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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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In the Matter of
CASE 11-W-0200

A Proceeding on a Motion of the Commission
as to Rates, Charges, Rules/Regulations
of Long Island Water Corporation d/b/a
Long Island American Water re Water Services
=====

Date: Thursday, October 20, 2011
Time: 10:00
At: Public Service Commission
Department of Public Service
Three Empire State Plaza
Albany, New York 12223-1350

STENOGRAPHIC RECORD of a Conference and
Evidentiary Hearing pursuant to Notice.

BEFORE: RAFAEL A. EPSTEIN
Administrative Law Judge

APPEARANCES: JOSEPH DOWLING, ESQ.
Assistant Counsel, PSC
Office of General Counsel
Three Empire State Plaza
Albany, New York 12223-31350

SAUL A. RIGBERG, ESQ.
Intervenor Attorney, Utility
Intervention Unit, Dept. of State

HARRIS BEACH, PLLC, for the Company
677 Broadway, Suite 1101
Albany, New York 12207
BY: STEVEN D. WILSON, ESQ.
SUZANA DUBY, ESQ.

REPORTED BY: BETH S. GOLDMAN, RPR
Certified Shorthand Reporter

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

2 ALJ EPSTEIN: I call Case 11-W-0200, the
3 Long Island American Water Company rates. This is
4 a status conference to be followed immediately by
5 an evidentiary hearing, and is explained
6 sufficiently, I hope, in the notice that was
7 issued regarding today's event. And, I appreciate
8 everybody showing up. I got an e-mail two days
9 ago from Staff saying that the parties had agreed
10 in principle, and it implied that everybody was
11 looking forward to not being here today. But, as
12 I explained in response to that, it has been on
13 the agenda for a long time that we might need this
14 conference today because there was an agreement in
15 principle, if there was one.

16 So, there are a number of steps I would
17 like to go through. Why don't we start with the
18 status conference as advertised. If we could get
19 an indication from one or more parties as to how
20 concrete this agreement is. I am also interested
21 in finding out the substance of the agreement, but
22 an important qualification is that if matters
23 remain to be negotiated, that should not be
24 disclosed to me. I mean you can disclose to me
25 that there are still things to be negotiated and

1 the devil is in the details, and whatever else
2 along those lines that you may want to say. But,
3 if there is any doubt as to what the terms will
4 be, such that the terms are not ready for public
5 disclosure, then if they are not ready for public
6 disclosure they should not be disclosed to me.
7 Because, if there are -- and there are differences
8 of opinion about this within the agency, but my
9 view is that if they are disclosed to me I am
10 unable to continue as the litigation judge who is
11 supposed to be able to make a dispassionate
12 recommendation about the terms of the Joint
13 Proposal when it's ultimately filed.

14 So, with that said -- actually, before
15 the first order of business comes the threshold
16 order of business. Could we have the appearances
17 for the record, please.

18 MR. DOWLING: For Staff, Joseph Dowling,
19 Office of General Counsel.

20 MR. WILSON: For the Company, the law
21 firm of Harris Beach by Steven Wilson.

22 MR. RIGBERG: For the Department of
23 State, Saul Rigberg.

24 ALJ EPSTEIN: Any other parties?

25 (No response)

1 ALJ EPSTEIN: Okay. So, then, what is
2 the status of the agreement?

3 MR. WILSON: Your Honor, we believe that
4 the company has reached a settlement in principle
5 with staff that reflects a balance of the
6 interests of both parties. We are in the process
7 of drafting the terms of the Joint Proposal, but I
8 believe that the numbers that ultimately make up
9 the settlement have been decided on -- and Staff
10 can correct me if I'm wrong -- but at this point
11 we do have a settlement and we expect to have the
12 JP completed by the date contained in the
13 procedural ruling.

14 MR. DOWLING: Your Honor, I just want to
15 state that there are some numbers that still need
16 to be finalized. The amounts are not exactly
17 done, but the principles behind them are.

18 ALJ EPSTEIN: Okay. And, just
19 continuing on that broad level, Mr. Rigberg, is
20 the Department of State going to have any position
21 on this, if you know?

22 MR. RIGBERG: Well, I would say that I
23 can almost guarantee that we will not be opposing
24 the Joint Proposal, and we are awaiting bill
25 impact information so that the Department can

1 decide if we actually will be supporting the Joint
2 Proposal.

3 ALJ EPSTEIN: Okay. And, again, subject
4 to the caveats that I threw out a moment ago,
5 would anybody care to characterize what the
6 proposed revenue allowance is, or would that be
7 premature?

8 MR. DOWLING: Your Honor, it would be
9 premature to give a number at this time.

10 ALJ EPSTEIN: Okay. Let me make another
11 inquiry about the substance of the Joint Proposal
12 and see if I can get an answer about that. I'm
13 sorry, Mr. Dowling. Did you want to add anything?

