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BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

In the Matter of Sewer and Water)
Tariff Filings made by Osage) Case No. ST-2003-0562
Water Company.)
)

PREHEARING CONFERENCE
Volume 4
Monday, January 20, 2004
Governor Office Building
200 Madison Street
Jefferson City, Missouri 65101

MORRIS L. WOODRUFF, Presiding,
REGULATORY LAW JUDGE

REPORTED BY:

Patricia A. Stewart
RMR, RPR, CCR, CSR
ASSOCIATED COURT REPORTERS
714 West High Street
Jefferson City, Missouri 65101

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APPEARANCES:

GREGORY D. WILLIAMS, Attorney at Law
P. O. Box 431
Highway 5 at 5-33
Sunrise Beach, Missouri 65079

FOR: Osage Water Company.

WILLIAM HAAS, Deputy General Counsel
BRUCE H. BATES, Associate General Counsel
PUBLIC SERVICE COMMISSION
P. O. Box 360
Jefferson City, Missouri 65102

FOR: Staff of the Missouri Public Service
Commission.

M. RUTH O'NEILL, Assistant Public Counsel
OFFICE OF PUBLIC COUNSEL
P. O. Box 2230
Jefferson City, Missouri 65102

FOR: Office of the Public Counsel and
the Public.

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

2 JUDGE WOODRUFF: Please be seated.

3 Good morning everyone. We're here today for a
4 prehearing conference in Case No. ST-2003-0562, which
5 concerns the water and sewer tariff filings of
6 Osage Water Company.

7 And we'll begin today's proceedings by taking
8 entries of appearance, beginning with Osage Water
9 Company.

10 MR. WILLIAMS: Gregory Williams, P. O. Box 341,
11 Sunrise Beach, Missouri 65079 for Osage Water Company.

12 JUDGE WOODRUFF: Thank you.

13 And for Staff.

14 MR. HAAS: The Staff appears by William K. Haas
15 and Bruce H. Bates, P. O. Box 360, Jefferson City,
16 Missouri 65102.

17 JUDGE WOODRUFF: And for Public Counsel.

18 MS. O'NEILL: Yes. Ruth O'Neill for the Office
19 of Public Counsel, P. O. Box 2230, Jefferson City,
20 Missouri 65102.

21 JUDGE WOODRUFF: All right.

22 Thank you.

23 And as you'll note, we are joined today by two
24 of the Commissioners, Connie Murray and Commissioner
25 Robert Clayton.

1 We're going to begin today by taking up a
2 motion that was filed last week by the Office of Public
3 Counsel, which is a motion to dismiss and reject tariffs,
4 and a notice was issued last week indicating that this
5 would be brought up and give the parties a chance to
6 respond to this.

7 So we'll begin by giving Staff a chance to
8 respond, and then we'll move to give Osage Water Company
9 the last -- the last word on it.

10 Staff.

11 MR. HAAS: Thank you, Your Honor.

12 Since you've all read the Public Counsel's
13 motion to dismiss, I won't summarize that for you. I'll
14 just begin with my position.

15 The Staff is unable to support Public Counsel's
16 motion to dismiss. Staff is unaware of any authority
17 allowing summary disposition of a rate case, and the
18 Staff is aware of authority suggesting that the
19 Commission cannot summarily dispose of a rate case.

20 The Commission's rule on summary dispositions
21 at 4 CSR 240-2.117 provides that a party may seek
22 disposition of a case by summary determination except in
23 a case seeking a rate increase or which is subject to an
24 operational law date. That exception would apply here.

25 The rules exception seems consistent with

1 Section 393.150, which allows the Commission to suspend
2 and hold a hearing on a new water or sewer rate and to
3 decide a proper rate, quote, after full hearing, end
4 quote.

5 The Staff and Public Counsel have prefiled
6 testimony showing that Osage Water Company does not need
7 an increase in its water and sewer rates.

8 The Staff believes that after full hearing, the
9 Commission will find that testimony to be competent and
10 substantial and persuasive and will deny Osage Water's
11 requested increase at that time.

12 JUDGE WOODRUFF: Thank you.

13 And for Osage Water Company.

14 MR. WILLIAMS: Your Honor, I'm going to echo
15 Mr. Haas with respect to Section 393.150.

16 I'll state simply that the hearing that is set
17 here, it's not set at the Company's request. I believe
18 it was set in response to a motion from Staff, not the
19 Company.

20 The Company has absolutely no problem with the
21 Commission not conducting a hearing and allowing the
22 tariffs to go into effect as 393.150 would require.

23 I agree with Mr. Haas, that the Commission may
24 only make orders modifying a filed tariff after a
25 hearing, and if the Commission decides not to conduct a

1 hearing, then I think the tariffs as filed will stand.

2 I think the evidence will be the evidence at
3 the hearing, and it will be up to the Commission to
4 decide whether or not at that time a rate increase is
5 justified.

6 I think there will be -- there is prefiled
7 substantial and competent evidence to show that a rate
8 increase is not only appropriate but necessary and that
9 that will be the outcome of the hearing.

10 Thank you.

11 JUDGE WOODRUFF: Thank you.

12 Ms. O'Neill, do you wish to be heard?

13 MS. O'NEILL: Yes. Thank you, Your Honor.

14 Although it is highly unusual and under normal
15 circumstances there would not be a situation where one of
16 the parties here before you, a company party, the Staff
17 or Public Counsel, were asking the Commission to dismiss
18 a rate case proceeding without hearing. I think the
19 situation in this case is a little bit different.

20 First of all, there are two grounds under which
21 my office seeks dismissal and rejection of the tariffs,
22 and the first is in the nature of -- although not styled
23 as a situation where we would ask the Commission to find
24 that there is not sufficient evidence that has been
25 prefiled pursuant to Commission rules regarding the case

1 in chief that the party must file to support any sort of
2 determination that a rate increase is necessary.

