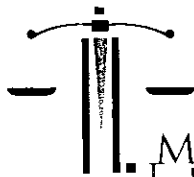


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APR 20 2007

Missouri Public
Service Commission



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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

**IN THE MATTER OF UNION ELECTRIC COMPANY D/B/A/
AMEREN UE FOR AUTHORITY TO FILE TARIFFS
INCREASING RATES FOR ELECTRIC SERVICE PROVIDED
TO CUSTOMERS IN THE COMPANY'S
MISSOURI SERVICE AREA**

CASE ER-2007-0002

DEPOSITION OF PROFESSOR ROBERT DOWNS

JANUARY 26, 2007

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

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Date 3-16-07 Case No. ER-2007-0002
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BEFORE THE PUBLIC SERVICE COMMISSION

7

OF THE STATE OF MISSOURI

8

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10 In the Matter of Union Electric)
Company d/b/a Ameren UE for)
11 Authority to File Tariffs)
Increasing Rates for Electric) Case ER-2007-0002
12 Service Provided to Customers in)
the Company's Missouri Service Area)

13

14

15

DEPOSITION OF PROFESSOR ROBERT DOWNS

TAKEN BY STEVEN DOTTHEIM, ESQ.

16

ON BEHALF OF

THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

17

JANUARY 26, 2007

18

19

REPORTED BY CINDY J. TAYLOR

20

REGISTERED PROFESSIONAL REPORTER

CERTIFIED SHORTHAND REPORTER

21

CERTIFIED COURT REPORTER

22

23

24

25

1 BEFORE THE PUBLIC SERVICE COMMISSION
2 OF THE STATE OF MISSOURI
3
4

 In the Matter of Union Electric)
5 Company d/b/a Ameren UE for)
 Authority to File Tariffs)
6 Increasing Rates for Electric) Case ER-2007-0002
 Service Provided to Customers in)
7 the Company's Missouri Service Area)

8
9
10
11 DEPOSITION OF PROFESSOR ROBERT DOWNS, produced,
12 sworn, and examined on the 26th day of January, 2007,
13 at the offices of Ameren UE, 1901 Chouteau Avenue, in
14 the City of St. Louis, State of Missouri, before Cindy
15 J. Taylor, Registered Professional Reporter, Certified
16 Court Reporter within and for the State of Missouri,
17 in a certain cause now pending Before the Public
18 Service Commission of the State of Missouri, In the
19 Matter of Union Electric Company d/b/a Ameren UE for
20 Authority to File Tariffs Increasing Rates for
21 Electric Service Provided to Customers in the
22 Company's Missouri Service Area.
23
24
25

A P P E A R A N C E S:

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ALSO PRESENT:

Michael Brosch
Greg Meyel
Kevin Higgins

A P P E A R A N C E S (continued)

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Midwest Litigation Services
711 North Eleventh Street
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I N D E X

Examination by Mr. Dottheim	Page 05
Examination by Mr. Mills	Page 35
Examination by Mr. Micheel	Page 82

1 S T I P U L A T I O N

2 IT IS HEREBY STIPULATED AND AGREED by and
3 between counsel for the parties that this deposition
4 may be taken in shorthand by Cindy J. Taylor,
5 Certified Shorthand Reporter, Certified Court
6 Reporter, and afterwards transcribed into printing,
7 and signature by the witness is reserved.

8 PROFESSOR ROBERT DOWNS,
9 of lawful age, being first duly sworn to tell the
10 truth, the whole truth and nothing but the truth
11 deposes and says as follows:

12 EXAMINATION BY MR. DOTTHEIM:

13 Q. Professor Downs, would you please state
14 your full name for the record?

15 A. Robert Carl Downs, D-O-W-N-S.

16 Q. And Professor Downs, would you state
17 your employment, please?

18 A. I am a law professor at the University
19 of Missouri Kansas City School of Law, and I also have
20 a corporate law consulting practice.

21 Q. Professor Downs, you've been deposed
22 before?

23 A. I have.

24 Q. You know the procedure. Of course, I
25 and other counsel will be asking you questions. I'll

1 try not to talk over you. If I'm not clear in what I
2 ask you please ask me to clarify or ask me to repeat
3 my question.

4 At any time you want to take a break,
5 we'll do so, just ask. I'm not sure how long we're
6 going to go. I don't think it's going to be anywhere
7 as long as some of the depositions that we've had
8 earlier this week.

9 Is there any reason why this afternoon,
10 you wouldn't be able to give true and accurate answers
11 to questions that you're asked?

12 A. No.

13 Q. Okay. You're not taking any medication
14 that would prevent you this afternoon from giving you
15 --

16 A. Not at all.

17 Q. -- true and accurate answers to
18 questions that you would be asked?

19 MR. DOTTHEIM: Well, I think -- I don't
20 think we've done it, but for purposes of this
21 deposition, but I think we'd like to have for the
22 record who are the parties that are hear for the
23 deposition. I'm Steve Dottheim. I'm attorney for the
24 staff of the Missouri Public Service Commission.

25 MR. MICHEEL: I'm Doug Micheel. I'm an

1 assistant attorney general at the State of Missouri.

2 MR. CYNKAR: Bob Cynkar for Ameren.

3 MR. MILLS: I'm Lewis Mills on behalf
4 of the Office of the Public Counsel.

5 MR. HIGGINS: Kevin Higgins witness for
6 the Commercial Group.

7 MR. MILLS: And I should mention that
8 with me in Jefferson City is Ryan Kind, Chief Energy
9 Economist for the Office of Public Counsel.

10 MR. BROSCHE: I'm Michael Brosch
11 consultant to the State of Missouri.

12 MR. MEYER: Greg Meyer, Regulatory
13 Auditor with the staff, Commission Staff.

14 Q. (By Mr. Dottheim) Professor Downs, did
15 you receive a copy of the notice of deposition?

16 A. I did.

17 Q. Okay. And did you have an opportunity
18 to review that document?

19 A. Yes, I did.

20 Q. Okay. Do you recall that attached to
21 the notice of deposition was an Exhibit A?

22 A. I think there was.

23 Q. Okay. And it asks that you provide
24 copies of certain information, copies of all
25 electronic or other communications or correspondence

1 documents, reports, prior commission rulings or cases,
2 federal or state judicial or agency decisions, board
3 of director minutes, data request responses, periodic
4 monthly reports, letters, calculations, plans,
5 drawings or other information upon which the deponent
6 relied in forming deponent's opinions set out in his
7 testimony in the rate case.

8 Did you bring any information with you,
9 any copies, documents in response to that item in the
10 -- in Exhibit A?

11 A. All I have is the report that I first
12 submitted in this matter. I also have with me a list
13 of the cases in which I have given depositions in the
14 last 10 years.

15 Q. Okay.

16 A. Which is attached to the curriculum
17 vitae that I gave you a few minutes ago.

18 Q. Yes. Thank you.

19 So there's nothing further, at least
20 that you've brought with you? It's not that there are
21 no other things in existence.

22 A. I've looked at a number of things, but
23 to identify something as being a document that
24 informed my opinion in terms of legal issues in this
25 case there would be none. I've looked at some

1 depositions and some other direct testimony, but in
2 terms of it helping me determine what the legal issues
3 are, that I think I'm being asked to give opinions
4 about, there are none.

5 Q. You mentioned that you looked at
6 depositions. Could you identify --

7 A. I'm not sure depositions. I've gotten
8 a couple that I haven't actually had time to review
9 yet, but I've looked at the direct testimony of three
10 or four witnesses in this matter.

11 Q. Can you identify the individuals?

12 A. They're the ones named -- I guess
13 they're named in my draft of the rebuttal. It's Mr.
14 Brosch, Mr. Kind, two or three others I think.

15 Q. I'm not going to ask you about your
16 rebuttal testimony. We'll wait for your rebuttal
17 testimony.

18 In forming your opinions in your direct
19 testimony, you didn't have that testimony for which
20 you've just referred to for purposes of filing your
21 direct testimony in this case?

22 A. That's true.

23 Q. In July of last year?

24 A. That's correct.

25 Q. What did you have? What did you review

1 for purposes of forming your opinions that are
2 contained in your July direct testimony?

3 A. I'm not sure I had any documentation.
4 I had information that I gathered from interviews with
5 employees of Ameren that described what this process
6 was, what the issues were likely to be. In the
7 context of that, I also did get copies of the power
8 contract with EE, Inc., the one that was entered into
9 in '87 and expired in '95. I also obtained copies of
10 the articles of incorporation and bylaws of EE, Inc.
11 And there could have been another document or two, but
12 I just don't recall.

13 Q. You mentioned interviews, do you recall
14 which individuals you interviewed? Could you identify
15 those people?

16 A. I visited with Tom Byrne of Ameren. He
17 is a lawyer. I visited with Jim Lowery, who also is a
18 lawyer who does work for Ameren. And there could have
19 been another business person in those conversations.
20 I just don't recall.

21 I've also had -- are you talking about
22 now before -- before my direct testimony document was
23 done or any time?

24 Q. I'm referring to before your direct
25 testimony document was done and up to and through the

1 preparation of your direct testimony. Not after the
2 preparation and filing of your direct testimony.

3 A. Then that would be it.

4 Q. You mentioned a possible business
5 person?

6 A. There could have been a person or two
7 that walked in and out of the meeting with Tom Byrne
8 and Jim Lowery.

9 Q. You didn't meet or talk with PROFESSOR
10 ROBERT DOWNS?

11 A. I don't believe that I did. It's
12 possible that he was there. I barely new the lawyers
13 let alone anybody else.

14 Q. Before you completed your testimony,
15 you refer in your testimony, I think, repeatedly to
16 Mr. Moehn's direct testimony, do you not?

17 A. Yes, I do.

18 Q. You must have had a copy of Mr. Moehn's
19 testimony to review for purposes of your direct
20 testimony?

21 A. I think I did. Certainly possible, I
22 did.

23 Q. To the best of your recollection, you
24 did not talk with him yourself or prepare the
25 testimony that you filed?

1 A. I think that's correct.

2 Q. Okay. Professor Downs, I'm going to
3 refer you on occasion to your direct testimony. Did
4 you bring a copy with you or maybe you remember it
5 quite well?

6 A. I did bring a copy with me. I think
7 it's being copied, as we speak. That was the other
8 one. I do have a copy.

9 Q. Very good. I'd like to direct you to
10 Page 3 of your direct testimony, Line 6 to 7.

11 A. Yes.

12 Q. Okay. You mentioned that you practice
13 law in the Kansas City law firm of Linde, Thomson,
14 VanDyke, Fairchild & Kohn, if I'm pronouncing the
15 members of the firm correctly.

16 A. It's close enough.

17 Q. From 1968 to 1978. When you were with
18 that firm, did you perform any regulatory work for
19 public utilities during that time frame?

20 A. Not for public utilities. I did do a
21 little bit of Public Service Commission work in the --
22 during that time in which I obtained certificates of
23 public convenience and necessity dealing with putting
24 railroad tracks into the underground storage areas in
25 Kansas City.

