 case procedures consequently apply.

4 In summary, you could only grant a rate
5 increase after considering all relevant factors.
6 Where a company is about to collapse and leave its
7 customers stranded and without necessary services,
8 perhaps the fact of that emergency is the main thing,
9 maybe the only thing that you have to consider. But
10 that is not this case. Ameren has not alleged that
11 it faces any emergency, Ameren has admitted that it
12 does not. Certainly Staff is not aware of any
13 independent facts suggesting that Ameren faces an
14 emergency.

15 As recently as last week on
16 September 9th, Ameren announced an offering of some
17 20 million shares of common stock at \$25.25 per
18 share. It appears that Ameren is operating as
19 normal, serving its customers and obtaining capital
20 as necessary to conduct its business. For all these
21 reasons, Staff respectfully urges you to reject the
22 interim rate increase tariff.

23 JUDGE WOODRUFF: Thank you,
24 Mr. Thompson. Chairman Clayton?

25 CHAIRMAN CLAYTON: Mr. Thompson, thank

1 you. I just want to ask a couple of questions, and I
2 apologize if I get repetitive or if you have to
3 rehash what you've already said. I want to ask you
4 what circumstances do you think would it be
5 appropriate for an interim rate increase for a large
6 utility?

7 MR. THOMPSON: I think an emergency that
8 threatens the continuation --

9 CHAIRMAN CLAYTON: And how would you --
10 how would you define just the continuation of -- of
11 services or --

12 MR. THOMPSON: Loss of financial
13 integrity. I think that in times of runaway
14 inflation, for example, such things were considered
15 and perhaps granted.

16 CHAIRMAN CLAYTON: Have -- have -- in
17 your experience or in the Staff's experience, how
18 many times has that occurred in recent memory?

19 MR. THOMPSON: I have no idea, but I
20 could get that information and provide it.

21 CHAIRMAN CLAYTON: Do you -- but do you
22 have any anecdotal examples?

23 MR. THOMPSON: I do not. Mr. Dottheim?

24 MR. DOTTHEIM: I don't believe there are
25 any recent examples. I think Mr. Thompson was

1 alluding to the 1970s and the 1980s, and I think the
2 emergency standard has been characterized at times
3 that the utility needs additional funds immediately,
4 the need cannot be postponed and there are no other
5 alternatives available for obtaining those additional
6 funds other than by rate relief. The company cannot
7 finance, for example, because of not meeting the
8 interest coverages that are required in order to
9 finance.

10 CHAIRMAN CLAYTON: Okay. Thank you.
11 Mr. Thompson, can you give me an idea of whether or
12 not the -- the dollars and the issues associated with
13 the interim rate increase, are these numbers easily
14 verifiable or easily audited by the Staff? Are these
15 complicated issues?

16 MR. THOMPSON: Staff has only just begun
17 its audit. We believe that probably the -- the
18 operational, the in-service nature or the fact of
19 in-service has been verified. As far as other
20 matters in offsetting, Staff has only just begun the
21 audit.

22 CHAIRMAN CLAYTON: Well, setting aside
23 the policy discussion of whether it's appropriate for
24 an interim rate increase, whether it's emergency,
25 whether there are dire circumstances involved, I'm

1 trying to get a handle on how difficult or
2 contentious these issues at issue in this interim
3 request. I mean, is this something that you
4 anticipate being resolved at the end of the case
5 relatively easily or is there a lot of controversy or
6 dispute among -- on these facts?

7 MR. DOTTHEIM: Chairman, you're
8 referring to -- and excuse me, Mr. Thompson.

9 MR. THOMPSON: No, go ahead.

10 MR. DOTTHEIM: You're -- you're
11 referring specifically to the -- the numbers as far
12 as the -- the infrastructure investment --

13 CHAIRMAN CLAYTON: Just the 10 percent
14 of their overall request section, yeah.

15 MR. DOTTHEIM: The number's in the \$30
16 million, \$35 million range. I don't know that --
17 that those are likely to be contested or that it
18 takes a great amount of time to verify those numbers
19 themselves. I think Mr. Thompson was alluding to
20 offsetting issues, offsetting adjustments also, and I
21 think Mr. Byrne addressed this in part too.

22 If one would characterize these
23 infrastructure investments akin to the gas and water
24 company ISRS, the Staff believes, and again, I think
25 Mr. Byrne indicated, that what the company is

1 proposing is something other than what is covered by
2 statute for -- for the water companies and -- and the
3 gas companies.

4 But again, if -- if you're asking for
5 just verification of the -- the numbers, I think that
6 does not necessarily take a great amount of time, and
7 I'm not aware that there are any prudence issues at
8 this time, although I don't believe we've checked
9 specifically with the Staff on that matter, but I
10 haven't heard that there are prudence issues. So I
11 don't know that that's something that might have to
12 wait as far as verification of the numbers until the
13 end of the case.

14 CHAIRMAN CLAYTON: Okay. Okay. Well,
15 it sounds like it's not a matter of the Staff simply
16 checking a few boxes on some spreadsheets. I mean,
17 this is going to -- I guess what you're suggesting is
18 that the Staff needs additional time to establish
19 prudence and the level of the expenditures. Is that
20 what you're saying?

21 MR. DOTTHEIM: Well, we could -- well, I
22 think we could -- we could provide the Commission
23 with an indication of how much time that it would --
24 would take the Staff to -- to perform those -- those
25 tasks. And again, I'm not certain that it -- it will

1 take a great -- a great amount of time. So it may be
2 something that is doable within the time frame that
3 AmerenUE has suggested that is -- that is going
4 beyond the October 1 date to November 1. But that is
5 certainly something that we can get back I would
6 think fairly quickly, within the next day, I would
7 think, to -- to the Commission on as far as how long
8 it would take for the Staff to fulfill those tasks.

9 CHAIRMAN CLAYTON: Either one of you
10 answer this question. I'm not sure since you're kind
11 of both working me over here. In a prior case, there
12 was discussion about capital investments that were
13 included in a case but that those investments went
14 into service outside of the test year, that they took
15 place either in the true-up period or the -- the
16 update period.

17 And I guess what I was asking in this
18 instance, Mr. Byrne was making suggestions of
19 investments that occurred, I think, outside of the
20 test year, and I was wondering how those investments
21 applied in this case to the true-up and update
22 period. And I'm not sure if that question makes
23 sense, but...

24 MR. DOTTHEIM: Well, they -- they -- I
25 think what he was referring -- referring to, they

1 were the investments that -- that were outside of the
2 true-up period in the -- in the -- in the last case.

3 CHAIRMAN CLAYTON: In the last case?

4 MR. DOTTHEIM: Yes.

5 CHAIRMAN CLAYTON: Okay.

6 MR. DOTTHEIM: They were -- the true-up
7 period, I believe, was through September 30th of --
8 of 2008, and he was referring to investments after
9 October 1 of -- of 2008.

10 CHAIRMAN CLAYTON: Okay. If you are --
11 if I'm getting that wrong --

12 MR. LOWERY: Your Honor, I'll interject.
13 No argument because this is Staff's time, but just as
14 a factual matter, the \$37 million that has been
15 calculated for interim rates, the basis of that is
16 about \$380 million of actual investments that -- that
17 are in-service, and the books on those closed on
18 May 31st of this year.

19 CHAIRMAN CLAYTON: May 31st.

20 MR. LOWERY: So -- so I mean, they're on
21 the books, they've been on the books for several
22 months. We're not reaching forward, we're not
23 doing --

24 CHAIRMAN CLAYTON: I understand. I
25 didn't mean to suggest that. Just tell me what the

1 test year is and I'll let other Commissioners ask
2 questions. What is the test year?

3 MR. DOTTHEIM: Well, in this case if
4 my -- and it was just, I think, addressed in an
5 order. And if my memory serves me correctly, I think
6 it's through March 31 of -- of this year, 2009, with
7 a true-up through January 30th of 2010.

8 CHAIRMAN CLAYTON: Okay. Thank you very
9 much.

10 JUDGE WOODRUFF: Commissioner Davis?

11 COMMISSIONER DAVIS: Okay. So
12 Mr. Dottheim -- well, let's -- let's go back to you,
13 Mr. Thompson. Okay. All relevant factors --

14 MR. THOMPSON: Yes, sir.

15 COMMISSIONER DAVIS: That's everything?

16 MR. THOMPSON: Yes, sir.

17 COMMISSIONER DAVIS: Okay. What in your
18 opinion are all relevant factors?

19 MR. THOMPSON: Well, I think the court
20 gave some guidance in that quote that I read about
21 total amount of operational revenue, the allowed
22 return.

23 COMMISSIONER DAVIS: Okay. Okay. So
24 you don't -- you don't dispute Mr. Baxter's graph in
25 terms that they are earning well below their allowed

1 return on equity, but you say that there are -- I
2 mean, what you're saying in essence is that there are
3 some -- some plausible reasons there for it and you
4 cite Taum Sauk or Noranda...

5 MR. THOMPSON: Well, you know, we
6 haven't -- we have not put on evidence, we have not
7 prepared to put on evidence. So I don't think it's
8 appropriate to say I don't dispute or that Staff does
9 not dispute Mr. Baxter's graph.

10 COMMISSIONER DAVIS: Okay.

11 MR. THOMPSON: We have no comment on the
12 graph at this point.

13 COMMISSIONER DAVIS: Okay.

14 MR. THOMPSON: It's an allegation that
15 Mr. Baxter has made in support of their request for
16 rate relief, and Staff would have to basically
17 deconstruct the graph to determine whether the
18 earnings are as Ameren has indicated and to begin to
19 determine what the causes might be.

20 COMMISSIONER DAVIS: Okay. But you have
21 suggested a couple of those causes?

22 MR. THOMPSON: I have suggested a couple
23 of things that occurred to us as being major things
24 that would impact earnings.

25 COMMISSIONER DAVIS: Right. And do you

1 know what Ameren's earnings are supposed to be, what
2 their -- what the -- the ROE that we gave them in the
3 last case, what does that equate to in dollar terms,
4 do you know?

5 MR. THOMPSON: No, sir, I don't.

6 COMMISSIONER DAVIS: You don't know.

7 But you seem to recall -- I think maybe it was
8 Mr. Byrne that said Taum Sauk was approximately
9 25 million a year, is that --

10 MR. THOMPSON: That's what he said.

11 COMMISSIONER DAVIS: That's -- is that
12 ball park?

13 MR. THOMPSON: I personally don't know.

14 COMMISSIONER DAVIS: You don't know, you
15 don't know. And so -- but you did read the -- the
16 Ameren pleading where they talked about Noranda
17 costing them \$76 million, so --

18 MR. THOMPSON: I certainly did.

19 COMMISSIONER DAVIS: -- you know that --
20 you know that they valued it at \$76 million?

21 MR. THOMPSON: In that pleading, yes,
22 they did.

23 COMMISSIONER DAVIS: So -- all right.

24 So there's 101 that you --

25 MR. THOMPSON: Yes, sir.

1 COMMISSIONER DAVIS: If you sum those
2 two numbers up, that's 101 million?

3 MR. THOMPSON: Yes, sir.

4 COMMISSIONER DAVIS: Do we know anything
5 else you want to speculate on? Any other...

6 MR. THOMPSON: No, sir.

7 COMMISSIONER DAVIS: No. Okay. Now,
8 Mr. Dottheim, you said that you thought the -- the
9 Staff could give us an estimate by the end of the day
10 tomorrow of how long it would take Staff to -- to
11 verify the -- the numbers?

12 MR. DOTTHEIM: The numbers which are
13 based upon the interim relief that --

14 COMMISSIONER DAVIS: Right.

15 MR. DOTTHEIM: -- that AmerenUE is -- is
16 seeking that is the -- the infrastructure investment
17 numbers, yes.

18 COMMISSIONER DAVIS: Okay. Can you file
19 that?

20 MR. DOTTHEIM: Yes, most definitely.

21 COMMISSIONER DAVIS: Okay. Now, I'm
22 going to -- I'm going to --

23 MR. DOTTHEIM: And that, Commissioner --

24 COMMISSIONER DAVIS: -- I'm going to
25 put an -- I want to put an addendum on that request,

1 if I may, Mr. Dottheim.

2 MR. DOTTHEIM: Okay. And what you're --
3 and what we're filing is the date --

4 COMMISSIONER DAVIS: Yes.

5 MR. DOTTHEIM: -- by which we can -- we
6 can provide or we can, either for purposes of
7 submitting an affidavit or testimony or appearing at
8 a hearing, that -- that we could provide that
9 information.

10 COMMISSIONER DAVIS: Okay. Now, can
11 I -- can I add something to that request?

12 MR. DOTTHEIM: Yes, sir.

13 COMMISSIONER DAVIS: Okay. Can you --
14 can Staff also give us an answer that, for instance,
15 if -- if there's any portion of that request that
16 seems that it is troublesome or unduly burdensome,
17 because it's -- you know, maybe it's a small expense
18 but extremely repetitive so that it would take Staff
19 a long time to verify that number.

20 I mean, could you -- can you give us a
21 request -- I mean, the first request basically says
22 100 percent of the 380 million. Do you understand
23 that? Like tell us how long it would take you to
24 verify that, those numbers.

25 Now, if for some reason there's

1 something -- there's one item or two items in that
2 list that for whatever reason it's going to take the
3 Staff a disproportionate amount of time compared to
4 the -- to the total cost of the items, can -- can you
5 also give us --

6 MR. DOTTHEIM: Yes.

7 COMMISSIONER DAVIS: And can you, you
8 know, give us a time excluding -- excluding those
9 numbers? Does that make sense?

10 MR. DOTTHEIM: Yes. And again, we're
11 talking about the infrastructure investment?

12 COMMISSIONER DAVIS: Yes, just the --
13 just the infrastructure investments --

14 MR. DOTTHEIM: Yes.

15 COMMISSIONER DAVIS: -- the
16 approximately \$380 million to rate base which would
17 ultimately allegedly result in an increase of
18 something, I don't know the number. So anyway. But
19 we understand -- you understand the -- the nature of
20 the request and --

21 MR. DOTTHEIM: Yes, yes. And we can
22 give you a breakdown as far as whether -- how long it
23 would take us to verify the numbers if it -- how long
24 it would take us to do a prudence, whether if we'd
25 have to do -- whether prudence would have to be done,

1 we wouldn't be able to do it on the same time
2 frame -- let's say we could verify the numbers --

3 COMMISSIONER DAVIS: Right.

4 MR. DOTTHEIM: -- in -- in several days,
5 but as far as -- as far as prudence or -- or what
6 have you, that might take a different time frame.