3 And that is one of the -- that is one of the
4 grounds.

5 And, frankly, if my office wasn't convinced
6 that a rate increase was unnecessary at this time, even
7 though this company faces receivership proceedings, even
8 though this company is not providing safe and adequate
9 service to its customers, if we in my office believed
10 that the only reason safe and adequate service wasn't
11 being provided was because the rates weren't adequate, we
12 would not be before this Commission asking for a
13 dismissal.

14 In fact, we would probably be seeking to do
15 some sort of accommodation and settlement which would
16 allow a company that is hampered from providing safe and
17 adequate service that it wants to provide only by the
18 level of rates, so that they could begin to provide that
19 service.

20 That's not the case here.

21 The reason this Commission wanted its general
22 counsel to seek receivership based on evidence that was
23 presented to it in a hearing is because this company's
24 owners and operators have refused to do more than the
25 bare minimum, when they do that, as far as operating

1 their water and sewer operations.

2 At the local public hearing that was held last
3 week, witness after witness testified with photographs,
4 with letters from customers who couldn't be there, about
5 the lack of service, the inadequacy of the service and
6 the unsafe nature of the service being provided by this
7 company.

8 There is prior -- there have been prior
9 Commission decisions, one of which I've cited in the
10 motion, which, admittedly, is an old case, North Missouri
11 Telephone Company case, where the Commission stated that
12 it can't lose sight of the cardinal principle of
13 regulation, which is the public should and receive must
14 adequate service.

15 And until that company's customers receive
16 adequate service to which they're entitled, the
17 Commission would be derelict in its duty in imposing
18 higher rates.

19 We believe that if a Commission would be
20 derelict in its duty and impose a higher rate in a phone
21 company case in 1963, it's even more vital than in a
22 water case that the company provide necessary water and
23 sewer service, that they're not providing safe and
24 adequate service, and it would also be inappropriate to
25 raise their rates at this time.

1 And because it's so clear that the problems
2 that existed at the time that receivership -- the initial
3 receivership application was made to this Commission
4 still exists, that the rate should not be raised.

5 They haven't done what they need to do to
6 correct the problems.

7 So for the reasons I've set forth in the motion
8 and because we believe that the unsafe and adequate
9 service is not solely due to the inability of the company
10 to finance, a provision of that service, we're asking for
11 this dismissal.

12 JUDGE WOODRUFF: Thank you.

13 Staff, do you have any further response?

14 MR. HAAS: No, Your Honor.

15 JUDGE WOODRUFF: Osage Water, any further
16 response?

17 MR. WILLIAMS: Yes, Your Honor.

18 I'd simply say that much of what Office of
19 Public Counsel had to say here today is not in evidence.
20 There are no findings. She's referred to evidence to
21 which the company has not had an opportunity to respond
22 that was received at the local public hearing just last
23 week.

24 I believe that there will be substantial and
25 competent evidence to rebut much of the testimony that

1 was heard at the local public hearing, and that simply
2 for this Commission to say, well, we've heard part of one
3 side, we're done, would be a gross dereliction of its
4 duty in this matter.

5 JUDGE WOODRUFF: Thank you.

6 Commissioner Murray, do you have any questions
7 you wanted to ask any of the counsel?

8 COMMISSIONER MURRAY: Yes.

9 Do we not have mikes up here?

10 JUDGE WOODRUFF: No, we do not.

11 COMMISSIONER MURRAY: I'd like to ask each of
12 the parties to respond to how this pending rate case
13 affects, if at all, the receivership case, other than to
14 throw up an ex parte wall, so that we can't get full
15 information on the determination of rate base in the
16 receivership case.

17 JUDGE WOODRUFF: Whoever wants to go first can
18 go first.

19 MR. WILLIAMS: Well, I think I'd be glad to
20 respond.

21 Your Honor, the Company agreed with this
22 Commission in the pending receivership case pursuant to a
23 stipulation.

24 And I don't know if you've been privy to a copy
25 of that.

1 COMMISSIONER MURRAY: Yes, I have.

2 MR. WILLIAMS: But it was signed last
3 September, I believe, and filed with the Circuit Court,
4 in which this Commission agreed with the Company to make
5 a determination as to the Company's rate base post-
6 haste. And I'm saying within a matter of two weeks.

7 There are specific dates set out in that
8 stipulation. That was not done. It has become an issue
9 between the Company and the Staff.

10 In this case we have been consistently trying
11 to get a determination as to the Company's rate base.

12 I would be more than happy to submit the
13 Company's information directly to the Commission if
14 that's how you would like to proceed.

15 We need a determination of rate base.

16 We have here today both the business
17 development director of Missouri American Water Company
18 and their counsel in this matter, Mr. Rich Ciottone.

19 The Company has done everything it agreed to do
20 under that stipulation.

21 We sat down with Missouri American. We
22 negotiated out a complete contract. It was prepared. We
23 sat literally until seven o'clock at night on the
24 deadline that the Commission wants to give us our rate
25 base number, and waited, and we got no number.

1 That's the only thing that is missing from our
2 contract. We're ready to sell this company to Missouri
3 American for an agreed rate base as per the stipulation.

4 I don't know how to get the issue in front of
5 you other than in a rate base hearing.

6 COMMISSIONER MURRAY: Mr. Williams, I'm well
7 aware of the history of that, painfully aware of the
8 history of Osage Water Company completely.

9 But as you know, the major factor to be
10 determined in the receivership case is a determination of
11 rate base.

12 And as you know, there is a determination of
13 rate base by the Staff in the hearing -- or the rate
14 case.

15 Now, I think, because we have some calculations
16 by Staff in the rate case, and apparently we're going to
17 be presented by some calculations of rate base in the
18 receivership case, I personally want to be able to talk
19 about whether those numbers match, and if they don't, why
20 not. And I want to know how this rate base is figured.