1 Q. And the PSE work for certificates of
2 convenience and necessity, was that with the Missouri
3 Public Service Commission?

4 A. Yes, it was.

5 Q. Okay?

6 A. I guess I should clarify. I didn't
7 work for the Public Service Commission, obviously. It
8 was with that Commission, but I wasn't with that
9 Commission.

10 Q. You were working --

11 A. For private companies.

12 Q. Private companies that were applicants?

13 A. Yes, that's correct.

14 Q. Before the Commission seeking the award
15 of certificates of public convenience and necessity?

16 A. That's correct.

17 Q. If I could refer you again to Page 3,
18 Lines 10 to 13, you list the law school subject areas
19 that you teach, do you not?

20 A. That's right.

21 Q. You don't list the area of regulated
22 industries. Have you taught a course on public
23 utility regulation?

24 A. No. I claim no expertise in the area
25 of public regulation.

1 Q. Okay. I guess -- I want to also ask
2 you, again, on Page 3, Lines 15 to 14 you state, Your
3 research interest and publications and focused in the
4 corporate and securities area. You haven't published
5 any articles on public utility regulation, have you?

6 A. That's true.

7 Q. Have you represented any public
8 utilities in your history as a practicing attorney?

9 A. No.

10 Q. Okay. Have you -- other than the cases
11 of public convenience and necessity which you've
12 mentioned, have you appeared before any state Public
13 Service Commission?

14 A. I don't believe that I have.

15 Q. Have you ever appeared before any --
16 the Federal Energy Regulatory Commission, or the
17 Federal Communications Commission?

18 A. No. Well, actually there was a time
19 where our firm did some work in the regulated area of
20 television licensing and radio licensing, and I did
21 some work in relation to that.

22 Q. Okay. You also mention on Page 3, Line
23 19, that you advised boards of directors, do you not?

24 A. I do.

25 Q. You haven't advised any boards of

1 directors of any public utilities or have you?

2 A. I have not.

3 Q. Okay. Again, on Page 3, you mention at
4 Lines 20 to 22 that you testified in a number of cases
5 in state and federal courts, do you not? Have you
6 testified in any state or federal courts on behalf of
7 a public utility?

8 A. I believe I have not.

9 Q. I notice in your curriculum vitae that
10 you handed to me where you've got listed in the latter
11 pages the expert witness matters that you've appeared
12 on or in cases in which you've, if I'm reading this
13 correctly, consulted. I noticed on the very last page
14 the last item you have United States via David Wittig,
15 et al.

16 Could you provide some information
17 respecting your activities in that case?

18 A. I was called but did not testify as a
19 witness on behalf of David Wittig to discuss the
20 matter in which corporation boards act and the kind of
21 authority that they grant to management. There were a
22 number of issues. You may be aware that he was
23 accused in a criminal case of excessive salaries and
24 some other things. I was not -- I did not testify,
25 but I was called on his behalf.

1 Q. Is there any reason why you did not
2 testify?

3 A. Yes. The judge didn't want a law
4 professor on behalf of David Wittig and said so.

5 Q. Okay. And there's been some recent
6 activity in that --

7 A. Yes. His conviction was overturned
8 partly because she didn't let me testify, I think.

9 Q. Your activity in that case, which you
10 weren't permitted to testify, was your activity in
11 that litigation designed to maximize shareholder
12 value?

13 A. My activity was to provide information
14 about how boards of directors act. I gave no opinion
15 and would not have given an opinion about whether
16 David Wittig's particular behavior did or didn't
17 comply. I was there to provide the standard. That's
18 what that was about.

19 Q. Okay. Thank you. I also notice that
20 you have listed on the preceding page Item E,
21 Teleconnect of Kansas City, Inc. versus Laner, if I'm
22 pronouncing that correctly.

23 Could you provide any more details
24 about that case?

25 A. I gave a deposition in that case. If I

1 remember right, it got settled. It involved the
2 representation of lawyers -- a lawyer named Laner, if
3 I remember right. He was being accused of
4 malpractice. And the questions involved the standards
5 of behavior of lawyers representing corporations.
6 There was some conflict of interest issues about the
7 lawyer representing two parties. Maybe some other
8 things, too. I just don't remember now.

9 Q. Okay. Mr. Downs, you've mentioned
10 that, if I understood correctly, that you've reviewed
11 the Power Supply Agreement between EE, Inc. and the
12 sponsoring companies that was in effect from 1987 to
13 2005?

14 A. I did.

15 Q. Okay. Did you review also any
16 modifications or letter agreements?

17 A. There were some attached to it, if I
18 remember right, to the back of it. I read the whole
19 thing.

20 Q. Do you remember how many modifications
21 there were? Do you remember if the modifications were
22 individually numbered?

23 A. I don't remember.

24 Q. And you also indicated that you
25 reviewed the articles of incorporation and the bylaws?

1 A. I did.

2 Q. Okay. The articles of incorporation
3 and the bylaws that you reviewed, were those the
4 articles of incorporation and bylaws that are
5 currently in effect or have you reviewed them as they
6 have existed through the years of the existence of EE,
7 Inc. and have been possibly modified since the
8 creation of that entity in the early 1950s?

9 A. I would have to look to see. I'm not
10 sure. I don't remember what date was on the documents
11 I saw. If I remember right the bylaws were the
12 current bylaws. I'm not sure about the articles
13 whether there were amendments or not amendments
14 attached to them.

15 Q. Professor Downs, do you know what the
16 business purpose of -- and when I keep referring to it
17 as EE, Inc., I'm referring to Electric Energy, Inc. I
18 assume that that's the entity that you also have been
19 assuming that I'm referring to when I say EE, Inc.?

20 A. It is.

21 Q. Do you know what the original business
22 purpose of EE, Inc. was when it was created in 19 --
23 in the 1950s?

24 A. I believe that I do.

25 Q. Could you identify it, sir?

1 A. My understanding is that it was to
2 create a corporation to build and develop a power
3 plant in Joppa in order to provide power to the
4 federal government that needed that power in the
5 nuclear energy area.

6 Q. Do you know whether the business
7 purpose has changed in the 50 years or so in which
8 that entity Electric Energy, Inc. has been in
9 existence in terms of talking about what the business
10 purpose is?

11 A. My understanding was that was the
12 primary objective of the business to be established.
13 Whether the business purpose was limited to only that
14 in the articles, I'd have to look again to see. My
15 recollection is that it describes that as one of the
16 business purposes, but I don't remember whether it
17 says that's the only thing the company can do.

18 If you're asking a broader question of
19 whether the business of EE, Inc. has changed some over
20 the time, they still have the Joppa plant and my
21 understanding is that the federal government no longer
22 is buying the power that it once did and so it is
23 selling the power otherwise.

24 Q. And, Professor Downs, what is the basis
25 of your understanding that the federal government is

1 no longer buying the power that it once did?

2 A. I got that just from people at Ameren
3 giving me the numbers and looking at -- it may have
4 been in Mr. Moehn's testimony, too. I don't remember
5 where I got that.

6 My understanding is that early on a
7 significant amount of the power was being bought by
8 the federal government. The vast majority of it was
9 being bought by the government. The excess power was
10 being bought by the owners of EE, Inc. And that over
11 time the amount of federal government's purchases went
12 down and the amount of the other purchasers --
13 purchases went up.

14 Where that stands today, I can't tell
15 you. I don't know how much.

16 Q. Professor Downs, you reviewed PROFESSOR
17 ROBERT DOWNS's direct testimony. Did you review any
18 of the documents that he refers to in his testimony,
19 other than those that you have already identified?
20 You mentioned the articles of incorporation, the
21 bylaws and the Power Supply Agreement that was in
22 effect from 1987 to 2005.

23 He mentions a number of other documents
24 in his testimony. If I gave you a copy of his
25 testimony, could you identify what additional

1 documents you reviewed, if any?

2 A. I'd be happy to look at it. I don't
3 believe that I reviewed any other documents.

4 Q. Why don't I give you a copy of Mr.
5 Moehn's testimony?

6 A. I have not actually seen this whole
7 report.

8 Q. I'm really just interested in the
9 section -- the section on EE, Inc. which is limited
10 only to a portion.

11 A. I may have just gotten excerpted parts
12 of it.

13 Q. I was just -- I really, again, I'm not
14 interested in the other sections. I was interested in
15 the step -- in the section that starts on Page 10 and
16 goes to Page 10 which is the section that he
17 specifically identifies as covering the EE, Inc. And
18 then he identifies any number of documents some of
19 which he footnotes and refers to in the footnotes,
20 others of which he doesn't.

21 For example, on Page 11 he makes
22 reference to two cases before the Missouri Public
23 Service Commission which are not footnoted and which
24 previously have not mentioned from the 190s.

25 A. And your question is?

1 Q. My question is whether you have
2 reviewed any of those other documents, the cases he
3 refers to, whether they're Missouri Public Service
4 Commission cases or Federal Energy Regulatory
5 Commission cases orders from the Federal Energy
6 Regulatory Commission or testimony filed before the
7 Missouri Commission or testimony filed by -- filed
8 before the Federal Energy Regulatory Commission by the
9 Office of the Public Counsel or by the staff of the
10 Missouri Public -- or filed by the staff of Missouri
11 Public Service Commission before the Missouri Public
12 Service Commission the staff -- excuse me -- the staff
13 of the commission doesn't file testimony before the
14 Federal Energy Regulatory Commission, the Missouri
15 Public Service Commission files testimony before the
16 Federal Energy Regulatory Commission, but I'm sorry.
17 I said a lot. I don't know if I've been very clear.

18 A. All I had of his testimony before I did
19 my testimony was the information that I referred to in
20 my report and the idea there, of course, is that I
21 don't have any direct knowledge of the underlying
22 facts of the case.

23 I'm not being asked to help establish
24 any of the underlying facts of the case. I'm asked to
25 give legal opinions to the corporate law to EE, Inc.

1 and it's shareholders. To that extent, I have not
2 seen all of this. I haven't reviewed any of the
3 things that he relied on to give his report.

4 Q. Again, Professor Downs when you say
5 you've not seen all of this, what are you referring to
6 when you say you've not seen all of this?

7 A. I don't think I ever received a full
8 copy of his report. What I saw was little excerpts of
9 it, which was intended to, I think, give me some
10 comfort in making my own conclusions that there would
11 be factual basis presented for that. I'm not the fact
12 person.

13 Q. Who is the fact person?

14 A. I have no idea who is involved in this.
15 Sounds like quite a cast of characters, as I
16 understand it.

17 Q. Would you characterize yourself as
18 being the law person?

19 A. I'm one of them. I don't know if there
20 are others. I'm certainly the one that is supposed to
21 talk about what the fiduciary duties are of directors
22 and their obligations to the corporations and so on.
23 I try, and I think I did, limit my direct testimony to
24 those kind of issues.

25 Q. I'd like to refer you to Page 5 of your

1 testimony, in particular Line 16 to 18 where you
2 state, I base my understanding of OPC's position on
3 the facts outlined in Mr. Moehn's direct testimony
4 which I have supplemented by my own review of
5 materials from prior regulatory proceedings where OPC
6 has taken this position.

