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BEFORE THE
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)
)
ILLINOIS COMMERCE COMMISSION)
)
on its own motion)
)
-vs-) 03-0606
)
KMS MACON POWER, INC.)
)
Investigation of compliance with)
order granting QSWEF status)

Chicago, Illinois
February 6, 2004

Met pursuant to notice.

BEFORE:

Mr. Terrence Hilliard, Administrative Law Judge.
Ms. Bernadette Cole, Administrative Law Judge.

APPEARANCES:

GOULD & RATNER by
MR. LOUIS BERNSTEIN
222 North LaSalle Street, Suite 800
Chicago, IL 60601
for LePetomane VI, Inc.,
as receiver of KMS Macon Power, Inc.

MR. MICHAEL S. PABIAN
10 South Dearborn Street, 35th Floor
Chicago, Illinois, 60603

-and-

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for Commonwealth Edison Company;

1 APPEARANCES: (Continued)

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8 Chicago, IL 60601
9 for the staff.

10 SULLIVAN REPORTING COMPANY, by
11 MICHAEL R. URBANSKI, C.S.R.,
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1 JUDGE HILLIARD: On behalf of the Illinois
2 Commerce Commission we call Docket 03-0606,
3 Illinois Commerce Commission on its own motion,
4 investigation into KMS Macon Power, Inc.,
5 investigation of compliance with order granting
6 QSWEF status. That's Q-S-W-E-F status.

7 Could the parties, beginning with
8 counsel on the left, identify themselves please.

9 MR. BERNSTEIN: Louis Bernstein from Gould &
10 Ratner, B-e-r-n-s-t-e-i-n, on behalf of LePetomane,
11 L-, small -e-, capital P-e-t-o-m-a-n-e, Roman
12 numeral six, Inc., as receiver of KMS Macon Power,
13 Inc.

14 MR. PABIAN: For Commonwealth Edison,
15 Michael S. Pabian, 10 South Dearborn Street, 35th
16 Floor, Chicago, Illinois, 60603.

17 MR. REED: Also on behalf of Commonwealth
18 Edison, G. Darryl Reed of the law firm Sidley,
19 Austin, Brown & Wood LLP, 10 South Dearborn,
20 Chicago, 60603.

21 MR. YASUNAGA: Shig William Yasunaga,
22 Y-a-s-u-n-a-g-a, 500 South 27th Street, Decatur

1 Illinois, 62521, appearing on behalf of Illinois
2 Power Company.

3 MR. NIXON: David L. Nixon on behalf of
4 Illinois Commerce Commission staff, 160 North
5 LaSalle Street, Suite C-800, Chicago, Illinois
6 60601.

7 JUDGE HILLIARD: Okay. The order of procedure
8 will be that the respondent can go first here.

9 MR. BERNSTEIN: Your Honor, we will rely upon
10 and ask that the Exhibits 1 through 10 be
11 introduced.

12 We will rely upon that as our defense
13 of the staff charge.

14 JUDGE HILLIARD: All right.

15 In case this wasn't clear on the
16 record, in the earlier hearing on Tuesday of this
17 week, the receiver had filed supplemental testimony
18 with Exhibit 1 through 10 attached.

19 Staff objected to the timeliness of
20 the supplemental -- is supplemental the appropriate
21 designation?

22 MR. BERNSTEIN: I'm sorry?

1 JUDGE HILLIARD: Did you call it supplemental
2 testimony?

3 MR. BERNSTEIN: Yes, I did, your Honor.

4 JUDGE HILLIARD: Supplemental testimony was
5 objected to by staff as not timely. We are
6 sustaining the objection to the testimony.

7 We will allow the respondent to
8 introduce Exhibit 1 through 10 which are attached
9 to the testimony to which staff has no objection.

10 Is that correct?

11 MR. NIXON: Just one clarification, it's
12 actually Exhibits 2 through 10.

13 Exhibit 1 on the list is the
14 objectionable testimony.

15 JUDGE HILLIARD: Exhibit 1 is not going into
16 the record. You sly dog, you.

17 MR. BERNSTEIN: I wish I was that sly.

18 MR. STEINBERG: Or David had fallen asleep,
19 one or the other.

20 JUDGE HILLIARD: That's the extent of your
21 presentation today; is that right?

22 MR. BERNSTEIN: Yes, your Honor.

1 JUDGE HILLIARD: Okay. Let's go around the
2 table.

3 Does ComEd have anything to put in
4 here?

5 MR. PABIAN: No.

6 MR. YASUNAGA: Illinois Power has none.

7 JUDGE HILLIARD: Mr. Nixon.

8 MR. NIXON: Yes, your Honor. Thank you.

9 We have -- we had previously
10 submitted the direct testimony of David A. Borden
11 of the energy division and Thomas O. Griffin of the
12 accounting department, staff Exhibit 1.0 and 2.0.

13 Given the change in the nature of
14 what we thought KMS and the receiver's case was, we
15 have attempted to change -- we have attempted to
16 change the testimony where appropriate to make it
17 Macon specific.

18 And I'll let Mr. Borden otherwise go
19 through his testimony to show the changes between
20 what was given to the parties previously and what
21 we're asking to be put in the record and have
22 copies for marking and for the parties so they can

1 follow.

2 We have also been directed by the
3 Judge to provide as exhibits various documents that
4 underlie the staff report and we have those today
5 and I will be asking Mr. Borden questions on those
6 so that we can have those admitted into the record.

7 JUDGE HILLIARD: Mr. Borden and Mr. Griffin,
8 you're both previously sworn and you're still under
9 oath.

10 Proceed, Mr. Nixon.

11 MR. STEINBERG: Since these are new, the
12 introduction of documents, I assume are old.

13 MR. NIXON: I mean the --

14 MR. STEINBERG: They weren't created
15 overnight.

16 MR. NIXON: Can you guys share one?

17 MR. PABIAN: Sure.

18 JUDGE HILLIARD: Gentlemen on the telephone,
19 Judge Cole informes me that I never got around to
20 swearing you in because we didn't get that far in
21 the proceeding.

22 So I'll ask you at this point to

1 raise your right hands to be sworn.

2 (Witness sworn.)

3 WITNESS BORDEN: Is it possible to move the
4 telephone to a different location because I'm
5 having difficulty --

6 JUDGE HILLIARD: I don't know how successful
7 it will be, but I can move it up closer to us
8 and I can turn up the sound.

9 Say something Dave for the record.

10 MR. NIXON: David, can you hear us now?

11 WITNESS BORDEN: That's better, but you're
12 cutting out a little bit.

13 MR. NIXON: Just me or everybody in the room.

14 WITNESS BORDEN: Well I can only here you
15 right now.

16 MR. NIXON: I have got a speaker like
17 literally like a foot in front of my face, so if
18 this isn't good, I don't know what we're going to
19 do.

20 MR. BERNSTEIN: Can I just raise --

21 JUDGE COLE: Please speak up.

22 MR. BERNSTEIN: Can I raise an objection, your

1 Honor?

2 JUDGE HILLIARD: Sure.

3 MR. BERNSTEIN: I just received obviously this
4 testimony. It is completely different, 100 percent
5 different, than the prior testimony. I don't think
6 there's anything that's the same. I have never
7 seen it before.