7 COMMISSIONER DAVIS: Okay. And
8 that's --

9 MR. DOTTHEIM: You know, but --

10 COMMISSIONER DAVIS: And that's fine.
11 But you under -- you understand my concern. If
12 there's -- if there's an item or a series of items
13 that for whatever reason would take
14 disproportionately --

15 MR. DOTTHEIM: Yes.

16 COMMISSIONER DAVIS: -- a long -- longer
17 amount of time, then can you give us an estimate with
18 those numbers excluded?

19 MR. DOTTHEIM: Yes. Yes, we can.

20 COMMISSIONER DAVIS: Okay. Thank you,
21 Mr. Dottheim.

22 MR. DOTTHEIM: And we're also going to
23 provide you, the Commission, with a chart or a graph
24 on off-system sales margins compared to the
25 comparison of AmerenUE earned and allowed ROEs.

1 COMMISSIONER DAVIS: Okay. Thank you,
2 Mr. Dottheim.

3 JUDGE WOODRUFF: Commissioner Jarrett?

4 COMMISSIONER JARRETT: Good afternoon,
5 Mr. Thompson.

6 MR. THOMPSON: Good afternoon, sir.

7 COMMISSIONER JARRETT: Just wanted to
8 ask you a question about the -- the Laclede case and
9 standard.

10 MR. THOMPSON: Okay.

11 COMMISSIONER JARRETT: Doesn't the
12 Laclede case basically broaden -- and maybe the
13 question is how much broaden, but doesn't it --
14 doesn't it at least acknowledge that there may be
15 situations where an interim -- interim rate relief is
16 appropriate even in the absence of any emergency?

17 MR. THOMPSON: It does suggest that,
18 yes, sir.

19 COMMISSIONER JARRETT: But the -- of
20 course, the scope of that would be determined by the
21 facts, I assume?

22 MR. THOMPSON: Yes, sir.

23 COMMISSIONER JARRETT: Okay. That's
24 all. Thank you, Mr. Thompson.

25 JUDGE WOODRUFF: Commissioner Gunn?

1 COMMISSIONER GUNN: To build on that
2 question, so -- so the emergency standard is not the
3 only standard that you think that could be used?

4 MR. THOMPSON: I don't think it's wrong
5 to characterize the standard as good cause shown.
6 However, I also believe that the good cause is almost
7 certainly the existence of exigent circumstances that
8 impact the public interest.

9 COMMISSIONER GUNN: So you don't
10 envision any scenario -- or it would be very
11 difficult for you to envision any scenario that
12 doesn't rise to the level of immediate harm that
13 would justify good cause?

14 MR. THOMPSON: That is correct.

15 COMMISSIONER GUNN: So you're equating
16 good cause -- essentially good cause with the
17 emergency standard, you're not making a huge
18 distinction between the two?

19 MR. THOMPSON: It seems to me that
20 that's the distinction that I'm making is the same
21 one that the author of the Laclede decision made
22 which is maybe theoretically there could be something
23 else, but I don't know what it is and -- and this
24 ain't it.

25 COMMISSIONER GUNN: I want to go back to

1 your comment about -- about single-issue ratemaking
2 and how -- how this could be declared unlawful if we
3 were to do this. Doesn't the -- doesn't the fact
4 that it would be interim and subject to refund kind
5 of take it out of that single-issue ratemaking realm
6 because it will -- ultimately can be considered in a
7 much broader rate case with argument and...

8 MR. THOMPSON: I wondered the same
9 thing, and so I took a look at the decision where
10 Judge Stith reviewed the ACA/PGA mechanism and found
11 that it was lawful. And she did not give any
12 particular attention to the fact that it was interim
13 subject to refund.

14 COMMISSIONER GUNN: But she found it was
15 lawful?

16 MR. THOMPSON: She did find it was
17 lawful because she compared it to the tax -- the tax
18 adjustment that was approved in the Hotel Continental
19 case and the fuel adjustment clause that was struck
20 down in Utility Consumers and decided that ultimately
21 it was more like the tax in Hotel Continental than it
22 was like the fuel adjustment clause.

23 And -- and certainly, this decision was
24 made against the background that it was interim
25 subject to refund with a -- with a true-up in the

1 ACA, but that was not a factor that the judge
2 discussed in the case and -- and explicitly gave any
3 weight to.

4 COMMISSIONER GUNN: So we don't know
5 because they didn't talk about it?

6 MR. THOMPSON: I think -- I think the
7 reason is, is that the consider-all-factors rule in
8 Utility Consumers applies to any rate increase,
9 interim or permanent.

10 COMMISSIONER GUNN: I agree with that,
11 but -- but the interim subject to refund is within
12 another proceeding which considers all relevant
13 factors, so --

14 MR. THOMPSON: That's true.

15 COMMISSIONER GUNN: -- if this had
16 been -- this is one of the reasons why it wasn't
17 filed separate, right? I mean, if it had been filed
18 separately, then -- then -- then you may be correct,
19 but I don't know -- I don't know the answer to the
20 question.

21 MR. THOMPSON: Right, right. The
22 Commission used to require them to be filed
23 separately, and we mentioned that in our pleading.

24 COMMISSIONER GUNN: Right.

25 MR. THOMPSON: In the Fisher case, the

1 court explains that it's ancillary. It doesn't
2 matter what number the Commission gives it, it's --
3 it's ancillary to the permanent rate increase request
4 whether it's in the same case or not.

5 COMMISSIONER GUNN: But ultimately the
6 rates that go into effect --

7 MR. THOMPSON: Yes, sir.

8 COMMISSIONER GUNN: -- would take into
9 account all relevant factors because it -- because it
10 would be a -- almost a retroactive determination that
11 it was -- that -- that it was correct or the money
12 would be given back.

13 MR. THOMPSON: Yes, sir.

14 COMMISSIONER GUNN: So at the end of the
15 case, these interim rates would either be justified
16 or not justified?

17 MR. THOMPSON: Yes, sir.

18 COMMISSIONER GUNN: And if they were not
19 justified, they would be ended?

20 MR. THOMPSON: Yes, sir.

21 COMMISSIONER GUNN: All right. I also
22 want to go back and ask a little bit of questions.
23 You said that -- that ROE alone is not -- is not
24 enough.

25 MR. THOMPSON: This Commission has said

1 that, and so has the court.

2 COMMISSIONER GUNN: But they're not
3 exactly arguing that. It's just the fact that the
4 ROE doesn't -- doesn't rise to the level, I mean,
5 because they are -- because Ameren is arguing that
6 it's not that we just didn't earn it which could be
7 for any fact -- any number of factors; it could be
8 mismanagement, it could be weather, it could be
9 anything. But what they're arguing is a systematic
10 handicap against -- against arguing.

11 MR. THOMPSON: That's true.

12 COMMISSIONER GUNN: Or against --
13 against earnings. So aren't they arguing broad -- a
14 much broader policy issue than just we're not earning
15 ROE?

16 I mean, I agree with you that if they
17 just came in and said, hey, we're not earning --
18 earning this, you guys, and, you know, it's --
19 it's -- and I agree that's what the law is, but
20 they're -- they're arguing something broader, aren't
21 they?

22 MR. THOMPSON: I agree, Commissioner,
23 they are. They're saying we're not earning it. If
24 you look back over the past 24 or 30 months, you'll
25 see that almost every month we didn't earn it, and

1 what's more, because of the regulatory lag in
2 Missouri, which is caused by certain -- three certain
3 characteristics that were enumerated, we can't earn
4 it. That's what they're saying. And -- and I guess
5 that's the decision confronting this Commission.
6 Does that systematic problem, if you agree, number
7 one, that they've convinced you there is a systematic
8 problem, does that then become something that the
9 Commission can redress using this interim rate relief
10 mechanism that in the past has been limited to dire
11 emergencies?

12 COMMISSIONER GUNN: And would you agree
13 that that would require most likely an evidentiary
14 hearing?

15 MR. THOMPSON: I think it certainly
16 would, yes.

17 COMMISSIONER GUNN: Okay. I -- I think
18 you made the contention that if we -- if we say
19 emergency standard, you don't mean it --

20 MR. THOMPSON: Yes.

21 COMMISSIONER GUNN: -- then we wouldn't
22 have to have it and there's no need to have an
23 evidentiary standard because of Ameren's pleadings
24 essentially?

25 MR. THOMPSON: Yes, sir.

1 COMMISSIONER GUNN: All right. All
2 right. Thank you. I appreciate your time, Kevin.

3 JUDGE WOODRUFF: Commissioner Kenney?

4 COMMISSIONER KENNEY: Good afternoon. I
5 think my microphone is on this time. If -- and I
6 want to just elaborate on what you were just
7 discussing with Commissioner Gunn about good cause
8 shown. Ameren's argument is that they're not earning
9 because of the regulatory lag. Do they not take it a
10 step further and say because of regulatory lag, we're
11 also -- that that acts as a disincentive to invest in
12 infrastructure and it harms our credit rating and --
13 which is in the long run going to be disadvantageous
14 to the customers, is that a continuation of their
15 argument?

16 MR. THOMPSON: They do say all those
17 things.

18 COMMISSIONER KENNEY: Do you agree or
19 disagree that those additional statements would
20 constitute exigent or emergency circumstances,
21 particularly given the country's economic
22 environment?

23 MR. THOMPSON: I would not agree that
24 that constitutes exigent circumstances, no, sir.

25 COMMISSIONER KENNEY: And I know this

1 question was asked of you, and I just -- I'm not
2 clear. What set of facts in your mind would be
3 considered exigent or extraordinary to satisfy the
4 good cause standard such that -- because what I'm
5 hearing now and what I think was in a footnote in
6 your pleading is that you've essentially conflated
7 the emergency standard and the good cause standard
8 such that there's ultimately no distinction, and I
9 think that's your interpretation of the Laclede case.

10 And if that's correct, then -- then
11 you're not going to be able to give me any set of
12 facts that would distinguish the good cause standard
13 from the emergency standard, or are you?

14 MR. THOMPSON: It's kind of like
15 obscenity for the Supreme Court. I haven't seen it
16 and I know I haven't seen it. I don't know what it
17 is. I think that the legislature has laid out a
18 particular way for rates to be made, either by
19 complaint or by file-and-suspend. And the
20 legislature has described a complex process that
21 occurs.

22 And as the court said, you know, you can
23 let a tariff go into effect, but there's a
24 preference, there's a preference for
25 file-and-suspend, for suspending that tariff and

1 initiating all the procedures in a hearing. Okay.
2 So I mean, I think we at least agree the -- the
3 interim thing is extraordinary. And like a TRO, it
4 should be applied when there's something
5 extraordinary going on. It's an extraordinary
6 remedy.

7 Now, a system problem, something
8 inherent in the legal structure, is that something to
9 be solved with a TRO? Is that something to be solved
10 with this kind of remedy? I don't know. I know
11 you're not looking for an answer of I don't know.
12 Let me say that for me, if I was making the decision,
13 the answer would be no. And that's probably the best
14 I can get in answering your question, sir.

15 COMMISSIONER KENNEY: Thank you,
16 Mr. Thompson.

17 MR. THOMPSON: Thank you.

18 JUDGE WOODRUFF: Anything else for
19 Mr. Thompson?

20 (NO RESPONSE.)

21 JUDGE WOODRUFF: Thank you, sir.

22 MR. THOMPSON: Thank you.

23 JUDGE WOODRUFF: Next, for Public
24 Counsel.

25 MR. MILLS: Thank you. May it please

1 the Commission. You know, when I -- when I was
2 preparing for this hearing, I had -- I had a very
3 few, very streamlined remarks. Having listened to
4 Union Electric and other questions posed and the
5 answers given, they've grown exponentially, and not
6 necessarily in a linear, coherent fashion.

7 So I'm going to be talking about a lot
8 of stuff, and I apologize in advance that I'm going
9 to be skating all over the place.

10 But to begin with, let me -- let me just
11 sort of put UE's entire request in context. The
12 proposal that UE has put before you is that -- that
13 they be allowed an interim rate increase and that the
14 Commission allow it to go into effect without a
15 hearing relies entirely, entirely on two bits of
16 dicta from two cases you heard a lot about. One is
17 the Jackson County case and one is the Laclede case.

18 And let me backtrack a little bit and
19 describe what was actually going on in those cases
20 aside from the court's sort of voluntary little bit
21 of dicta that -- that UE relies on.

22 The Laclede case. The Commission had
23 denied Laclede Gas a request for interim rate relief.
24 The question before the court was whether the
25 Commission abused its discretion in denying that

1 request, and the court said no, it didn't. It dealt
2 with a lot of other questions, but that was the
3 central question before the -- before the court. So
4 anything beyond that is necessarily dicta.

5 You know, I think you need to be very,
6 very cautious any time you rely on -- on a court
7 that -- that sort of voluntarily says it may be
8 theoretically possible for something else to happen.
9 That's -- that's pretty much a big, big red flag
10 saying that's not a question before this court. And
11 so when we -- when we're telling you about what we
12 might possibly do under some theoretical possible set
13 of facts, I would be hesitant in relying on that
14 any -- any too heavily.

15 But that's exactly what Laclede wants
16 you to do. They want you to take all of the language
17 in the Laclede case that is most favorable to them
18 and interpret it to read your discretion that you
19 don't have to rely on the emergency standard.

20 I think as Commissioner Jarrett pointed
21 out -- or didn't point out, but -- but was able to
22 get through, through his questioning, you know,
23 even -- even though the Laclede court wasn't directly
24 addressing that question, they were very skeptical
25 about whether or not some sort of nonemergency would

1 qualify for interim rate relief, and I think the
2 language in that case makes that quite clear.

3 The -- the Jackson County court case --
4 the Jackson County case in which Laclede -- in which
5 UE cites for the proposition that the Commission can
6 allow the interim rate relief request to go into
7 effect without a hearing is also dicta.

8 In that case, the -- the -- what was
9 going on in that case was that the Commission,
10 despite having a moratorium in place, allowed a rate
11 increase. So one of the questions going on in that
12 case was whether or not the Commission had the
13 authority to sort of ignore the moratorium and go on
14 and allow a rate increase anyway.

15 And the court answered that in the
16 affirmative and sort of citing that the Commission's
17 ongoing jurisdiction over utilities and -- and the
18 requirement that the Commission stay abreast of
19 what's gone on with utilities.