7 What prior regulatory proceedings are
8 you referring to in that sentence?

9 A. This information was provided to me by
10 Ameren's legal department because I basically asked
11 the question how do you know what we're responding to
12 here. You know, what -- you're trying to decide what
13 the direct testimony is going to be and so you're
14 trying to anticipate what the questions are going to
15 be, as I understand this process.

16 As you know this, is quite an unusual
17 process where you file these reports back and forth.
18 I've never been through this before. I said how do we
19 know what we're supposed to be talking about here,
20 other than just plain legal questions? That's where
21 this came from.

22 The staff of Ameren believed that these
23 were going to be the issues raised by OPC and maybe
24 others in this matter. They were trying to anticipate
25 what those positions would be. I think they got that

1 from prior things. I think I looked at that with them
2 when I was here.

3 Q. Do you recall -- I'm sorry, sir.

4 A. That's where that comes from.

5 Q. Do you recall exactly what they showed
6 you and what you looked at?

7 A. I don't.

8 Q. Was it a summary that the Ameren UE
9 staff put together or was it actually Office of Public
10 Counsel source documents that the Office of Public
11 Counsel had filed in dockets?

12 A. At this point, I can't tell you. I
13 don't recall what it was.

14 Q. Did you keep copies of those materials
15 yourself?

16 A. I don't think so.

17 Q. Professor Downs, the staff has filed
18 direct testimony on the EE, Inc. issues. In fact, the
19 staff witness who filed a testimony as Mr. Meyer. I'm
20 not going to ask you about your rebuttal testimony. I
21 just want to ask you if you recall reading a copy of
22 Mr. Meyer's direct testimony on the EE, Inc. matter?

23 A. I did read that.

24 Q. Okay. Do you recall any of the
25 details? Do you recall what the staff's position is

1 on the EE, Inc. issue?

2 A. I would have to look at the direct
3 testimony reports to see who said what, but I looked
4 at all of the ones that were filed that had to do with
5 EE, Inc. I think there were four.

6 Q. Okay.

7 A. But to tell you which person said which
8 thing I would have to look at the reports to see that.

9 Q. You couldn't characterize what the
10 staff's position is on the EE, Inc. issue without
11 reviewing again Mr. Meyer's testimony?

12 A. To be able to say who said what, I
13 would have to look at it. My impression is that the
14 staff's position -- there was some uniformity in the
15 response among the three or four witnesses that I
16 looked at. And there may be some differences there,
17 but the main thrust is the same, it seems to be.

18 Q. How would you characterize the main
19 thrust?

20 A. Seems to me that they are taking the
21 position that the shareholders of EE, Inc. are
22 entitled to buy the power that is produced by EE,
23 Inc.'s Joppa at other than market rates.

24 MR. CYNKAR: I think you misspoke. I
25 think you said the shareholders of EE, Inc. Did you

1 mean the shareholders of UE?

2 THE WITNESS: No.

3 MR. CYNKAR: Am I confused?

4 MR. MICHEEL: Why don't we let the
5 witness testify. If he's confused he'll tell Mr.
6 Dottheim.

7 MR. CYNKAR: Okay.

8 Q. (By Mr. Dottheim) Professor Downs,
9 excuse me, I think you indicated that you reviewed the
10 Power Supply Agreement that was in effect between EE,
11 Inc. and the sponsoring company in 1987. Have you
12 reviewed any other Power Supply Agreements between an
13 electric utility company and other entities?

14 A. No.

15 Q. I would like to direct you to Page 12
16 of your testimony, Lines 4 to 5 where you state, As I
17 understand it, for decades the cost based or cost plus
18 price was a market price as the market was defined at
19 that time. You state, as I understand it, what is the
20 basis for your understanding as you've stated there?

21 A. I asked the people at Ameren what the
22 pricing mechanisms were in the past, and basically was
23 informed that the market for power -- the so-called
24 free market or what they referred to as free market
25 for power had developed only in the last few years and

1 that the method of pricing power prior to that time
2 was done on a cost plus basis and that that was
3 intended to be a fair price for the power under those
4 circumstances where there was no other way to price
5 it. So that's where that came from.

6 Q. Okay. So your understanding is based
7 upon solely representations of the Ameren UE staff?

8 A. That's true.

9 Q. Professor Downs, I would like to pose a
10 question for you based on your testimony. I would
11 like for you to assume that Ameren UE believes that it
12 is legally entitled to three quarters of a billion
13 dollar rate increase, about a \$750 million rate
14 increase, but it is only seeking \$360 million in a
15 rate increase. Would such an action be inconsistent
16 with your direct testimony that Ameren UE has a legal
17 responsibility to maximize the profit to its
18 shareholders?

19 A. What Ameren is going to do is what its
20 board of directors is going to do is make a decision
21 about what the best position is to take in front of
22 the regulatory agency. And they may have their
23 reasons for not asking for the entire amount. They
24 may think it's not the right time.

25 I mean, there are lots of possibilities

1 about why they wouldn't go to the regulatory agency
2 for more than they thought they could get. I don't
3 know a lot about this process, but my understanding is
4 that there's a lot of pushing and pulling in this
5 process.

6 And so the reasons that the board may
7 have, may be very legitimate, practical business
8 reasons to do that and so -- so I would say it's not
9 at all inconsistent with what I think the law requires
10 or permits.

11 Q. Is there a certain amount of
12 discretion?

13 A. Discretion in what way?

14 Q. Discretion on the part of the board.

15 A. The board needs to make a business
16 judgment about what it's going to do and the board has
17 some leeway. There's always an issue about how much
18 leeway. The business judgment rule gives them some
19 leeway, but they still have their fiduciary duties to
20 the company and to the shareholders.

21 Q. Do you know whether the law provides
22 the commission any discretion?

23 A. I'm not a regulatory lawyer. I don't
24 know what the Commission is permitted to do. It might
25 be legitimate to ask you what you meant by does the

1 Commission have discretion? The Commission doesn't
2 have the ability to take property from the people they
3 regulate. So it would be a question of whether
4 there's a taking of the Commission -- the Commission
5 has their rules. I assume that they're supposed to
6 follow in rate making. So I guess discretion, you
7 know, is a -- doesn't explain much.

8 Q. Does the Commission have any discretion
9 in determining what it finds to be just and
10 reasonable?

11 A. I think that's what they do, what
12 they're trying to do.

13 Q. Professor Downs, I'd like to refer you
14 to Page 10 of your testimony.

15 A. I thought we were almost done since we
16 were on the last page here.

17 Q. I'm sorry.

18 A. No.

19 Q. I'd like to refer you to Lines 13 to 15
20 of your testimony?

21 A. All right.

22 Q. You say, Today EE, Inc. the business
23 essentially does one income-producing thing and one
24 thing alone. It produces power. And you're saying
25 that in regards to Mr. Moehn's testimony suggests that

1 to you, do you not?

2 A. When I wrote this report, it was my
3 understanding that that was a correct statement about
4 EE, Inc.

5 Q. Okay. Do you know whether EE, Inc.
6 has any affiliates or subsidiaries?

7 A. I do now. I didn't know that when I
8 wrote this report. I learned just a few days ago that
9 they have at least a couple of subsidiaries. I don't
10 know how many.

11 Q. Do you know what businesses those
12 affiliates and subsidiaries are engaged in?

13 A. I don't know that with the exception
14 that one of them either is or was a barge company.

15 Q. Professor Downs, do you know whether
16 Ameren UE stock is publicly traded?

17 A. I believe that it is.

18 Q. Do you have any opinion as to whether
19 the regulatory relationship of a utility with its
20 customer is a matter of concern, should be a matter of
21 concern, to the shareholders of the corporation?

22 A. Say that again, please.

23 Q. Do you have an opinion whether the
24 regulatory relationship of a public utility with its
25 customers should be a matter of concern to the

1 shareholders of the corporation of the public utility?

2 A. Frankly, don't know. If it's a
3 publicly held company or even non public, there's got
4 to be shareholders out there that don't care at all
5 about that. They're interested in the return on their
6 investment and that would be it. There may be fine
7 people out there that own stock that care about a lot
8 of different things.

9 Q. Similar question if you have an
10 opinion. Are the rates charged to customers by a
11 public utility -- should the rates charged to a
12 customer by a public utility be a matter of concern to
13 the shareholders of a public utility?

14 A. I don't know quite what you're thinking
15 about or asking about when you're asking whether it's
16 a matter of concern. Personal concern? Or a concern
17 for the company? What are you asking?

18 Q. A concern to the company.

19 A. Well, the shareholders of a public
20 utility would be concerned about public utility be
21 operated in accordance with law, that it have a decent
22 working relationship with the regulatory agencies it
23 deals with.

24 If it's long-term, that's probably good
25 for the public utility. The bottom line from the

1 shareholders point of view is always going to be a
2 return on their investment and whatever things need to
3 happen to have a good return on the investment is what
4 they'll be mostly caring about. You can see that in
5 the markets that go up and down based on that.

6 Q. Professor Downs, is Union Electric
7 Company or Ameren Corporation that has the ownership
8 share in EE, Inc.? What is your understanding of the
9 corporate structure?

10 A. I would have to look back to see. The
11 name sometimes get away from me. I thought it was
12 Ameren -- in fact, isn't Ameren just a d/b/a of Union
13 Electric? Am I wrong about this?

14 Q. When I refer to Ameren, I'm referring
15 to the holding corporation, Ameren Corporation?

16 A. Okay.

17 Q. Okay. And I refer to Union Electric
18 Company's d/b/a Ameren UE.

19 A. Yeah. That's confusing, to say the
20 least.

21 Q. If you bare with me I just may have a
22 few more questions. Professor Downs, do you perform
23 any other work for Ameren Corporation or any of the
24 Ameren affiliates or subsidiaries?

25 A. I do not and I have never. This is the

1 first encounter I've had with Ameren.

2 Q. Who contacted you from Ameren or Ameren
3 UE or one of the Ameren Corporation affiliates
4 regarding testifying in this proceeding?

5 A. I believe it was Jim Lowery who works
6 -- does work for Ameren. I think that's the first
7 contact.

8 Q. I assume you're being compensated for
9 your work?

10 A. So far, yes.

11 Q. Being compensated on an hourly basis?

12 A. Yes.

13 Q. What is that compensation?

14 A. I think it's \$250 an hour.

15 Q. How many hours have you billed so far,
16 if you recall?

17 A. I don't. We can work backwards from
18 it, I think. I think the total is 6 or \$7,000. You
19 can work back from that and see.

20 Q. Are you working on just an as needed --
21 if-needed basis or just a firm fixed contract?

22 A. My understanding is and was from the
23 beginning is that I would need to get up to speed on
24 the issues, to provide a direct testimony written
25 statement, and to review some other testimony by other

1 people and then do rebuttal and then testify in the
2 hearing once those occurred. That's my understanding.
3 All on an hourly basis.