14 MR. DOWLING: No, Your Honor.

15 ALJ EPSTEIN: I'm asking this mostly for
16 purposes of docket management. I believe I have
17 told some of you that I have been assigned to two
18 other proceedings involving Long Island Water.
19 One is 11-W-0484, which is a tax refund. And the
20 other one is 11-W-0472, which is a petition by
21 American Waterworks, Long Island Water's parent
22 corporation, to acquire AQUA New York. In the
23 AQUA New York case, as far as we know at this
24 point, the only reason I have been assigned is to
25 just kind of keep track of it so that somebody

1 here will be informed as to when it's getting to
2 the Commission and is it getting to the Commission
3 in tandem with the rate case. And, also, to deal
4 with any issues that might come up; for example,
5 regarding discovery if that kind of problem
6 develops or treatment of confidential materials,
7 things that an ALJ would normally deal with. I
8 have been assigned to that case for such purposes.
9 It doesn't mean that we are going to have
10 hearings, although it's possible. It's possible
11 that we will have Public Statement Hearings. I
12 really don't know that's going to go procedurally.
13 But, for purposes of the docket the case that we
14 are on here today, the rate case, I'm wondering
15 whether the agreement in the rate case includes a
16 proposal for disposing of the tax refund in
17 11-W-0484 for one thing. I know I had made a
18 suggestion awhile back that it might be helpful if
19 we could get that out of the way as part of this
20 case. And the reaction I got from the Company and
21 Staff was, no, it wouldn't. So, I wonder, is that
22 still the situation or are we, in fact, going to
23 be seeing something in this agreement regarding
24 the tax refund?

25 MS. DUBY: Your Honor, no, we are not.

1 It's moving -- the tax proceeding is moving in
2 discovery, but we do not intend to merge this tax
3 refund petition with this rate case.

4 ALJ EPSTEIN: Okay. So, if you can
5 disclose this, is there a reason they shouldn't be
6 considered together? And, the reason I'm asking
7 that is because if a commissioner, let's say, sees
8 this Joint Proposal, they might very well ask:
9 Well, what about the tax refund?

10 MS. DUBY: Well, we have discussed the
11 issue of property tax refunds with staff. And I
12 think, in general, the direction was that we
13 should keep the property tax refunds separate from
14 the rate case. And I don't think that there is
15 really a connection between the two with regard to
16 the rate setting process and the refunding
17 process. Once we dispose of the property tax
18 refund case, which we hope to do as expeditiously
19 as possible. They have been moving fairly
20 quickly; right, Joe?

21 MR. DOWLING: Yes.

22 MS. DUBY: The Staff knows what kind of
23 questions they want to ask. It will result in a
24 credit to the customers which is always a good
25 thing. So, that's a separate line item on the

1 bill.

2 ALJ EPSTEIN: Okay. And, going back to
3 my hypothetical commissioner, if they are looking
4 at bill impact from an agreement on the rate case,
5 would there be any material significance to the
6 disposition of the tax refund in terms of the bill
7 impact?

8 MS. DUBY: I would say so. The rate
9 setting process is something that we are still in
10 discussions about with Staff, how to take the
11 revenue requirements that we are kind of
12 fine-tuning and look forward and discuss how we
13 distribute that among the rate classes. That is
14 the next level of conversations. But the practice
15 of the Company, with agreement of the Staff, has
16 been to issue a one-time credit within the
17 earliest months following the issuance of the
18 Commission Order. So, in terms of bill impact,
19 there is a one-month bill impact which we believe
20 will be favorable to the customers. That's how we
21 dispose of it as the most efficient way to dispose
22 of this.

23 ALJ EPSTEIN: Okay. And, am I correct
24 that -- and we don't have to get into the details.
25 But, it's my recollection that the tax refund

1 proceeding started with a petition from the
2 Company which proposed a specific sharing, a
3 specific percentage?

4 MS. DUBY: Yes.

5 ALJ EPSTEIN: Is there any expectation
6 as to whether that case would reach the Commission
7 at the same time as the end of the suspension
8 period; that is to say, would it reach the
9 Commission at the March session or before or
10 later?

11 MS. DUBY: My anticipation -- I would
12 have to confirm whether or not the SAPA notice was
13 issued. We think we should have provided the SAPA
14 notice with the case. I will need to check with
15 Staff as to whether or not it has been issued.
16 That would add 45 days to anything once we
17 finalized it. I think our hope would be that it
18 would be finished a bit earlier than March since
19 it was filed in September. And, as I said, this
20 is the most recent in a series of property tax
21 refund petitions have been filed since about 2006.
22 And, the more we do them with Staff, the more
23 familiar they are with the issues and the more
24 expeditiously they go.

25 ALJ EPSTEIN: Are you Ms. DUBY?

1 MS. DUBY: Yes.

2 ALJ EPSTEIN: How do you do.

3 MS. DUBY: How do you do.

4 ALJ EPSTEIN: I thought I might be able
5 to tell you whether the SAPA Notice was issued,
6 but I can't.

7 MS. DUBY: I will follow up with Staff
8 and we will circle back and make sure it gets
9 issued.

10 ALJ EPSTEIN: I'm sorry. What it comes
11 down to is, assuming the Staff permits it, you
12 would anticipate that it would be decided by the
13 Commission at an earlier time?

14 MS. DUBY: Yes. I think we would
15 anticipate that it would be on the Commission's
16 agenda before March.

17 ALJ EPSTEIN: Okay. Now, extending the
18 same kind of discussion to the AQUA case, I don't
19 want to impute any position to anybody, but just
20 looking at this at a distance I think it could be
21 argued that if that acquisition occurred, it would
22 have some impact on revenue requirement. And, I
23 wonder whether that has been taken into
24 consideration at all in your agreement in the rate
25 case, or was that not -- would that be beyond the

1 scope of the agreement?