20 The other question that was going on
21 was -- was sort of an out-of-the-blue challenge to
22 the file-and-suspend method that had -- the
23 Commission had been using for -- for decades at that
24 point, and -- and the court sort of summarily
25 dismissed that and said -- well, didn't summarily, I

1 mean talked about it at length, but -- but it
2 ultimately dismissed that saying, you know, one of
3 the -- one of the factors that -- that allowed them
4 to decide that the file-and-suspend was a legitimate
5 method was the fact that it had been going on for so
6 long and that the legislature had acted with respect
7 to utility statutes and hadn't changed it. And so
8 there was sort of the presumption that the
9 file-and-suspend method was legitimate. And I think
10 the challenge to that whole method of changing rates
11 was viewed as -- as somewhat out of school.

12 But the -- the central question in -- in
13 Jackson County was not whether or not you could have
14 sort of a third option which is a
15 file-and-not-suspend method of raising rates. The
16 question was really you have the complaint method and
17 then can you use the file-and-suspend method. And
18 the court's holding was yes, you can use the
19 file-and-suspend method in Missouri. There was never
20 a question about file-and-not-suspend.

21 The tariffs in that case were suspended,
22 there was a hearing, there was a full process held,
23 and at the end of the day, the court affirmed the
24 Commission's decision. But there was never a
25 question in that case whether or not the Commission

1 could allow a rate increase without a hearing.

2 Similarly, in UCCM, there was a hearing.
3 There's some language in there that seems to indicate
4 that there may be circumstances under which the
5 Commission could somehow make an examination of all
6 relevant factors without having a hearing, but that
7 wasn't the fact situation before that court. We have
8 yet to see a decision out of any Missouri court in
9 which it finds that the Commission can consider all
10 relevant factors in a contested case and come up with
11 a hearing without having -- I mean, come up with a
12 decision without having some kind of a hearing.

13 But yet, UE suggests that -- that there
14 is case law out there that allows you to do that. I
15 don't think there is -- I don't know if they can cite
16 a single case in which that has happened in which in
17 a full-blown rate case for a major utility that the
18 Commission would allow a -- an increase, whether
19 interim or not, without a hearing.

20 Now, one of the questions that
21 Commissioner Gunn asked was whether or not the
22 possibility of a refund should allow the Commission
23 to act on something less than an examination of all
24 relevant factors, is if that -- if the -- if the
25 refund really cures that.

1 And I think it's kind of ironic because
2 right now, even as we speak, or earlier today, UE
3 is -- is arguing in Stoddard County against a stay
4 from the last -- the last rate case even though --
5 and Noranda is seeking a stay in court down there --
6 even though Noranda would be required to post a bond
7 for any amounts that they have stayed so that at the
8 end of the day, UE would be made whole and in essence
9 it would be interim subject to refund because of the
10 operation of a bond.

11 UE's argument is that there's -- there's
12 a cash flow issue there even though some time later
13 on if you get the money back, you're not made whole,
14 even though there is a refund or in this case even
15 though there's a bond posted and you would get the
16 difference back at the end of the case.

17 And the same thing happens with
18 customers. I mean, even though there may be a refund
19 later, you know, nine months from now at the end of
20 the case, customers in the -- in the interim are out
21 that money and there's no way for them to get that
22 back. I mean, there may -- there's interest --
23 there's interest imposed and so there -- you know,
24 there is some remedy, but it's not a complete remedy.

25 And so I think you really need to look

1 at all relevant factors before you do any increase
2 even if it's refunded later, because in the meantime,
3 customers are suffering through those higher rates.
4 And -- and right now, you know, there are customers
5 that are -- that are on the edge and -- and even a
6 small increase is going to cause a lot of people a
7 lot of hardship. So I don't think you can simply
8 say, you know, there's some -- there's some lesser
9 look that you have to give to an interim rate
10 increase just because it's subject to refund later.

11 Now, one of the things that -- in going
12 back to the Jackson -- Jackson County case as well,
13 one of the things that the case says with regard to
14 the fact that it's possible that the Commission could
15 raise rates without a hearing, that was in the
16 context of the question of the due process argument.

17 And the court was saying that there is
18 not a due process violation if the Commission were to
19 allow rates to -- to go into effect without a
20 hearing. Didn't go so far as to say there are no
21 other prohibitions or no other reasons why the
22 Commission should or can't do that, but said there's
23 no -- there's no -- no due process violation in doing
24 so. And again, there was a hearing in that case, so
25 even that pronouncement is dicta.

1 Now, there have been a bunch of
2 questions about the -- the bar chart that -- that UE
3 presented, and I think it's kind of interesting that
4 in this case, you know, we're used to -- almost every
5 time I see somebody from UE speak in public, brings
6 out that bar chart, you know, the one from Business
7 Week that shows the rates going up from all these
8 other states, and in Missouri they've been going
9 down.

10 I think there's a reason that we're not
11 seeing that bar chart today is because in -- in -- in
12 the past when rates were -- have been going down for
13 Union Electric Company, you haven't been hearing any
14 arguments about regulatory lag.

15 When regulatory lag was Union Electric's
16 friend, we didn't hear any of this kind of argument.
17 We didn't hear that regulatory lag was a systemic
18 problem that needs a serious fix. And I think that's
19 critical because right now we're in a business cycle
20 in which regulatory lag, at least in this case and
21 perhaps in the last couple of cases, has cut against
22 the utilities, but that's not a permanent thing. You
23 know, it can go both ways.

24 Union Electric is saying, you know, now
25 because it's going against us, you should fix it, you

1 should -- you should fix it so that regulatory lag
2 doesn't hurt us. There has never been a serious
3 proposition, at least one that UE has taken
4 seriously, that -- that would have done the opposite.
5 When rates were going down throughout the late '80s
6 and '90s, it took a long time to prosecute a
7 complaint.

8 I think in an ideal world, there
9 probably would have been more complaints or more rate
10 reductions in there, but it's a -- it's a hugely
11 labor-intensive process to -- to prepare, prosecute
12 and get a -- get a complaint against a utility like
13 Union Electric to hearing. It's virtually impossible
14 for anybody but the Staff.

15 And even if there were some sort of
16 mechanism to -- to somehow lessen the impact of
17 regulatory lag in those situations, I -- I have a
18 very strong suspicion that the utilities would fight
19 against that tooth and nail.

20 Now, I -- in the interest of time, I'm
21 not going to talk a lot about regulatory lag, but,
22 you know, there -- there are a number of scholarly
23 articles -- in fact, the Alfred Kahn book points out
24 that regulatory lag is not necessarily a bad thing,
25 even when it is operating in an era when costs are

1 rising because it has the salutary effect of
2 providing an incentive to utilities to keep costs
3 down to the extent they can. To the extent that the
4 Commission were to take extraordinary steps to remove
5 regulatory lag from the equation, it would remove
6 that incentive as well, and I don't think that's a --
7 that's a -- necessarily a good thing.

8 As -- as some of the questions have
9 pointed out already today, there -- there have been
10 steps in the recent past in Missouri that reduce
11 regulatory lag on a number of fronts; the ECRM, the
12 ISRS, the EC -- the FAC. Most of those have not
13 really been fully sort of absorbed into the
14 regulatory process, and we don't know exactly to the
15 extent that they -- that they will lessen regulatory
16 lag and then help the utilities out, but certainly
17 they will go in that direction rather than the
18 opposite direction.

19 Now, with respect to the -- the three
20 questions that the Commission asked to be addressed,
21 the first one is what standard. And you know, a lot
22 has been -- and I think -- I think UE referred --
23 referred to this as the dire emergency standard, and
24 I think that's really overstating the case. I think
25 it has been referred to in a number of cases as the

1 emergency or near emergency standard.

2 And I really think that's -- that's a
3 better way to refer to it, because if there are
4 circumstances in which a utility is not, you know,
5 faced with a circumstance that tomorrow they're going
6 to have to shut the lights out, but if they are
7 getting to such a -- you know, getting so close to
8 the precipice that you can see that there's a
9 significant risk that that would happen, I think that
10 would meet the standard. I don't think it has to be
11 a current actual emergency. I think it has to be an
12 emergency or something very close to it such that the
13 risk of an emergency, the risk that a utility will
14 not be able to provide safe and adequate service
15 would need to be shown.

16 And one of the other, I think, critical
17 factors to -- to the emergency or near emergency
18 standard, and Mr. Dottheim touched on this earlier,
19 is that one of the things that a utility has to show
20 in order to -- to show that -- that that standard has
21 been met is that there are no other means to meet the
22 emergency.

23 And one of the things that -- that
24 you've seen in the -- in the bar chart and that
25 you've heard through -- through the discussion today

1 is that likely one of the reasons that UE is not
2 meeting its authorized rate of return, if indeed that
3 is the -- that is the case, is regulatory lag. And
4 it is the -- the time that elapses between when an
5 investment is made and when it's recovered in rates.
6 We don't know what all the other factors are.

7 We don't know what sort of steps, as you
8 see those -- the -- the returns decline over the --
9 over the -- the more recent months on that bar chart,
10 we don't know what steps the company took to try to
11 combat that. We don't know whether they took other
12 extraordinary steps. We don't know whether they did
13 layoffs, whether they sought early retirements,
14 whether they sought productivity gains. We just
15 don't know.

16 All we know is that they allege that --
17 that regulatory lag is one of the factors that led to
18 that decline. We don't know what the others are and
19 we don't know what they did to try to -- to try to
20 stop that trend or mitigate that trend if they
21 couldn't stop it.

22 Now, another question that the
23 Commission has posed for the parties is whether or
24 not an evidentiary hearing is required. And I agree
25 with -- with Mr. Thompson on this. If -- if you

1 decide to adhere to the historical emergency or near
2 emergency standard, I don't believe a hearing is
3 required. UE has -- has admitted repeatedly that
4 they don't meet that standard. I think that the
5 game's over at that point if you want to stick with
6 that standard.

7 If the Commission is considering some
8 other standard, then I think, yes, you would have to
9 have an evidentiary hearing, but I think there are
10 some -- some -- I certainly would have -- have
11 serious reservations about going down that path, and
12 I -- and I'll talk about just a few of those
13 reservations.

14 One is -- and I think Mr. Byrne
15 highlighted this quite well when -- when he was
16 asked, you know, what -- what is the good cause
17 standard. And he said, "Well, I don't know, but I
18 know we met it." You know, I think -- I think that's
19 a very, very difficult standard to -- to address in
20 an evidentiary hearing.

21 I mean, with the emergency, near
22 emergency standard, we know what we're talking about.
23 We've got cases for years and years going back.
24 And -- and some -- in some cases the utilities have
25 met it, in some cases they haven't and we know what

1 we're dealing with.

2 In this case where we're talking about
3 some amorphous good cause standard, as Commissioner
4 Kenney's questions pointed out, we don't really know
5 factors that go into that. We know -- we know a
6 couple of things that UE has alleged that would --
7 would cause them to meet that. I think -- I think
8 under the -- the Laclede case that that -- that
9 doesn't qualify as a standard. But if that's the
10 standard, you know, maybe they do, maybe they don't.

11 But I think if the Commission were to
12 decide that we want to go forward with a hearing, I
13 think it would be in everyone's best interest if the
14 Commission were to try to -- because it's purely a
15 policy question.

16 If the Commission were to -- to define
17 the standard for us before we get to a hearing;
18 otherwise, we're going to be just throwing evidence
19 around trying to figure out whether or not, you know,
20 this piece of evidence tends to prove or disprove a
21 point that's relevant and that piece of evidence
22 tends to prove or disprove. We won't really know
23 exactly what we're shooting at when we're -- when
24 we're throwing evidence around.

25 Now, another reservation I have with

1 respect to the question of whether or not we should
2 have an evidentiary hearing is, you know, this whole
3 process in dealing with an interim rate request at
4 the beginning of a case is -- is somewhat out of the
5 norm, at least in the recent past.

6 And it's a fairly resource-intensive
7 process, and it would be made much more so if we were
8 try to -- were to try to get to an evidentiary
9 hearing under a short time frame. For entities like
10 my office and the Staff and the other intervenors,
11 you know, there's only so -- you know, 11 months
12 seems like a long time, but at this point in the
13 case, Union Electric has -- has finished preparing
14 its direct case in chief. It's simply responding to
15 discovery. It's got more resources in general.
16 Certainly at this point in the case, it's got more
17 resources to devote to -- to try to deal with an
18 evidentiary hearing than all the rest of the parties
19 do.

20 And I -- and I think that's a -- that's
21 a -- a critical point for the Commission to bear in
22 mind, that if -- you know, if -- if they -- if the
23 Commission -- unless the Commission is truly serious
24 about abandoning the emergency or near emergency
25 standard, I don't think there's any need to make the

1 parties go through an evidentiary hearing. I think
2 that only benefits Union Electric and it will take
3 everyone else's time, and I don't think it would be
4 terribly productive.

5 Now, with respect to a couple of the
6 other questions, one -- one of them was about a
7 forward test year. And I think one of the things
8 that -- that the Commissioners need to bear in mind
9 is that Missouri's regulatory regime has evolved as
10 sort of a cohesive whole, you know, ever since
11 regulation started here.

12 And you know, we do some -- we do some
13 things differently in Missouri than they do in other
14 states, but everybody does things differently. I
15 mean, I think if you were just to look at, for
16 example, a list of states in which you've -- which
17 use a forward test year, I don't think that's really
18 particularly informative because unless you can show
19 that for some reason Missouri's utilities go bankrupt
20 more than they do in other states -- you know,
21 utilities in Missouri are as a group suffering from
22 much lower credit ratings than -- than all the other
23 states, I don't think you can say that Missouri's
24 regulatory regime as a whole is harder on utilities
25 than somebody else's.

1 I think in order to make sense of
2 whether or not it's material that some other state
3 uses a forward test year, I think you need to look at
4 all the other things they do in that state, how --
5 and how they compare to Missouri and how their rates
6 compare to Missouri and how the -- their -- the
7 health of their utilities compare to those in
8 Missouri.

9 Now, one of the things -- one of the
10 things that's come up is the question of how hard or
11 how quickly can Staff look at the specific dollars at
12 issue here. Well, first of all, I submit that
13 that's -- that's not a -- it certainly is not a
14 dispositive question and it's really not a
15 particularly relevant one because, as I've noted, you
16 really need to look at all the reasons why there --
17 UE's returns are falling below their authorized. And
18 just looking at whether those dollars have actually
19 been spent doesn't really get you far down that road.

20 And moreover, I think it would take a
21 significant amount of time to -- to do more than
22 simply verify whether those are based on actual
23 invoices based on actual dollars reflected on --
24 on -- on UE's books and -- and to look more closely
25 into whether or not those expenditures were all

1 prudent or not.