4 MR. DOTTHEIM: Professor Downs, thank
5 you very much. I greatly appreciate your patience.

6 EXAMINATION BY MR. MILLS:

7 Q. Professor, this is Lewis Mills from the
8 Office of Public Counsel. I would like to ask you a
9 few questions if you don't mind. I'm not sure that I
10 heard all of Mr. Dottheim's introductory questions.
11 I'll ask you a few. You have been deposed before; is
12 that correct?

13 A. Yes, I have.

14 Q. You're familiar with the process?

15 A. Oh, yes.

16 Q. If I ask you any questions that you
17 don't understand, will you ask me to clarify rather
18 than simply answering what you think I asked?

19 A. Certainly.

20 Q. Are you -- is there anything that would
21 prevent you today from giving truthful answers to my
22 questions?

23 A. No.

24 Q. You're not under the influence of any
25 kind of medication?

1 A. No.

2 Q. And I can't see, but I assume you're
3 not testifying at the point of a gun?

4 A. That's true.

5 Q. I don't believe that you -- that you
6 got into detail with Mr. Dottheim on the -- the
7 corporations on whose behalf you've testified before.
8 Is that part of your CV that you handed out?

9 A. Yes, it is.

10 MR. MILLS: Can we get a copy of that,
11 Mr. Cynkar?

12 MR. CYNKAR: Absolutely.

13 Q. (By Mr. Mills) Since I don't have that
14 in front of me, I will assume that it's complete. I'm
15 not going to ask a lot of questions about it.

16 A. I believe that it is complete.

17 Q. Okay. Your undergraduate degree you
18 earned from Kansas State University in 1963?

19 A. That's right.

20 Q. What was your degree in?

21 A. Bachelor of science with three years of
22 engineering under it.

23 Q. Okay. And later in your career you
24 received an LLM. Was that in tax?

25 A. It was not. It was in corporate law.

1 Q. Okay. Does UMKC currently have an LLM
2 program for corporate law?

3 A. It has a general LLM that you can
4 tailor and specialize in a number of different areas.

5 Q. Page 2 of your testimony on Line 18
6 reference to an LLM and taxation. That's not the only
7 field of emphasis in which you can receive an LLM from
8 UMKC?

9 A. That's correct. We now have several.

10 Q. Okay. During the approximately 10
11 years in which you were an associate then a partner in
12 a Kansas City law firm, what was the -- what areas of
13 practice did you emphasize?

14 A. Early on I did all kinds of work. I
15 gravitated toward business law early on. Basically,
16 did all of the business formation work for the whole
17 firm for a number of years. I started doing
18 securities work representing publicly held companies
19 and registration work. I represented securities firm
20 that did that kind of work. I bought a seat on the
21 American Stock Exchange for a client. I did merger
22 and acquisition work buying and selling companies
23 around the country. I did syndication work buying and
24 putting together coal mining projects in Virginia and
25 Southern Ohio. Also bought and sold some gold and

1 silver mines out in Nevada and Colorado.

2 The bulk of what I would say I did is
3 corporate and then corporate and securities and later
4 with an emphasis on merger and acquisition work.

5 Q. I believe you mentioned that during
6 that time you were involved in at least one Public
7 Service Commission proceeding; is that correct?

8 A. That's correct.

9 Q. How many proceedings were there?

10 A. Our firm represented the underground
11 storage company in Eastern Jackson County. And they
12 were putting in railroad tracks in a number of the
13 caves where they do that underground storage. I did
14 the Public Service Commission work to get approval. I
15 think they're called certificates of necessity and
16 convenience or something like that. It's a good
17 thing. It's regulated, too. I probably shouldn't
18 have added that.

19 Q. How many Public Service Commission
20 proceedings were you involved in?

21 A. I don't remember. Probably three,
22 maybe give or take a couple.

23 Q. All having to do with that same general
24 focus?

25 A. Exactly that. Just railroad tracks in

1 underground storage case.

2 Q. Were you the lead attorney for the --
3 for the applicants in those cases?

4 A. Yes. Well, in those days, we didn't
5 have lead and follow. I was the attorney.

6 Q. Have you ever been involved, other than
7 this current case, in a Public Service Commission case
8 that has to do with setting utility rates?

9 A. No, I have not.

10 Q. Okay. And what specifically was your
11 assignment when you were hired to provide testimony in
12 this case?

13 A. To provide information about the
14 fiduciary duties of directors to the corporations and
15 to their shareholders.

16 Q. Okay. And how detailed is your level
17 of understanding at the time at which you agreed to
18 take on this assignment?

19 A. I'm not sure I can answer that very
20 well. To begin with, I received a general description
21 of what was going on. I received a general
22 description of EE, Inc. and it's Joppa plant and the
23 ownership structure from the beginning up until the
24 current time of that corporation.

25 Basically, I've had a learning curve

1 ever since about having detail about it. I guess I
2 can't really characterize what my level of
3 understanding was. Nothing that I am testifying about
4 -- at least in my belief is controlled by any special
5 facts particularly. I'm just talking about what the
6 law is with respect to fiduciary duties of directors
7 to shareholders and to the company.

8 Q. And those fiduciary duties are -- would
9 it be fair to say, in your opinion, those are not
10 variable from corporation to corporation?

11 A. Well, the fiduciary duties -- the
12 standard of the fiduciary duty I think is the same
13 corporation to corporation, but the implementation of
14 those duties depend on the circumstances.

15 Any time directors are accused of
16 breaching their fiduciary duty, what they actually
17 decided and how they decided and the circumstances
18 under which they decided it have to be applied to the
19 duty to see whether they breached it.

20 Q. So from this particular case, you need
21 to know enough about the situation with EE, Inc. and
22 Union Electric Company to know whether a certain
23 course of action by the EE, Inc. board would or would
24 not violate the fiduciary duty; is that correct?

25 A. I would say that's a correct statement.

1 Q. When I asked you about your level of
2 understanding when you decided to take on this
3 assignment, you said you were provided information
4 about certain things, I believe. Were you provided
5 that information in writing or were you provided that
6 information orally?

7 A. Originally, I had a couple, I think a
8 couple at least, of telephone conversations with legal
9 counsel for Ameren and then I had one visit to St.
10 Louis about a half day meeting, give or take a few
11 hours, to add information to that.

12 All of that occurred prior to my direct
13 testimony report.

14 Q. Did all of that occur before you
15 decided to take on this assignment or after?

16 A. Well, I don't know what you mean by
17 take on the assignment. I agreed to provide legal
18 information by the standards that this would be
19 measured. It wasn't -- I didn't decide that the
20 standard had not been met or not met by then by any
21 means.

22 Q. Okay. Now, at the time you finalized
23 your direct testimony, what specific documents had you
24 read?

25 A. I had read the contract, the power

1 contract, of '87 that expired in '95. I read the
2 articles of incorporation of EE, Inc. and the bylaws
3 of EE, Inc. there may have been a few other things
4 that I looked at while I was here, but I don't -- I
5 can't tell you what they are right now.

6 Q. Had you, at that point, read a draft of
7 Mr. Moehn's testimony?

8 A. I don't know. At some point -- I don't
9 think I ever read the whole thing. I think all I've
10 ever seen of his testimony until just now were
11 excerpts from it. And that was probably because I
12 didn't want to be in the position -- and I don't think
13 anybody wanted me to be in the position of being a
14 fact witness and saying things that are so or not so
15 based on my personal knowledge, because I don't have
16 personal knowledge about that -- those facts.

17 Q. Just for an example, if you look at
18 Page 5 of your testimony, Line 16 to 17.

19 A. Yes. We were just talking about this.

20 Q. Okay. At the time that you wrote that
21 section of your testimony, had you seen excerpts from
22 Mr. Moehn's testimony?

23 A. Yes. Just the small little blurbs, I
24 think is the case.

25 Q. What do you mean by small little

1 blurbs?

2 A. When they're talking about factual
3 matters that I wasn't certain about the factus, the
4 Ameren counsel said, well, have witnesses that are
5 going to testify about these facts as -- or stated in
6 my report. And the whole point of that is so that it
7 doesn't sort of represent me as a fact witness.

8 Q. So similarly on Page 7, Lines 1 through
9 8, for example, you make about four references to Mr.
10 Moehn's testimony to make those -- when you made those
11 references those were in reliance on what you referred
12 to as little blurbs?

13 A. That's true. I relied on whatever
14 information was sent to me that was either already in
15 or was going to be in Mr. Moehn's report, that's true.

16 Q. Okay. And the information that was
17 sent to you, is that what you're calling little
18 blurbs?

19 A. It's an unfortunate term, but it's
20 that's true. They were short statements.

21 Q. So you didn't see even a section of
22 testimony that addressed EE, Inc, a three or four-page
23 coherent segment of testimony?

24 A. That was asked a while ago. I'm not
25 certain that I didn't, but I don't remember

1 specifically seeing a whole section either.

2 Q. The pieces that you did see of Mr.
3 Moehn's proposed testimony, did you receive that by
4 e-mail or paper copy?

5 A. I don't recall.

6 Q. Do you recall ever seeing a paper copy
7 of any portion of Mr. Moehn's testimony before you
8 finalized your testimony?

9 A. It's possible that I did, but I can't
10 tell you right now that I saw it or didn't see it.

11 Q. Okay. Do you recall ever receiving an
12 e-mail that contained any portion of Mr. Moehn's
13 proposed testimony?

14 A. That would be the same answer. I may
15 well have, but I can't tell you that I did.

16 Q. Did you ever see a piece of Mr. Moehn's
17 testimony that was handwritten before you filed your
18 direct testimony?

19 A. No.

20 Q. The little blurs that you referred to,
21 do you remember those well enough to know if those are
22 the same as portions of Mr. Moehn's testimony as it
23 was ultimately filed with the Public Service
24 Commission?

25 A. I don't know that.

1 Q. Do you still have any of Mr. Moehn's
2 proposed testimony that you relied on in preparing
3 your direct testimony?

4 A. I don't know if I do.

5 Q. Do you know that you don't?

6 A. I don't know that either.

7 Q. Okay.

8 A. I may have just seen them when I was
9 here at Ameren. I just don't recall.

10 Q. You mentioned that you were at Ameren
11 for a half day meeting. Do you recall when that was?

12 A. I don't. I have it written down, but I
13 don't now.

14 Q. Do you have it written down somewhere
15 with you?

16 A. No, I don't.

17 Q. Do you recall when you submitted your
18 final draft of the testimony to people at Ameren for
19 filing?

20 A. I have a record of when that was, but I
21 don't have it with me.

22 Q. Okay. Do you have a copy of the
23 testimony as it was filed?

24 A. I think I do. I brought a copy that
25 looks like it's the final one, but it's not a signed

1 one so I can't tell you for sure.

2 Q. Does it have a cover sheet on it?

3 A. Yes.

4 Q. Does the cover sheet on yours show at
5 the upper right hand corner a line that reads date
6 testimony prepared July 5, 2006?