2 MR. DOWLING: Your Honor, we discussed
3 the facts of the potential acquisition on the rate
4 case. And, to the extent we could, we tried to
5 accommodate them, but I think the parties
6 recognize that there is a tremendous amount of
7 uncertainty about the effects of the acquisition
8 over the course of this rate plan. So, the
9 effects and the steps we took are limited. And,
10 are going to leave it mostly up to the acquisition
11 procedure to determine what effects it should be.

12 ALJ EPSTEIN: Is there an understanding
13 of what the mechanics of that would be in the
14 acquisition proceeding? For example, let's say
15 that the parties agreed that the acquisition would
16 produce savings for existing Long Island Water
17 customers. Let's say the parties agreed that the
18 acquisition would produce either a certain level
19 of savings or they agreed, just as a matter of
20 theory, that some savings will be incurred and,
21 therefore, should be imputed, at least as a
22 hypothetical assumption, when rates are being set.
23 How would you implement such an agreement? Would
24 you come back to the rates that were set in this
25 case and change them, or would you impute some

1 kind of a credit? What I'm trying to get at is
2 what would be done? What, if anything, would be
3 done, for example, in March by the Commission?

4 (Off the record discussion between Staff
5 counsel and Company counsel)

6 MR. DOWLING: Your Honor, Staff and the
7 Company believe that getting into this territory
8 would cross the line you drew for us in that we
9 have not exactly determined the mechanism for
10 addressing potential savings. But, the JP will
11 express the parties' intentions when it is finally
12 drafted.

13 ALJ EPSTEIN: Okay. Maybe that's a good
14 segue into the next thing I wanted to go to, which
15 is I'm wondering whether it is possible to create
16 some kind of monitoring system so that we can be
17 confident that the drafting of the JP is
18 progressing as hoped? I mean now that I have
19 asked you not to tell me anything about what is in
20 the JP -- or what is in the agreement -- as far as
21 I know there might be nothing in the agreement.
22 There is very little on the record. And, here's
23 what my concern is; that -- well, obviously, the
24 case has to be completed in some manner within the
25 statutory suspension period so that if the JP does

1 you that for planning purposes there will be a
2 separate notice of this, of course. And, I'm also
3 going to be -- I expect to be working with the
4 Company on publicizing this in the newspaper and
5 so forth. But it's going to be on December 13th
6 at the Hempstead Town Hall, the Bennett Pavilion
7 at three o'clock p.m. and 6:00 p.m. And, at least
8 one of those sessions is going to serve as the
9 opportunity for a Commissioner to attend a hearing
10 in this case, which is a statutory requirement.

11 Until today I postponed the decision on
12 whether to do the public statement hearing on
13 November 15th or December 13th. And, now, I
14 expect to go with the December 13th date because
15 that will allow some time between the filing of
16 the JP and the public statement hearing so that we
17 can actually have the JP available for public
18 examination on the website and so that we can put
19 some kind of description of the JP in the notices
20 that we issue and whatever may be published in the
21 newspaper, so that people will have a meaningful
22 opportunity to comment on the JP instead of just
23 commenting on what we have to date, which is only
24 the Company's initial filing and the Staff case.
25 So, there is one more reason that we really have

1 to know whether this JP is getting filed by
2 November 23rd.

3 So, in view of those concerns, is it
4 possible to set up some kind of arrangement -- I
5 don't really know how this might be done. But, is
6 it possible to set up some kind of arrangement
7 that would track whether we are still progressing
8 as hoped on the JP? Is there some way of setting
9 up an alarm system in case we should be forgetting
10 about a JP because there have been unanticipated
11 problems in drafting it?

12 MR. WILSON: Well, Your Honor, at this
13 point we don't see any reason why the JP process
14 would fail. But, the Company can work with Staff
15 and we can provide Your Honor weekly updates at
16 the end of each week as to where we stand with
17 respect to the JP and e-mail those updates every
18 Friday.

19 MR. DOWLING: Yes. There are certain
20 milestones we can definitely inform you of, such
21 as when the revenue requirement is finalized.
22 And, after that, drafts will be going back and
23 forth, so I don't know what more would be useful
24 for that. But, we can definitely inform you when
25 the revenue part of it is finalized and let you

1 know how things are going to progress.

2 ALJ EPSTEIN: Okay. And, I don't know
3 whether you are going to circulate global or
4 anticipated drafts or piecemeal topic by topic.
5 But I guess you can also describe what kind of
6 drafts you are circulating or whether you are
7 circulating drafts or whether you have circulated
8 a final global one or a piece of -- a non-final
9 piece of one or a final piece of one. I don't
10 want to impose a lot of make-work, but do you
11 think a weekly report makes sense? Would that be
12 convenient?

13 MR. DOWLING: I don't think that would
14 be difficult at all for us to inform you.

15 ALJ EPSTEIN: Okay, so let's do that.
16 And, when would you like to start? Would you like
17 to start that a week from tomorrow, or are we
18 going to be exactly -- Are we going to be in a
19 different position a week from tomorrow than we
20 are right now?

21 MR. DOWLING: For Staff, next Friday
22 would be a good day for the first status update.

23 ALJ EPSTEIN: A week from tomorrow?

24 MR. DOWLING: Yes.

25 MR. WILSON: That works for the Company

1 as well.