2 So those are -- those are two big
3 questions with -- with respect to whether or not it
4 makes sense to -- to simply look at the dollars on
5 the books for specific infrastructure investments.
6 And I think that's all I have. Thank you.

7 JUDGE WOODRUFF: Commissioner Davis?

8 COMMISSIONER DAVIS: Now, Mr. Mills,
9 was -- was I listening correctly when you said you
10 wanted us to provide you with a definition of -- of
11 good cause in advance if we choose to have an
12 evidentiary hearing?

13 MR. MILLS: I think it would be much
14 more efficient if the Commission is thinking about
15 abandoning the emergency or near emergency standard
16 for some other standard, to give us more definition
17 on what you're thinking about.

18 We know what the emergency -- near
19 emergency standards are. I think some of the
20 questions today have made it very clear, at least to
21 me, that nobody really knows exactly what the good
22 cause standard is and how you can tell if a utility
23 has met it.

24 You know, the best we can get from UE
25 is -- is well, here are a couple of factors and it's

1 up to your discretion. That doesn't really help the
2 parties in terms of figuring out what kind of
3 evidence to put on to show whether or not a -- a --
4 some -- somewhat amorphous good stand -- good cause
5 standard has been met.

6 COMMISSIONER DAVIS: But, I mean, aren't
7 you asking us to -- wouldn't that be an issue in
8 the -- in the -- in the hearing and aren't you -- I
9 mean, isn't that asking us to prejudge -- prejudge
10 the issue?

11 MR. MILLS: No, it's not an evidentiary
12 question, it's a policy question. If you-all are
13 planning to change the policy, it would -- it would
14 help us prepare the evidence to know what the new
15 policy is because we know what the old policy is, and
16 they don't meet it. But we don't know what the new
17 policy is.

18 COMMISSIONER DAVIS: Do we have stare
19 decisis in -- here at the PSC?

20 MR. MILLS: There are cases that say
21 that stare decisis does not specifically, you know,
22 strictly apply.

23 COMMISSIONER DAVIS: All right.

24 MR. MILLS: But you've got the Laclede
25 decision. I mean, we certainly do have -- have stare

1 decisis in the court.

2 COMMISSIONER DAVIS: Well, that's true.

3 Okay. So you're just saying it would be helpful?

4 MR. MILLS: Yes.

5 COMMISSIONER DAVIS: But not necessary?

6 MR. MILLS: We could -- if the

7 Commission were to order a hearing and said come --

8 come -- come before us and try to prove or disprove

9 that there -- that good cause exists to allow in a

10 rate increase, we would all certainly come forward

11 and put on evidence to try to hit that mark, but it

12 would be more helpful if we knew exactly where the

13 mark was.

14 COMMISSIONER DAVIS: All right. But in

15 the end, isn't Ameren's burden of proof to show that

16 they have met good cause or whatever the standard is

17 and then it's up to you to rebut that?

18 MR. MILLS: Yes.

19 COMMISSIONER DAVIS: Okay. Now, you

20 stated that you didn't think it was particularly

21 relevant about -- about the number of other states

22 that have adopted future test years without taking

23 into context all of the -- the other...

24 MR. MILLS: I think if you looked at --

25 if you look at any -- any particular state, you

1 really need to look at the package of regulation and
2 the way it -- it -- it -- as a pragmatic matter that
3 works in terms of allowing utilities the opportunity
4 to -- to earn a fair return and allows customers fair
5 and reasonable rates.

6 COMMISSIONER DAVIS: Do you think
7 it's -- it's fair to say that a number of other
8 states have already abandoned that emergency or near
9 emergency standard?

10 MR. MILLS: I think there are a number
11 of states that have changed that statutorily. I'm
12 not aware of -- of -- of state commissions that have
13 sort of sua sponte abandoned it, but there may be
14 some. I haven't -- I haven't looked that closely at
15 that question.

16 COMMISSIONER DAVIS: Well, but they
17 didn't directly -- when -- I mean, when you say the
18 state legislature's, you know, enacted new
19 legislation, I mean, they didn't directly say we're
20 going to repeal what the Commission has done in law.
21 I mean, there's lots of -- isn't it like -- like what
22 you were saying earlier, that there's just lots of
23 other -- other factors involved?

24 MR. MILLS: Sure. But I mean, if you
25 look, for example, at the -- at the Minnesota statute

1 and the North Dakota statute, it says the Commission
2 shall allow interim rate relief under X, Y and Z
3 circumstances.

4 COMMISSIONER DAVIS: Okay.

5 MR. MILLS: And -- and I -- I'm not
6 aware of any state commissions that have on their own
7 without legislative fiat basically said we don't like
8 the emergency standard anymore, we're -- we're going
9 to just allow utilities to -- to have an interim rate
10 increase on some new standard.

11 COMMISSIONER DAVIS: And what -- what
12 were those two states again?

13 MR. MILLS: Minnesota and North Dakota.

14 COMMISSIONER DAVIS: Okay. And what
15 about -- do you have any idea about Wisconsin?

16 MR. MILLS: I do not.

17 COMMISSIONER DAVIS: New York?

18 MR. MILLS: No.

19 COMMISSIONER DAVIS: Okay.

20 MR. MILLS: Minnesota and North Dakota
21 were discussed in the UE pleading and addressed in
22 the Staff pleading as well.

23 COMMISSIONER DAVIS: Okay. Do you know
24 what AmerenUE's credit ratings are from the -- from
25 the -- I guess the three registrate -- the three, I

1 guess you'd call them the big three, Moody's, Fitch,
2 S&P?

3 MR. MILLS: I don't remember which one
4 is which, but they are rated one or two notches above
5 junk bond status by all of them, I believe.

6 COMMISSIONER DAVIS: Okay. And do you
7 know where that puts them in relation to other
8 vertically integrated utilities like AmerenUE, and if
9 you were going to list all of them out by triple A,
10 double A, A, you know, going down the line, I'm not
11 sure exactly what the rating is, I mean, where on
12 that spectrum would AmerenUE fall?

13 MR. MILLS: It's really more of a bell
14 curve than a spectrum, and -- and they would not --
15 they would not be in either extreme, I know that,
16 that they may be towards the bottom end. I -- I
17 doubt that they're at the top end, but they certainly
18 are not out at the very tail end of the bell curve.

19 COMMISSIONER DAVIS: Okay. And you
20 would agree that, you know, the abuse of discretion
21 standard that the courts apply to Commission
22 decisions, I mean, that's just pretty much the -- the
23 standard of review that they have for our cases,
24 correct?

25 MR. MILLS: That -- that is one of

1 the -- the standards of review. It's -- it's --
2 there are two -- there are two prongs, lawful and
3 reasonable, and part of the reasonable has to do with
4 the -- with the discretion and abuse thereof.

5 COMMISSIONER DAVIS: Okay. Thank you,
6 Mr. Mills.

7 MR. MILLS: Thank you.

8 JUDGE WOODRUFF: Commissioner Jarrett?

9 COMMISSIONER JARRETT: Just a question
10 going back to the Laclede case. Doesn't Laclede --
11 the Laclede case set out the standard for us?

12 MR. MILLS: It -- it -- it does, but as
13 I said earlier, that really wasn't a question before
14 them. I mean, the question was whether or not the
15 Commission abused its discretion in -- in denying an
16 interim rate request. And -- and -- and maybe I
17 misunderstood because there -- there are a couple of
18 parts of the Laclede case that we've talked about in
19 the pleadings and -- and here today.

20 But they -- they do talk about a -- a
21 standard in -- in -- with respect to whether or not
22 the Commission abused its discretion in denying the
23 rate relief request. But there are some -- some
24 later language towards the ending of the decision
25 where they talk about a theoretical possibility of

1 some other fact situations that would allow the
2 Commission to go a different way.

3 COMMISSIONER JARRETT: Right. Well, I
4 know -- know the -- the way the opinion is
5 structured. They -- they first of all talk about
6 whether the Commission has authority to even consider
7 interim rate increases, and then they make the
8 decision that they do. And then they state that all
9 of the distracting preliminary issues now having been
10 cleared away, there are finally laid bare the real
11 substantive issues in this case; number one, what is
12 the proper test to be applied for the allowance of an
13 interim rate increase -- rate increase?

14 MR. MILLS: Right.

15 COMMISSIONER JARRETT: And number two,
16 has Laclede proved facts bringing this case within
17 the appropriate test?

18 MR. MILLS: Yes.

19 COMMISSIONER JARRETT: And in the
20 court -- the court's determination is that Laclede
21 failed to carry the burden under 386.430. And
22 386.430 says that they have to show by clear and
23 satisfactory evidence the determination, requirement,
24 direction or order the Commission complained of is
25 unreasonable or unlawful as the case may be.

1 MR. MILLS: Uh-huh.

2 COMMISSIONER JARRETT: So the way I read
3 that is, the Western District is saying that Ameren
4 has the burden of proof showing that our order in the
5 last rate increase is now unreasonable or unlawful.
6 Isn't that the standard that the Laclede court has
7 set?

8 MR. MILLS: Commissioner, with all due
9 respect, I think what they're talking about in that
10 passage is that in -- in the case at bar in the
11 Laclede case, the Commission denied Laclede's request
12 for interim rate relief.

13 COMMISSIONER JARRETT: Right.

14 MR. MILLS: And that on appeal, Laclede
15 has the burden of showing that the Commission's
16 denial of the interim rate -- rate relief request was
17 unreasonable under -- under 386.430.

18 COMMISSIONER JARRETT: I don't read it
19 that way.

20 MR. MILLS: Okay.

21 COMMISSIONER JARRETT: I don't have any
22 further questions.

23 MR. MILLS: Okay.

24 JUDGE WOODRUFF: Commissioner Gunn?

25 COMMISSIONER GUNN: Yes, thanks. So you

1 believe that as it stands right now, the standard is,
2 is it an emergency?

3 MR. MILLS: Or near emergency, yes.

4 COMMISSIONER GUNN: Near emergency. Is
5 there -- and this is just -- this is kind of as a
6 policy issue. Is there a danger in calling it an
7 emergency or near emergency standard? I mean, just
8 using the semantics, just taking the semantics of it,
9 does it become a self-fulfilling -- self-fulfilling
10 prophecy? I mean, if -- if a -- if a company goes
11 out and says we -- we're filing for this interim rate
12 increase because we have a near emergency, would that
13 cause essentially credit to be shut down, people to
14 sell the stock? I mean, would it -- would it then
15 potentially spiral...

16 MR. MILLS: No, I don't think so,
17 because in -- in Missouri, that standard has been met
18 on any number of occasions. And -- and I think --
19 you know, if I were in -- in -- you know, Mr. Market,
20 I would think that's a good thing that a utility that
21 has that kind of a situation facing them can come
22 before the Commission and can get relief under those
23 circumstances.

24 COMMISSIONER GUNN: As long as they get
25 the relief that they request?

1 MR. MILLS: Yeah. So no, I don't -- I
2 don't think simply calling that would -- would cause
3 any -- you know, requiring utilities to allege that
4 they have an emergency, I don't think that would
5 cause any kind of, you know, market turmoil.

6 COMMISSIONER GUNN: It's just something
7 I was wondering. Now, if we go back to the good --
8 the good cause standard, wasn't the court kind of
9 laying out that we have pretty broad discretion in
10 order to send out these -- to either approve or
11 disapprove these of -- of interim rate increases or
12 do you think it was just on the disapproval side?

13 MR. MILLS: Well, I mean, partly that.
14 One -- one of the things that they talk about is the
15 fact that there isn't any standard laid out in
16 statute so that -- so that necessarily it rests on
17 the Commission's discretion.

18 COMMISSIONER GUNN: Right.

19 MR. MILLS: And -- and as far as they
20 could really go on the facts of that case was in
21 denying it in the Laclede case, you didn't abuse your
22 discretion.

23 COMMISSIONER GUNN: Right. I mean, I
24 think that -- that's ultimately the issue.
25 There's -- there's no statutory standard set out, so

1 we have to kind of find it.

2 MR. MILLS: Right, right.

3 COMMISSIONER GUNN: And -- and -- you
4 know, this -- and as some of the parties have said,
5 no one really knows what it is, but maybe somebody
6 sees it -- I mean, even -- even near emergency is a
7 squishy term in and of itself, that we would have to
8 make -- we would essentially have to make business
9 judgments to -- to -- to find a near emergency to see
10 whether they are so close to the edge that they
11 deserve this interim review.

12 MR. MILLS: In general that's true. In
13 this case, no, you wouldn't because in this case that
14 hasn't even been alleged.

15 COMMISSIONER GUNN: I agree, I agree. I
16 mean, I think -- I -- I -- I agree with you that
17 if -- if that is our standard, then we can -- we can
18 roll up the tarp and go home. I mean, I don't think
19 we need to -- we need to worry about that.

20 So -- now, as a theoretical possibility,
21 I mean, we've talked about -- one of the things
22 that -- that Ameren has said is that -- and I -- I
23 don't know what I'm talking about here, so I'm just
24 asking the question. If all the parties came
25 together and agreed at some early stage that the

1 plant -- the -- the -- the plant should be considered
2 in service, they file a unanimous stipulation to
3 that -- that effect, could this Commission then order
4 kind of a half rate increase on that -- on those
5 particular issues?

6 MR. MILLS: If the parties agree that
7 the Commission should do so?

8 COMMISSIONER GUNN: Let's say -- let's
9 say you guys walked out of the back of the room and
10 tomorrow -- or you came to an agreement that said
11 look, we've decided that this one and a half percent
12 or whatever the -- \$37 million is perfectly
13 appropriate, and -- and -- and at the end of this
14 11-month period would no doubt be included as -- in
15 rates, could we -- could then we -- and if that
16 happened tomorrow, could then we order a partial rate
17 increase to go into effect October 1st or
18 November 1st?

19 MR. MILLS: I don't think so because
20 even under those circumstances, that's only one
21 factor, and you don't know all the other factors
22 that -- even if -- even if all parties agree that
23 this one factor pushes the utility this far in that
24 direction --

25 COMMISSIONER GUNN: Right.

1 MR. MILLS: -- we don't know what the --
2 what the myriad of other factors do or could have
3 done or --

4 COMMISSIONER GUNN: Offsets.

5 MR. MILLS: -- how when you look at
6 them, off -- yeah, exactly.

7 COMMISSIONER GUNN: Or what other
8 offsets there are out there, what other factors --

9 MR. MILLS: Right, uh-huh.

10 COMMISSIONER GUNN: -- are you willing
11 to -- okay. That's what I thought the answer was.

12 MR. MILLS: Yeah.

13 COMMISSIONER GUNN: I just wanted to --

14 MR. MILLS: I think if you take it a
15 step farther and the parties agree that there should
16 be an interim rate increase, then I think the
17 Commission could allow one under the circumstances,
18 but I think just knowing that certain amounts of
19 dollars were prudently spent is only a little, bitty,
20 tiny piece of the picture.