7 A. That's right.

8 Q. Does that help refresh your
9 recollection at all in terms of when you finalized
10 your final draft?

11 A. I don't doubt that that's true, but I
12 don't know that that's the actual final one with the
13 final corrective copy, if you will.

14 All I'm telling you is I don't have a
15 signed copy in front of me.

16 Q. Do you know what this date was filed at
17 the Missouri Public Commission?

18 A. I don't. Somebody just handed me a
19 signed copy and it was notarized July 5th, 2006. I
20 assume that it would have been filed shortly after
21 that.

22 Q. Okay. And --

23 A. Whose was this?

24 Q. Was the date that the affidavit was
25 signed, would that be the date that you submitted your

1 to Ameren for filing?

2 A. That's true. If I remember right, I
3 had it notarized and overnighted. I'm not sure about
4 that either.

5 Q. Would it make any difference to the
6 conclusions that you drew in your testimony if
7 hypothetically you were to learn that Mr. Moehn's
8 testimony was not reliable?

9 A. It depends on what testimony you're
10 talking about and what point you're talking about.

11 Q. If, for example, his entire testimony
12 concerning EE, Inc. was found by the Missouri Public
13 Service Commission to be unreliable, would that
14 undermine your testimony?

15 A. Well, it depends on whether it's
16 unreliable because you don't -- because he doesn't
17 testify or there's some problem with his character or
18 something like that. If the underlying facts that he
19 testified about were still so, then it wouldn't change
20 my view at all.

21 Q. If the underlying facts that Mr. Moehn
22 testified were somehow not in the record in this case
23 for the Commission to rely on, what use could the
24 Commission make of your testimony?

25 A. Well, the testimony that I give

1 regarding the fiduciary duties of officers and
2 directors is good testimony no matter what Mr. Moehn
3 said.

4 Q. So those fiduciary duties are immutable
5 regardless of circumstance?

6 A. Those fiduciary duties exist in the
7 law, and they're going to be applied by a trier of
8 fact either at this level or some other level. And to
9 that extent, they're immutable. There's no doubt
10 about what those responsibilities and duties are.

11 Q. Okay. I believe you said that you
12 reviewed the articles of incorporation and the bylaws
13 of EE, Inc.; is that correct?

14 A. I did.

15 Q. Did you review more than one version of
16 either of those documents?

17 A. I don't believe I did.

18 Q. Do you know if you viewed the current
19 version of the bylaws?

20 A. I hope that it was. Whether it is or
21 not I can't tell you.

22 Q. How did you obtain the version that you
23 reviewed?

24 A. From counsel from Ameren.

25 Q. Now, in terms of the EE, Inc. board

1 decision to sell the output of the Joppa plant at
2 market based rates, would it have been a violation of
3 the board members fiduciary duties to sell that power
4 at cost instead if all shareholders had agreed?

5 A. The board of directors have fiduciary
6 duties to the corporation as well as the shareholders.
7 They have to make their decision based on the long
8 range impact on their own corporation. And it may
9 well have been if they made that decision a
10 shareholder who had agreed to it wouldn't be able to
11 sue them, but they'd still have their fiduciary duties
12 that are created by law and not just from shareholder
13 approval or disapproval. So it wouldn't necessarily
14 solve their problem if the shareholders all agreed.

15 Q. So you're saying that a situation could
16 arise where the shareholders -- because in this
17 instance the group of shareholders is relatively small
18 -- that the shareholders could unanimously decide
19 on a course of action and the board of directors could
20 disregard that because the board of directors felt
21 that it was not within the best interest of the
22 corporation itself?

23 A. They absolutely could do that.
24 Shareholders don't decide what to do with the
25 company's assets, the directors do.

1 Q. Is that true for all corporations
2 regardless of what the corporate bylaws say?

3 A. I'm not sure I can answer that with
4 much certainty. I'm trying to think of a case where I
5 have seen any corporation board of directors be
6 relieved of their fiduciary duties to the company
7 because of the bylaws.

8 I'm having trouble coming up with any
9 authority that would say that what you said is
10 correct. So I'm just not -- I'm not willing to say
11 that it couldn't be, but I -- I have been reading
12 corporation cases for 40 years, and I've never seen
13 one that says that's okay.

14 Q. You don't think it's possible for a
15 corporation's bylaws to give shareholders certain
16 rights over decisions to be made by the corporation
17 that you would normally expect for the board of
18 directors to have?

19 A. I believe that's true. I would have to
20 see some authority to show that's possible. I don't
21 believe I've seen any.

22 Q. If in fact there was a corporation that
23 had provisions like that in its bylaws, would you say
24 they have no legal effect?

25 A. They may have legal effect in the sense

1 that they would relieve the directors from liability
2 to those shareholders who had agreed to it. It might
3 have that effect, but whether it could actually
4 relieve the directors from their fiduciary duties to
5 the company, I think is a -- certainly, it's a
6 question that I'm not willing to say is okay.

7 Q. Does the fiduciary duty to the
8 corporation itself exist in the absence of harm to
9 shareholders?

10 A. The fiduciary duty of the corporation
11 exists regardless. The board of directors is
12 responsible for managing the affairs of the company
13 and that fiduciary duty is owed to the company. So
14 there is a point in time where even creditors can
15 claim the breach of fiduciary duty. Yeah, it would be
16 right to say that it -- that it could exist in the
17 absence of harm to shareholders.

18 Q. Can you give me an example of a breach
19 of a director's fiduciary duties that did not harm any
20 shareholder?

21 A. One breach of the fiduciary duty would
22 be where the corporations in financial difficulty and
23 they -- the board of directors takes actions that
24 damages creditors, might not damage shareholders.
25 That would be one.

1 Q. In order for there to be a breach of
2 fiduciary duty, must either shareholders or creditors
3 or both be harmed?

4 A. I don't know that that's a fair
5 statement.

6 Q. There could be --

7 A. There's so much case law that says that
8 the duty of the director is owed to the corporation,
9 but the corporation might be able to bring its own
10 claim against the directors regardless of whether
11 shareholders lost money or didn't. And the sense
12 would be there -- the example, would be where
13 shareholders are entitled to bring derivative actions
14 on behalf of the corporation, they can bring a
15 derivative action whether or not the value of their
16 stock went up or down.

17 Q. Could that scenario take place in a
18 situation in which the shareholders had all
19 unanimously endorsed the coarse of action that the
20 board of directors took?

21 A. I would have to think about that more.

22 Q. You're a professor at the University of
23 Missouri at Kansas City School of Law; is that
24 correct?

25 A. That's correct.

1 Q. Are you familiar with the Sprint
2 Corporation in the Kansas City area?

3 A. I'm aware of it.

4 Q. And the Kansas City Power and Light
5 Corporation in the Kansas City area?

6 A. I'm aware of it.

7 Q. Are you aware that Sprint buys some of
8 its power requirement from Kansas City Power and Light
9 at above market prices because the power is supposed
10 to be more environmental friendly than some other
11 sources of power?

12 A. I don't know that independently of your
13 statement.

14 Q. Okay. Assume hypothetically, if you
15 will, that that is the case --

16 A. And again what was it?

17 Q. Sprint Corporation is buying power from
18 Kansas City Power and Light Corporation at a rate
19 higher than they otherwise could have paid because the
20 power has -- the power that they are buying has
21 environmentally friendly attributes. Are you clear on
22 that hypothetical?

23 A. I think so.

24 Q. In that situation, has the Sprint board
25 of directors violated its fiduciary duty in not

1 obtaining power at the lowest possible cost, therefore
2 maximizing profit?

3 A. It may maximize profits in any event.
4 The Sprint board of directors may well think that by
5 buying environmentally beneficial power that the
6 public is going to think well of them and buy their
7 telephones and all of the other things they sell. So
8 there may well be business reasons to do that.

9 Q. So there can be situations in which
10 business reasons other than purely maximizing profits
11 should guide the actions of board of records?

12 A. That's not what I said. What I'm
13 suggesting is that there may be business reasons that
14 benefit shareholders that may be effectuated by doing
15 things that on the surface might not seem the best
16 short -- excuse me -- the short-term solution.

17 Boards of directors typically maximize
18 products whether it's long term or short term, but
19 they're always trying to make a way to maximize
20 profits.

21 And I can well believe that the Sprint
22 board in doing that has a business reason to do that.
23 It's -- it's a shareholder business reason.

24 Q. I'm sorry, I missed the last part of
25 that answer.

1 A. I said it's a shareholder business
2 reason with long-term benefit, the Sprint Corporation
3 to so, whether they're right or not about that is
4 another matter.

5 Q. Sort of along those lines, is
6 maximizing shareholder value always the same as
7 maximizing profits?

8 A. I don't know. It depends on whether
9 you're talking about a long term or a short term.
10 You may spend money developing
11 something that is going to have great value in the
12 future. The short-term shareholders don't benefit
13 much by that, but the long-term shareholders may
14 benefit a greater deal.

15 I don't know that that's a -- that
16 dichotomy -- I don't know that you're choosing
17 necessarily between those two things.

18 Q. So is it the board of directors
19 fiduciary duty to maximize profit over the long term
20 or maximize profit from this transaction at which it
21 enters into?

22 A. It's the fiduciary duty to take actions
23 that benefit the corporation. The board of directors
24 decides occasionally to do that in the short term.
25 They decide occasionally to do it in the long term.

1 People disagree about which is the
2 better role to -- or position to take.

3 Q. As you have used that word benefit, is
4 that always measured in profitability?

5 A. Ultimately, it is.

6 Q. Your testimony on Page 9 at Line 4 you
7 talk about the authority of EE, Inc.'s board. What is
8 the source of that authority?

9 A. Point me to where you're talking again.

10 Q. Page 9, Line 4.

11 A. The source of the board of directors
12 authority comes from the statutes of the State of
13 Illinois, and it comes from the articles and bylaws of
14 the corporation.

15 Q. Are there ever situations in which the
16 bylaws and the statutes are not in accord with what
17 the authority of the board is?

18 A. I don't know. Ever is a big word.

19 Q. And in your experience, have you ever
20 run across that situation?

21 A. Well, I've seen cases where companies
22 have tried to eliminate the duty of loyalty to the
23 corporation by adopting provisions and the articles or
24 bylaws to eliminate the duty of loyalty and the case
25 law is supportive of the conclusion that the duty of

1 loyalty can't be eliminated, that it's one that exists
2 because of general law says it exists. So that may
3 apply to the duty of care, too. I'd have to look.

4 So, yeah, there are plenty of
5 situations out there where people have tried to do
6 that I think non effectively.

7 Q. What is your understanding of what a
8 utilities regulated rate base is?

9 A. I'm certainly not a regulatory
10 attorney. I don't know much about that. My own
11 understanding is that there are certain items of the
12 company's business that are included in the costs and
13 that are allowable in determining what the rates are
14 going to be and that there are certain things about
15 the company that are not -- cost related to those
16 things that are not included in the rate making
17 regulatory process.

18 I think the vernacular is, at least
19 what I've -- the lingo I heard so far is above the
20 line and below the line assets.

21 Q. So is it your understanding that an
22 asset that is above the line is in rate base and an
23 asset that is below the line is not in rate base?

