

1 STATE OF MISSOURI
2 PUBLIC SERVICE COMMISSION
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4
5 TRANSCRIPT OF PROCEEDINGS
6 Evidentiary Hearing
7 January 30, 2009
8 Jefferson City, Missouri
9 Volume 3

10 Christy and Michael Scrivner,)
11)
12 Complainant,)
13)
14 V.) Case No. SC-2008-0409
15)
16 House Springs Sewer Company, Inc.,)
17)
18 Respondent.)

19 DANIEL R.E. JORDAN, Presiding,
20 REGULATORY LAW JUDGE
21
22 ROBERT M. CLAYTON III, Chairman,
23 CONNIE MURRAY,
24 TERRY JARRETT,
25 COMMISSIONERS.

26 REPORTED BY:
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1 P R O C E E D I N G S

2 (EXHIBIT NOS. 1 THROUGH 18 WERE MARKED FOR
3 IDENTIFICATION BY THE REPORTER.)

4 JUDGE JORDAN: Missouri Public Service
5 Commission calls Case No. SC-2008-0409, Scrivner vs. House
6 Springs Sewer Company. Entries of appearance and
7 introduction of representatives from clients will begin.
8 We'll start with House Springs Sewer Company.

9 MR. MILLER: Attorney Danny Miller for the
10 House Springs Sewer Company, Pat Fribis on behalf of the
11 corporate representative of House Springs Sewer Company.

12 JUDGE JORDAN: Staff?

13 MR. HAAS: My name is William K. Haas. I'm
14 representing Staff of the Public Service Commission in
15 today's hearing. My witness will be Mr. James Busch.

16 JUDGE JORDAN: Okay. Do you have any other
17 representatives of your client here?

18 MR. HAAS: Mr. Steve Loethen is also in the
19 hearing room today, and Mr. Merciel, Mr. James Merciel is
20 also in the hearing room.

21 (Chairman Clayton joined the hearing via
22 telephone.)

23 JUDGE JORDAN: Commissioner, we're taking
24 entries of appearance, and we are over to the Scrivners
25 now.

1 MR. SCRIVNER: Michael Scrivner.

2 JUDGE JORDAN: Okay. Thank you. Thank
3 you, everyone. The purpose of this hearing is for the
4 Commission to hear all sides of the complaint. The
5 complaint will be resolved by a decision which is called a
6 Report and Order. I will draft the Report and Order, but
7 the Commissioners are the decision-makers. They will have
8 the last word on what happens with this complaint. They
9 will decide the complaint by facts. The facts will come
10 from what we say today on the record, and by documents
11 that are entered into the record today.

12 Here's how this hearing will proceed. I'd
13 like everyone to make an opening statement, which is where
14 you tell the Commission what you're going to tell the
15 Commission, followed by presentation of a case in chief,
16 which is what -- when you tell the Commission what you
17 have to say, either by testimony or through documents that
18 you have ascribed for the Commission, and then a closing
19 statement is also helpful, too. That's where you tell the
20 Commission what you've just told them.

21 You will also have the right to file
22 written arguments, which you can do using a transcript
23 that the court reporter will prepare for you. Each party
24 will get the opportunity to do each of those things in
25 sequence. Testimony and witnesses will be subject to

1 cross-examination, that is the other parties can ask
2 questions of your witnesses. And there may also be
3 objections. An objection means there's some reason in the
4 law that that evidence can't come into the record, and
5 I'll rule on those.

6 Any questions before we begin this
7 procedure?

8 MR. MILLER: Judge, the only question that
9 I had, Bill, Mr. Haas, indicated that -- who his witnesses
10 would be, and I didn't -- I disclosed the corporate
11 representative, but I'm going to have -- I'm going to call
12 members of the Commission Staff as well. So I just wanted
13 to make sure that if there was a rule that said I had to
14 prior to beginning note -- give you who the witnesses
15 were, I wanted to make sure I didn't mess it up.

16 JUDGE JORDAN: Thank you. Thank you very
17 much. All right. I will begin by swearing in
18 Mr. Scrivner. The reason I'm going to do that is because
19 persons who are not members of the bar will occasionally
20 get confused between an opening statement and the
21 evidence. I want to make sure that everything you say you
22 only need to say once. So please raise your right hand.

23 (Michael Scrivner was sworn.)

24 JUDGE JORDAN: Then we'll begin with your
25 opening statement. Tell the Commission what you'd like to

1 show today.

2 MR. SCRIVNER: I would like to present to
3 the Staff that I believe my restaurant has been improperly
4 classed in the fees pertaining to the connection of my
5 sewer, and I propose to show that to members of the Staff
6 here today.