8 I understand that I'm the one who
9 raised the issue regarding the order at the hearing
10 on Tuesday, but I have never seen it. I can't get
11 a response testimony. I don't even know what it
12 says. I wasn't given a copy last night. And it's
13 a totally -- it's a totally different hearing.

14 I haven't seen any of the exhibits.
15 I assume there will be exhibits. I don't know what
16 they are. And I don't know how --

17 JUDGE HILLIARD: What's your response,
18 Mr. Nixon?

19 MR. NIXON: The direct testimony is word for
20 word exactly the same as it was in the prior except
21 it's limited to Macon as we were directed to do.

22 JUDGE HILLIARD: So it's redacted and the

1 redaction is the part that concerns another
2 facility is taken out.

3 MR. NIXON: That's correct.

4 JUDGE HILLIARD: All right.

5 MR. BERNSTEIN: There's nothing additional in
6 here?

7 MR. NIXON: There's nothing additional and I
8 don't believe a single word has been changed. It's
9 just been transposed from one format to another.

10 MR. BERNSTEIN: Okay.

11 JUDGE HILLIARD: The objection is overruled.

12 As to the exhibit that he's
13 introducing now --

14 MR. NIXON: They are Commission formally
15 stamped documents.

16 JUDGE HILLIARD: Have you showed copies to
17 counsel?

18 MR. NIXON: They are the direct testimony of
19 Henry L. Martin, president of KMS Macon Power, Inc.
20 Both of them are actually.

21 One was offered in Docket 98-0607,
22 petition of KMS Morris Power, Inc.; and the other

1 was offered in Docket 98-0163, the petition of KMS
2 Macon Power, Inc., both at the time when they were
3 seeking the QSWEF status.

4 And the remaining one -- I'll pass
5 those out as soon as I explain what the last one
6 is.

7 The remaining one that was referred
8 to -- these were all documents that were referred
9 to in the staff order -- excuse me, I take that
10 back -- the staff report that underlies the
11 citation case.

12 These were documents that Judge
13 Hilliard directed staff to obtain for today and we
14 have done so.

15 The last one is simply, I believe, if
16 I'm correct, just the home page, I believe, from
17 the KMS Energy web site kmsenergy.com.

18 JUDGE COLE: Let me just interrupt you for a
19 moment.

20 Could you please provide counsel with
21 copies of the documents before we proceed?

22 MR. NIXON: Certainly.

1 MR. STEINBERG: Just for the record, I think
2 they refer to me as president and as duly appointed
3 receiver.

4 I'm not the receiver. The receiver
5 is LePetomane VI, Inc., and I am the president of
6 the receiver, but I am not the receiver.

7 JUDGE COLE: Let's try to do this thing in a
8 little more order.

9 Let's give him an opportunity to
10 distribute the exhibits and then we'll address that
11 issue.

12 MR. STEINBERG: Okay.

13 MR. NIXON: This is what we were directed on
14 Tuesday to provide you.

15 MR. BERNSTEIN: I have never seen this.

16 MR. NIXON: It's the testimony of your
17 client -- or the --

18 JUDGE COLE: I think this is a little
19 difficult for the court reporter.

20 Let's begin the colloquy after you
21 have returned to your seat.

22 MR. NIXON: Again, what I have distributed

1 to -- I hope everybody has got a copy of each --
2 are the documents that the Judge has directed staff
3 to provide for today.

4 They were documents that were
5 referred to and relied upon in the staff report
6 that underlies the Commission citation.

7 Again, they are the direct testimony
8 of Henry L. Martin, president of KMS Morris Power,
9 Inc., Docket 98-0670. And the direct testimony of
10 Henry L. Martin, president of KMS Macon Power,
11 Inc., Docket No. 98-0163. And they both bear --
12 although in the 98-0670, it's hard to read -- they
13 both bear the official file -- stamped file of
14 being formally admitted in prior Commission
15 dockets.

16 And the last was the first page, home
17 page from kmsenergy.com, the web site of KMS
18 Energy.

19 JUDGE COLE: Let's mark these exhibits for
20 identification.

21 JUDGE HILLIARD: Have you marked them, Dave?

22 MR. NIXON: How would you like them marked?

1 JUDGE HILLIARD: Well, do you have --

2 MR. NIXON: Do you want them marked as --
3 well, two of these -- the two with the Commission
4 file stamps we would be asking to be -- have, I
5 guess, administrative notice taken of.

6 JUDGE HILLIARD: That's the evidentiary
7 foundation, but let's mark them so we know what
8 exhibits we're talking about.

9 MR. NIXON: As administrative notice
10 documents, I believe only one copy is required for
11 the record as opposed to three; is that correct?

12 JUDGE HILLIARD: I take your word for it.

13 JUDGE COLE: Three are required. Let's just
14 proceed. Let's get them marked.

15 MR. NIXON: Mr. Borden will be the witness
16 that's authenticating -- is the right word
17 authenticating them?

18 Would the Judge prefer them to be
19 attachments to his exhibit or shall I just have
20 them marked as Exhibits 3.0, 4.0 and 5.0?

21 JUDGE COLE: I prefer the latter.

22 MR. NIXON: Okay. Then this would be Staff

1 Exhibit 3.0.

2 JUDGE HILLIAD: Which one is which?

3 MR. NIXON: Which one?

4 WITNESS BORDEN: This is Dave Borden in
5 Springfield. I can't hear anything at all. I
6 don't know if there's anything --

7 MR. NIXON: I'm moving around the room. I'm
8 not near where the microphones are.

9 KMS Macon Power, Inc. would be 3.0,
10 the testimony of Mr. Martin.

11 Testimony of Mr. Martin in KMS Morris
12 Power, Inc., Docket 98-0670 would be 4.0.

13 And the web page from kmsenergy.com,
14 I guess, would then be 5.0.

15 I only have one copy left of the
16 Henry L. Martin KMS Morris. I will make sure that
17 we have three before we leave.

18 (Whereupon, Staff
19 Exhibits 3.0, 4.0 and 5.0
20 were marked for identification.)

21 JUDGE HILLIARD: You want to call Mr. Borden
22 to provide a foundation for these documents?

1 MR. NIXON: Certainly.

2 Mr. Borden, can you hear me? David?

3 JUDGE HILLIARD: Dave?

4 WITNESS GRIFFIN: I can hear you in Oklahoma.

5 MR. NIXON: Dave, are you still there? Tom,
6 you talk to him and see if he can hear you.

7 WITNESS GRIFFIN: David, can you hear me?

8 MR. NIXON: Did we lose him?

9 JUDGE HILLIARD: Dave? That's a problem.

10 JUDGE COLE: We can go off the record.

11 (Whereupon, a discussion was
12 had off the record.)

13 JUDGE HILLIARD: Back on the record.

14 DAVID A. BORDEN,
15 having been called as a witness herein, after
16 having been first duly sworn, was examined and
17 testified as follows:

18 DIRECT EXAMINATION

19 BY

20 MR. NIXON:

21 Q. Good morning, Mr. Borden.
22 Could you state your full name for

1 the record, please.

2 A. David A. Borden.

3 Q. And can you say by whom you're employed
4 and in what capacity?

5 A. I work for the Illinois Commerce
6 Commission. I'm an economist in the energy policy
7 section.

8 Q. And did you have prefiled -- submit
9 prefiled direct testimony in this case designated
10 as ICC Staff Exhibit 1.0?