24 A. I think that would be a fair statement,
25 in my understanding, but my understanding is awfully

1 weak.

2 Q. Okay. How did you gain that
3 understanding?

4 A. By discussing this matter with lawyers
5 from Ameren.

6 Q. In the context of this particular case?

7 A. Yes.

8 Q. And when did you have your very first
9 discussion with Ameren about this case?

10 A. I don't know that date. I have it
11 somewhere in my office, but I don't know it off the
12 top of my head.

13 Q. Assuming that you prepared your direct
14 testimony and finalized that on July 5th, would it
15 have been six months before that, one month before
16 that?

17 A. I would have to look. I really can't
18 tell you. It's been several weeks, maybe several
19 months.

20 Q. Have you reviewed any textbooks or
21 treatises or law review articles or any documents to
22 further your understanding of the regulatory term
23 above the line and rate base?

24 A. No, I haven't.

25 Q. At the time that you wrote your

1 testimony relying on Mr. Moehn's testimony, did you
2 know Mr. Moehn's educational background?

3 A. No.

4 Q. Do you know it now?

5 A. No.

6 Q. Do you know Mr. Moehn's employment
7 history?

8 A. I do not.

9 Q. Do you know how long he has been
10 involved with Ameren UE?

11 A. I do not.

12 Q. Are any of those factors relevant to
13 your decision to rely on his testimony in formulating
14 yours?

15 A. My testimony is based partly on certain
16 facts being true. My understanding was that there
17 would be another witness, and it ended up being Mr.
18 Moehn. There may be others, for that matter, who
19 would testify about those facts because I'm not a fact
20 witness and I don't know those facts independently,
21 that's -- so -- I mean, that's my answer.

22 Q. Now, you said that that witness ended
23 up being Mr. Moehn. Was there at some point a
24 discussion of someone else being that witness?

25 A. No, not that I know of. Just early on

1 there were certain things that I didn't know. Early
2 on, I was saying what is the factual circumstance
3 here. And a number of issues were identified.

4 There is no point in my giving a legal
5 opinion with regard to any matters for which there is
6 going to be no factual support. I also didn't want to
7 appear to be a fact witness.

8 Q. I believe you've said that several
9 times in your deposition as well as in your prefile
10 testimony, but are you an expert on public utility
11 law?

12 A. No, I'm not.

13 Q. Do you know whether most business
14 corporations in the United States are monopolies?

15 A. I know most of them are not.

16 Q. Okay. Are most public utilities
17 monopolies?

18 A. I believe they are.

19 Q. Are you familiar with the concept of
20 the regulatory compact?

21 A. Only in the most general term. You're
22 talking about the idea that private industry will
23 provide utilities to the public. In exchange for
24 that, they get a monopoly, in exchange for the
25 regulatory scheme; is that what you're referring to?

1 Q. That's generally a big part of what we
2 usually talk about as a regulatory compact.

3 A. Okay.

4 Q. Do most business corporations in the
5 United States have an obligation to serve?

6 A. An obligation to serve, you mean some
7 independent legal obligation?

8 Q. Yes.

9 A. No.

10 Q. They're not required to sell their
11 product to every customer or potential customer who
12 asks to buy that product; is that correct?

13 A. I believe that's true.

14 Q. Can most business corporations in the
15 United States raise their prices when necessary to
16 remain profitable?

17 A. That's all market based.

18 Q. Would a general business corporation
19 have to seek governmental approval to raise prices?

20 A. No, they wouldn't.

21 Q. Does a utility?

22 A. Yes, they do.

23 Q. Are most corporations in the United
24 States protected from competition by law?

25 A. No.

1 Q. Now, do the -- does the board of
2 directors -- do the directors on the board at EE, Inc.
3 who happen to be employees or officers of Kentucky
4 Utilities, do they have a different fiduciary duty
5 from the directors who happen to be employees of Union
6 Electric?

7 A. I'm sorry. Say that again, please.

8 Q. Okay. Let me back up a step and see if
9 we agree on the facts.

10 How many board members are there on EE,
11 Inc.?

12 A. I think there's seven.

13 Q. All right. Are some of those board
14 members also employees of Kentucky Utilities?

15 A. I believe that's true.

16 Q. Are some of the board members also
17 employees of the Union Electric Company?

18 A. Yes.

19 Q. And those two are different groups.
20 There's a group of directors that are KU employees. A
21 group of directors that are UE employees.

22 A. That's true.

23 Q. Do the directors that are cushion KU
24 employees have different fiduciary duties than the
25 directors who are UE employees?

1 A. To EE, Inc.

2 Q. To EE, Inc., correct?

3 A. No, they don't.

4 Q. Okay. Is it possible that directors on
5 the same board could interpret their fiduciary duties
6 differently from other directors on that same board?

7 A. You mean could seven different human
8 beings have a different view of what they're supposed
9 to do? Yes, I would say they could.

10 Q. Okay. Are all such differences of
11 opinion necessarily the result of one opinion holder
12 violating his or her fiduciary duty?

13 A. I don't know that that would a
14 universal statement to be true, no.

15 Q. Okay.

16 A. People have differences of opinions
17 about what's to be done and both of them may be
18 legitimate both of them may be illegitimate.

19 Q. Are you --

20 A. But if one of those positions is to
21 violate their fiduciary duty to their corporation or
22 to their shareholders, then that's the illegitimate
23 group.

24 Q. Are you aware that the EE, Inc. board
25 of directors had discussions in the years leading up

1 to the end of 2005 when the Power Supply Agreement
2 that you reviewed was set to expire about what to do
3 upon that expiration?

4 A. I believe that's a correct statement.

5 Q. Do you know the position that the
6 directors who happen to also be employees of Kentucky
7 Utilities advocated during those discussions?

8 A. I think I do.

9 Q. And what is your understanding?

10 A. I think that at one point they thought
11 they could sell the power to the shareholders for cost
12 plus rate as opposed to market rates.

13 Q. If they persuaded a majority board to
14 go along with that, would that have been a violation
15 of the board's fiduciary duties?

16 A. I believe it would have been.

17 Q. Well, did a violation of the fiduciary
18 duties of those Kentucky Utility board members to
19 advocate for that position?

20 A. I don't know. I would have to hear
21 what their -- what their real reason was, whether they
22 had some legitimacy for taking that position. It's
23 possible that they could have had. I'm just unaware
24 of anything like that.

25 I guess in one sense I'm not sure that

1 advocacy of any particular position is necessarily a
2 breach of fiduciary duty, even if the taking of the
3 action itself would have been a breach of fiduciary
4 duty.

5 Q. Assuming that the directors voted along
6 the lines of the position that they advocated would
7 that vote have been a breach of their fiduciary
8 duties?

9 A. Well, again, you have the same problem.
10 Unless the company ends of doing the thing that is
11 wrong, then you don't end up with any -- any claim
12 against somebody who voted the other way.

13 Q. So it your understanding that you can
14 only be in breach of your fiduciary duty if you're in
15 the majority of the board?

16 A. That's not what I was suggesting.

17 Were you asking whether the two
18 directors from KU voted for the sale at below market
19 value, but the sale still was at market value and,
20 therefore, they have breached it even though it didn't
21 happen? Or were you suggesting that they voted with
22 the majority and then together the seven of them sell
23 it at cost and whether they're then in breach?

24 Q. No. My -- and if you know this to be
25 the fact, we can talk about it that way. Otherwise

1 we'll talk about it as a hypothetical.

2 The situation I outlined was that two
3 directors affiliated with KU voted to continue
4 provision of power to sponsor to sponsor at cost based
5 rates, the majority voted the other way and so that
6 action did not take place. Instead the action that
7 did take place was that the power, henceforth, will be
8 sold at market base rate.

9 Are you understanding the situation
10 that I've outlined?

11 A. I think so.

12 Q. Is it your understanding that that is
13 actually what happened?

14 A. I don't remember what the vote was.

15 Q. Well, then let's treat it as a
16 hypothetical?

17 A. Fine.

18 Q. Assume that that's happened. By voting
19 in that fashion, did the members of the board who
20 happen to be affiliated with KU violate any fiduciary
21 duties?

22 A. When you're talking about an outcome
23 like this, I'm having a hard time imagining a
24 situation where you could accuse someone of breach of
25 their fiduciary duty when no action based on that

1 occurred. I think it's possible.

2 Q. I'm sorry. Were you fished?

3 A. Yes.

4 Q. You think what is possible?

5 A. I think it's possible that they're in
6 breach of their fiduciary duty even though they lose
7 the vote.

8 I just can't -- I've never seen any
9 actual authority asserting that. It comes up in
10 situations where you have a breach of the duty of
11 loyalty occasionally where somebody is there
12 advocating a position where they get a personal
13 benefit from it. When it doesn't actually happen, you
14 never end up with a case. So I don't know for sure.

15 MR. MILLS: Let's take a break.

16 (A temporary recess was taken at this
17 time.)

18 Q. (By Mr. Mills) Page 7 of your
19 testimony, Line 22. You talk about directors not
20 owing a duty to third party including Missouri retail
21 rate payers; is that accurate?

22 A. I'm sorry what line?

23 Q. Page 7, Line 21 to 22.

24 A. Yes, I see it.

25 Q. Could there be situations in which the

1 board would act in such a way to give benefits to
2 Missouri retail rate payers that would also benefit
3 the EE, Inc. itself?

4 A. Probably so.

5 Q. So EE, Inc. board members duties with
6 respect to EE, Inc. don't necessarily preclude them
7 from doing things that may be favorable to Missouri
8 rate payers?

9 A. As long as this -- to the benefit of
10 EE, Inc., that's true.

11 Q. I'm sorry. Were you going to add
12 something.

13 A. No, that's fine.

14 Q. Okay. Page 9 you have a quote at Line
15 6 to 7 that appears to be from EE, Inc.'s bylaws; is
16 that where that quote is from?

17 A. Yes.

18 Q. Do you know where in the bylaws that
19 quote comes from?

20 A. I don't know.

21 Q. Is it possible that there are
22 exceptions to the power to manage the property
23 business and affairs of the corporation within the
24 bylaws?

25 A. You mean in these particular bylaws or

1 bylaws generally?

2 Q. I'm talking about the bylaws from which
3 that quotation comes from.

4 A. I don't remember any such thing.

5 Q. Have you ever seen any such thing in
6 any corporation's bylaws?

7 A. Well, this is what we were talking
8 about earlier where corporations have attempted to
9 give power to other parties to make decisions that the
10 board of directors is supposed to make and the
11 difficulty -- legal difficulty of doing that.

12 Q. Okay. And just refresh my memory, did
13 you say you had seen this before in other bylaws or
14 you had not?

15 A. What I suggested was that I've seen
16 cases about that. I don't know that I've actually
17 seen those bylaws.

18 Q. Okay. And what did the cases that
19 you've seen hold?

20 A. That the board of directors essentially
21 have non delible duties to make good decisions for the
22 company in managing the company, except to the extent
23 that they delicate specific responsibility to officers
24 and other agents of the company or to committees of
25 the board which they can also do.