21 And I don't like the fact that there is a rate
22 case pending that presents us with an inability to talk
23 to our Staff about this pending litigation that involves
24 the same issue.

25 And I just can't understand what purpose this

1 rate case serves other than to put up that ex parte rule.

2 MR. WILLIAMS: If I may, ma'am.

3 The Company initiated this rate case last
4 summer, I believe, in June or July, somewhere about that
5 time frame, with the filing of tariffs based on the
6 Company's understanding that it simply has insufficient
7 revenues to do the job, pay a return on investment, so
8 forth and so on, the typical issues that you would raise
9 in a rate case.

10 At that point in time there was no stipulation
11 in the receivership action for a determination of rate
12 base. There were no discussions about selling the
13 company to Missouri American. None of that was on the
14 table at the time.

15 The Company has not brought this case before
16 the Commission, the rate case, as a means to prohibit or
17 prevent you from reaching a determination in the
18 receivership case as to what its rate base might be.

19 And I would tell you, quite simply, I am
20 puzzled, and very puzzled, why we're getting different
21 numbers in our receivership analysis to what the
22 Company's rate base is from what the Staff has filed in
23 the rate case to be the Company's rate base.

24 And I'm talking about a difference of
25 between -- I believe in the rate case the Staff says the

1 Company's rate base is approximately \$360,000. I have
2 numbers from Staff in the receivership case of \$904,000.

3 And I think there is a huge difference there, a
4 very big issue. I don't know how to resolve it short of
5 a hearing or short of a conference on the record with the
6 Commission. I don't know how else to do that.

7 If you have some ideas, I'm certainly willing
8 and more than anxious to conclude our negotiations with
9 Missouri American and move forward.

10 COMMISSIONER MURRAY: Anybody else have any
11 further comment on that?

12 MS. O'NEILL: Yes, Commissioner.

13 I do want to say that on one point I do agree
14 with Mr. Williams, and that is, that there was a
15 stipulation signed, my office was a party to that
16 stipulation, and it did require that there be a rate base
17 number determined, so that Missouri American Water
18 Company, who has offered to purchase this company for an
19 agreed rate base, would know whether or not that was
20 the -- would know the purchase price, and would also, I
21 believe, as a practical matter, I believe that Missouri
22 American only wants to purchase it for rate base because
23 it doesn't want to deal with the possibility of
24 acquisition adjustments later on down the road, which I
25 think is a very realistic and practical concern that they

1 have.

2 And I will also agree with Mr. Williams that
3 the Staff was to come up with a number by a date that
4 past before the Staff was able to make a determination.

5 I also believe that the number for rate base
6 for purposes of purchasing the company is going to be a
7 different number than the number that is going to be
8 present in the rate case.

9 And the reason for that has to do with prior
10 decisions regarding how to treat some property that is
11 subject to a judgment by a former partner in Osage Water
12 Company.

13 I'm not sure how much detail we need to get
14 into regarding that. It's little bit complicated. But
15 there is a significant portion of property that is
16 subject to a judgment, and how that judgment was being
17 handled for ratemaking purposes in the past didn't put
18 that -- a portion of that property into rate base because
19 there was a different accounting treatment given to it.

20 And I believe that in this rate case the
21 evidence, if you go forward on the rate case, would show
22 the same sort of proposal for treatment.

23 So there is going to be some disparity in
24 numbers.

25 There has also been some disparity and some

1 issues regarding a sale of some property that is not
2 currently owned by Osage Water Company, that is being
3 contemplated to be sold to Missouri American, that
4 currently being -- currently owned by Mr. Williams and
5 his wife, which gets into other issues regarding problems
6 that this small water company has, and some other problem
7 companies have had in the past, is that the company
8 doesn't own all of the assets that are being used to
9 provide service.

10 That's been a problem, and that's been a
11 problem in the receivership case. It's been a problem in
12 the rate cases that this company has had in the past, and
13 continues to have.

14 The receivership statute also -- you know, one
15 of the determinations that the Commission needed to
16 consider in the receivership proceedings before it last
17 year was whether or not the lack of safe and adequate
18 service is solely related to inadequate rates.

19 And, again, if the lack of safe and adequate
20 service was solely related to inadequate rates, it would
21 be appropriate to consider a rate case, even though a
22 receivership was pending, to try and correct those
23 problems, and eliminate the need to have a receiver.

24 That's not the situation in this case.

25 My office believes, and I believe the Staff

1 also, believes that receivership is appropriate because
2 of things outside, how much money is coming into the
3 managers, current managers of Osage Water Company, every
4 month, and the revenues that they're getting from the
5 customers.

6 There is a lot of other problems that just are
7 not going to be corrected while this ownership remains in
8 place.

9 We're also concerned that squabbling over what
10 the appropriate amount of rate base is for purposes of
11 sale and what properties are going to be sold has
12 extended the negotiation process in trying to determine
13 that purchase price for the company under the stipulation
14 that Mr. Williams has talked about.

15 We agree that the Staff was late in coming up
16 with their initial numbers. We also would suggest that
17 the Company has not -- Osage Water Company has not
18 accepted those initial numbers that Staff came up with,
19 and there has been continuing discussions and
20 negotiations regarding that number for quite some period
21 of time.

22 And I think that has been going on as late as
23 last week.

24 COMMISSIONER MURRAY: Ms. O'Neill, I also
25 wanted to ask you, does the Office of Public Counsel file

1 motions to reject tariffs?

2 MS. O'NEILL: Occasionally we do.

3 And I think we filed one in this -- or we
4 joined the Staff in a motion to reject the tariff last
5 summer in this case.