2 ALJ EPSTEIN: Okay, great. Now, if I
3 could just back up for a moment. I had asked what
4 the Department of State's position might be. A
5 similar question is that, as you know, we have
6 been through some uncertainty about whether we
7 were going to have a municipal consortium as an
8 intervenor. And, then, I got indications from the
9 Village of Lynbrook that they were trying to get
10 up to speed on what was going on but that they
11 also understood that the inhibitions on a party
12 trying to modify their schedule to accommodate
13 them when they come in late. And I notice also
14 that they are not here today. I wonder, can
15 anybody tell me about the possibility of
16 additional intervenors, either Lynbrook or other
17 municipalities, trying to jump into this
18 negotiating process now? Is that something that
19 could happen, as far as you are aware?

20 MS. DUBY: To our knowledge, we are not
21 aware of any other potential municipal
22 intervenors.

23 MR. WILSON: And, Your Honor, I will add
24 that I did have a discussion with the attorney for
25 Lynbrook the day he filed party's request form,

1 and I advised him that settlement negotiations
2 were pretty much at an end, so he's aware of the
3 status of the proceedings without discussing the
4 terms of the settlement because he's not a party.
5 But I advised him of where we were, so he is aware
6 of the status.

7 ALJ EPSTEIN: If I'm getting these
8 weekly status reports, in your view, now that
9 Lynbrook is a party, are they a party to the
10 negotiations, or you didn't have that type of
11 understanding with them? I mean I know they are
12 not here to answer the question, but it was your
13 sense that -- Well, do you think they are
14 sufficiently interested to require a status report
15 just that would be accessible to them just like it
16 is accessible to the parties that are here today?
17 Or, do you think it would be inappropriate because
18 they haven't really been participants in the
19 negotiations as distinguished from the parties?

20 MR. WILSON: Well, Your Honor, I am
21 hesitant to reach out to Lynbrook and advise them
22 on what they should be doing in this proceeding.
23 The Village itself, even before the Town obtained
24 counsel, has been aware of the proceedings, where
25 we were in the proceedings. Before Mr. Guthrie

1 withdrew from the case he was advising them where
2 we were. I will leave it to Lynbrook to decide
3 what they want to do. Like I said, I really don't
4 want to advise them of where they should be in
5 this proceeding.

6 ALJ EPSTEIN: Okay. Well, let me just
7 reiterate for whoever may be reading this -- and I
8 know the attorney from Lynbrook is aware of this
9 because I spoke to him about it. But, under the
10 Commission's rules late intervention requires that
11 the intervening party -- it can be conditioned on
12 the requirement that the intervening party accept
13 the proceedings as they stand at the time of the
14 intervention. And, I'm going to assume that the
15 processes that we are agreeing upon today, such as
16 the weekly status reports, are the processes that
17 we are going to follow until further notice. If
18 late intervenors find that this creates problems
19 for them, we'll see what can be done about
20 resolving those problems. But, I'm not going to
21 sit here and make accommodations in advance or
22 make provisions in advance for the contingency
23 that other intervenors may be coming in. And, as
24 part of that approach, in my view the parties here
25 do not have an obligation to provide any absent

1 parties with the weekly updates that I have
2 requested, again, unless and until some other
3 party now absent comes in and indicates that that
4 is giving them a problem.

5 Now, also on the subject of potential
6 opposition, I have gone back to the July 20th
7 ruling recently, and I think it overlooked
8 something. It provides that in the event of
9 opposition -- and this is the negotiation track --
10 that if a JP were filed but it turned out that it
11 was not unanimous and there was some opposition to
12 it, what the ruling says is that if a ruling is
13 contested in whole or in part, this would also
14 cover the situation where I suppose the parties
15 here were able to reduce their agreement to
16 writing except that maybe there was one or two
17 sticking points that were relatively minor, or
18 sometimes it happens that the parties just throw
19 up their hands and agree that the Commission
20 should sort it out because the parties cannot come
21 to agreement. If something like that happened,
22 the July 20th ruling provides that an adversarial
23 hearing with cross-examination and so forth would
24 be held no later than January 3rd. What that
25 overlooks is that it's not unusual for the

1 Administrative Law Judge presented with a Joint
2 Proposal to question witness about the Joint
3 Proposal and about the reasonableness of the
4 terms, if only to make sure there is some kind of
5 a record basis for a decision to the extent that
6 the Commission might want to go in a direction
7 different from what is in the Joint Proposal. In
8 the present situation, that strikes me as probably
9 unnecessary because, among other things, we have a
10 whole prefiled case from the Company and from
11 Staff and we have a rebuttal case from the
12 Company. So, I think we are not suffering for
13 lack of a decisional basis. When I see the JP, I
14 might have some questions about it, but I would
15 hope that I could resolve them without a hearing
16 by asking you the questions in writing and getting
17 the answers in writing. So, in conclusion, all I
18 would say is that the hearing described in the
19 July 20th ruling to be held no later than January
20 3rd probably will not occur merely because I have
21 questions or concerns about the JP. But, I can't
22 rule it out one hundred percent at this time.
23 And, also, of course, I can't rule out the
24 possibility that either of the parties here will
25 have some unresolved dispute or another party will

1 come in seeking to contest the
2 JP. So, for all of those reasons -- and not
3 merely the reasons listed in the July 20th ruling
4 -- the January 3rd hearing remains a possibility
5 at this time.