21 COMMISSIONER GUNN: And from a policy
22 standpoint, what are -- what, if any, fundamental
23 problems do you have with using a forward-looking
24 test year or a future test year?

25 MR. MILLS: From -- from a -- you know,

1 there's all kinds of things that you could do in
2 theory that just aren't going to work out well in
3 practice. And in theory, I don't really have a
4 problem with a forward-looking test year. But the
5 practical aspects, the part that you have to rely
6 entirely on -- almost entirely on utilities' budgeted
7 forecast which, you know, as long as they're
8 forecasting increases, they're -- tend to be a
9 self-fulfilling prophecy.

10 COMMISSIONER GUNN: Right.

11 MR. MILLS: I mean, if you set rates
12 based on what the utility wants to spend next year, I
13 mean, it's pretty likely -- and then, you know, they
14 have to come back for -- you know, for rate case
15 after rate case, you know, pretty likely they're
16 going to go out and spend that.

17 So you know, I think -- I think as a
18 practical matter, trying to, you know, come to the
19 same compromises with respect to -- to -- to budget
20 and -- numbers and realistic numbers, you know, I
21 don't know -- know that that necessarily moves you
22 that far out in the future anyway.

23 COMMISSIONER GUNN: Do you know if
24 there -- I -- I don't disagree with that -- with that
25 statement, but do you know of empirical evidence

1 that -- that -- that would back that up in the states
2 that do use it?

3 MR. MILLS: No. In fact, I don't even
4 know how many states do use forward test years, so I
5 really haven't looked at that test at all.

6 COMMISSIONER GUNN: All right. Thank
7 you. I don't have any further questions.

8 MR. MILLS: Thank you.

9 JUDGE WOODRUFF: Commissioner Kenney?

10 COMMISSIONER KENNEY: Mr. -- I'm sorry.
11 Sorry about that. The -- the emergency standard is
12 pretty cut and dried and there's three things that
13 we're to look at and that disposes of the issue. And
14 I'll ask you the same question that I asked
15 Mr. Thompson. I mean, what in your -- can you
16 provide any factual circumstances that you can think
17 of that would constitute extraordinary stances --
18 giving -- extraordinary facts giving rise to good
19 cause shown?

20 MR. MILLS: For -- for an -- an interim
21 rate increase --

22 COMMISSIONER KENNEY: Right.

23 MR. MILLS: -- without -- without some
24 sort of a hearing or -- or without --

25 COMMISSIONER KENNEY: Or even with --

1 MR. MILLS: -- without -- or even with
2 all other factors?

3 COMMISSIONER KENNEY: -- even with the
4 factors -- I mean --

5 MR. MILLS: Well --

6 COMMISSIONER KENNEY: -- even with the
7 hearing, because I guess we need to figure out
8 what -- what we need to see if that's the standard we
9 decide to adopt.

10 MR. MILLS: You know, I really can't
11 with any specificity. I -- I was trying to come up
12 with something earlier, and the best I could come up
13 with is if -- if the Commission has just gone
14 through, you know, for -- for a particular utility a
15 rate case or a series of rate cases, all of which
16 came out to relatively the same result, and you know,
17 it's clear that nothing except one factor has changed
18 since that most recent one has concluded and all
19 parties recognize that, I mean, that's -- you could
20 perhaps try to construct a fact situation along those
21 lines that you'd come up with something.

22 But as far as I know, you know, we've
23 been regulating utilities in Missouri for a long
24 time. I don't know that that's ever happened. So
25 theoretically, you could probably construct

1 something, although I have not been able to.

2 COMMISSIONER KENNEY: Does harm to your
3 credit rating constitute an extraordinary fact?

4 MR. MILLS: No, no. Harm -- harm to a
5 credit rating can have some financial impact on
6 customers, but sometimes the -- the remedy for that
7 small amount of harm is much worse than the harm
8 itself. So we don't want to, you know, create an
9 entire new regulatory construct simply because a
10 utility alleges there may be -- there may be a hit to
11 their credit rating.

12 COMMISSIONER KENNEY: What about a
13 systemic problem that disincentivizes a utility to
14 invest in infrastructure improvements, particularly
15 given the economic environment in which we exist
16 today? Forgetting historically, but looking at where
17 we are today, would that not be an extraordinary
18 fact?

19 MR. MILLS: It could be, although --
20 although I disagree that under the current
21 circumstances there's -- that there's any sort of a
22 disincentive to invest in infrastructure. I think
23 given, you know, that the opportunities for
24 investment in today's world, the ability for a
25 utility to invest and get the opportunity to have a

1 pretty significant rate of return on that investment,
2 assuming that it's prudent, is very, very attractive.

3 And I think it's -- it's somewhat
4 disingenuous to say regulatory lag makes us not want
5 to invest when, you know, investing in a utility
6 today with -- with the guaranteed opportunity to earn
7 a rate of return is pretty darn attractive.

8 COMMISSIONER KENNEY: Thank you. I
9 don't have any other questions.

10 JUDGE WOODRUFF: I have one question,
11 Mr. Mills. Assuming the Commission does issue some
12 sort of order on this interim rate increase request,
13 can anyone appeal that immediately or would they have
14 to wait until the final order on the overall rate
15 case is final?

16 MR. MILLS: You know, it's -- it's my
17 recollection -- and I didn't look specifically for
18 the answer to that question, but it's my recollection
19 from the series of cases on interim rate relief that
20 that is taken up with the overall -- with -- with
21 the -- the final result in the case. And you might
22 want to ask Mr. Dottheim who has been here even
23 longer than I and -- and --

24 JUDGE WOODRUFF: All right.
25 Mr. Dottheim?

1 MR. DOTTHEIM: I think that's correct.

2 JUDGE WOODRUFF: All right. That's all.

3 Thank you. Thank you, Mr. Mills.

4 Next parties on the list were AARP and
5 Consumer Council, and I see Mr. Coffman has left.
6 Midwest Energy Users and Mr. Woodsmall indicated he
7 had to leave at three o'clock. So we're down to
8 MIEC.

9 MS. VUYLSTEKE: May it please the
10 Commission. I think that Mr. Mills and Mr. Thompson
11 have covered the issues very well, and so -- and so I
12 plan to be brief and then respond to your questions.

13 I think there are a few key points that
14 I would just like to emphasize in agreement with
15 those gentlemen. And one of those is that whatever
16 standard that the Commission applies in this case,
17 that the touchstone should be whether the utility has
18 the ability to attract capital and making the
19 necessary investment to ensure that the utility is
20 providing reliable service, infrastructure, all of
21 the investments that are essential to providing
22 reliable service.

23 Ameren is able to make those investments
24 and attract capital. It is investment grade and it
25 is -- there has been no showing that it can't attract

1 capital in this case, and I think that should be the
2 touchstone of your decision here. And I think that
3 should be the standard that -- that you should apply.
4 And so even in the -- even in the worst case
5 scenario, Ameren has all the ability to do that.

6 I also think that when you look at
7 incentives, utilities argue that -- that under the
8 current regulatory regime without interim rate
9 requests, they don't have an incentive to invest. I
10 mean, we have to remember this is a monopoly, that it
11 has a duty to make these investments and it is making
12 them and has the ability to make them. And so I
13 don't think it's really fair to say that there is not
14 an incentive under the existing Missouri regulatory
15 structure for the utilities to do that.

16 I think that it's been said, and we
17 certainly would like to emphasize, that over the
18 course of many, many years, Ameren was able to earn
19 above a reasonable return. And after a tremendous
20 complaint case -- case that took an extraordinary
21 amount of effort, rates were reduced. I think for
22 the Commission to suddenly change the longstanding
23 policy, they should consider the fact -- the fact
24 that Ameren has benefited from that policy
25 potentially to the tune of hundreds of millions of

1 dollars that its shareholders have gained through
2 that policy over the years.

3 And I think the Commission, especially
4 in this economy, should show -- should require a very
5 strong showing by Ameren that that policy should be
6 changed, and should exercise a very high degree of
7 scrutiny before allowing a rate increase basically on
8 a single-issue basis without examining all relevant
9 factors. And I'll be happy to take your questions.

10 JUDGE WOODRUFF: Commissioner Davis?

11 COMMISSIONER DAVIS: Thank you.

12 Ms. Vuylsteke, this -- I've just got like maybe one
13 or two questions. I do have some more for
14 Mr. Dottheim in the end here.

15 If AmerenUE -- well, I -- they have --
16 to my knowledge they have not made this argument, but
17 if AmerenUE were to argue that the most recent rate
18 case fundamentally -- that they are fundamentally
19 unable to even have the opportunity to earn close to
20 their allowed return on equity, does that change
21 anything?

22 MS. VUYLSTEKE: I -- the short answer
23 would be no. The question is, are they able to earn
24 a sufficient return or do they have the financial
25 integrity to make the necessary investments to ensure

1 reliable service. That is the touchstone, not
2 whether they have a -- they're earning their allowed
3 return or whether the Commission's prior order was --
4 was just or reasonable. They can come in and ask for
5 a new rate which they've done.

6 COMMISSIONER DAVIS: Okay. All right.
7 Thank you, Ms. Vuylsteke.

8 JUDGE WOODRUFF: Commissioner Jarrett?

9 COMMISSIONER JARRETT: I don't have any
10 questions, Ms. Vuylsteke. Thanks.

11 JUDGE WOODRUFF: Commissioner Gunn?

12 COMMISSIONER GUNN: Just to -- when we
13 talk about standards, so the emergency or near
14 emergency standard is one that you would concur with
15 as -- as what this Commission should -- should -- how
16 we should view the interim rate increases?

17 MS. VUYLSTEKE: Yes.

18 COMMISSIONER GUNN: All right. Now --
19 and -- and you talked about access to capital. Is
20 there a point in which the capital -- where access to
21 capital might exist, but the cost of that capital was
22 so high that even though they could -- they could
23 borrow that money that the impact on -- on future
24 rate cases would cause you to allow an interim rate
25 increase?

1 MS. VUYLSTEKE: That the cost to borrow
2 would be so high. Again, I think even if the cost of
3 borrowing is high and becomes significantly higher,
4 as long as the utility is able to make the investment
5 and attract the capital even at a higher cost, it
6 will be able to recover the increased cost in -- in a
7 rate case. And it -- as long as it can attract the
8 capital to make necessary reliability investments,
9 then I think that shouldn't make any difference.

10 COMMISSIONER GUNN: Okay. All right.
11 I'm --

12 MS. VUYLSTEKE: Although I would add
13 that if the Commission were to decide that it wants
14 to hold -- have an evidentiary hearing on this, that
15 due process were to require it if you were to allow
16 an interim rate increase, that is definitely the kind
17 of evidence they -- that I think the parties would
18 probably be introducing.

19 COMMISSIONER GUNN: I think that's
20 probably right. Thanks. I don't have any further
21 questions.

22 JUDGE WOODRUFF: Commissioner Kenney?

23 COMMISSIONER KENNEY: I don't have any
24 questions. Thank you.

25 JUDGE WOODRUFF: Mr. Chairman, do you

1 have any questions?

2 CHAIRMAN CLAYTON: No, no questions.

3 Thank you.

4 JUDGE WOODRUFF: Thank you. Next is
5 DNR. Ms. Woods?

6 MS. WOODS: Thank you, your Honor, but
7 the department does not have any response.

8 JUDGE WOODRUFF: Next is Laclede.
9 Mr. Pendergast?

10 MR. PENDERGAST: May it please the
11 Commission. It's been 35 years, so we thought we'd
12 give it another shot. My name is Mike Pendergast. I
13 am here on behalf of Laclede, and although we
14 intervened in this proceeding primarily to monitor a
15 rate design issue, we wanted to briefly comment on
16 Ameren's requests for interim rate relief.

17 I think the problem which Ameren seeks
18 to at least partially mitigate with its interim rate
19 relief request, namely, the long delay in Missouri
20 between when costs are incurred to provide utility
21 service and when those costs are ultimately reflected
22 in rates is a chronic one that affects most utilities
23 in this state to one degree or another. We therefore
24 support Ameren's request for several reasons.

25 I thought in my prepared comments that

1 I'd also be able to go ahead and say that,
2 fortunately, this is an area where there's no dispute
3 regarding the Commission's authority on not only to
4 grant interim rate relief, but to determine what that
5 standard for granting interim rate relief should be.
6 But as I've heard over the last several hours, there
7 does seem to be a significant dispute, and I'd like
8 to address that just very briefly.

9 As Mr. Byrne indicated, not too long ago
10 you folks determined that it might be proper to
11 consider interim rate relief other than on an
12 emergency standard. And I'm assuming that that
13 determination was not made on a cavalier basis, that
14 the regulatory law judge who advised you was familiar
15 with the law in Missouri.

16 And I think at least at that point in
17 time, you thought you did have the discretion to do
18 something other than an emergency standard, and I
19 continue to think that that is a well-founded
20 conclusion. I don't think you had the best set of
21 facts for a utility that wanted interim rate relief
22 in the Laclede case. If you look back at it, I think
23 what the court ultimately determined in that case was
24 that it is a matter for the Commission to decide.

25 Laclede at that point was basically

1 saying, well, we've been under-earning, we've not
2 achieved our authorized return. I think they were
3 about 20 basis points below it, which is a far
4 different situation than what you're looking at here
5 with Ameren.

6 And basically, Laclede tried to go ahead
7 and suggest to the court that the Commission had been
8 arbitrary and capricious and unreasonable in denying
9 them a -- an opportunity to obtain interim rate
10 relief. And the court said not so fast. Just
11 because you're not earning your authorized rate of
12 return doesn't mean that you're entitled to go ahead
13 and get interim rate relief.

14 I think if you made that determination
15 today with respect to this request, you'd be within
16 your rights to do it. But that's a far different
17 situation than saying that the court determined that
18 if you were to determine that providing interim rate
19 relief because there's been a chronic inability to
20 earn an authorized rate of return, that that would
21 not be within your discretion.

22 You've heard a number of cases cited,
23 all of which said that the Commission has the
24 authority to issue interim rate relief when there's
25 an emergency. True enough, the courts have

1 determined that. That does not mean that it doesn't
2 have the discretion to go ahead and issue interim
3 rate relief when there's a nonemergency or under a
4 different kind of standard.