6 COMMISSIONER MURRAY: And was your position at
7 that time that we could have rejected the tariff at that
8 point without scheduling a hearing?

9 MS. O'NEILL: Yes.

10 The reason -- the reason that we filed the
11 motion to reject the tariff before was, actually, the
12 filing didn't comply with any of the Commission rules for
13 filing rate cases.

14 The Company filed tariffs with a 30-day
15 effective date, but all they did was file tariffs. They
16 didn't initiate a small company rate case under the small
17 company rate proceedings that we have, although they
18 qualified for those. They chose not to do that.

19 They did not comply with the rules for filing
20 the formal rate case.

21 And for those reasons both the Staff and my
22 office asked the Commission to reject the tariffs and
23 dismiss at that time.

24 The alternative that my office had was to give
25 them an opportunity to cure it and at least suspend the

1 tariffs so that a determination could be made.

2 The Commission chose to suspend the tariffs,
3 directed the Company to make filings that complied with
4 the Commission's rules with former rate cases. The
5 Commission later adopted a procedural schedule.

6 The Company actually didn't make that
7 procedural schedule, didn't file the direct testimony at
8 the time it was -- that was ordered.

9 I filed a motion to dismiss at that time. But
10 during the time that we were having discussions regarding
11 the stipulation, also agreed with the Company that if
12 direct testimony was filed, and once I knew that direct
13 testimony had been filed, I would withdraw that motion if
14 the Commission had not yet ruled on it.

15 The Company did file their -- file direct
16 testimony prior to the ruling on my motion, and so I
17 withdrew it.

18 COMMISSIONER MURRAY: And is it your position
19 that they did cure the defects in the filing?

20 MS. O'NEILL: My agreement with the Company was
21 that if testimony was filed, I would withdraw the motion
22 to dismiss.

23 If I would have been -- and, frankly, at that
24 point in time we had this stipulation and I didn't really
25 think a rate case was going to go forward, because I

1 thought we were going to have a number and the company
2 would be sold.

3 And I did not say I would withdraw the motion
4 if testimony was filed that I believe fully complied with
5 the rules; just that if it was filed, I would withdraw my
6 motion.

7 COMMISSIONER MURRAY: Thank you.

8 Is that Staff's position as in terms of the
9 curing of the defects upon which you filed your initial
10 motion to dismiss?

11 MR. HAAS: Yes. That was a motion to dismiss
12 for procedural fault. Whereas, the motion that Public
13 Counsel has not now filed would be on substantive
14 grounds.

15 Back to your original question about the rate
16 base being an issue.

17 Rate base is an issue in both the potential
18 sale and in this rate case, but those are two separate
19 proceedings going on in front of different tribunals.

20 And it's for that reason that Mr. Bates and I
21 were assigned to the rate case piece of it.

22 We do have somewhat of a wall between the Staff
23 counsel and Commission counsel in this case also.

24 Regarding this rate case, if the Company is not
25 sold, or if a receivership goes forward, the operator

1 needs to know what those rates will be.

2 And we think that the rates are currently
3 sufficient and that this rate case would allow that
4 decision to be made.

5 Thank you.

6 COMMISSIONER MURRAY: Thank you.

7 I'll pass to Commissioner Clayton.

8 JUDGE WOODRUFF: Commissioner Clayton, do you
9 have any questions?

10 COMMISSIONER CLAYTON: I do.

11 Ms. O'Neill, is your motion to dismiss based on
12 summary disposition as referred to by Staff?

13 MS. O'NEILL: Not exactly, although I think
14 that those issues come into it.

15 I can't actually ask you for a summary
16 disposition in a rate case just because of, you know,
17 whether the prefiled evidence is sufficient.

18 COMMISSIONER CLAYTON: You have asked for a
19 directed verdict?

20 MS. O'NEILL: Sure.

21 COMMISSIONER CLAYTON: Well, is there a
22 difference between that and a summary disposition?

23 MS. O'NEILL: In practical effect, no.

24 COMMISSIONER CLAYTON: I'm not talking about a
25 practical effect. I'm talking about a legal difference

1 between summary disposition and having a directed
2 verdict, where a petition or an application fails to
3 state a claim or fails to plead or provide sufficient
4 information to make a prima facia case.

5 Isn't there a difference between those two
6 procedures?

7 MS. O'NEILL: Yeah, I think there are.

8 COMMISSIONER CLAYTON: A summary disposition is
9 actually where sufficient information is supplied, but
10 based on the facts that are pled, that summary
11 disposition could be had in an earlier stage than going
12 to hearing.

13 Would you agree with that?

14 MS. O'NEILL: Yes, I would.

15 COMMISSIONER CLAYTON: In this case you all
16 have stated that there is not sufficient information, or
17 that there isn't sufficient documentation to support any
18 type of rate case.

19 Is that correct?

20 MS. O'NEILL: That's our position, yes.

21 COMMISSIONER CLAYTON: Okay.

22 Is there a different standard for the
23 Commission to look at in making a decision on that
24 directed verdict or this consideration of missing parts
25 of a case?

1 MS. O'NEILL: I think that -- I'm not sure
2 that -- and I am not aware of a decision where the
3 Commission has made a distinction or acted on that sort
4 of procedure before us.

5 So as far as what the Commission does, I'm not
6 sure.

7 I would say that summary judgment -- you know,
8 traditional summary judgment is, you look at -- you look
9 at what the facts are, you assume the facts are true, you
10 see whether or not all -- all of the facts support the
11 relief being sought by the plaintiff or the petitioner or
12 the applicant.

13 When you're asking for a dismissal for failure
14 to state a claim, what you're really saying is, the
15 relief being sought is not supported by the documentation
16 that has been filed, and that's more of a legal question
17 as opposed to a factual question.