11 A. Yes.

12 Q. And have you at the direction of the
13 Judges revised that testimony?

14 A. Yes, I have.

15 Q. Do you have the revised form of that
16 Exhibit 1.0 in front of you?

17 A. Yes.

18 Q. Can you tell us what the nature of the
19 changes were from the previously submitted
20 testimony to the testimony we will be asking
21 admission of today?

22 A. Yes.

1 Primarily to account for the docket
2 that was previously consolidated to include KMS
3 Morris, so my testimony reflected that originally
4 so the changes are to remove the parts of my
5 testimony that address KMS Morris, and also to
6 remove where I responded to what was initially
7 prefiled testimony by the receiver.

8 My understanding, that's no longer
9 being offered by the receiver. I have to delete my
10 references to it because I guess it's just not in
11 existence now.

12 Q. For the testimony that you do wish to
13 still have admitted into the record, as it compares
14 to what was previously seen by the parties, are
15 there any language changes? In other words, have
16 you changed any of the words, any of your
17 conclusions?

18 A. No, no conclusions. Some -- literally
19 some words have changed only to reflect singular
20 instead of plural.

21 Q. Those are the only changes that you
22 recall making?

1 A. Yes.

2 Q. All right. Do you have any corrections
3 or other changes you need to point out this
4 morning?

5 A. No.

6 Q. If you were asked the questions set
7 forth in Exhibit -- ICC Staff Exhibit 1.0 this
8 morning would your answers be the same?

9 A. Yes.

10 Q. Are they true and correct, to the best
11 of your knowledge?

12 A. Yes.

13 MR. NIXON: I would ask for the admission of
14 ICC Staff Exhibit 1.0 and offer Mr. Borden for
15 cross-examination.

16 JUDGE HILLIARD: Objections?

17 MR. BERNSTEIN: The only objection is I don't
18 know what the change is. He did use the word
19 primarily when saying it was primarily the same.

20 If it's just singular and plural, and
21 I have had no chance to check that, I don't object
22 other than that, but I just don't know exactly if

1 it's the same or not or what the changes are.

2 JUDGE HILLIARD: Subject --

3 MR. BERNSTEIN: Subject to that.

4 JUDGE HILLIAD: Subject to check, do you have
5 something you want to say?

6 MR. STEINBERG: I have got a point of
7 clarification.

8 In the direct testimony, he indicated
9 he refers to J.A. Steinberg as President of
10 LePetomane IV and duly pointed receiver for KMS
11 Macon as the receiver.

12 I just got a point of clarification,
13 pursuant to Judge Siebel's order entered
14 February 5th, '03, which is in Exhibit 2, I
15 believe, the receiver is LePetomane VI. He
16 reversed LePetomane VI, Inc., not individually but
17 solely as receiver. J.A. Steinberg is not
18 mentioned at all as the receiver.

19 I happen to be the president of the
20 receiver. But if you're going to use it to define
21 terms, the receiver is LePetomane VI, Inc., not
22 individually but solely as receiver.

1 JUDGE HILLIARD: All right. Subject to that
2 point of clarification and your check as to whether
3 or not there are any substantive changes, exhibit
4 1.0 will be admitted.

5 (Whereupon, Staff
6 Exhibit No. 1.0 was admitted
7 into evidence.)

8 JUDGE HILLIAD: Proceed, Mr. Nixon.

9 MR. NIXON: Since we have Mr. Borden, we'll
10 continue on. We'll skip ahead to Staff Exhibits
11 3.0 which on its face states it's the direct
12 testimony of Henry L. Martin, president of KMS
13 Macon Power, Inc., petition of KMS Macon Power,
14 Inc., in Docket No. 98-0163. It bears the official
15 file stamp of the Commission and it's dated June
16 3rd, 1998.

17 BY MR. NIXON:

18 Q. Mr. Borden, do you have that document in
19 front of you?

20 A. Hold on just one second. Make sure I
21 have the right one.

22 Is that for KMS Morris?

1 Q. No. We're on the KMS Macon Power.

2 A. I have that.

3 Q. Mr. Borden, were you responsible for
4 preparing the staff report that is in the record in
5 this case?

6 A. Yes.

7 Q. And in that staff report, does that
8 staff report refer to this direct testimony of
9 Henry L. Martin?

10 A. Yes, it does.

11 Q. And so -- and you relied upon this
12 document -- scratch that. You already answered.
13 What is the source of this document?

14 A. I retrieved that from the chief clerk's
15 office from microfilm. It's part of the official
16 record in that docket.

17 JUDGE HILLIARD: That docket is 98-0143?

18 MR. NIXON: 63.

19 JUDGE HILLIARD: 63, I'm sorry.

20 Is that correct, Mr. Borden?

21 THE WITNESS: Yes.

22 MR. BERNSTEIN: We'll stipulate to the

1 introduction of the documents. You don't need to
2 lay --

3 JUDGE COLE: Please speak up.

4 MR. BERNSTEIN: I'm not going to object to the
5 introduction of this testimony nor the testimony
6 for Morris Power. You don't need to lay the
7 groundwork. I'll stipulate to its admission.

8 MR. NIXON: So Staff Exhibits 3.0 and 4.0 --

9 MR. BERNSTEIN: Correct.

10 JUDGE HILLIARD: No one has an objection to
11 these exhibits. Exhibit 3.0 and 4.0 will be
12 admitted.

13 (Whereupon, Staff
14 Exhibits 3.0 and 4.0 were
15 admitted into evidence.)

16 How about 5.0, do you object to that
17 one?

18 MR. BERNSTEIN: I do object to that. I want
19 to see what the point of it is before I --

20 MR. NIXON: Well, again, Shig, can I have your
21 copy? I miscounted copies. Thanks.

22 BY MR. NIXON:

1 Q. Mr. Borden, we have designated here as
2 Staff Exhibit 5.0 the page from the KMS Energy web
3 site.

4 Do you have that in front of you?

5 A. Yes, I do.

6 Q. Could you please -- is this also a
7 document that was relied on in the preparation of
8 the staff report?

9 A. Yes, it's cited in the staff report.

10 Q. It's cited in the staff report. Thank
11 you.

12 Could you tell us, please, did you
13 print -- did you print this document out from the
14 web site?

15 A. Yes, I did.

16 Q. Could you please tell us how you
17 accessed this page?

18 A. Just by searching for KMS Energy over
19 the Internet and, you know, accessing their web
20 site.

21 Q. And you did that personally?

22 A. Part of the investigation or as part of

1 the background prior to --

2 JUDGE HILLIARD: This document is dated
3 February 19, 2003.

4 Is that the day you did it or do you
5 know what that date refers to?

6 THE WITNESS: I believe that would be the
7 date -- I'm not positive, your Honor. It could be
8 the date that I did it in that that might be
9 printing it off on that date.

10 MR. NIXON: That -- I would represent that I
11 believe that's the date that it was printed down.

12 I have visited the site separate on
13 separate dates and when I printed materials it had
14 the date -- the date travels to whenever you are
15 printing it down.