6 Another related point is that in the
7 July 20th ruling that hearing is one of the things
8 where the date actually is open-ended. It doesn't
9 have a specific date; it just says, "no later
10 than" -- So, what the July 20th ruling says is
11 that the seven-month scenario is that the JP is
12 filed no later than November 23rd, the parties
13 provide an outline at the same time as the JP, and
14 two weeks later they provide initial statements,
15 and thirty days after the JP they provide reply
16 statements. That hearing that I just talked about
17 is no later than January 3rd. And, if there is
18 that kind of an adversarial hearing no later than
19 January 3rd, initial briefs will have to be no
20 less than fifteen days after the hearing, and
21 reply briefs -- excuse me -- initial briefs will
22 be no more than 15 days after the hearing, and
23 reply briefs will be no more than twenty-two days
24 after the hearing. And, the reason I am raising
25 all that is to -- perhaps this is just to inject

1 some humor or something. But, is there any
2 thought to accelerating the whole thing and filing
3 the JP earlier than November 23rd, or has that not
4 crossed anybody's mind? I don't think that we
5 need to presume that it's going to take all the
6 way to November 23rd.

7 MR. DOWLING: Your Honor, I don't really
8 think we can say how long it would take. But I
9 think if we come to an agreement before the
10 deadline, we will definitely file early.

11 ALJ EPSTEIN: Okay. Were you going to
12 add something, Mr. Wilson?

13 MR. WILSON: I was going to say that the
14 Company feels the same way. If we can get the JP
15 done earlier, we would be happy to submit it
16 earlier.

17 ALJ EPSTEIN: Okay. I'm not sure what
18 the benefit would be to the parties, because I
19 can't really say that it will get you to an
20 earlier session. And, even if it did, would you
21 be able to tell me now whether there is going to
22 be a date certain when the proposed rates would
23 take effect? Is the proposal going to be that
24 certain rates go into effect on April 1st
25 regardless of when the Commission gets the case?

1 MR. WILSON: Yes, Your Honor. The rates
2 will stay with an effective date of April 1st.

3 ALJ EPSTEIN: So, to be honest, you
4 know, I don't see that there is a benefit to the
5 parties in getting the JP to some earlier session
6 instead of the March session, except that it's
7 always better if a JP runs into some type of a
8 snag at the advisory Staff or Commission level, as
9 you can understand, everybody is probably better
10 off the more time we have to resolve any such
11 unforeseen problems. So, accelerating the JP
12 instead of getting it in on November 23rd would
13 provide at least that kind of a benefit; namely,
14 providing more time for internal review within the
15 Department. And, it would also, perhaps, obviate
16 a New Year's Day hearing. We call it a Hanover
17 Hearing. I think January 3rd is the second
18 business day after the New Year's holiday, and it
19 might just be a more comfortable process for all
20 of the parties if the JP did come in before
21 November 23rd. And, then those open-ended dates
22 that I just described would be accelerated
23 accordingly. But, again, you know, that's all
24 that I can say because we really don't know how
25 long it will take to get the JP done. But, we

1 know it won't take beyond November 23rd. That's
2 an article of faith on my part, at least.

3 I don't know if this is clear enough
4 from the July 20th ruling, but as I just
5 mentioned, the July 20th ruling calls for a
6 submittal at the same time that the JP is
7 submitted. It calls for a joint filing from the
8 parties who subscribe to the JP, a joint filing of
9 a neutral outline, or summary of the Joint
10 Proposal. And, if I could explain that, what it
11 means is that I think it's likely that Staff
12 and/or the Company have some kind of internal
13 document that summarizes what the terms are, or
14 that you will have that type of document by the
15 time you are finished. And, if you could provide
16 that kind of document -- and I am definitely not
17 talking about a document that says: This JP is
18 great and here's why it should be adopted; it
19 balances the interests of the parties. It
20 provides rates lower than might have been the case
21 under a litigated scenario, and so forth. So, I'm
22 not looking for any of that stuff at all. But,
23 what I am looking for is just a summary that has
24 no span and no adornments. And, the reason for
25 that is because immediately when the JP is filed,

1 I have to circulate within the Department that
2 kind of a mutual description of what is in it.
3 And because I have to do it immediately, typically
4 it's partly wrong. I just grab the JP and read it
5 and jot down what I think it means and shoot that
6 out in an e-mail. And, it would be much better if
7 that came from persons such as yourselves who
8 actually know what the heck it does mean, and also
9 because that type of summary then becomes the
10 basis for publicity notices and announcements
11 about the public statement hearing so that we can
12 tell the public what it's about without
13 unintentionally misleading them. It's not just
14 inviting people to go to the public statement
15 hearings. Of course, it's also going to be
16 inviting public comment. So, in order to put out
17 a notice encouraging that kind of public
18 participation, we need to have an accurate
19 statement of what's in the JP. And often, I have
20 asked for that. I am always a little bit
21 surprised to get the answer that, no, we don't
22 have anything like that. The parties will say
23 they don't have anything like that. But, if you
24 could maybe think about that in advance, maybe if
25 you don't have that kind of a document in the

1 normal course, maybe you could think about
2 developing it so that it would be ready st the
3 same time as the JP. And, again, it's not a
4 supporting statement; it's just descriptive. And,
5 it becomes necessary because sometimes just the JP
6 has complex provisions that just aren't
7 immediately comprehensible to someone who is
8 coming to it fresh like myself. So, that's what
9 that is about.