18 COMMISSIONER CLAYTON: Don't you think before
19 us today it's a legal question as a matter of law, that
20 the case as filed to date is insufficient to support a
21 rate case?

22 MS. O'NEILL: Yes, I do.

23 COMMISSIONER CLAYTON: So we don't need to take
24 any factual testimony in that determination?

25 MS. O'NEILL: I don't think that it would be

1 necessary, no.

2 COMMISSIONER CLAYTON: In a summary disposition
3 would you have factual testimony or affidavits that would
4 be filed?

5 MS. O'NEILL: Yes, I think you would.

6 COMMISSIONER CLAYTON: In fact, doesn't the
7 rule state, relating to summary disposition, that
8 affidavits can be filed?

9 MS. O'NEILL: Yes.

10 COMMISSIONER CLAYTON: Okay.

11 And that would be the same in a civil case,
12 where affidavits would be filed to support a summary
13 disposition?

14 MS. O'NEILL: Yes.

15 COMMISSIONER CLAYTON: Okay.

16 Is it your position that we have the ability to
17 dismiss this case on grounds of a failure to supply
18 sufficient information?

19 MS. O'NEILL: Yes. I believe that that would
20 be a procedural ground, as Mr. Haas has previously
21 stated, as opposed to a substantive ruling on the merits
22 of a case.

23 I don't think that it would preclude a company
24 who believed that it had sufficient evidence going
25 forward and could make a legal case to support a request

1 for a rate increase from making another one.

2 COMMISSIONER CLAYTON: Can you cite a statute
3 or a specific rule that would support that position?

4 MS. O'NEILL: No, I cannot off the top of my
5 head, but I do believe that generally civil procedure
6 rules are similar, in that the failure to properly state
7 your claim is something that can preclude you from
8 getting a hearing and seeking relief on that claim.

9 COMMISSIONER CLAYTON: Okay.

10 Before I go on, does anyone want to comment on
11 this?

12 MR. WILLIAMS: I do, Your Honor.

13 Sir, I think it's important to understand the
14 procedural posture that the statutes put the Company and
15 the Commission in in this particular instance.

16 Section 393.150 allows the Company to file its
17 tariffs with the Commission. The Commission may,
18 according to that statute, if it deems it appropriate,
19 order a hearing, so that it may inquire into the
20 proprietary of the tariffs that have been presented.

21 And the statute says, after hearing, the
22 Commission may make such orders concerning those tariffs
23 that it deems proper based upon the information
24 presented.

25 It says that the Company bears the burden of

1 persuasion at the hearing. And those are -- that's the
2 procedural posture that the Company has before the
3 Commission today, that the Company has brought forth its
4 tariffs and filed them with the Commission.

5 The Commission has ordered a hearing in
6 response thereto, to determine whether or not the tariffs
7 as filed are appropriate.

8 How can you make a determination without a
9 hearing?

10 You simply cannot.

11 COMMISSIONER CLAYTON: How does direct
12 testimony being prefiled play into that, considering that
13 a hearing is normally where you take direct and
14 cross-examination and rebuttal testimony. Before the
15 Commission direct testimony is filed and no direct
16 testimony is actually heard at the hearing.

17 So how does a prefiled direct testimony play
18 into your analysis?

19 MR. WILLIAMS: Well, prefiled direct testimony
20 is clearly part of the evidence which this Commission
21 would hear if the hearing was conducted.

22 I've been through a number of hearings in front
23 of the Commission. We always seem to end up with 30 or
24 40 exhibits that were never attached to any of the
25 prefiled testimony that are evidence.

1 What you hear, cross-examination of other
2 witnesses, becomes part of the case. What you hear -- at
3 this point you have prefiled direct, you have prefiled
4 rebuttal. You don't even have prefiled surrebuttal.

5 How can you say you're not going to have enough
6 evidence when you get to a hearing, where you got the
7 opportunity for cross-examination, you'll have the
8 opportunity for redirect?

9 You'll have all of those other parts of
10 evidence that you can't see right now.

11 The big picture is there. And I think if you
12 look at the direct testimony of the Company, the simple
13 thing that is in there that more than brings this matter
14 beyond the point of summary judgment is the testimony
15 that the Company has spent all of the money it has and
16 needs more.

17 COMMISSIONER CLAYTON: May I ask you a
18 hypothetical question?

19 MR. WILLIAMS: Certainly.

20 COMMISSIONER CLAYTON: Let's say if a company
21 were to file a new tariff with the increased rates. The
22 Commission suspends the tariff to go to this hearing, as
23 you mentioned.

24 But assume that whoever this company would be
25 fails to file any direct testimony, any direct testimony,

1 no workpapers, nothing.

2 Would the Commission have the ability to
3 permanently suspend the tariff or reject the tariff based
4 on not supplying any supportive documentation, or would
5 we still six months down the road have to go to hearing?

6 MR. WILLIAMS: The statute says after a
7 hearing.

8 I think if you had that situation, which is not
9 the situation we have here today, that if a company fails
10 to file their direct testimony, that it would be
11 appropriate for the Commission to convene a hearing and
12 note on the record that the Company has failed to
13 present -- to maintain its burden by filing any testimony
14 and reject the tariff.

15 But without a hearing, I don't think you can do
16 anything. That's what the statute says.

17 COMMISSIONER CLAYTON: So it is not your -- or
18 you do not believe that as a matter of law that we can
19 throw out this case for failure to plead sufficient facts
20 to support the rate increase?

21 MR. WILLIAMS: We have no pleadings.
22 That's -- that is, in essence, where we run into a brick
23 wall.

24 COMMISSIONER CLAYTON: What do you consider
25 direct testimony?

1 MR. WILLIAMS: It's exactly that. It's direct
2 testimony. It's evidence.

3 Your regulations do not call for the filing of
4 formal pleadings in a rate case. We're working under
5 statute, Section 393.150. The Company files a tariff.
6 The Commission may order a hearing to determine the
7 propriety of the tariff.