16 MR. BERNSTEIN: If what you're getting at
17 is -- to maybe cut to the chase on this one, that
18 KMS Energy International or the holding company for
19 KMS Energy, Inc., which is under the company
20 overview, I'll stipulate to that, that that did
21 occur, if that's what you're getting at.

22 MR. NIXON: Whatever -- we're just offering it

1 as directed by the Judge.

2 The Judges wanted to see the staff
3 support that under -- the staff report and that's
4 what this is part of --

5 MR. BERNSTEIN: Okay.

6 MR. STEINBERG: Can I make a general comment,
7 your Honors, as to this document, this is a web
8 page. The company engaged in fraudulent activities
9 not only as to the state but as to other parties
10 they dealt with including their bank.

11 I object to this as to the truth of
12 anything stated in here because there is no
13 indication anything in here is true or not true.

14 This is what they say. This is what
15 they say here. But there was massive misdeeds.

16 MR. NIXON: It's all it's offered for. It was
17 put forward in the staff report and it is only here
18 because it was put in the staff report.

19 JUDGE HILLIARD: It's a document --

20 MR. NIXON: It's a document staff relied upon.

21 JUDGE HILLIARD: So it's a document staff
22 relied upon in compiling a report; is that right?

1 MR. NIXON: That's correct.

2 MR. STEINBERG: Did they do any investigation
3 as to the statements in this?

4 JUDGE HILLIARD: You'll get a chance to
5 cross-examine the witness, but this isn't it.

6 MR. STEINBERG: Excuse me.

7 JUDGE HILLIARD: Do you have any further
8 questions for the witness about this document?

9 MR. NIXON: I don't believe so.

10 JUDGE HILLIARD: Do you have cross-examination
11 for the witness?

12 MR. BERNSTEIN: I do.

13 JUDGE HILLIARD: Okay.

14 CROSS-EXAMINATION

15 BY

16 MR. BERNSTEIN:

17 Q. Mr. Borden --

18 A. Yes.

19 Q. -- who owned Macon Power on July 8,
20 1998?

21 A. On July 8, 1998? Can you explain what
22 the importance of that date is? What's the

1 relevance for the date?

2 Q. That is the date of the Illinois
3 Commission order.

4 JUDGE HILLIARD: In what docket?

5 MR. BERNSTEIN: 98-0163. That is Exhibit 4.

6 JUDGE HILLIAD: So are you directing the
7 witness to look at the testimony that's been
8 offered here as Exhibit No. 4?

9 MR. BERNSTEIN: It's just an exhibit. It's
10 Exhibit 4 and it's --

11 MR. NIXON: It's respondent's exhibit.

12 MR. BERNSTEIN: It's the ICC order.

13 JUDGE HILLIARD: Respondent's Exhibit 4?

14 MR. BERNSTEIN: Yes, your Honor.

15 JUDGE HILLIARD: Which is -- can you describe
16 it more fully, please.

17 MR. BERNSTEIN: It is an Illinois Commerce
18 Commission order dealing with Macon.

19 JUDGE HILLIARD: Do you have a copy of that
20 order, Mr. Borden?

21 THE WITNESS: I have a copy. Just hold on a
22 second. Let me pull that out of my file.

1 JUDGE HILLIARD: All right.

2 JUDGE COLE: The witness does not -- the
3 witnesses do not have copies of the exhibits
4 submitted by the respondent; is that correct?

5 MR. BERNSTEIN: I don't know if counsel gave
6 it to them.

7 MR. NIXON: I know Mr. --

8 WITNESS GRIFFIN: I do not.

9 MR. NIXON: I was going to say Mr. Griffin
10 doesn't. I don't think Mr. Borden does either.

11 JUDGE HILLIARD: Borden may have them but
12 they're not marked as exhibits.

13 MR. NIXON: I'm sure he has a copy of the
14 Commission order.

15 JUDGE HILLIARD: Do you have the document,
16 Dave?

17 WITNESS BORDEN: Well, your Honor, I'm having
18 a hard time finding it, but I looked at it. I know
19 the document. I just don't have it right in front
20 of me but I'm familiar with that.

21 I'll stipulate to the line --

22 JUDGE HILLIAD: You don't stipulate to

1 anything, Dave, your lawyer does that for you.

2 MR. NIXON: That is the July 8, 1998 date, it
3 does appear on the order.

4 JUDGE HILLIARD: All right.

5 JUDGE COLE: Do you have it, Mr. Borden?

6 JUDGE HILLIARD: No. He doesn't have the
7 order in front of him.

8 WITNESS BORDEN: I have it but I cannot find
9 it at this time.

10 MR. NIXON: This is the printed out from Lexus
11 version of the order.

12 JUDGE HILLIARD: Can you reference -- can you
13 come up with a question that he can answer when
14 he's not looking at the document?

15 BY MR. BERNSTEIN:

16 Q. Okay. In going through your testimony,
17 you state on Page 3, Lines 47 and 48, it is
18 apparent and not disputed that KMS Macon has
19 changed ownership without proper notification to
20 the Commission.

21 Do you recall that testimony?

22 A. Yes.

1 Q. Okay. Yet when one reads on, you have
2 nothing further to say, is that correct, regarding
3 the change in ownership? Is that correct?

4 JUDGE HILLIARD: It's just yes or no, Dave.

5 THE WITNESS: No, I don't think -- I don't
6 have anything further to say.

7 BY MR. BERNSTEIN:

8 Q. And, in fact, you have no documents
9 referenced in this testimony whatsoever, is that
10 also correct?

11 A. I have no documents referenced?

12 Q. Referencing a change in ownership; is
13 that correct?

14 JUDGE HILLIARD: This is testimony you
15 submitted when this was all thought to be agreed,
16 Dave. Just answer the question.

17 THE WITNESS: I have -- my testimony
18 references the staff report and the Commission's
19 order and --

20 BY MR. BERNSTEIN:

21 Q. Independent of that, you have no
22 testimony -- you are relying upon the staff report;

1 is that correct?

2 A. Yes. And I'm relying on discussions I
3 have had with the receiver.

4 JUDGE COLE: Would you identify who you mean
5 by receiver.

6 THE WITNESS: The receiver I believe is
7 LePetomane VI as it was clarified for us earlier.

8 JUDGE COLE: What person did you speak to?

9 THE WITNESS: I believe that was Jay Steinberg

10 BY MR. BERNSTEIN:

11 Q. Is it your testimony that contained
12 within your current testimony, Mr. Steinberg made
13 an admission that there was a change in corporate
14 ownership of KMS Macon?

15 A. I believe my recollection of those
16 meetings are that when I brought that subject up,
17 the receiver could not deny that there had been a
18 change of ownership. I believe they simply didn't
19 know.

20 Q. So he made no admission; is that
21 correct?

22 A. Well, in the sense that we told them it

1 had to be resolved and they basically didn't
2 respond to it, I determined that that was an
3 admission.

4 Q. Okay. That was your decision. He made
5 no verbal admission; is that correct?

6 MR. NIXON: I believe that's been asked and
7 answered.

8 JUDGE COLE: Mr. Borden, did you hear the
9 question?

10 THE WITNESS: Yes. Yes.

11 BY MR. BERNSTEIN:

12 Q. So there has been no verbal admission;
13 is that correct?

14 A. Yes.

15 Q. And, in fact, there's been no written
16 admission also; is that correct?

17 A. That's correct.

18 Q. Okay. In addition, there is no
19 reference to any of those issues in your current
20 testimony; is that correct?

21 A. That's correct.

22 Q. Okay. And, in fact, KMS Macon never

1 changed its ownership after July 8, 1998; isn't
2 that correct?