10 We can probably go off-line with this.
11 This is a request that I have to the Company. But
12 if there are problems with it, maybe we should
13 talk about it right now. But in issuing these
14 kinds of notices about the Commission seeking
15 public comment, we try to develop a service list.
16 I think now it's going to be electronic service
17 list, but we try to develop a list that is as
18 all-embracing as possible and that reaches
19 everybody that might be interested. And,
20 typically, it goes to elected officials. It goes
21 to public libraries, and just really anybody we
22 can think of. And, it's the kind of list -- and I
23 happened to see in the Company's response to
24 Department of State Interrogatory 18(c) where the
25 Company says: The following is -- the

1 Interrogatory was: Whom did the Company work
2 with? I'm paraphrasing. But, whom did the
3 Company work with in, you know, discussing the
4 issues in the case? And, in response, the Company
5 came back with a list of a couple dozen elected
6 officials or community organizations. And, I'm
7 wondering if I could get the contact information
8 for all those folks from the Company to use, so
9 that I can use it in developing a service list for
10 purposes of notice of inviting public comment and
11 notices of public statement hearings. Do you
12 think that would be a problem? Is that some kind
13 of a trade secret or -- I mean the list is here
14 but it just doesn't have the contact information.

15 MS. DUBY: I don't think we should have
16 a problem submitting the contact information for
17 the public officials that were listed in that
18 discovery list.

19 ALJ EPSTEIN: That would be good,
20 because we actually started trying to find them
21 all. We decided, you know, it would be a lot
22 easier for the Company, probably, if they have
23 already been in contact with them.

24 MS. DUBY: They are all in the Company's
25 service territory, I believe. So, that shouldn't

1 be an issue.

2 MR. WILSON: Your Honor, can we go off
3 the record for a minute?

4 (A discussion was held off the record.

5 Time noted: 11:02 a.m. - 11:07 a.m.)

6 ALJ EPSTEIN: While we were off the
7 record we had a discussion about the difference
8 between party service lists and territory lists.
9 I'm still a little uncomfortable about putting out
10 this notice of public statement hearings without
11 having the JP in hand. And, now that I think of
12 it, I take back the part where I said the outline
13 of the JP is needed for the notice, because I
14 think maybe the notice -- I'm not sure, but the
15 notice may have to be published and posted on the
16 web prior to there actually being a JP. The
17 notice may have to have some kind of contingent
18 language in it that the parties filed their cases
19 and then they were negotiating. By the time this
20 public statement hearing is held, there may very
21 well be a JP that you can read on the Department's
22 website -- something long those lines. But, the
23 publicity effort will most likely start no later
24 than -- well, it will start within the next few
25 days. Probably I will be contacting the Company

1 with a proposed notice for publication, because
2 the public statement hearing is only -- No, no.
3 I'm sorry. I was thinking of the original early
4 public statement hearing date. I would expect
5 that the notices and publication regarding the
6 public statement hearing would commence no later
7 than a month before the December hearing date.

8 So, under the premises that we have been
9 talking about here initially, at least, the notice
10 will not contain the terms of the Joint Proposal,
11 but it will make reference to the imminence of the
12 Joint Proposal.

13 Now, I think I'm down to the last item
14 on my agenda, but just let me double-check that.

15 (Pause taken)

16 ALJ EPSTEIN: Okay. I just wanted to
17 check whether we covered everything that was
18 mentioned in the October 7th notice of this
19 conference. And, we did, except for the
20 evidentiary hearing part. And, as the notice
21 explains, the evidentiary hearing today, given the
22 representations that an agreement is on its way to
23 fruition, the evidentiary process today will be
24 limited to putting the prefiled cases into the
25 record. So, before we get to that, is there

1 anything else that anybody wants to raise of a
2 procedural nature or regarding the status of the
3 case or anything? Is there anything of that type?

4 (No response by the participants)

5 ALJ EPSTEIN: Okay. So, that completes
6 the status conference. And, we are now commencing
7 the evidentiary phase of today's meeting.

8 There is only one question about that as
9 far as I can see. The question is this. This may
10 be a question for you. But, what I am planning to
11 do is, as I said, put the prefiled cases into
12 evidence so that they will be there for whatever
13 purpose, if any, the Commission may ultimately
14 need them for. They will be there, for example,
15 as evidence of the parties' litigation positions,
16 because one of the Commission's criteria in
17 judging reasonableness of a joint proposal is how
18 it compares with the litigating positions.

19 They also will be available in the
20 situation where, as I was describing before, a
21 party comes in opposing the joint proposal and
22 wants to use something in the prefiled cases to
23 impeach the joint proposal and they are subject to
24 the criticism, if you will, that they have not
25 been cross examined. But, I would like the record

1 to show that they were offered for
2 cross-examination. So, that requires some kind of
3 representation from the parties. And I'm not sure
4 how you would be inclined to approach this. It
5 seems to me like overkill to get an affidavit from
6 every witness that this represents their
7 testimony, you know, as if given orally; that they
8 are adopting it as their testimony. I would
9 assume that we can stipulate that every witness
10 who put something in was prepared to vouch for it.

11 Let me frame this in the negative, and
12 then maybe we don't need any further
13 representations from witnesses or counsel. Would
14 it be correct that -- Does anybody disagree with
15 the following: These prefiled cases were
16 submitted in the expectation that the parties
17 sponsoring them would make the witnesses available
18 for cross-examination if there were any desire for
19 cross-examination, and that these prefiled cases
20 represented the litigation positions of the
21 respective parties at the time that they were
22 filed. Does anybody believe that that is a
23 misstatement of what the prefiled cases
24 constitute?