8 There is not a petition before this court that
9 alleges Fact A, Fact B, Fact C. There is not an answer
10 from the Office of Public Counsel. There is not an
11 answer from Staff.

12 COMMISSIONER CLAYTON: Can you direct me to
13 where in your testimony you make reference to this being
14 the Company's testimony, where there is any evidence
15 relating to actual cost incurred by the Company on behalf
16 of customers, or any documentation or evidence relating
17 to proposed capital structure or rate of return?

18 Can you point that out to me where --

19 MR. WILLIAMS: This is in Schedule 8 attached
20 to the direct testimony, a statement of income and
21 expense for a twelve-month period for the company.

22 COMMISSIONER CLAYTON: And whose testimony
23 would that be?

24 MR. WILLIAMS: There is only the direct
25 testimony of Mr. Mitchell.

1 It's toward the end of the schedules attached,
2 sir.

3 JUDGE WOODRUFF: It says Schedule 8, Budget.

4 MR. WILLIAMS: Yeah, the column to the left
5 hand, I believe, is actual operating information from the
6 Company.

7 COMMISSIONER CLAYTON: Does this include
8 capital structure?

9 MR. WILLIAMS: Sir, I'm sorry. I'm not
10 prepared to answer that question.

11 I did look at the income and expense issue with
12 respect to the direct testimony. I did not look at the
13 capital structure issue.

14 COMMISSIONER CLAYTON: Would the Movant care to
15 comment on that filed exhibit --

16 MS. O'NEILL: Well, Your Honor --

17 COMMISSIONER CLAYTON: -- on whether or not --

18 MS. O'NEILL: Commissioner, that is --
19 Schedule 8 budget appears to be a listing of expenses
20 without verification and a proposed future budget for a
21 year that has not occurred yet.

22 And I believe what -- I believe what that next
23 column is, is -- I'm not sure -- I don't know what --

24 COMMISSIONER CLAYTON: Was there an agreed-to
25 test year in this case?

1 MR. WILLIAMS: No, there was not.

2 MS. O'NEILL: No, there is no agreed-to test

3 year.

4 COMMISSIONER CLAYTON: Is there normally an

5 agreed-to test year?

6 MS. O'NEILL: Yes, there is.

7 And generally there is a test year that is

8 historical test year that is used to determine what rates

9 should be on a going-forward basis.

10 COMMISSIONER CLAYTON: Why wasn't there a

11 proposed or agreed-upon test year?

12 Can anyone answer that?

13 MS. O'NEILL: My understanding is that -- well,

14 there haven't been a lot of agreements at all.

15 For purposes of filing testimony, my office and

16 the Staff have adopted a test year.

17 COMMISSIONER CLAYTON: And what year is that?

18 MS. O'NEILL: I believe it's the year from

19 July 1st of 2001 -- 2002 to June 30th, 2003.

20 COMMISSIONER CLAYTON: Does Staff want a piece

21 of this action?

22 Do you all have any comments on this relating

23 to a test year, relating to what numbers we're going to

24 be working off on?

25 MR. HAAS: Until -- unless there is an

1 agreement from the parties or an order out of the
2 Commission, the parties -- each individual party can
3 propose a test year, and I think that's what's happened
4 here.

5 MR. WILLIAMS: Your Honor, if I may, I will
6 take responsibility for the discrepancy.

7 The Company's testimony appears to be, from
8 review of information in my office, based on a test year
9 of September through August.

10 We did furnish Staff with information from July
11 through June. That was an inconsistency on our part.

12 And I believe this Schedule 8 will be amended
13 in the surrebuttal testimony to match with the Staff's
14 information as far as the test year.

15 There is not a discrepancy -- and the Company
16 is certainly not suggesting that we should have differing
17 test years.

18 I just became aware of that in reviewing the
19 testimony with respect to the motion to dismiss.

20 COMMISSIONER CLAYTON: Mr. Haas, you're not the
21 attorney on the receivership case, are you?

22 MR. HAAS: That's correct.

23 COMMISSIONER CLAYTON: Okay.

24 Mr. Williams, do you believe that this
25 Commission is bound by what Staff negotiates in the

1 receivership case, or do we have the ability to reject
2 whatever agreements that they supposedly work out?

3 MR. WILLIAMS: In terms of the stipulation
4 signed with the Circuit Court or in terms of the rate
5 base analysis that Staff has presented to the Company?

6 COMMISSIONER CLAYTON: Either one.

7 MR. WILLIAMS: With respect to the stipulation,
8 sir, you were represented by Mr. Krueger before the
9 Circuit Court of Camden County.

10 As a Commission, he bound you with the court.

11 Now, I don't believe it would be appropriate
12 for me to suggest that this Commission may renig on its
13 signed agreement with the Circuit Court.

14 With respect to the rate base analysis, our
15 agreement is with the Commission, the Company's agreement
16 is with the Commission, that the Company and the
17 Commission will make a determination as to the Company's
18 rate base, so that its assets may be sold to Missouri
19 American Water Company.

20 Are you bound by what the Staff has presented
21 to the Company in making a rate base determination?

22 Certainly not.

23 COMMISSIONER CLAYTON: Okay.

24 So if we didn't specifically authorize Staff to
25 actually work an agreement with you on the sale of the

1 company with regard to the rate base negotiation, you
2 think we're stuck with that?

3 MR. WILLIAMS: Sir, I don't begin and I will
4 not begin to comment on the relationship between this
5 Commission and its attorneys and the authority you've
6 given to Mr. Krueger to act or not act on your behalf.