3 A. No. I disagree with that.

4 Q. Okay. KMS Macon was owned by whom or
5 what on July 8, 1998?

6 A. I believe they were owned by KMS Energy.

7 Q. Okay. And on October 8, 2003, they were
8 also owned by KMS Energy; isn't that correct?

9 A. Most likely. I'm not sure. I think in
10 the interim, though, they were owned by KMS
11 International.

12 Q. You really don't know, do you?

13 A. Yes, I do.

14 Q. You just said you believe or you're
15 assuming.

16 From July 8, 1998, through October 8
17 of 2003, was KMS owned by any -- KMS Macon owned by
18 any other entity other than KMS Energy?

19 A. Yes. They were owned by KMS
20 International.

21 Q. Based on what?

22 A. Based on the testimony provided in the

1 KMS Morris docket which indicates that KMS
2 International owns 100 percent of KMS Energy.

3 Q. Okay. And I'll ask the question again.

4 So based on that testimony, KMS
5 Energy continued to own KMS Macon; isn't that true?

6 A. At that time, yes.

7 Q. And, in fact, for all times; isn't that
8 true?

9 A. I think there needs to be some
10 clarification here.

11 JUDGE HILLIARD: Go ahead, Dave.

12 THE WITNESS: The change in ownership that I
13 can substantiate is from KMS Energy to KMS
14 International.

15 Now, as about the veracity of the --

16 JUDGE COLE: Would you repeat it. You were
17 just cut off.

18 THE WITNESS: -- I know for sure that KMS
19 Energy still owns KMS Macon. I don't have any
20 reason to believe differently at this point in
21 time.

22 JUDGE HILLIARD: Do you have a question?

1 MR. BERNSTEIN: Can you repeat -- can you read
2 back what he just said.

3 (Whereupon, the record was
4 read as requested.)

5 BY MR. BERNSTEIN:

6 Q. So, in fact, there was no change in
7 ownership of KMS Macon vis-a-vis KMS Energy, true?

8 A. Yes, but I don't think it stops there.
9 We have never made that position that it stops at
10 that point.

11 Q. But, in fact, the ownership of KMS Macon
12 remained was maintained by KMS Energy?

13 MR. NIXON: Asked and answered.

14 THE WITNESS: I have already answered that.

15 MR. BERNSTEIN: Okay.

16 JUDGE HILLIARD: Sustained.

17 BY MR. BERNSTEIN:

18 Q. The operations of KMS Macon were
19 maintained by KMS Energy; isn't that true?

20 A. Probably over time. I don't know who's
21 operating at this point in time. It could be the
22 receiver.

1 Q. I'm saying at the time you issued the
2 report on October 8.

3 JUDGE HILLIARD: 2003?

4 MR. BERNSTEIN: Yes, 2003.

5 THE WITNESS: My answer is the same there.

6 BY MR. BERNSTEIN:

7 Q. Which is?

8 A. I don't know who is actually operating
9 the company at this point in time. It could be the
10 receiver.

11 Q. So is it your testimony that the fact
12 that KMS Energy International was created changed
13 the ownership of KMS Macon?

14 A. Yes.

15 Q. And in your opinion that is a change of
16 ownership --

17 A. Yes.

18 Q. -- of KMS Macon?

19 And wasn't testimony adduced
20 involving the same exact issues regarding KMS
21 Morris?

22 JUDGE HILLIARD: In what docket?

1 MR. BERNSTEIN: In 98-0670. It's one of the
2 exhibits adduced and produced by the ICC here.

3 THE WITNESS: Yes. The identification of KMS
4 International in that docket as the owner of KMS
5 Energy formed the basis for my position that an
6 ownership change took place for KMS.

7 BY MR. BERNSTEIN:

8 Q. And, in fact, the requirement of the '98
9 order is that KMS Macon was to notify the
10 Commission of any change in ownership, correct?

11 A. Yes. That's a requirement in that
12 specific order. However, that does not preclude
13 the law's requirement that that ownership change be
14 approved by the Commission for that specific
15 company.

16 Q. But the issue I'm making is the fact
17 that KMS Energy International became a holding
18 company for KMS Energy was known to the Commission
19 in 1999; isn't that true?

20 A. It was known, yes, in that -- through
21 that docket of KMS Morris, that's correct.

22 Q. And, in fact, Mr. Martin notified and

1 testified to that fact, did he not?

2 A. He testified to it for KMS Morris.

3 Q. Okay. And I assume when you went
4 through all of these matters you looked at the flow
5 chart dealing with KMS Macon and KMS Morris as to
6 how they were related, did you not?

7 A. No, I looked at the testimony in the two
8 dockets, and I'm not sure what you're asking in
9 terms of flow charts.

10 Q. Well, you're here testifying that
11 there's been a change in ownership structure --

12 A. Yes.

13 Q. -- correct?

14 A. In one docket the same person testified
15 KMS Energy owns KMS Macon 100 percent. In the next
16 docket he testified KMS Energy, in turn, is owned
17 100 percent by KMS International.

18 That is the basis for my position
19 there.

20 Q. And my point is the Commission knew
21 about the -- about KMS Energy International in
22 1999?

1 A. They knew that KMS International, yes,
2 was an owner of KMS Morris.

3 Q. And you're coming forth and saying that
4 there's been a change?

5 A. Yes, there has been a change.

6 JUDGE COLE: Would you repeat that again.

7 (Whereupon, the record was
8 read as requested.)

9 THE WITNESS: If you're referring to KMS
10 Macon, my answer is yes.

11 JUDGE HILLIARD: There has been a change; is
12 that right?

13 MR. BERNSTEIN: And the change is --

14 THE COURT: Hold it. Yes, there has been a
15 change; is that your testimony?

16 THE WITNESS: Yes, sir.

17 JUDGE HILLIARD: All right. Go ahead.

18 BY MR. BERNSTEIN:

19 Q. And is that your testimony, the fact
20 that there was a change, that's the violation?

21 A. A change in ownership is required to be
22 approved by the Commission.

1 In that docket for KMS Macon, I did
2 not work on that docket. For whatever reason it
3 was put into that docket that the QSWEF file a
4 report with the Commission if its ownership
5 changed.

6 That doesn't mean that the Commission
7 was waiving its right for approval. Just that the
8 Commission could then -- I interpreted it that the
9 Commission could then cite the company in to get
10 approved.

11 JUDGE HILLIARD: There's no question pending,
12 Dave.

13 THE WITNESS: Thank you.

14 BY MR. BERNSTEIN:

15 Q. So if we just kind of summarize here,
16 your testimony is that the fact that KMS Energy
17 International was a holding company for KMS Energy
18 changed the operational or ownership structure of
19 KMS Macon, correct?

20 A. Yes.

21 Q. Okay. And, in fact, though, when you
22 did this analysis, I'm assuming you looked at all

1 of the KMS documents; is that correct?