5 And as far as what that standard should
6 be, I think you have to go ahead and apply a standard
7 of fairness and equity. And in this particular case,
8 I think there are two strong elements that argue in
9 front of granting Ameren its requested rate relief.

10 The first is that it's asking for a very
11 modest part of its increase. It's less than 10
12 percent. It all has to do with capital items that
13 are in the ground that as far as I know are
14 noncontroversial in nature, that are easy to audit
15 and are easy to verify.

16 In the highly unlikely event that you
17 have an ultimate rate award in this case that doesn't
18 even approach 10 percent of what the company
19 requested, they've also proposed to put it into
20 effect on an interim subject-to-rate -- or a
21 subject-to-refund basis. That's about as robust a
22 set of protections as you could possibly have for
23 consumers. What it means is that no matter what,
24 consumers are guaranteed that they're not going to
25 be, in the end, overcharged for utility service.

1 Same kind of protections, same kind of safeguards
2 that you had in the ACA cases and when it comes to
3 significant increases and decreases in cost. It
4 works while they're protecting consumers. I see no
5 reason why it can't work here as well.

6 And I think given the modest nature of
7 the request, the fact that you do have a interim
8 subject-to-refund protection, that you ought to feel
9 comfortable moving forward and granting a request
10 like this.

11 And then you always have the alternative
12 of going to the courts and determining whether, under
13 these circumstances, that was a reasonable exercise
14 of your discretion and allow the courts to go ahead
15 and clarify what is best, a series of dicta and
16 unclear language on what the standard really is.

17 You know you can do interim rate relief.
18 There may be some lack of clarity on what the
19 standard should be, but one way to get that clarity
20 is to do -- grant interim rate relief under terms and
21 circumstances that you think are comfortable.

22 The other thing, and I want to pick up
23 on what Commissioner Gunn had said. You talk about
24 the fact that in the end you would go ahead and
25 dispose of this interim rate relief and the

1 consequences of it in the context of a rate case and
2 doesn't that mean something in terms of whether
3 you've considered all relevant factors. I tend to
4 think it does.

5 The courts in the past have upheld
6 accounting authority orders and the Commission's
7 ability to grant those even though some have said,
8 well, you're granting an increase or at least you're
9 allowing a utility to track increased costs outside
10 the context of a rate case without a consideration of
11 all relevant factors. And the courts have said,
12 yeah, but before they go ahead and ultimately recover
13 this amount, it will be considered in a rate case.

14 Obviously, before they are ultimately
15 entitled to recover this amount on a permanent basis,
16 it will be considered in a rate case. There have
17 been other instances. We've had some talk about
18 forecasted test years where in the past the parties
19 agree to go ahead and forecast a fuel and electric
20 rate case.

21 And this has been a situation where you
22 make a forecast of fuel expense that you expect to
23 incur over the next 12 months or 18 months. You go
24 ahead and you put those into effect and estimated
25 costs subject to refund. It can only go one way, but

1 that fuel cost is varying and you're only looking at
2 that one factor. But the fact of the matter is, you
3 establish that fuel cost in the context of a rate
4 case even though how it varies and what happens to it
5 may take place in a period outside the rate case.
6 Same thing with something like this that's taking
7 place a little bit before the rate case is concluded.

8 I guess the only other point I'd make is
9 since 1976, you know, we've made a fair amount of
10 progress in our ability to track information, in our
11 ability to go ahead and monitor, you know, what kind
12 of financial performance utilities are actually
13 turning in. I mean, you know, we deal with rather
14 sophisticated information management systems these
15 days.

16 We all have disclosure requirements and
17 SEC filings that basically take a company and provide
18 its financial performance and details in excruciating
19 detail. You have approved a number of different
20 contexts, surveillance reports that are supposed to
21 give the Staff and other parties an idea of where a
22 company is financially.

23 Ameren was just in here for a rate case
24 not too long ago, and it's a little astounding to me
25 that folks can sit here today and have absolutely no

1 idea about whether or not Ameren is entitled to
2 probably have at least 10 percent of its return -- or
3 10 percent of its rate increase. I mean, with all
4 this information that's being provided, it's
5 available for synthesis, it's available for analysis,
6 it seems to me that it shouldn't take a rocket
7 scientist to take a look at that and make a
8 determination that from a reasonableness standpoint,
9 this is a very conservative estimate and it's
10 something that deserves the kind of interim treatment
11 that Ameren's proposed.

12 So I leave you with hopeful confidence
13 that we'll get a different result this time around,
14 but that's, of course, up to you. Thank you.

15 JUDGE WOODRUFF: Thank you,
16 Mr. Pendergast. Commissioner -- or Chairman Clayton?

17 CHAIRMAN CLAYTON: No questions. Thank
18 you.

19 JUDGE WOODRUFF: Commissioner Davis?

20 COMMISSIONER DAVIS: No questions.

21 JUDGE WOODRUFF: Commissioner Jarrett?

22 COMMISSIONER JARRETT: No questions.

23 JUDGE WOODRUFF: Commissioner Gunn?

24 COMMISSIONER GUNN: I'm going to have a
25 question. Just one. Sorry.

1 You talked about -- oh, I just -- I did
2 have a question, but I -- but I lost it. But it was
3 about -- we -- you talk about the rate increases
4 and -- and -- and how the subject-to-refund
5 protects -- protects us -- or protects the consumer.
6 But -- but what about the issue where, as -- as
7 Mr. Mills brought up, that -- and is there a problem
8 with yes, this particular issue has a
9 subject-to-refund protection in it, but that refund
10 may be eaten up by other increases in the larger rate
11 case.

12 So while if we find out that consumers
13 are being overcharged for that -- for this individual
14 issue, subsequent or other parts of the case eat into
15 that -- into that refund, and is that something that
16 we have to deal with? Do we have to deal with the
17 fact that the interim rate needed to be paid back,
18 but the rate increases do it? So there's -- does
19 there need to be a separation between those -- those
20 two issues first?

21 MR. PENDERGAST: Well, yeah, and I think
22 that's an excellent question. And I think that's why
23 having this done in the context of a rate case helps
24 to address that very kind of concern. Because if
25 there are offsetting cost reductions that haven't

1 been picked up or recognized, if in fact, Ameren is
2 not ultimately entitled to even 10 percent of what
3 it's requested, then that's going to be reflected in
4 an ultimate rate award that will not only go ahead
5 and, you know, theoretically, I suppose, give them
6 zero, it would also require them to go ahead and
7 refund the entire amount they've collected over the
8 last six or seven months.

9 And you know, that's kind of a -- a --
10 you know, a risk, if you will, for -- for both Ameren
11 because it certainly doesn't want to face the
12 prospect of having money taken away that at least on
13 an interim basis booked, and for the customers'
14 perspective -- I mean, compared to the changes that
15 are made when it comes to increases and decreases in
16 gas costs and the fact they can be subject to refund
17 for multiyear periods, I think that's a relatively
18 small consideration. I think that in the end, that
19 protection is robust enough to protect these
20 customers for this next six or seven months.

21 COMMISSIONER GUNN: But isn't that
22 exactly why we have a rate case as a whole and we
23 don't grant a series of step-up rates when issues are
24 settled? I mean, it -- it isn't -- isn't that
25 essentially what -- what this would do, is we

1 would -- we'd give them kind of a step-up rate --
2 rate increase?

3 And -- and if we did that, why don't --
4 why don't we do -- well, we don't do, but my -- what
5 my question to Mr. Mills was, was after we settle or
6 after -- if the parties settle parts of these cases,
7 why don't we go ahead and those rate increases?

8 And especially if everybody agrees that
9 it's just and reasonable and prudent, isn't it
10 exactly for that -- for this reason, is because there
11 are other factors that go into it that may or may not
12 cause that rate to main -- to stay where it is?

13 MR. PENDERGAST: Sure. And I think
14 that's a consideration, and I think in any of these
15 kind of mechanisms, you have to go ahead and give a
16 lot of attention, a lot of care and concern to what's
17 practical and what's reasonable. I wouldn't suggest
18 in the course of 11 months you have two or three or
19 four separate rate increases to go ahead and reflect
20 kind of a rolling settlement regimen where people go
21 ahead and settle this issue and then settle that
22 issue.

23 On the other hand, you know,
24 particularly if parties have come to the conclusion
25 that, well, they ought to be getting at least 50

1 million or 60 million or 70 million, the prospect of
2 saying, well, let's just go ahead and wait until the
3 expiration of the statutory extension period before
4 they get a dime. That doesn't particularly sound
5 very reasonable either.

6 And I think that one way to address that
7 is what Ameren's done is come in with a very
8 reasonable number if they said we want 400 million in
9 effect on an interim basis and we'll refund it to the
10 extent, I think you'd be perfectly within your rights
11 and -- and -- and probably well advised to go ahead
12 and reject that. Maybe 50 percent is too much, but
13 it just seems to me that at 10 percent you can
14 probably reach a pretty good consensus that -- that
15 this is a fairly conservative reasonable amount.

16 COMMISSIONER GUNN: Then you get into
17 the second argument about what is that number and
18 where does it exist --

19 MR. PENDERGAST: Sure.

20 COMMISSIONER GUNN: -- and what's
21 considered and what's not considered. So I
22 appreciate it. Thank you very much.

23 MR. PENDERGAST: Yeah, thank you.
24 Appreciate it.

25 JUDGE WOODRUFF: Commissioner Kenney?

1 COMMISSIONER KENNEY: No questions.

2 COMMISSIONER DAVIS: Judge, can I go
3 back and ask Mr. Pendergast a question real quick?

4 JUDGE WOODRUFF: Sure.

5 COMMISSIONER DAVIS: And Mr. Pendergast,
6 do you think that the real question here, the one
7 that hasn't been talked about is -- is where you
8 would draw the line, so to speak, and that what
9 the -- what the parties oppose in this request are --
10 are ultimately concerned about is this is the
11 proverbial camel's nose under the tent, so to speak,
12 and that, you know, okay, first it's, you know,
13 30 million which is 10 percent of the rate increase
14 requested and then there's one for 40 and 50, and --
15 and pretty soon we're FERC and, you know, FERC as I
16 understand it, you know, you just come in and make
17 absurd requests and they just say, okay, it's all
18 interim subject to refund, and then -- and then what
19 happens at FERC is that -- you know, it's my
20 understanding is that they come back in and say, oh,
21 well, you know, we can't -- we can't like force the
22 company to refund all this money because then that
23 would hurt them? I mean, is that --

24 MR. PENDERGAST: Yeah. No, and I -- and
25 I certainly understand that, and certainly when

1 somebody comes in and they propose a change in
2 regulatory policy that I don't particularly like and
3 it may go against me and it may go ahead and not be
4 so offensive the first time around but it might get
5 worse and worse as we go on, that's a concern that
6 everybody ought to have and that's a concern the
7 Commission ought to have.

8 I think, though, that when you look at
9 doing something like this, you know, it's probably
10 pretty hard to go ahead and come up with one rule of
11 thumb that says under these circumstances, you know,
12 it's always going to be reasonable or it's always
13 going to be unreasonable.

14 But I do think that when you're talking
15 about something that's capital-related entirely or
16 it's less than 10 percent of a utility's earnings
17 request, that you can go ahead and say under these
18 circumstances, yeah, it probably passes the
19 reasonableness test and put a caveat in there that
20 says -- but that ain't saying that, you know,
21 something different than this is going to go ahead
22 and pass the reasonableness test.

23 COMMISSIONER DAVIS: Thank you.

24 MR. PENDERGAST: Thank you.

25 JUDGE WOODRUFF: Missouri Retailers.

1 Mr. Schwarz?

2 MR. SCHWARZ: May it please the
3 Commission. AmerenUE is a retailer with a regulatory
4 compact. I represent retailers who don't have
5 regulatory compacts, and that is a remarkable
6 difference. It should be clear, both from the
7 written pleadings as well as the parties' discussions
8 today that both the customers and the utilities who
9 are partners under the regulatory compact chafe at
10 regulatory lag, only at different times in -- if
11 you're talking long-term.

12 When long-term costs are coming down,
13 the consumers chafe with regulatory lag because it --
14 it pushes off the reduction in rates that they would
15 otherwise get to. Now, when costs may be going up,
16 the utilities chafe under regulatory -- because of
17 regulatory lag because increases to which they might
18 be entitled get put off.

19 But regulatory lag in the long-term is a
20 phenomenon that cuts both ways and -- and balances
21 off. It is -- given the complexity and the nature of
22 set -- the rate-setting process, the regulatory lag
23 between the filing of a rate case and the -- and the
24 order for new and different rates is a fact of life.
25 It's -- it's -- we live in a complex world and these

1 are complex parts of those arrangements.

2 However, there are other advantages to
3 the regulatory compact that my clients are well aware
4 of that seem to have been glossed over a bit this
5 afternoon. Yes, it's true that there may be lag in
6 the utility's recovery of fuel expense under its fuel
7 adjustment clauses. Simply doesn't exist outside the
8 regulatory compact. If -- if our fuel costs are
9 costs of heating and lighting and other utilities go
10 up and we don't make those in our current margins,
11 it's gone.

12 Likewise, the occurrence of storms and
13 storm damage and the need to replace and recover from
14 those, my recollection is that in such circumstances
15 under the regulatory compact, utilities are permitted
16 to get accounting authority orders and book those
17 expenses for later recovery from their customers.
18 Those kinds of expenses and costs are simply borne by
19 the retailer outside of the regulatory compact.
20 Furthermore, those kinds of arrangements, those kinds
21 of incidents are accounted for systematically through
22 the annualization and normalization polic -- policies
23 and practices in setting rates.

24 So it's also true that regulated
25 utilities make substantial capital investments prior

1 to being able to have those investments -- both a
2 return on and a return of those investments reflected
3 in rates.

4 On the other hand, they are also
5 guaranteed under the regulatory compact that the
6 instant those investments are made, a competitor will
7 not come down and install competing capital
8 investments down the street. So the regulatory
9 compact has advantages to the utilities which are
10 significant.

11 Now, I will tell you also under the
12 Commission's rules and the statutes, utilities have
13 to sell on credit to lots of people that we probably
14 wouldn't sell to on credit. So the -- there are a
15 lot of aspects to the -- to the regulatory compact.

16 Regulatory lag is one that depending on
17 the economic environment, can either cut in favor of
18 the ratepayer or it can cut in favor of the utility.
19 But it is not per se something which is
20 extraordinary, which is unusual, which would justify,
21 in my view, departing from the normal rate-setting
22 process.