7 I cannot. I will not.

8 COMMISSIONER CLAYTON: Okay.

9 MR. WILLIAMS: That is between you and him.
10 All I know is that the Company in good faith
11 negotiated the stipulation and signed it, we believed,
12 with this Commission. We would like the Commission to
13 keep that agreement.

14 COMMISSIONER CLAYTON: Is it your position that
15 it is Staff's fault that it's taken six months to
16 negotiate a rate base in the receivership case?

17 MR. WILLIAMS: Fault is an interesting word,
18 sir.

19 COMMISSIONER CLAYTON: What is your analysis of
20 it?

21 MR. WILLIAMS: The Company presented
22 substantial information to Staff in connection with its
23 1999 rate case to support rate base for the Company.

24 I think what is significant and what this
25 Commission needs to be painfully aware of, the number I

1 just quoted to you of some 900 and some thousand dollars,
2 the Company's change in investment during that period is
3 somewhere in the vicinity of \$200,000. The Staff's
4 position in '99 was that rate base was \$360,000. They
5 filed that position in this case, with about \$18,000 in
6 change.

7 There is a very, very big problem in
8 determining this Company's rate base. It was a problem
9 in 1999. It's reflected in the signed stipulation that
10 the Company entered into with Staff to dispose of its '99
11 rate case, that we were not even close on numbers then.
12 We're much closer now at 900 and some thousand dollars
13 than we were in 1999.

14 But it's a big issue, and it's one that I think
15 this Commission needs to get right to the bottom of.

16 I would suggest that if you want to honor the
17 stipulation that your attorney entered into with the
18 Company in the receivership case, set a date. Let's come
19 up here. You can hear the evidence on rate case.

20 COMMISSIONER CLAYTON: What if we don't want to
21 honor it? What happens if we have a vote to not honor
22 it?

23 Do we have the ability to do that?

24 MR. WILLIAMS: I would ask the Circuit Court of
25 Camden County to impose sanctions on the Commission for

1 not keeping its stipulation.

2 I don't know what else to say to you. That's
3 what I will ask for.

4 COMMISSIONER CLAYTON: Okay.

5 MR. WILLIAMS: I have been patiently waiting to
6 get that number, with the understanding that no later
7 than the conclusion of the rate case in this matter we
8 would have that number and we could sell these assets to
9 Missouri American.

10 I've been waiting. I'm not happy about
11 waiting. I'm not happy with what is going on with the
12 customers down there. I'm not happy with what is going
13 on with continuing the losses of Osage Water Company, of
14 unrecovered expenses, of no return on capital. I'm not
15 happy, sir.

16 I don't want you to think that I am. I'm very
17 upset.

18 These customers that you're talking to are
19 people I know. They're people in my community. They
20 deserve better, and you need to get this job done.

21 COMMISSIONER CLAYTON: I need to get this job
22 done?

23 MR. WILLIAMS: Sir, we need a rate base
24 determination.

25 COMMISSIONER CLAYTON: Sir, I think I sat

1 patiently through some of the most tortured and painful
2 testimony the other night. And I'm a newcomer here, and
3 I'm sure not used to rate cases, and I'm not sure if that
4 is a regular occurrence. But I sat patiently through it,
5 and I want to get to the bottom of this as well.

6 And my interests are for the benefits of the
7 customers, not you, not your company. I want to help
8 those people down there.

9 MR. WILLIAMS: Sir, I do also.

10 I can only spend what is on the table to spend.

11 COMMISSIONER CLAYTON: Well -- that's okay.

12 I don't have any other questions.

13 COMMISSIONER MURRAY: I do.

14 JUDGE WOODRUFF: All right.

15 Go ahead, Commissioner.

16 COMMISSIONER MURRAY: Did you have something to
17 add before I ask another question?

18 MR. HAAS: Your Honor, I don't know if this is
19 the opportunity or if you want to take the time now to
20 hear from a Staff member to hear Staff's view on what has
21 been going on in the past six months, or if it's
22 appropriate now.

23 I just wanted to offer that suggestion.

24 JUDGE WOODRUFF: Would it be part of the rate
25 case proceeding?

1 I know we've got two things going on here, and
2 I don't want to get into the stipulation in Camden County
3 as part of this.

4 Would this Staff member be able to add
5 something in consideration to the rate case?

6 MR. HAAS: The Staff member could explain what
7 has gone on in the last six months, but it would deal
8 probably in relation to the Camden County matter.

9 JUDGE WOODRUFF: Okay.

10 Would the Commissioners like to hear that?

11 COMMISSIONER MURRAY: I don't think we have
12 time to hear it before agenda.

13 JUDGE WOODRUFF: It is nearly agenda time.
14 We'll pass on that then.

15 Commissioner Murray, you were about to ask
16 another question.

17 COMMISSIONER MURRAY: Yes.

18 I want to ask -- and I'm not sure exactly how
19 to ask this, because, once again, we are being put in an
20 impossible position, where there is something pending
21 which prevents us from talking and getting the right
22 information that we need.

23 But if this rate case goes forward, I have a
24 great concern about the concurrent receivership case and
25 the fact that it appears to me that the Company entered

1 into an agreement to -- that you signed a stipulation and
2 an agreement in that receivership case so you wouldn't
3 have to go before the court and present all of your
4 testimony at that time, because it's my understanding
5 that court was ready to go ahead.

6 You signed an agreement that said you will sell
7 that property for an agreed-upon rate base. You're
8 accusing the Commission at this point of not following
9 through with the agreement that the Commission bound
10 itself to, and yet the agreed-upon rate base was to be
11 between the Company and the Staff.