2 A. I looked at all the --

3 MR. NIXON: I'll object to that. That's very
4 vague and broad as to what all the KMS documents
5 are.

6 MR. BERNSTEIN: All the corporate documents.

7 JUDGE HILLIARD: Sustained.

8 BY MR. BERNSTEIN:

9 Q. Did you look at all of the --

10 JUDGE HILLIARD: Why don't you ask him what
11 documents he looked at.

12 BY MR. BERNSTEIN:

13 Q. What documents did you look at regarding
14 KMS's ownership structures?

15 A. I looked at the testimony of Mr. Martin
16 who apparently is the president and one of the
17 primary shareholders in at least three of those
18 companies, so I'm assuming that he's somewhat
19 authoritative on the subject.

20 JUDGE HILLIARD: What else, Dave?

21 THE WITNESS: I looked at the company's
22 description of itself on its web site to gain a

1 better understanding of it.

2 It referred to KMS International as
3 the conglomerate for these companies.

4 JUDGE HILLIARD: What else did you look at, if
5 anything?

6 THE WITNESS: I believe that's it.

7 JUDGE HILLIARD: Okay.

8 THE WITNESS: Your Honor, the only other thing
9 that I have looked at, and it's not a subject of
10 this particular docket, but it is a KMS company at
11 least in name, and that is annual reports for the
12 KMS Power Income Fund.

13 JUDGE HILLIARD: Power and what?

14 THE WITNESS: Annual reports for the KMS Power
15 Income Fund.

16 JUDGE HILLIARD: Okay.

17 BY MR. BERNSTEIN:

18 Q. I guess just to get to the -- cut to the
19 chase.

20 KMS Energy owned KMS Macon in 1998.
21 That's where we started off, correct?

22 A. Yes, sir.

1 Q. Okay. And they owned them on October 8,
2 2003, did they not?

3 A. Yes.

4 Q. Okay. KMS Energy International never
5 owned KMS Macon on October 8, 2003; isn't that
6 true?

7 A. I would dispute that.

8 Q. You dispute that based on what?

9 A. I am assuming that the testimony of
10 Mr. Martin is still accurate at that point in time.

11 JUDGE HILLIARD: So your dispute with his
12 question is based upon the testimony of Mr. Martin.

13 A. Yes.

14 BY MR. BERNSTEIN:

15 Q. What specific testimony of
16 Mr. Martin?

17 A. Mr. Martin has testified that KMS
18 International owns 100 percent of KMS Energy in the
19 dockets -- KMS Morris docket.

20 MR. BERNSTEIN: We'll stipulate to that.

21 JUDGE HILLIARD: Okay.

22 BY MR. BERNSTEIN:

1 Q. Did Mr. Martin ever testify that KMS
2 Energy International owned KMS Macon?

3 A. No. I believe he was required to report
4 that to the Commission and did not do so.

5 Q. Did he state that KMS Energy
6 International owned 100 percent of the stock of KMS
7 Morris?

8 A. I would have to look at the testimony
9 again. I don't know.

10 Q. Why don't you go ahead and look at the
11 testimony.

12 JUDGE HILLIARD: Would you look at the top of
13 Page 3, Dave.

14 MR. NIXON: Of which exhibit, 4 or 3?

15 JUDGE HILLIAD: Of Docket 98-0670.

16 MR. NIXON: I have that.

17 I think the relevant information is
18 also at the top of the third page of the other
19 Exhibit 3.0 as well.

20 JUDGE HILLIARD: Okay.

21 JUDGE COLE: Were you able to hear Mr. Nixon
22 just now?

1 MR. NIXON: I think the relevant information
2 Exhibit 3.0 is also at the top of the third page.

3 JUDGE HILLIARD: Of Exhibit 3.0?

4 MR. NIXON: That's correct.

5 JUDGE HILLIARD: All right.

6 Have you had a chance to look at
7 that, Mr. Borden?

8 THE WITNESS: Yes, sir.

9 JUDGE HILLIARD: All right.

10 Could you repeat the question,
11 Mr. Reporter.

12 (Whereupon, the record was
13 read as requested.)

14 JUDGE HILLIARD: What's the answer?

15 Could you hear the question?

16 THE WITNESS: Yes. It says -- I believe my
17 reference is to the order in that case and possibly
18 not the testimony.

19 JUDGE HILLIARD: Answer the question.

20 What does the testimony say?

21 THE WITNESS: Yes. It is all of the
22 outstanding --

1 JUDGE HILLIARD: All the outstanding stock is
2 what?

3 THE WITNESS: Outstanding stock of KMS Energy,
4 Inc., is owned by KMS Energy International, a
5 corporation under the organized -- organized under
6 the laws of Nevada. That is what the testimony
7 says.

8 JUDGE HILLIARD: All right.

9 BY MR. BERNSTEIN:

10 Q. And the sentence prior to that says KMS
11 Morris is wholly owned by KMS Energy, Inc.,
12 correct?

13 A. Yes, it says KMS Morris is wholly owned
14 by KMS Energy, Inc.

15 Q. So then we can -- can we then surmise
16 that KMS Macon was also wholly owned by KMS Energy,
17 Inc.?

18 A. Not from this testimony.

19 Q. Well --

20 A. Doesn't refer to KMS Macon.

21 Q. In fact, there's nothing you can produce
22 or testify to that would say anything to the

1 contrary to what I just asked; isn't that true?

2 A. Well --

3 MR. NIXON: Wait. Excuse me, counsel,
4 contrary to what?

5 Can we just ask it as a question
6 instead of --

7 JUDGE HILLIARD: Hold it. Hold it.

8 MR. BERNSTEIN: I can --

9 JUDGE HILLIARD: I want you to rephrase your
10 question.

11 THE WITNESS: I can tell you --

12 JUDGE HILLIARD: Hold it Dave. Dave. Let him
13 rephrase his question.

14 THE WITNESS: Okay. Thank you.

15 BY MR. BERNSTEIN:

16 Q. There is nothing in the record to refute
17 that KMS Macon was wholly owned by KMS Energy;
18 isn't that correct?

19 MR. NIXON: Asked and answered.

20 MR. BERNSTEIN: Just want it to be clear.

21 THE WITNESS: That was answered before.

22 JUDGE HILLIARD: Asked and answered.

1 Sustained.

2 You got another question?

3 BY MR. BERNSTEIN:

4 Q. What's the purpose of the reporting
5 requirement?

6 A. I don't know why that reporting
7 requirement was in that case because I did not work
8 on that case, but one possible reason for it is so
9 that the Commission can be aware of ownership
10 changes and either have informal discussions with
11 the owners to get them to come in for approval or
12 possibly be forced to cite them in.