25 MR. DOWLING: No, Your Honor.

1 MR. WILSON: No, Your Honor.

2 ALJ EPSTEIN: Okay. And, then, the next
3 question is: It's possible, regardless of whether
4 there is any further controversy in this case or
5 not, it's possible that parties may want to cite
6 this material. And, for that reason, I think that
7 -- although I could declare that the Company
8 filing as a whole is going to be Exhibit 1 and the
9 Staff filing is exhibit 2 and the Company rebuttal
10 is Exhibit 3. I could, instead of doing it that
11 way, I could break it down further and say that,
12 you know, go through it witness by witness and say
13 that, for example, Mr. Engalls' testimony and
14 exhibits will henceforth be Exhibit -- I don't
15 know where we are -- fifteen, and so break it down
16 that way through a whole list of exhibits numbered
17 1 through 50 or however many that may be. I can
18 break it down that way. And, what will happen,
19 regardless of how the exhibits are numbered, they
20 will be reposted on the website as exhibits. Even
21 though they already appear there as testimony and
22 exhibits, they will be reposted as the exhibits
23 that were ultimately moved into evidence at
24 today's hearing. And, I could go through them now
25 and tell you what number every exhibit will be, or

1 I could just do it on paper and post that on the
2 website as well. And, that will be like an index
3 of: Exhibit 1 is so-and-so and Exhibit 50 and
4 so-and-so, and we wouldn't need to do that here
5 and now. Can I assume that everybody would prefer
6 the latter approach, or do you feel you want to
7 walk over here with your own personal exhibit
8 list?

9 MR. WILSON: The latter approach is fine
10 with the Company.

11 MR. DOWLING: Yes, Staff agrees.

12 MR. WILSON: And I will add, Your Honor,
13 with respect to the beginning of your proposal, if
14 you want to put the Company's testimony in as 1
15 and 3, or if you want to put the initial testimony
16 in and rebuttal in as 1, that's fine with us, too.
17 We don't need the individual testimony marked
18 individually.

19 ALJ EPSTEIN: Yes. I think it just
20 doesn't serve any purpose to call it Exhibit 1,
21 because if anyone does want to cite it, where they
22 could have originally cited Mr. Engalls' prefiled
23 testimony, they are now going to have to cite it
24 as Exhibit 1, Mr. Engalls' prefiled testimony.
25 So, it's just is a piece of useless data in the

1 caption. So, I think they might as well be
2 numbered individually.

3 MR. DOWLING: Especially if we are not
4 going to do it here today.

5 ALJ EPSTEIN: If we had to do it here, I
6 would take a different view. Okay. So, with the
7 understanding that the exhibits will be numbered
8 after the close of this hearing and an index
9 showing the numbering will be posted on the
10 website, is there any objection to moving any of
11 these materials into evidence? By "these
12 materials" I mean the parties' prefiled cases.
13 And I understand there may be confidentiality
14 issues.

15 MR. WILSON: I have a question, Your
16 Honor. I guess the only question I have with
17 respect to separating the testimony out and making
18 them separate is that it's for each witness -- and
19 correct me if I am wrong -- but different
20 witnesses in the initial testimony supports
21 different workpapers and different tabs of the
22 consolidated exhibit to the initial filing. And I
23 just don't know logistically how you would
24 separate out their initial testimony and pull the
25 separate pages from the workpapers to put them in

1 one exhibit when -- it just may become a
2 nightmare.

3 ALJ EPSTEIN: Okay. Now, I don't want
4 to do anything that analytical, but -- Well, let's
5 go off the record.

6 (A discussion was held off the record.

7 Time noted: 11:23 a.m. - 11:30 a.m.)

8 ALJ EPSTEIN: Okay, back on the record.

9 We had a discussion about numbering the exhibits,
10 and we found that I will have to investigate
11 further as to what numbering method will both
12 maintain the integrity of the original filing and
13 also make it feasible for people to inspect the
14 prefiled cases on the Department website.

15 So, continuing, then, I will investigate
16 that and I will let you know what happens. And,
17 if it turns out that every piece is being numbered
18 individually, I will provide you with an index
19 which also will be posted on the Department
20 website.

21 Now, portions of the material that we
22 have just been talking about are claimed to be
23 confidential. And, I think I have indicated in
24 e-mails in the past, or a ruling, or both, that I
25 can't decide claims of confidentiality in the

1 abstract. I believe, for example, I can't decide
2 that all union salary provisions are inherently
3 confidential. But, rather, I have to rule on
4 individual pieces of testimony or exhibits for
5 which confidentiality is claimed. And, up until
6 this point it was not definite that such rulings
7 were necessary, because if something is not going
8 into the record and being offered as a basis for
9 an eventual -- if something is not going into the
10 record and being offered as a possible basis for
11 an eventual Commission decision, it may be a moot
12 point whether the trail is confidential. But,
13 since it's being offered, a ruling is required.
14 And, that means that even though the parties have
15 agreed on categories of information that would or
16 would not be confidential, as far as I can see,
17 that does not satisfy the requirement in the
18 Commission's Rules for the so-called comprehensive
19 brief explaining why the proprietor considers the
20 information to be proprietary. So, unless I am
21 mistaken, the Company needs to file some type of
22 argument as to why the claimed confidential
23 materials should be finally determined to be
24 confidential.