23 The -- the quote from the Laclede Gas
24 case that struck me was at page 570 where the court
25 said, "The better view rejects the argument that any

1 return less than the rate previously set must be
2 deemed prima facia unreasonable." So if -- if a
3 utility comes in and says I'm not earning my
4 authorized rate of return according to the language
5 of the court, that doesn't make a prima facia case.
6 There has to be more. And certainly, in the current
7 economic circumstances, there's a lot more.

8 There can be no doubt that AmerenUE's
9 rate margins; that is, the difference -- particularly
10 on off-system sales, the differences between what
11 they sell their electricity for in the wholesale
12 market and what it costs them, those margins have
13 shrunk, but that's true of my clients as well.
14 Margins in the retail sector have shrunk everywhere.
15 All of our customers are suffering about nine and a
16 half percent unemployment. We live in economic
17 powerless times.

18 AmerenUE's investors are suffering in
19 this economic climate, and they suffer from
20 regulatory lag. Investors in other retailers are
21 suffering as well. And certainly and fortunately,
22 none of us are suffering to the extent of investors
23 in AIG, Lehman Brothers, Wachovia, Fannie Mae,
24 Freddie Mac, you can go down the list.

25 The -- I think if you step back and look

1 at the big picture that regulatory lag and earning
2 less than the authorized rate of return are simply
3 part of the economic environment that we live in --
4 it -- regulatory lag is not something that can be
5 separated from the other aspects of the regulatory
6 compact, some of which are very favorable to the
7 utilities, some of which are favorable to the
8 customers.

9 But I -- I will close with my favorite
10 statutory quote. It's the last sentence of Section
11 38610 -- 386.610 which says, "The provisions of this
12 chapter shall be liberally construed with a view to
13 the public welfare, efficient facilities and
14 substantial justice between patrons and public
15 utilities."

16 It's not an exact science. The
17 utilities can expect that the regulatory compact at
18 times is going to -- to cost them earnings that they
19 might otherwise have had. On the other hand, at
20 times it provides them with earnings that they might
21 not otherwise have had. Neither circumstance is one
22 that would justify departure from the normal
23 ratemaking process of file-and-suspend and enter a
24 Report and Order setting rates at the end of that
25 period when you have fully considered all the

1 evidence to set an order that provides just and
2 reasonable rates. Thank you.

3 JUDGE WOODRUFF: Questions for
4 Mr. Schwarz. Commissioner Davis?

5 COMMISSIONER DAVIS: Mr. Schwarz, I
6 mean, what was the whole point of that analogy about
7 comparing AmerenUE to your retail members?

8 MR. SCHWARZ: Well, Ameren -- this is
9 the process to set retail rates. Wholesale rates are
10 set in the -- in the, you know, federal arena but --

11 COMMISSIONER DAVIS: Well, right.

12 MR. SCHWARZ: Right. They are a
13 retailer. They provide a retail -- retail service --

14 COMMISSIONER DAVIS: Okay. And so
15 they're free to charge whatever they want?

16 MR. SCHWARZ: Ameren?

17 COMMISSIONER DAVIS: No.

18 MR. SCHWARZ: No, my customers.

19 COMMISSIONER DAVIS: Your -- your --
20 your members.

21 MR. SCHWARZ: No, no, no.

22 COMMISSIONER DAVIS: Okay.

23 MR. SCHWARZ: Exactly.

24 COMMISSIONER DAVIS: All right. I just
25 didn't know if anything had changed in the retail

1 compact.

2 MR. SCHWARZ: No, no, no. The
3 regulatory compact.

4 COMMISSIONER DAVIS: Right. But I was
5 asking about the retail compact.

6 MR. SCHWARZ: Oh. Well, no. The
7 Commission may remember that there was a series of
8 summer thunderstorms I think in 2005, 2006, along in
9 there, and then there was a ice storm in
10 December/January of 2006, 2007 in which tens of
11 thousands of AmerenUE customers were without service
12 for a period of days to weeks.

13 None of those customers, unless they
14 moved out of Ameren's service territory, abandoned
15 AmerenUE. AmerenUE continued to be their service
16 provider. That is -- that is an aspect of a retailer
17 operating under a regulatory compact that is not
18 present with retailers operating without a regulatory
19 compact. There's...

20 COMMISSIONER DAVIS: Right.

21 MR. SCHWARZ: Yeah.

22 COMMISSIONER DAVIS: But you would --
23 you would agree that, you know, you can come in and
24 under the regulatory compact you can argue about what
25 Ameren's rate of return is?

1 MR. SCHWARZ: That's true, that's true.

2 COMMISSIONER DAVIS: Okay. I mean, we
3 can't argue about what Starbucks' rate of return is,
4 can we?

5 MR. SCHWARZ: No, no.

6 COMMISSIONER DAVIS: I guess we could,
7 but it wouldn't do much good, would it?

8 MR. SCHWARZ: No, but you could -- you
9 could go to Coffee Zone, you could go -- I mean,
10 there are any number of --

11 COMMISSIONER DAVIS: Right. Well,
12 that's --

13 MR. SCHWARZ: Yeah.

14 COMMISSIONER DAVIS: -- there -- so
15 there are trade-offs?

16 MR. SCHWARZ: Yes, absolutely.

17 COMMISSIONER DAVIS: All right.

18 MR. SCHWARZ: Absolutely.

19 COMMISSIONER DAVIS: Thank you,
20 Mr. Schwarz. It's a pleasure to see you again.

21 JUDGE WOODRUFF: Commissioner Jarrett?

22 COMMISSIONER JARRETT: Good afternoon,
23 Mr. Schwarz.

24 MR. SCHWARZ: Good afternoon.

25 COMMISSIONER JARRETT: A couple -- just

1 a couple of questions. You don't deny that the
2 Commission does have the authority to grant interim
3 rate relief in appropriate cases?

4 MR. SCHWARZ: I -- I think that's
5 reasonably clear under the cases, yes. That would be
6 my advice to the Commission.

7 COMMISSIONER JARRETT: Okay. Now --
8 now, would you agree with, I think, Mr. Thompson and
9 Mr. Mills that in order -- if we were to grant
10 interim rate relief, we would have to have an
11 evidentiary hearing first?

12 MR. SCHWARZ: I'm not sure what the
13 Supreme Court and the UCCM meant with the -- by the
14 passage that was quoted by -- or read by
15 Mr. Thompson. It would appear to me that the court
16 was saying that as long as the Commission considers
17 all relevant factors, it can allow rates to go into
18 effect. I think the statute is clear. The statute
19 says that the utility files a tariff, it has to have
20 at least a 30 days -- it has to have at least a
21 30-day period before it can take effect, and unless
22 suspended by the Commission, it goes -- goes into
23 effect, and that is statutory.

24 COMMISSIONER JARRETT: Okay, thanks. No
25 further questions.

1 JUDGE WOODRUFF: Commissioner Gunn?

2 COMMISSIONER GUNN: I don't have any
3 questions.

4 JUDGE WOODRUFF: Commissioner Kenney?

5 COMMISSIONER KENNEY: No questions,
6 thank you.

7 JUDGE WOODRUFF: All right. Thank you,
8 Mr. Schwarz. Was there any other questions from any
9 of the non-Ameren parties?

10 COMMISSIONER DAVIS: I have a few
11 questions more for Mr. Thompson and Mr. Dottheim.

12 JUDGE WOODRUFF: Go right ahead.

13 COMMISSIONER DAVIS: All right. Well,
14 Mr. Dottheim, having -- having -- having read the
15 pleadings filed by Staff in this case, is it fair to
16 say that -- that you think the Commission ought to
17 pay attention to its past precedents?

18 MR. DOTTHEIM: Yes.

19 COMMISSIONER DAVIS: Okay. Do you think
20 the PSC Staff also ought to follow those past
21 Commission precedents?

22 MR. DOTTHEIM: I think the Staff
23 attempts to be aware of the past precedents and
24 attempts to follow when it is clear what has been
25 indicated by the Commission.

1 COMMISSIONER DAVIS: Okay. So if the
2 Commission had decided an issue in two previous cases
3 and then Staff did an about-face and decided to argue
4 to the contrary, I mean, what should this Commission
5 make of that?

6 MR. DOTTHEIM: Well, I -- without
7 knowing --

8 COMMISSIONER DAVIS: Maybe Mr. Thompson
9 wants to join in.

10 MR. DOTTHEIM: Yeah, well, without
11 knowing further why there was a change, that's --
12 that's somewhat difficult to respond to. Usually the
13 Staff reads the Commission's decision very closely,
14 and if the Commission does not definitively decide
15 against a Staff position but indicates that an area
16 was not developed completely or that -- with certain
17 question about the -- the Staff's position, the Staff
18 may retry that issue attempting to address questions
19 raised in the Report and Order by the Commission,
20 again, reading the Commission's decision very
21 carefully.

22 But when -- when the Commission rules
23 unalterably, usually the Staff at that -- I'm -- I'm
24 not recalling offhand when the Staff has retried an
25 issue other than when there's some indication usually

1 from the Commission that the Commission's view may
2 have changed on the issue or there -- there is some
3 explicable reason that hopefully the Staff is making
4 clear to the Commission why it is retrying the issue.

5 COMMISSIONER DAVIS: All right.

6 MR. DOTTHEIM: But yes, I -- if -- if --
7 if the Staff would flip-flop on an issue with no
8 explanation, that would be curious, and hopefully the
9 Staff would not flip-flop on an issue without
10 providing an explanation as the Staff would never
11 take a position without providing a full and complete
12 explanation to the Commission and to the parties and
13 to the company. Of course.

14 COMMISSIONER DAVIS: Okay.

15 Mr. Dottheim, would -- would you be an expert on the
16 issue of Staff flip-flopping its position?

17 MR. DOTTHEIM: No, other than I guess I
18 could say yes once. The discussion we had of a week
19 or so it ago about what's the -- the standard of an
20 expert at being very low, maybe I -- I -- I am, I
21 guess, an expert on -- on -- on the Staff
22 flip-flopping on -- on -- on positions. I have a
23 feeling I may not know what you're speaking of, but
24 please go ahead.

25 COMMISSIONER DAVIS: That's all right.

1 Thank you, Mr. Dottheim.

2 JUDGE WOODRUFF: All right. Anything
3 else for any of the nonAmeren parties?

4 (NO RESPONSE.)

5 JUDGE WOODRUFF: Let's then move to
6 response from Ameren.

7 MR. BYRNE: Thank you, your Honor. I --
8 I guess I want to sort of at random hit a few areas
9 of response and then maybe get back to a policy
10 discussion in my 15 minutes.

11 First -- first thing I want to say is I
12 agree with Commissioner Gunn. I've been waiting to
13 say that for -- ever since I agreed with him. You
14 know, Commissioner Gunn's point was, and I think it's
15 correct, that the UCCM case applied to a full rate
16 case, it did not apply to interim rate adjustments.

17 If it did apply to interim rate
18 adjustments, you would never have an interim rate
19 adjustment, because interim rate adjustments by
20 definition, basically, are not as comprehensive as a
21 full rate case. You'd never have the PGA, you'd
22 never have a -- you know, you'd never have any kind
23 of interim adjustment.

24 The -- the Fisher case makes it clear
25 that -- that interim rate cases are just ancillary to

1 the -- to the larger permanent rate increase or
2 permanent rate case increase or decrease, and --
3 and -- and the appeal -- the case is appealed at the
4 same time. There isn't a separate appeal for an
5 interim rate increase or decrease. And so -- and so,
6 you know, to my mind that's not an issue. The UCCM
7 case does not create a barrier to the Commission
8 granting interim relief if it -- if it believes it's
9 in the public interest to do so.

10 Same thing with AAOs, you know,
11 they're -- they're -- they do track -- as
12 Mr. Pendergast pointed out, they track an individual
13 thing but it's tied to making an adjustment in -- in
14 the rate case. And -- and so, in any event, UCCM is
15 no barrier to doing what the Commission thinks is
16 appropriate.

17 The Laclede case. I -- I -- you know, I
18 spoke to Commissioner Jarrett a little bit about the
19 Laclede case, and I guess I was being pretty
20 agreeable, but having thought about it a little bit
21 more, you know, the Laclede case was a case where
22 Laclede asked for interim rate relief and the
23 Commission denied it. And so the whole case is an
24 appeal of a Commission denial of interim -- interim
25 rate relief. And I didn't really -- I wasn't -- I

1 didn't recall the facts of the case, but
2 Mr. Pendergast makes it sound like the facts of the
3 case weren't tremendously compelling.

4 Anyway, so I think a lot of the
5 language, certainly the only holding in the case is
6 that Laclede didn't -- didn't provide -- didn't
7 convince the court that the -- that the Commission
8 should be reversed and it should be forced to allow
9 an interim rate increase. And to my mind, that's a
10 very different question than should the Commission do
11 it, which is -- which is what we're asking in this
12 case.

13 So I don't think -- I don't think the --
14 the Laclede case, given -- given the posture of that
15 case is -- is very instructive. You know, when --
16 when -- when the -- the Laclede court that said
17 there's a -- I don't know if I can find it, but there
18 was a heavy burden. I do agree with Lewis Mills what
19 they were talking about, and it was what you had
20 quoted me, Commission Jarrett. I believe what they
21 were talking about was -- was the fact -- was the
22 fact you have a heavy burden if you want to have the
23 Commission's decision overturned. And obviously,
24 we're not in court trying to overturn a Commission
25 decision, we're trying to get the best policy

1 decision at the Commission which is a different
2 standard.

3 I -- you know, I noticed when the Staff
4 made their presentation they -- they -- basically
5 they're saying that the emergency standard and the
6 good cause standard have been collapsed into a single
7 emergency standard, and -- but in our pleading, we
8 cited a -- a Staff filing from a 2002 case in -- in
9 an Empire -- Empire case in 2002 where the Staff
10 said, and I quote, While not disputing that the
11 Commission has the authority under Section 393.140,
12 subsection 11 to grant interim relief for reasons
13 other than the existence of an emergency situation,
14 the Staff continues to believe the Commission should
15 apply the traditional interim emergency or near
16 emergency standard for evaluation of such requests.

17 So it seemed like in that case, the
18 Staff recognized that there was a good-cause-shown
19 standard that's -- that's different than the
20 emergency or nonemergency standard.

21 Couple of mini items. One is the 70 --
22 I think it was \$76 million for the impact on Noranda
23 that Mr. Thompson read out of our pleading. I think
24 that is correct. I mean, the reason it's only \$19
25 million on that chart is there's only three months, I

1 think, of impact of Noranda. The Noranda -- the
2 Noranda failure happened in -- I think it started
3 affecting in -- in March, so maybe March, April, May
4 that it would have affected those numbers, and not
5 a -- not a full year which would have been a much
6 larger number.