13 Q. They would want to know about KMS Energy
14 International, would they not?

15 That would be one of the reasons,
16 wouldn't you agree?

17 JUDGE HILLIARD: You're talking about the
18 Commission?

19 MR. BERNSTEIN: Yes.

20 THE WITNESS: The Commission would want to
21 know whether KMS International was able to qualify
22 as an owner.

1 BY MR. BERNSTEIN:

2 Q. And, in fact, the Commission did
3 investigate KMS Energy International in the KMS
4 Morris docket, did they not?

5 A. Yes, they did make a determination in
6 that docket for KMS Morris.

7 Q. What was the determination?

8 A. They approved them as an owner.

9 MR. BERNSTEIN: Thank you.

10 JUDGE HILLIARD: Is that all your questions?

11 MR. BERNSTEIN: I have no more.

12 JUDGE HILLIARD: Anyone else have any
13 questions of the witness?

14 MR. YASUNAGA: None from Illinois Power.

15 JUDGE HILLIAD: Do you have any rebuttal?

16 MR. NIXON: Just a --

17 JUDGE HILLIARD: Redirect. Excuse me.

18 MR. NIXON: If I can check my notes for a
19 second.

20 REDIRECT EXAMINATION

21 BY

22 MR. NIXON:

1 Q. Mr. Borden, have you seen anything in
2 any of your research in the Commission's records or
3 otherwise that indicated that KMS Macon ever made
4 any attempt to notify -- satisfy the Commission's
5 directive that it notify the Commission of
6 ownership changes?

7 A. No.

8 MR. NIXON: That's all. We'll argue the rest.

9 MR. STEINBERG: Your Honor, could I ask for a
10 possible stipulation just to straighten this out?

11 JUDGE HILLIARD: Why don't you have a
12 stipulation -- you want to stipulate to something
13 with counsel.

14 MR. STEINBERG: With Mr. Nixon.

15 JUDGE HILLIAD: Why don't you talk to him off
16 the record.

17 MR. STEINBERG: Thank you.

18

19 (Whereupon, a discussion

20 was had off the record.)

21 JUDGE HILLIARD: Is there a stipulation or no?

22 MR. NIXON: No.

1 MR. STEINBERG: No.

2 JUDGE HILLIARD: All right.

3 Are there objections to Exhibits
4 3.5 -- 3 and 4 are already in the record.
5 Objections to Exhibit 5?

6 MR. BERNSTEIN: I guess the objection that
7 it's being introduced for the truth of the matter
8 asserted.

9 MR. NIXON: It's being entered because it was
10 relied upon by staff in the staff report and we
11 were directed to provide it for the record for that
12 purpose.

13 MR. BERNSTEIN: Then it gets into the whole
14 matter of it being introduced for the truth of the
15 matter asserted. I don't know --

16 JUDGE HILLIARD: Do you contest whatever facts
17 are stated on Exhibit 5?

18 MR. BERNSTEIN: I have never heard of
19 personally KMS Services, Inc.

20 I guess I don't have -- I can't
21 respond. I have never seen it. I don't know
22 anything about KEI to manage projects owned by

1 KEII. It's all new to me.

2 MR. STEINBERG: There's no verification.

3 MR. NIXON: KEII is Energy International.

4 MR. BERNSTEIN: It can't be for the truth of
5 the matter asserted. There's none of the people
6 here who produced it.

7 I guess what I'm trying to -- the
8 point of it is to show that KMS Macon went from KMS
9 Energy and then there's KMS Energy International,
10 and I already said I would stipulate that that was
11 a corporate chart.

12 If that's what you're doing it for,
13 I'll stipulate to that point.

14 JUDGE HILLIARD: Is that what you're doing it
15 for?

16 MR. NIXON: Mr. Borden, is that the
17 information that you took from the document?

18 THE WITNESS: That there is corporate chart?

19 JUDGE HILLIARD: No. Repeat what you're
20 willing to stipulate to, counsel.

21 MR. BERNSTEIN: What I understand is I think
22 it's being introduced to show that there was a

1 corporate structure of KMS Macon, although that's
2 not on this chart, KMS Energy, and then a holding
3 company of KMS Energy International.

4 That it does exist. And I would be
5 willing to stipulate to that.

6 JUDGE HILLIARD: Is that the point of the
7 exhibit?

8 THE WITNESS: Yes, that's accurate. We have
9 some other purposes for it, but --

10 JUDGE HILLIARD: What are the other purposes?

11 THE WITNESS: Those never came to light
12 because of the, you know, the settlement
13 discussions.

14 MR. NIXON: No. The other purposes are no
15 longer relevant.

16 THE WITNESS: Right. They're no longer
17 relevant.

18 JUDGE HILLIARD: All right. The Exhibit 5
19 will not be admitted but the stipulation is now a
20 matter of record in this proceeding.

21 MR. NIXON: So Exhibits 1, 3 and 4 are
22 admitted?

1 JUDGE HILLIARD: Yes, sir.

2 (Whereupon, Staff

3 Exhibits 1, 3 and 4 were

4 admitted

5 into evidence.)

6 JUDGE HILLIAD: I don't think there's anything

7 further for Mr. Borden then; is that correct?

8 MR. BERNSTEIN: No, your Honor.

9 JUDGE HILLIARD: Do you have another witness?

10 THOMAS GRIFFIN,

11 having been called as a witness herein, after

12 having been first duly sworn, was examined and

13 testified as follows:

14 DIRECT EXAMINATION

15 BY

16 MR. NIXON:

17 Q. Mr. Griffin?

18 A. Yes.

19 Q. Would you state your full name for the

20 record, please.

21 A. Thomas L. Griffin.

22 Q. Would you state by whom you're employed

1 and in what capacity?

2 A. I'm employed by the Illinois Commerce
3 Commission as an accountant in the accounting
4 department of the financial analysis division.

5 Q. And did you prepare direct testimony for
6 submission in this docket?

7 A. Yes.

8 Q. And is that what has been designated as
9 ICC Staff Exhibit 2.0?

10 A. Yes.

11 Q. Do you have that in front of you?

12 A. I do.

13 MR. NIXON: Just for clarification, since
14 Mr. Griffin is out of town, we have not been able
15 to change his testimony the same way we were able
16 to do Mr. Borden so that it's docket specific.

17 It still refers to the dockets when
18 they were consolidated.

19 JUDGE HILLIARD: All right.

20 MR. NIXON: And also refers to Mr. Steinberg's
21 testimony which is not in the record at this point.

22 BY MR. NIXON:

1 Q. Given that, Mr. Griffin, generally
2 speaking, aside from those changes that you would
3 make to make it Macon Power specific, are there any
4 changes you wish to bring to our attention?

5 A. Yes. When I wrote the testimony I was
6 responding to Mr. Steinberg's testimony which did
7 not get into the record, and specifically my
8 Exhibit 2.1 which is the exhibit showing the
9 payments for Macon from the receiver which he
10 offered from February 2003 through November 2003
11 which was the latest information I had at the time.

12 This exhibit in its present form, I
13 was going to revise to include payments or
14 liabilities after November 30th, 2003.

15 However, given that this is no longer
16 a matter to be discussed, the repayment by the
17 receiver for payments from February on, I would
18 revise this exhibit to include payments from the
19 exception which is August 1998 through whenever the
20 payments stopped or the liability stopped, and I
21 would revise that exhibit to reflect those new
22 numbers.

1 And my recommendation would be that
2 at the end of the -- when an order is issued in the
3 case, that the liability begin immediately to be
4 repaid.

5 JUDGE HILLIARD: Wait a minute. You have an
6 objection?

7 MR. BERNSTEIN: I have an objection.

8 JUDGE HILLIARD: State your objection.

9 MR. BERNSTEIN: My objection is this is not
10 part of the proceeding pending before your Honors.

11 There's nothing in here regarding
12 repayment of monies. It's strictly regarding an
13 ownership structure issue and I would ask that this
14 testimony be -- that my objection be sustained and
15 not be introduced into the record.