1 short run by neglecting long-term maintenance.

2 A. Well, it's a judgment call, a business
3 judgment, about whether that's in the best interest of
4 the corporation or not.

5 People do put off maintenance
6 occasionally, you know, in order to get short-term
7 benefits long term, though, and ultimately you have to
8 pay the piper for that. I guess I'm not sure what the
9 crust of your question is there really.

10 Q. Are you aware --

11 A. It's still a business decision to be
12 made by the board on behalf of the corporation and in
13 the best interest of the corporation. That doesn't
14 mean they do everything the first day. Everything
15 doesn't have to be done in January.

16 Q. Are you aware of any cases in which
17 directors have been found in breach of their fiduciary
18 duties by maximizing short-term profits at the expense
19 of the long-term health of the corporation?

20 A. I cannot think of one. Certainly can't
21 think of one where the harm that the -- would be
22 neglecting maintenance.

23 Q. Is one of the things that you do for a
24 living is advise boards of directors on how they
25 should conduct their affairs?

1 A. I do some yes.

2 Q. Do you advise them to always maximize
3 short-term profitability?

4 A. What I do is I make sure that they are
5 continuing to focus on the benefit of the corporation
6 and that they are evaluating all available information
7 in making their business judgments about what to do,
8 but it's not my decision about what's best for the
9 corporation so I don't try and tell them what to do.

10 Q. Now, would it be a violation of the EE,
11 Inc. board of directors' fiduciary duties to make a
12 decision that the corporation would be better off by
13 appeasing state regulators rather than maximizing
14 profits in the short run through making market based
15 sales?

16 A. From the point of view of EE, Inc,
17 you're just asking my opinion, my opinion would be
18 it's hard to justify selling at below fair market
19 value for a benefit that doesn't accrue to EE, Inc. I
20 guess, I don't see how appeasing regulators ultimately
21 inheres to the benefit of EE, Inc.

22 Q. In this particular situation what is
23 the difference on an annual basis between cost base
24 rates and market base rates?

25 A. In dollars you're talking about?

1 Q. Yes.

2 A. I don't know that. I think it's
3 significant.

4 Q. Doesn't the amount of benefit to be
5 derived from one course of action relative to another
6 course of action figure into a directors analysis of
7 which action to take?

8 A. Yes, it would. And I just can't tell
9 you the numbers, but when I started working on this,
10 my understanding was that the difference was dramatic.

11 And since that time, I've seen the
12 direct testimony of some of the other witnesses, I
13 guess, in opposition to this that describe their view
14 of how many dollars are involved in that and it
15 sounded large.

16 Q. But that difference is something that
17 the board of directors should consider as well as
18 other factors that may benefit or harm the corporation
19 from those decisions; is that correct?

20 A. Well, the amount would make a
21 difference. If it's an attributable amount obviously
22 it would be harder to make any case that they had
23 reached their fiduciary duty, but if it's a large
24 amount they would be hard pressed to justify.

25 Q. My question was should they consider

1 other costs and benefits that flow from that decision
2 other than simply the dollar impact?

3 A. Well, they certainly could consider
4 other things. You know, they're supposed to evaluate
5 all available information in making a decision on
6 behalf of the corporation and the corporation we're
7 talking about is EE, Inc.

8 Q. Right. And if they do not -- if they
9 do not honestly evaluate all information, would they
10 be remiss in their duties?

11 A. Well, it depends on what it is. I
12 mean, all information is too all encompassing. The --
13 you can never know everything. And a lot of what you
14 actually know is still guessing about what the future
15 is going to look like. So it wouldn't be fair to say
16 that they have to consider all other possibilities.

17 The general standard that the case law
18 supports is that they're supposed to evaluate the
19 business decision based upon the interest of the
20 company and relevant available information, not
21 trivial information.

22 Q. Would the directors be remiss if they
23 did not evaluate relevant and available information?

24 A. If it was important and material, then
25 it would be remiss.

1 Q. Okay. Is there any duty on the part of
2 a director to seek out information or should they just
3 rely on information that is provided to them?

4 A. You know, that's a difficult question.
5 The -- I think that they -- well, there's variety out
6 there in the case law about how far directors have to
7 go. And I haven't counted noses, but I would be very
8 surprised if the majority didn't conclude something
9 like this. That directors or supposed to seek out
10 available information. They're entitled to rely on
11 reports by management. They don't have to do their
12 independent studies. Management comes with a report.
13 There's a lot of case law that says the directors do
14 not have to go and independently verify those reports
15 or independently do their own studies. Directors meet
16 in many corporations no more than once a month,
17 sometimes only quarterly.

18 There's no way for them to obtain the
19 kind and level of information that management has. So
20 there's general acceptance of the idea that they can
21 rely on reports of management and others.

22 So I would say, no, they don't have an
23 obligation to go seek out everything. It's what a
24 reasonable person would do under the same
25 circumstances.

1 Q. And given your knowledge of what EE,
2 Inc. does and the kinds of decisions that the board
3 makes, what would you suggest is the minimum amount of
4 time that a director should spend with EE, Inc.
5 business?

6 A. I don't have an opinion about that.

7 Q. Have you ever been involved with or
8 seen a case in which directors were found liable for
9 not spending a sufficient amount of time or energy or
10 dull diligence on work business?

11 A. I've not been involved in one either as
12 a lawyer or as an expert, but I've certainly read the
13 cases that deal with that from various jurisdictions
14 around the country.

15 Q. And how bad does a director have to be
16 before they get into that kind of trouble?

17 A. For not doing their homework?

18 Q. Yeah.

19 A. It depends on the circumstances. I
20 mean, there are cases where directors, you know,
21 basically don't even come to meetings and don't
22 discharge their duties at all. There are other cases
23 where directors come, but they're not very well
24 educated or very well experienced in business and so
25 they don't understand everything and they don't go out

1 of their way to understand things in which there has
2 been some liability held.

3 Directors have been held liable for
4 letting their relatives do all of the work and they
5 just sit there and vote.

6 You know the most famous case of course
7 is the VanGorkum case where the director is real
8 smart, real educated, real fancy directors, were held
9 responsible for not discharging their fiduciary duty
10 to the company and its shareholders in a buy-out
11 setting where they just took the word of VanGorkum
12 that the best price had been achieved for the sale of
13 company. And they were plenty smart. They just
14 didn't have the corporation do the things it needed to
15 do in determine whether the best price had been
16 obtained.

17 Q. In your role as an advisor to boards of
18 directors, would you advise directors that they should
19 read the bylaws of the corporation on who -- the
20 bylaws?

21 A. I don't know that I ever have actually
22 said that out loud.

23 Q. Do you think that a director could
24 adequately participate on a board of directors without
25 having read the bylaws?

1 A. I believe they could, yeah.

2 Q. How about the articles of
3 incorporation?

4 A. Oh yeah. Lots of director do a fine
5 job without ever having read either one of those
6 documents. And that's one of the reasons why lawyers
7 go to meetings because they turn to the lawyers and
8 say what do the bylaws say.

9 Q. Would it be proper for a director to
10 vote on changes to the bylaws without having read the
11 bylaws?

12 A. I would say that if the legal counsel
13 to the company informed the directors about what the
14 old bylaw was or the new bylaw being proposed was,
15 that that would be okay. If they didn't have any
16 reason to suspect that was some kind of underhanded
17 behavior going on.

18 In fact, frankly, bylaw changes happen
19 that way all of the time where bylaws -- or changes
20 are submitted to -- under a statement of unanimous
21 consent and the directors don't get the whole bylaws
22 attached to them. They just get the changes.

23 Q. Let me pose another hypothetical to
24 you. If the board of directors of a car maker knew
25 that a particular car model was dangerous, but also

1 knew that the cost of wrongful death lawsuits would be
2 less than the cost of the recall of that particular
3 model, where does the fiduciary duty lie?

4 Should they require the recall even
5 though in the long run it cost the corporation more
6 money or should they allow the dangerous car on the
7 road?

8 A. Well, I don't think you should talk
9 about Ford Motor Company in such pejorative terms when
10 they just lost \$12 billion. That's a great case.

11 The directors have a fiduciary duty to
12 the corporation. And, as you know, I suspect you
13 know, they were found to -- the company was found
14 liable for millions and millions of dollars because of
15 the defect in the Ford Pinto.

16 That was a business decision that they
17 made that most people find bad at the very minimum.
18 On the other hand, corporations make those decisions
19 all of the time. Corporations decide to put one kind
20 of a safety switch on a device instead of another
21 because it cost two dollars different and more damage
22 is going to be done.

23 We do that in our public life. We
24 build single lane highways knowing that if we build
25 double lane highways, you know, another 100 people

1 wouldn't die, but we still don't spend the money.

2 It's always a cost benefit analysis.

3 Ford just did it in a really shabby way. Ultimately,
4 the decision is supposed to be for the benefit of the
5 corporation.

6 Q. And it may be that my hypothetical had
7 a resemblance to a certain real life situation, but
8 I'm not sure that you answered my question in the
9 hypothetical which was in that situation did the board
10 of directors have a fiduciary duty to recall the car
11 or to not recall the car?

12 A. I don't remember hearing that part of
13 your question. Under federal law, I think they do
14 have a duty to recall the car. I don't think the
15 fiduciary duty law, corporate law, creates that duty.

16 Q. The fiduciary duty of corporate law
17 require the opposite action, as you understand that
18 fiduciary duty?

19 A. I doubt it.

20 Q. So in that case the fiduciary duty to
21 maximize benefit to the corporation is somehow
22 outweighed by a public interest benefit?

23 A. I don't think it's outweighed
24 necessarily by a public interest benefit. It's
25 outweighed by the reality that what they've done is

1 secretly keep the potential harm away from the public.

2 And once that becomes known, the liability is so huge.

3 I mean, that was a bad business

4 decision as well as an immoral thing to do. It

5 doesn't flow from some separate obligation to the

6 customers. We have an obligation to sell safe

7 products to customers, but it comes from others. It

8 also comes from morality.

9 Q. And I hate to do this, but I think
10 you're mucking up my nice clean hypothetical --

11 A. I wouldn't do that on purpose.

12 Q. -- with real world facts.

13 I wasn't talking about any specific
14 car, and I wasn't talking about a bad business
15 decision.

16 In my hypothetical, the cost to recall
17 the car was greater than the cost of allowing the car
18 to remain on the road however unsafe.

19 My question was does the board have a
20 fiduciary duty to allow that car to remain on the road
21 even though it's unsafe because leaving it on the road
22 maximizes the value to the corporation?

23 A. No, I don't believe they do.

24 Q. And why not?

25 A. Because I think in their judgment they

1 could believe that long term it's not in the interest
2 of the corporation do so. I think they might justify
3 that in a number of ways. One of which is it's
4 immoral to do so. And long term the corporation is
5 going to be better off if it makes moral decisions as
6 opposed to immoral ones.