12 It's my understanding Staff has presented you
13 with the rate base and you've not agreed to it.

14 Now, for you to stand here and tell this
15 Commission that we're not doing our job and that the
16 dire-straight that these ratepayers are in and have been
17 in for years is our fault is very insulting,
18 Mr. Williams. I have to tell you that.

19 But I also would like to know the purpose of
20 this rate case.

21 If you are in agreement to sell this property
22 for an agreed-upon rate base, what is the purpose of this
23 rate case?

24 MR. WILLIAMS: Ma'am, I certainly don't mean to
25 insult you, nor am I suggesting that in some way that you

1 personally have not done everything that you can do in
2 this matter.

3 The Company did sign an agreement with this
4 Commission. The Company has done everything it can do to
5 keep that agreement. And I'm more than happy to put
6 Mr. LeGrand on the stand if you want to hear from him.

7 We did have an agreement prepared, ready to
8 plug in a number. We didn't get the number on the date
9 set forth in here. We have exchanged information back
10 and forth with Mr. Johansen on a daily, weekly basis.

11 JUDGE WOODRUFF: Did Mr. Johansen ever give you
12 a number?

13 MR. WILLIAMS: I have received a series of
14 numbers from Mr. Johansen.

15 COMMISSIONER MURRAY: Did you receive the first
16 number and reject it?

17 Is that why you received another number?

18 MR. WILLIAMS: We received a number from
19 Mr. Johansen. We pointed out to him certain items that
20 were omitted from it. He concurred they were omitted.
21 He has done additional research. His numbers have
22 consistently changed.

23 As recently as last week I received numbers
24 from Mr. Johansen. We are planning to discuss with him
25 today those numbers.

1 Our agreement and stipulation provided for the
2 opportunity for the Company to respond with respect to
3 the numbers provided.

4 I had envisioned at that time that we would
5 have a sit-down discussion and we would hammer this out.
6 It didn't happen that way.

7 It's been a series of e-mail. It's been, we're
8 busy with Missouri American's rate case. We don't have
9 time to get to your stuff. We'll get to it later.

10 And as I've said, we've always had in mind that
11 no later than the conclusion of the rate case here we
12 would have that number and we could sell the company.

13 COMMISSIONER MURRAY: Okay.

14 Assuming you had a number and you agreed upon a
15 number, what is the purpose of this rate case?

16 MR. WILLIAMS: Well, ma'am, if we have a number
17 that is \$900,000 or more and you plug that number into
18 Staff's rate analysis, you're going to end up with a need
19 for an increase in rates in excess of what the company
20 proposed in its original tariffs in order to provide a
21 return on that capital.

22 COMMISSIONER MURRAY: Why do you care? You
23 won't own it.

24 MR. WILLIAMS: Ma'am, I don't. Quite frankly,
25 I'll be real happy just to have a final rate base number

1 and be out of here.

2 I think Missouri American cares whether or not
3 they'll earn a return if they pay \$900,000 plus for
4 Osage Water Company, but that's -- that's not my issue,
5 you're correct.

6 But I don't have that number today.

7 COMMISSIONER MURRAY: So it's your position
8 that the number that is -- that is agreed upon in the
9 receivership is the number that will be plugged into the
10 rate case?

11 MR. WILLIAMS: Ma'am, I think rate base is one
12 number. I don't think its rate base differs depending on
13 whether you're owning or whether you're selling.

14 And I don't see how it can if it's a
15 mathematical computation of investment in a company.

16 So I think, yes, in answer to your question,
17 that we have one rate base for Osage Water Company. We
18 don't have two different numbers for different reasons.

19 COMMISSIONER MURRAY: I think that's all I
20 have.

21 JUDGE WOODRUFF: Let me ask a question. I
22 don't know if anybody can answer this or not.

23 Assuming hypothetically that the Company is
24 sold today, does this then become a Missouri American
25 case to proceed to hearing on February 9th?

1 MR. CIOTTONE: No, Your Honor.

2 JUDGE WOODRUFF: If you could identify
3 yourself.

4 MR. CIOTTONE: The Company is buying the
5 assets. They're not buying the stock. So the tariffs
6 would not be part of the deal.

7 I'm not exactly sure what rates would be
8 charged at that time. That might be an issue of
9 interest.

10 But I don't think it would be driven by these
11 tariffs, and I don't think this proceeding would have any
12 interest to the acquiring company.

13 But I might say with respect to the earlier
14 question about the concerns about this case, the deal may
15 not close. The contract is replete with contingencies.

16 And the mere -- the development of a rate base
17 number is indeed critical to the Missouri American
18 insofar as its willingness to sign a document, but once
19 the document is signed, the document itself has many
20 other contingencies, as would be expected in an
21 acquisition arrangement, about ownership, easement
22 rights, hazardous materials, all of those necessary
23 things.

24 So the mere fact that a rate base were to
25 materialize to the satisfaction of Missouri American and

1 that the number would be sufficient to induce Missouri
2 American to execute a contract to buy does not
3 necessarily mean that the contract would close.

4 JUDGE WOODRUFF: For the purposes of the
5 record, could you identify yourself?

6 MR. CIOTTONE: My name is Rich Ciottone,
7 C-i-o-t-t-o-n-e. I'm counsel for Missouri American.

8 JUDGE WOODRUFF: Thank you.

9 Any other matters anyone wants to bring up
10 while we're still on the record here?

11 MS. O'NEILL: No, Your Honor.

12 JUDGE WOODRUFF: All right.

13 I will tell you that an order regarding Public
14 Counsel's motion is on agenda today for discussion and
15 possible vote.

16 If an order is issued, I'll convey that
17 information. Otherwise, I'll leave you to your
18 discussions. And good luck.

19 With that, the on-the-record portion of this
20 prehearing is concluded.

21 Thank you.

22 WHEREUPON, the on-the-record portion of the
23 prehearing conference was concluded.

24

25