16 JUDGE HILLIARD: Well, I think my concern
17 about this testimony is that it's more expansive
18 than what's been served upon them previously.

19 I understand that it's in response to
20 their change of position, but you have numbers in
21 here that were for a specific period of time and
22 now he's indicating that he believes that the total

1 liability ought to be -- concern a much greater
2 period of time.

3 MR. NIXON: Well, I believe the other
4 number -- those other numbers and time periods are
5 in his testimony on Page 4.

6 JUDGE HILLIARD: Okay.

7 MR. NIXON: They weren't broken down into the
8 exhibit because at the time they were filed and up
9 until the day before the hearing last -- earlier in
10 the week we thought we still needed those numbers
11 and we haven't had a chance to revise them.

12 JUDGE HILLIARD: All right. Your objection is
13 overruled.

14 BY MR. NIXON:

15 Q. Are there any corrections to the
16 language in here?

17 MR. BERNSTEIN: If I may, your Honor.

18 JUDGE HILLIARD: You want to restate your
19 objection?

20 MR. BERNSTEIN: My objection is that this is
21 beyond the scope of the matter before your Honor
22 and that there is nothing here regarding the

1 Commission's order or charge regarding repayment or
2 tax credit issues. It's beyond the scope.

3 JUDGE HILLIARD: If the amount of the
4 liability is not relevant to the issue before the
5 Commission which is whether or not the ownership is
6 changed, that will be reflected in the order.

7 This testimony was served on the
8 receiver's attorney on December 23rd. There was no
9 objection filed to the testimony.

10 JUDGE COLE: What relevance do you see,
11 Mr. Nixon?

12 MR. NIXON: Well, it did have a certain
13 purpose which is no longer with us which was
14 responsive to certain issues that Mr. Steinberg had
15 in his testimony.

16 But it's also relevant because if the
17 Commission does revoke or rescind the QSWEF status,
18 it needs to know what the effects of that are. And
19 one of the effects of that is that it will also
20 need to order the respondent to pay the monies
21 back, although, as Mr. Griffin has stated, this
22 does not reflect the full amounts of the monies

1 because there are certain amounts that we haven't
2 been able to account for yet.

3 That is an action the Commission can
4 choose to take.

5 JUDGE HILLIARD: Judge Cole and I have had a
6 chance to discuss this. Because -- there's a
7 couple things here.

8 The 607 docket the order indicates
9 that the issue is -- one of the issues is how much
10 the reimbursement fund is in the Morris entity and
11 then the order in this case does not do that.

12 Secondly, if at some point in the
13 future KMS Macon wants to re-establish QSWEF
14 status, the Commission will have an ample
15 opportunity at that point to establish the amount
16 of money that, in fact, they're owed.

17 But the order being what it is in
18 this case, I think we're -- we agree with counsel
19 that it's not relevant and we're going to -- we're
20 going to sustain the objection to Mr. Griffin's
21 testimony.

22 JUDGE COLE: Unless you could establish some

1 relevance.

2 MR. NIXON: No. I mean it was not directly
3 referred to in the citation order.

4 We cannot disagree with that.

5 JUDGE HILLIARD: All right.

6 MR. NIXON: What that means then is if the
7 Commission accepts the staff's recommendation in
8 this case, we will just have to begin a second
9 docket immediately thereafter.

10 JUDGE HILLIARD: Yep. I think that's what you
11 have to do. I think due process requires that to
12 be the case.

13 Anything further?

14 MR. BERNSTEIN: No, your Honor.

15 JUDGE HILLIARD: All right.

16 MR. BERNSTEIN: We have no cross.

17 JUDGE HILLIARD: Do you have anything further,
18 Mr. Nixon?

19 MR. NIXON: No.

20 JUDGE HILLIARD: All right.

21 MR. NIXON: I do not believe so.

22 JUDGE HILLIARD: Do you have any rebuttal?

1 MR. BERNSTEIN: No.

2 JUDGE HILLIARD: Anybody else have anything?

3 Are we all done?

4 MR. NIXON: We had a briefing schedule set

5 which was two weeks from last Tuesday, I believe.

6 JUDGE HILLIARD: The briefing --

7 MR. BERNSTEIN: We have no objection to

8 maintaining the same briefing schedule so that it

9 can be done.

10 JUDGE COLE: Please speak up.

11 MR. BERNSTEIN: I'm sorry, we have no

12 objection to maintaining the same briefing schedule

13 so that you can meet your obligations also.

14 JUDGE HILLIARD: Mr. Nixon.

15 MR. NIXON: In other words, having a briefing

16 schedule of ten days instead of 14.

17 MR. STEINBERG: Whatever it was before.

18 MR. BERNSTEIN: We'll keep the same dates.

19 MR. NIXON: That's fine.

20 JUDGE HILLIARD: All right.

21 MR. NIXON: If you can just remind us what the

22 date is, yes.

1 JUDGE COLE: Initial post hearing briefs due
2 February 18th. Proposed order due February 25th.
3 Briefs on exceptions March 10.

4 And the reminder to serve us in paper
5 copy as well as Microsoft Word.

6 MR. NIXON: We only have one round of
7 exceptions in this one?

8 JUDGE HILLIARD: That's what it says.

9 MR. REED: If I --

10 JUDGE COLE: That's correct.

11 MR. REED: I believe, your Honor, if I may,
12 during the status hearing you had set briefs on
13 exceptions for March 3rd, reply briefs for March
14 10th with the submission to the Commission of your
15 proposed -- post hearing proposed order or post
16 exceptions on March the 17th.

17 MR. STEINBERG: Can we get a subsequent order
18 issued just to exactly say what it is and just
19 say --

20 JUDGE COLE: I'm looking at the docket.

21 JUDGE HILLIARD: It doesn't mean it's right.

22 JUDGE COLE: No, it doesn't but I guess it --

1 MR. STEINBERG: Can we pick dates now?

2 MR. PABIAN: I do recall that the parties
3 wanted two rounds in at least one of the briefing
4 rounds.

5 You know, if not the post hearing
6 brief, at least the round on exceptions.

7 MR. NIXON: That is what we determined on
8 Tuesday as what Morris did and we set the parallel
9 schedules for both dockets, I believe.

10 MR. PABIAN: We were working off of that
11 schedule. We just moved the Morris things back 30
12 days, and I think we did include reply brief on
13 exception.

14 JUDGE COLE: Let's go off the record.

15 (Whereupon, a discussion
16 was had off the record.)

17 JUDGE HILLIARD: We're going back on the
18 record.

19 Please read your summary of the
20 schedule into the record.

21 MR. YASUNAGA: Looking at the transcript of
22 the December 1, 2003 hearing, the schedule was

1 evidentiary hearing on February 3rd, simultaneous
2 initial briefs on February 18th, proposed order on
3 February 25th, briefs on exception March 3rd with
4 reply briefs on exceptions March 10th.

5 JUDGE HILLIARD: Unless there's an objection,
6 we'll maintain that schedule.

7 MR. STEINBERG: No objection.

8 JUDGE HILLIARD: Hearing no objection, that
9 will be the schedule.

10 If there's nothing further, we'll
11 mark this matter heard and taken.

12 HEARD AND TAKEN

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