25 Now, we don't yet know whether the

1 record is complete. We might end up having a
2 hearing or some kind of an evidentiary process as
3 late as January 3rd. So, would the parties be
4 inclined to deal now with the questions of
5 confidentiality that have already come up, or do
6 you want to put the whole problem off until after
7 January 3rd? Or, do you think that I am
8 misstating the task? That's another question.
9 You see, I wasn't entirely clear why -- and I
10 don't mean to criticize this at all because any
11 kind of agreement is better than no agreement.
12 But, I wasn't entirely clear why the parties want
13 to have an agreement up front as to what kind of
14 material is confidential and what kind isn't.

15 MR. WILSON: I think the purpose up
16 front was to get a protective order in place, make
17 sure that that which the Company thought was
18 confidential was protected. And we could keep the
19 discovery process moving along under those
20 agreed-upon conditions, expecting at a later date
21 to file a brief explaining why each of the
22 confidential categories should be kept
23 confidential and get a ruling from Your Honor
24 stating so.

25 ALJ EPSTEIN: Okay.

1 MR. WILSON: And, I think with respect
2 to the ruling, we would probably rather get that
3 done as soon as possible. So, within the next
4 week or so -- Within the next week we will get you
5 the brief required by the regulations detailing
6 why each piece of confidential information should
7 be kept confidential, and, so, just in case there
8 is a problem we allow ourselves enough time after
9 a ruling to address it.

10 ALJ EPSTEIN: Oh, okay. Because I
11 didn't quite appreciate what the time element was.
12 I thought that the time-sensitive part of the
13 process was getting the protective order into
14 place because of the way it interacts with the
15 Freedom of Information Act. But that's fine. If
16 there is also a time-sensitive aspect in wanting
17 to allow for problems or appeals, or whatever,
18 that's fine if we do that right away. So, we
19 could set dates or we could just leave it that the
20 Company will file arguments, and then other
21 parties can respond as if they were motions.
22 Other parties' response time will be determined by
23 the regulations as if the Company's brief was a
24 motion. Is that satisfactory?

25 MR. DOWLING: Yes, Your Honor.

1 ALJ EPSTEIN: Or, is that going to catch
2 you at a bad time? I don't want to stop the JP
3 process for this.

4 MR. WILSON: Well, I don't want to speak
5 for Staff. But I think that because in advance we
6 agreed upon a number of the categories, I don't
7 think we are going to catch Staff or the
8 Department of State off guard with anything we are
9 going to ask for confidential treatment for.

10 MR. DOWLING: Your Honor, staff's
11 testimony only has one instance where there is any
12 potential confidential material since our case
13 really doesn't hinge upon a large amount of
14 confidential material. So, I don't think -- we
15 don't object to codifying the agreement that the
16 parties have reached.

17 ALJ EPSTEIN: Assuming that the
18 materials for which the Company claims
19 confidentiality are within the categories that
20 Staff and Department of state, I take it,
21 concluded deserve confidential treatment, then
22 really Staff and the Department of State probably
23 are not going to feel the need to reply anyway;
24 right?

25 MR. RIGBERG: That's correct, Your

1 Honor.

2 MR. DOWLING: Yes.

3 ALJ EPSTEIN: Okay. So, then, the
4 Company will fire at will, and I will wait to hear
5 from you. I think that's everything. Is there
6 anything else?

7 MR. WILSON: Did we move the testimony
8 into the record?

9 ALJ EPSTEIN: I can't remember, but I do
10 remember there was no objection. So, subject to
11 the discussion that we have just had about the
12 need for identifying confidential information as
13 such after we hear arguments on that subject, and
14 also subject to the understanding that the
15 mechanics of numbering the exhibits will be dealt
16 with after today's hearing, the initial and
17 rebuttal cases of the Company and the initial case
18 of Staff are moved into the record. And, I'm
19 sorry, Staff. Was there also rebuttal?

20 MR. DOWLING: No, Your Honor; just our
21 prefiled testimony.

22 ALJ EPSTEIN: Okay. So, those things
23 are moved into the record.

24 (The aforementioned testimony and
25 exhibits were received in evidence.)

1 ALJ EPSTEIN: Thank you for that. And,
2 is there anything else?

3 MR. WILSON: No, Your Honor.

4 MR. DOWLING: No, Your Honor.

5 ALJ EPSTEIN: Okay. Thank you very
6 much.

7 (The proceeding in the above-encaptioned
8 matter was concluded at approximately
9 11:43 a.m.)

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13 (NOTE: Index to Exhibits to be provided
14 by ALJ to all parties)

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I, BETH S. GOLDMAN, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the County of Albany and the State of New York, hereby certify that the proceedings recorded hereinabove were recorded stenographically by me and reduced to computer-generated transcription.

I FURTHER CERTIFY that the foregoing transcript of said proceedings is a true and correct transcript as stenographically recorded at the time and place specified hereinbefore.

I FURTHER CERTIFY that I am not a relative or employee, attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested either directly or indirectly in this action.

IN WITNESS WHEREOF, I have set my hand hereinbefore on this 20th day of October, 2011 in the City of Albany, County of Albany, State of New York.



BETH S. GOLDMAN
Certified Shorthand Reporter
Registered Professional Reporter
Notary Public