7 Mr. Schwarz talked about using an AAO
8 for storm costs, and we do sometimes use an AAO to
9 recover storm costs, but you can't really use an AAO
10 for lost capital costs. It really only applies to
11 expenses. The -- the capital investment from a storm
12 will just go in in the next rate case. But the
13 loss -- the loss return on that isn't recoverable.

14 A lot of people, Mr. Mills and others,
15 have been skeptical about the good cause standard
16 because they say it's a vague standard. And -- and
17 that's -- that's true, but a lot of the standards
18 that apply to the Commission are vague and they
19 require the Commission to use its judgment. You
20 know, what are -- what are just and reasonable rates?
21 That's -- that's a standard, but -- but -- but it's a
22 pretty vague standard, and -- and -- and ultimately
23 it's the Commission's informed opinion that tells us
24 what just and reasonable rates are and can tell us
25 what good cause would be in this situation.

1 I'd like to talk a little bit about some
2 of the policy issues that were raised. I mean,
3 one -- one -- I think Mr. Mills might have said that
4 regulatory lag isn't a one-way street, sometimes
5 costs go up and sometimes they go down. But I don't
6 think that's really true. I think -- I think costs
7 go up more than they go down. I think -- I think
8 they almost always go up and every once in a long
9 while, they go down.

10 We live in a country that has had, you
11 know, except maybe for a couple of years during the
12 depression, pretty -- pretty persistent inflation,
13 not pretty persistent deflation. So -- so I don't
14 think it's fair to say that sometimes costs go up and
15 equally they -- they go down.

16 What we're arguing here is that -- that
17 there's a systematic problem, that we're
18 systematically unable to earn our authorized return
19 and that we're systematically unable to recover the
20 cost of our investment. We're systematically losing
21 money. And that's not a good thing. That's not a
22 good thing for the State of Missouri, for the
23 utilities or really in the end for the customers.

24 I guess one -- one thing I was asked by
25 one of the Commissioners, maybe Commissioner Gunn,

1 was what changed? You know, what's different here?
2 Is the regulatory regime different? And the
3 regulatory regime is not different, that's true. And
4 I don't know, there may be a bunch of things that
5 changed, but I know one thing that changed during the
6 period that that -- that we under-earned by \$200
7 million.

8 One thing that changed is we increased
9 the investment in our system materially above what it
10 had been before. That's what happened. And you
11 know, it's -- it's a disincentive to do what we've
12 been doing which is put money into our system because
13 you're not going to recover it. You're not going to
14 recover the whole amount of money ever, and you're
15 not going to start recovering it until months and
16 months and months after you put the money up.

17 You know, what would you do? If you --
18 if you took it down to a personal level, what would
19 you do if someone said invest \$10,000 in my
20 investment, but here's the deal. I'm not going to
21 give you any return for 20 months or 17 months or
22 15 months, and then I'll -- then after that, I'll pay
23 you a return on your money. Would -- would you make
24 that investment? I mean, that's -- that's the --
25 that's what the utilities are facing, and I don't

1 think that's good policy.

2 Another thing that -- that I think is
3 being overlooked a little bit is, it's not -- you
4 know, this -- this interim rate proposal is not an
5 equal two-way street. If it turns out we put -- we
6 put the 10 percent of our -- of our rate increase
7 into effect and it turns out we're wrong, the
8 ratepayers are -- get -- get the money back with
9 interest.

10 However, if we don't get to put it in
11 and it turns out we were right and we're entitled to
12 it, there's nothing to be done. We lose the money.
13 So -- so every -- in my opinion at least, everyone
14 can be kept whole through the -- through the interim
15 rate increase. And -- but -- but we're not kept
16 whole if there is no interim rate increase.

17 And I think with that, I will finish.
18 And if you have any questions, I'd like to answer
19 them.

20 JUDGE WOODRUFF: Thank you, Mr. Byrne.
21 Any questioners have any other questions?

22 COMMISSIONER GUNN: I just have -- I
23 just have one. And -- and I -- I understand your
24 argument and I'm -- and I'm not unsympathetic to it.
25 But -- but let me ask you this question: Since it is

1 a systematic problem and three reasons -- you gave
2 three essential reasons for that, does an interim --
3 an interim rate increase doesn't solve -- it may
4 solve a short-term problem, but it doesn't solve a
5 long-term problem. It doesn't fix the errors in the
6 system that Ameren is saying is causing the problem.

7 MR. BYRNE: Yes, and it doesn't even
8 fully solve the -- the earnings shortfall. You know,
9 it doesn't even fully solve that problem. But it's
10 a -- but it's -- but it's a step in the -- in the
11 right direction.

12 COMMISSIONER GUNN: Short-term --
13 it's -- from Ameren's perspective, it is a step in
14 the right direction, but it's still a short-term step
15 in the right direction. I mean, ultimately, don't
16 you need to go to the General Assembly and have them
17 change laws and set other standards in order to fix
18 the systemic problem? Is it something that we can
19 solve fully here at the Commission?

20 MR. BYRNE: Probably not, but -- but
21 there are things you can do. I think -- I think part
22 of the opportunity to solve the problem rests with
23 the Commission. The Commission's given a lot of
24 discretion to do things to set rates that are just
25 and reasonable, to make sure rates are fair to

1 customers, but they're also compensatory to -- to
2 utilities.

3 You have a lot of discretion to do
4 things, and this is one of the things you can do.
5 It's not the only thing you can do, and you're right,
6 we could -- we could go to the legislature and get
7 the CWIP law repealed, although I -- it didn't work
8 out too well. So...

9 COMMISSIONER GUNN: Well -- and, you
10 know, when we went through the three things that we
11 talk -- you talked about at the beginning, you know,
12 the -- the process is too long, the -- we're using a
13 historic test year and we've got a prohibition on
14 CWIP, I mean, you went through those things and --
15 and -- and essentially you don't necessarily want to
16 go to a forecasting year for a lot of the -- a lot of
17 the issues you talked about. And you said even that.
18 There's some things that -- that we -- that we can't
19 do.

20 I mean, I don't -- I don't -- since
21 we're talking about policy, I mean, I think it makes
22 sense that -- I mean, we'll obviously take a look at
23 the -- at the -- at the interim rate request as it
24 stands alone --

25 MR. BYRNE: Sure.

1 COMMISSIONER GUNN: -- to determine
2 whether it's -- whether it's proper and -- and meets
3 the standard. But again, that -- that's -- if --
4 if -- assuming -- let's -- let's just assume we --
5 we -- we fix it, it fixes -- it fixes this problem up
6 until the next rate cases and then you're running
7 into the same problem. I mean, it might -- won't
8 it -- it will solve -- it will -- it may cause or --
9 or create a short-term spike, but it doesn't really
10 solve the long-term systematic issue.

11 MR. BYRNE: I -- I think the Commission
12 could -- could get to the point where it allows
13 investment and infrastructure to be -- to be
14 recovered on an interim base regularly. If it did
15 that, that would -- that would be a step towards
16 solving the problem.

17 COMMISSIONER GUNN: And then you're
18 getting rid of that -- I mean, then -- then you're --
19 you're not only saying not only is it not an
20 emergency standard, but it becomes a regular practice
21 of the Commission in order to grant interim rate
22 increases. So we are -- we are adding a component to
23 traditional ratemaking.

24 MR. BYRNE: You could do that, you have
25 the power to do that, yes. And I mean -- you know, I

1 guess -- I guess if I could leave you with only one
2 thing, it's that discourages capital investment.
3 And -- and do you want to be in a position that
4 you're discouraging capital investment? And I don't
5 think that's good policy for the State of Missouri.
6 And it -- and it guarantees that a utility will --
7 will not recover its costs of service for -- for
8 those capital investments. And I -- I don't think
9 that's where the State of Missouri ought to go.

10 COMMISSIONER GUNN: Thank you. I don't
11 have anything else.

12 JUDGE WOODRUFF: Commissioner Jarrett?

13 COMMISSIONER JARRETT: Yes, I -- I do.
14 I have some questions. Mr. Byrne brought up about
15 the -- the Laclede case and indicating he didn't
16 think it was necessarily instructive on standard.
17 And I'll ask Mr. Mills since you both seem to agree
18 on this.

19 When the court says that, "It may be
20 theoretically possible even in a purposefully
21 shortened interim rate hearing for the evidence to
22 show beyond a reasonable [sic] to be that the
23 applicant's rate structure has become unjustly low
24 without any emergency as defined by the Commission
25 having as yet resulted. Although some future

1 applicant on some extraordinary fact situation may be
2 able to exceed in so proving, Laclede has singularly
3 failed in this case to carry the very heavy burden of
4 proof necessary to do so."

5 It is your position that that -- that
6 the court is referring to the Commission's order
7 denying -- denying the interim rate increase and it's
8 not referring to the fact that Laclede didn't meet
9 the standard to have an interim rate increase?

10 MR. BYRNE: No, I -- that's -- that's
11 not the part I was -- I'm sorry. I couldn't find the
12 decision when I was talking before. I -- I -- I do
13 agree with you that they were talking about -- but --
14 but that was -- it's dicta because that's not the
15 decision they had to make in the case. The decision
16 they had to make in the case was should they reverse
17 the Commission's --

18 COMMISSIONER JARRETT: I understand that
19 that's what the decision was.

20 MR. BYRNE: Sure, sure.

21 COMMISSIONER JARRETT: But --

22 MR. BYRNE: The quote that I was talking
23 about was a different quote, and it's -- I have it
24 here. It says -- and I think it was the one that you
25 read to me before. It says, "Under these facts,

1 Laclede clearly failed to carry the heavy burden of
2 proof imposed on it by Section 386.430 to show by
3 clear and satisfactory evidence that the
4 determination or order of the Commission complained
5 of is unreasonable or unlawful."

6 COMMISSIONER JARRETT: Right.

7 MR. BYRNE: That one I think --

8 COMMISSIONER JARRETT: Right. And what
9 facts are they talking about up here above? They're
10 talking about all of -- all of Laclede's earnings,
11 all of those facts; is that -- isn't that correct?

12 MR. BYRNE: Sure. That's true, those
13 are the facts, but --

14 COMMISSIONER JARRETT: Under these
15 facts, those are the facts they're talking about.

16 MR. BYRNE: Right. But they're talking
17 about what the burden is to overturn a Commission
18 order, you know, so --

19 COMMISSIONER JARRETT: Where does it say
20 that, "under these facts"?

21 MR. BYRNE: "Show by clear and
22 satisfactory evidence of the determination or order
23 of the Commission complained of is unreasonable or
24 unlawful." That -- that's the part I'm focusing on.
25 We may be talking past each other. Maybe we are.

1 I -- never mind. No further questions.

2 JUDGE WOODRUFF: Okay. Commissioner
3 Kenney?

4 COMMISSIONER KENNEY: There was a
5 discussion about the three states that allow interim
6 rate relief on a nonemergency basis in the footnote
7 in your suggestions, and that that -- those three
8 states codified it statutorily. Are you aware of
9 other states that allow the interim rate relief on a
10 nonemergency basis where it's not statutorily
11 codified?

12 MR. BYRNE: I don't believe so.

13 COMMISSIONER KENNEY: Okay. Thank you.

14 COMMISSIONER DAVIS: Mr. Byrne, doesn't
15 FERC? Doesn't FERC do it?

16 MR. BYRNE: Yes, FERC allows interim
17 rates for every rate -- rate case.

18 COMMISSIONER DAVIS: Right. And there's
19 no -- no showing of emergency necessary there?

20 MR. BYRNE: No, there's not.

21 COMMISSIONER DAVIS: Okay. And there --
22 and there wasn't anything in statute there either, is
23 there, to the best of your knowledge?

24 MR. BYRNE: I don't -- I'm not a FERC
25 lawyer, but I'm not sure if it is in the statute or

1 not.

2 COMMISSIONER DAVIS: Okay. Thank you.

3 JUDGE WOODRUFF: Mr. Mills?

4 MR. MILLS: If I may to -- to -- to turn
5 back to that question that Commissioner Jarrett and I
6 were talking about and that he was just talking about
7 with -- with -- with Mr. Byrne.

8 You know, from where that paragraph
9 appears in the decision, you may be right. Typically
10 when -- when a court talks about the 386.430 burden,
11 they're talking about what the -- what a party has to
12 show to a reviewing court to overturn the decision on
13 appeal. But where that paragraph shows up in the
14 decision after -- you know, between those two
15 paragraphs where it is, it's open to interpretation,
16 and your interpretation may be right.

17 But I think if you -- if you just had
18 that paragraph by itself, you would say they're
19 talking about the burden to overturn the decision on
20 appeal. The way it's read in this decision, yeah,
21 it's confusing that they put it there, just to say
22 the least.

23 COMMISSIONER JARRETT: I will agree that
24 there -- it's open to interpretation, gentlemen.

25 Thank you.

1 JUDGE WOODRUFF: Okay. Anything else?

2 (NO RESPONSE.)

3 JUDGE WOODRUFF: I did want to bring up
4 one other item. Commissioner Davis asked Ameren and
5 Staff to file some supplemental information.
6 Commissioner, when did you want that? Do you want it
7 before agenda on Wednesday?

8 COMMISSIONER DAVIS: I don't know that
9 it's reasonable. And I certainly think that all
10 parties should have the opportunity to respond.

11 JUDGE WOODRUFF: Okay.

12 COMMISSIONER DAVIS: So what do you
13 think is reasonable, Mr. Dottheim, Mr. Byrne?

14 MR. DOTTHEIM: We can at a minimum file
15 something which gives an idea as to when we can make
16 the filing. If we could do that tomorrow, I believe
17 that that would be helpful.

18 COMMISSIONER DAVIS: Okay.

19 MR. BYRNE: We can do it whatever --
20 whenever you want it, we will have it.

21 COMMISSIONER DAVIS: Can you get your
22 information by, say, like eight o'clock Wednesday
23 morning?

24 MR. LOWERY: Commissioner, why don't
25 we -- I think probably the answer to that is probably

1 yes, but why don't we, if we cannot make a filing
2 tomorrow, to advise you of when we can?

3 COMMISSIONER DAVIS: Okay. Sounds good.

4 JUDGE WOODRUFF: All right. With that
5 then, we are adjourned. Thank you.

6 (WHEREUPON, the recorded portion of the
7 oral argument was concluded.)

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