7 MR. MILLS: That's all I have. Thank
8 you.

9 EXAMINATION BY MR. MICHEEL:

10 Q. On Page 12 of your testimony, I'm
11 focusing at Line 9 and 10.

12 THE WITNESS: How many people are going
13 to ask me questions?

14 MR. CYNKAR: He is the last one.

15 Q. (By Mr. Micheel) There are more parties
16 than this. Only three showed up at the deposition.

17 A. I'm sorry. Your question was?

18 Q. I'm looking at Page 12 of your
19 testimony, Line 9. It says in summary that EE, Inc.
20 boards recent decision to sell power at market base
21 rates --

22 A. And which line -- okay. I got it.

23 Q. -- is simply a continuation of the
24 decisions it has always made to maximize shareholder
25 value; do you see that?

1 A. Yes.

2 Q. Now, you testified earlier today that
3 you are not a fact witness in this case; is that
4 correct?

5 A. That's true.

6 Q. Isn't it necessary to know the facts of
7 this case to reach that conclusion?

8 A. It depends on how many facts. And what
9 I base that on was the testimony that they had sold at
10 cost plus rates which were the only rates available.
11 I certainly see that as maximizing shareholder
12 benefits.

13 Q. Those are facts that you are utilizing
14 to reach that conclusion, are they not?

15 A. Sure.

16 Q. In that sense, you're a fact witness?

17 A. No. I'm just saying if that fact is
18 true, then that's exactly what occurred. I don't know
19 that they -- that they did anything like that other
20 than from the witness, Mr. Moehn's testimony, and what
21 I heard from the Ameren legal folks.

22 Q. So --

23 A. If it's not true, then it's not true.

24 Q. What the lawyers told you and what Mr.
25 Moehn has in his testimony?

1 A. I would say that's true.

2 Q. I think you testified earlier that EE,
3 Inc. went ahead and entered into a purchase power
4 contract that was cost plus, that would be a violation
5 of a fiduciary duty. Could you explain that?

6 A. If that was less than the fair market
7 value of the product that they have to sell, that's
8 what that is.

9 Q. Now, you talked earlier about the
10 business judgment rule. How far less does it have to
11 be?

12 A. I don't know that.

13 Q. Let's say the contract is cost plus a
14 guarantee 15 percent return on equity for EE, Inc.
15 guaranteed, and then the other choice is market where
16 there's a risk. Say the corporation decides to go
17 with the cost plus 15 percent return, is that a
18 violation of fiduciary duty?

19 A. Depends on whether the directors have
20 sufficient information to believe that that would
21 maximize the profit for the corporation.

22 Q. I guess what I'm asking is, isn't there
23 some range of profit that would be acceptable?

24 A. Below market?

25 Q. Yes.

1 A. Hard to justify that.

2 Q. What if the market was less than 15 --
3 less than a cost plus contract, then would it be a
4 breach of fiduciary duty to enter into market based?

5 A. Probably not.

6 Q. Why not?

7 A. Because it's less money.

8 Q. You talked earlier about the blurbs,
9 your term, that you reviewed of Mr. Moehn's testimony.
10 Did you know that Mr. Byrne wrote those?

11 A. I don't know who wrote them.

12 Q. So you weren't aware that Mr. Byrne
13 wrote the EE, Inc. section of Mr. Moehn's testimony?

14 A. As I just said, I don't know who wrote
15 that.

16 Q. How did Mr. Lowery get your name?

17 A. I think it was a recommendation from
18 Mr. Sullivan, I believe.

19 Q. And how did Mr. Sullivan get your name?

20 A. I think he may have been a student of
21 mine some years ago.

22 Q. Is any party suggesting in this case
23 that the directors of Union Electric breached any sort
24 of duty?

25 A. I don't know that they are.

1 Q. Is any party in this case suggesting
2 that the directors of EE, Inc. breached any duty?

3 A. I believe not.

4 Q. You testified earlier that you just
5 became aware --

6 A. Let me back off of that. My sense is
7 that the opposition to the rate increase or the rate
8 case is based on a conclusion that the board of
9 directors of EE, Inc. should have extended the
10 contract or should have given another contract for
11 cost plus rates. And that the board of directors had
12 some obligation to do that and throughout some of the
13 direct testimony of other witnesses their statements
14 like they owed it to the public or they owed it to the
15 rate making -- some other kind of comment that somehow
16 the directors should have done that.

17 So to that extent, I guess the should
18 have implies some obligation or duty.

19 Q. We're going to get to that. You said
20 that you weren't aware that EE, Inc. had subs,
21 subsidiaries?

22 A. I was not.

23 Q. And how did you become aware that they
24 did?

25 A. Someone mentioned one of them,

1 mentioned the barge company. And I said, well, what
2 is the rest of the structure then? And they said
3 there are other subsidiaries which I had not seen or
4 heard anything about.

5 Q. Who was the someone that mentioned the
6 barge company?

7 A. Probably one of the lawyers. It was on
8 a conference call.

9 Q. What is the barge company? I'm aware
10 of EE, Inc.'s barge company?

11 A. Yeah. I think it had a subsidiary some
12 time ago. Maybe still does, I don't know, that
13 invested in a barge business and lost a bunch of money
14 doing it. That's my understanding of it. Lost a
15 million and a half bucks doing it. But I don't have
16 any independent knowledge of that. I've not seen any
17 records or anything like that to show that.

18 Q. And so why did this Ameren individual
19 tell you about the barge company?

20 A. It was in a conversation with several
21 people on a conference call and it came up. And I
22 don't, frankly, know how to came up. And all I'm
23 suggesting is that's the first time I knew that it had
24 subs.

25 Q. Let me ask you this. Did you write all

1 of your testimony yourself?

2 A. I did most of it. Parts I think
3 probably picked up from information sent to me by
4 lawyers from Ameren. Obviously, didn't write the
5 parts that are the quotes and so on from Mr. Moehn's
6 testimony, but the main ideas and the main thrust were
7 all mine.

8 Q. So there were some question and answers
9 in your direct testimony that you received from Ameren
10 UE?

11 A. No. What I said was, I wrote the
12 question and answers and then some of that was
13 supplemented by information that I got after that.

14 Q. Do you know if there are going to be
15 other witnesses on the issue of the legal obligations,
16 other than yourself?

17 A. I don't know that.

18 Q. Have you reviewed the state witnesses
19 Mr. Brosch's testimony?

20 A. I believe so.

21 Q. And what is Mr. Brosch recommending?

22 A. As I mentioned earlier, I read three or
23 four all at once. I can't tell you which person said
24 which thing. I can't independently answer that.

25 Q. Is Mr. Brosch, if you know, offering

1 any sort of legal opinions?

2 A. I don't believe so, but again I'm not
3 certain of who all of these people are. I don't know
4 who said what. I know that in several of those
5 reports, the person would start out and say, well, I'm
6 not a lawyer but and then what they said sounded like
7 -- but that can't be the rule or it shouldn't be the
8 rule, it's unfair or some other kind of comment.

9 Q. Have you written some of your rebuttal
10 testimony?

11 A. Yes, I have.

12 Q. Okay. And have you provided specific
13 rebuttal testimony in that rebutting Mr. Brosch?

14 A. I'm sure I have.

15 Q. And what issues did you raise with
16 respect to Mr. Brosch?

17 A. I would have to look back at it to tell
18 you that.

19 Q. Do you have that with you today?

20 A. No, I don't recall.

21 Q. So you don't recall what it is?

22 A. I don't.

23 Q. Have you submitted it for review to
24 Ameren?

25 A. I have.

1 Q. So it's finished?

2 A. No, it's not quite finished.

3 Q. You're going to get input from Ameren
4 individuals?

5 A. Yeah. This was initial -- as soon as I
6 got those, I looked at them and I did question and
7 answer format, sent it back.

8 Q. On Page 7 you have a cite to Graham
9 versus Mimms, M-I-M-M-S. Did you find that case on
10 your own?

11 A. I didn't.

12 Q. Who found that case?

13 A. I think either Jim Lowery or Tom Byrne.

14 Q. Have you read that case?

15 A. I looked at it last summer.

16 Q. You haven't read it repeatedly?

17 A. No, I haven't.

18 Q. But that's not any legal research that
19 you did on your own?

20 A. No, that's true.

21 Q. Again, if that case doesn't stand for
22 the proposition cited there, you took that on Mr.
23 Byrne's or Mr. Lowery's word?

24 A. That would be true.

25 Q. They provided you the citations?

1 A. That's true.

2 Q. Okay. The citations is wrong. That's
3 okay.

4 If I could just get a synopsis of your
5 testimony. It's my understanding that the thrust of
6 your testimony is that the EE, Inc. board of directors
7 their main fiduciary duty is to maximize the profits
8 for the shareholders; is that a correct understanding?

9 A. A fiduciary duty is to the corporation
10 and to the shareholders and their main fiduciary duty
11 is to make the company profitable. And that includes
12 maximizing profits. People have different views about
13 how to go about that, but that's got to be the goal.

14 Q. And corporations such as EE, Inc. can
15 achieve that goal in a lot of different ways?

16 A. I don't know that to be true.

17 Q. Okay. For EE, Inc. is there more than
18 one way to achieve the goal?

19 A. I don't know that to be true. My
20 understanding was they have one major product.
21 Actually, I thought they only had one product which
22 was power. And that's how they make their money is by
23 selling that power. It's hard to see how they can
24 maximize shareholder benefits and company benefit
25 without selling that power for as high as price as

1 they can get.

2 Q. And that requires them to do it on the
3 market?

4 A. I don't know that it does. I mean,
5 arguably you could take the position that selling it
6 on the market is long term not in the best interest of
7 the company, but to do that you'd to believe that the
8 market is going to go down.

9 Q. And do you think that EE, Inc. should
10 have some analysis of the market to base their
11 determination on whether or not they should go to
12 market based rates?

13 A. I don't know that it's necessarily
14 required. It certainly wouldn't be a bad idea.

15 MR. MICHEEL: Thank you very much.

16 THE WITNESS: You want another turn.

17 MR. DOTTHEIM: No. Mr. Cynkar wouldn't
18 giver me another term.

19 MR. CYNKAR: Read and sign.

20

21

22

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25

C E R T I F I C A T I O N

1
2
3 in controversy aforesaid; that the witness was
4 I, Cindy J. Taylor, Certified Court
5 Reporter within and for the State of Missouri, DO
6 HEREBY CERTIFY that pursuant to notice/agreement
7 between the parties, the aforementioned witness came
8 before me at the time and place hereinbefore
9 mentioned, and having been duly sworn to tell the
10 whole truth of his knowledge touching upon the matter
11 in controversy aforesaid; that the witness was
12 examined on the 26th day of January, 2007, and
13 examination was taken in shorthand and later reduced
14 to printing; that signature by the witness is not
15 waived and said deposition is herewith forwarded to
16 the taking attorney for filing with the Court.

17 IN WITNESS WHEREOF, I have hereunto subscribed
18 my name this 28th day of January, 2007.

19 Cindy J. Taylor

20 CINDY J. TAYLOR, CSR, CCR
21
22
23
24
25

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