7 JUDGE JORDAN: All right. Anything else
8 you'd like to tell us right now?

9 MR. SCRIVNER: I don't think so.

10 JUDGE JORDAN: Then let's move on to the
11 company, House Springs Sewer Company.

12 MR. MILLER: May it please the Commission
13 and your Honor?

14 This is a -- I think a fairly simple case
15 that has been unduly complicated inasmuch as there was an
16 initial application for the construction of a -- and I may
17 mispronounce this, but Pogolino's restaurant in an area
18 served by the House Springs Sewer Company.

19 It was represented on the plans and as
20 built a 128-seat restaurant providing table service, and
21 as you'll see from the menus that are provided, it is a
22 wide-ranging menu. It has pizzas. It has various
23 appetizers, such as chicken tenders, toasted ravioli, a
24 salad menu, a sandwich menu of roast beef, Sicilian
25 meatballs, for a couple of examples, and an extensive

1 pasta menu, and, in fact, it even has a steak menu.

2 The manner in which it was classified was
3 as a full service restaurant. The argument is, nay, it is
4 in essence a paper service restaurant, limited service
5 because, gee, it has pizza, and I presume the insinuation
6 is that there's less preparation in conjunction with that.

7 Our argument is really that because they
8 have a fairly extensive carryout business, that indeed
9 they're operating two restaurants under one roof. They're
10 representing a takeout -- or excuse me. They're running a
11 takeout restaurant and they're running a full service
12 restaurant. For the takeout portion of the restaurant,
13 they really aren't paying anything because they're only
14 paying for what they have in the way of full service
15 seating.

16 They were assessed a contribution in aid of
17 construction based upon the established tariffs that have
18 been approved by this Commission. The -- obviously the
19 opposite side of this is that they were not properly
20 categorized, which is the Scrivners' position, as is
21 previously stated herein, but our position is that they
22 have both a full service restaurant and a takeout
23 restaurant and that they have been properly classified and
24 the tariff that is utilized has been approved by this
25 Commission and is proper. And that's it.

1 JUDGE JORDAN: Thank you.

2 COMMISSIONER JARRETT: May I inquire of
3 counsel?

4 JUDGE JORDAN: Please do.

5 COMMISSIONER JARRETT: You mentioned both
6 terms paper service restaurant and full service
7 restaurant. Do you have a copy of your tariff there with
8 you?

9 MR. MILLER: Yes, I do.

10 COMMISSIONER JARRETT: Can you show me in
11 the tariff where it defines what a full service restaurant
12 is?

13 MR. MILLER: It doesn't.

14 COMMISSIONER JARRETT: Can you show me in
15 your tariff where it defines what a paper service
16 restaurant is?

17 MR. MILLER: Cannot.

18 COMMISSIONER JARRETT: Then how is this
19 Commission supposed to determine whether this is a full
20 service restaurant or a paper restaurant? What are we
21 supposed to use?

22 MR. MILLER: My concept would be that this
23 gets down to a kind of a wale of a pile of common sense in
24 terms of our common experiences of having eaten out in
25 terms of what this Commission meant by the terms full

1 service and paper service. You know, there's no -- I
2 mean, I think you're the finder of fact as well as the
3 making -- concluding what the -- interpreting the law in
4 terms of what, you know, is the differentiation between
5 full and paper.

6 So as I said, I don't find anywhere where
7 there's what we would call bright line guidance in
8 conjunction with this, but it's either -- basically, it's
9 either one of the two, and it's either full or paper. And
10 as I said, from common experience, like, I would view
11 McDonald's as a paper service restaurant, the word paper
12 being kind of poignant, which is, if it's not disposable
13 such as is paper, then -- and people come to your table
14 and wait on you, it would appear to be fish or fowl
15 depending on those two.

16 COMMISSIONER JARRETT: So your answer is
17 we're just supposed to use our own subjective judgment as
18 to what paper service means and what full service means?

19 MR. MILLER: Yeah. I don't know that
20 there's, Judge, any particular -- as I said, if there was
21 bright line guidance, I would -- I would get it to you.
22 But I think that the idea of whether or not it has dishes,
23 silverware and that kind of thing, because I think what
24 the intent was in those two definitions was to go what
25 kind of load is it on the sewer system. Are there dishes,

1 glassware, silverware, et cetera, being washed, which
2 increases the load, which means full service, or is it
3 paper service wherein the Temack or whoever the trash
4 provider is has a bigger dumpster outside?

5 COMMISSIONER JARRETT: Right. And it is
6 the company that files the tariffs, isn't it?

7 MR. MILLER: Correct.

8 COMMISSIONER JARRETT: You think the
9 company has any responsibility to file tariffs that make
10 it clear what the terms that they use in those tariffs
11 mean?

12 MR. MILLER: You mean, Judge, in terms
13 of -- or excuse me, Commissioner. Are you suggesting that
14 the tariff should be refiled as, you know, provide a
15 specific definition for each?

16 COMMISSIONER JARRETT: I'm just asking if
17 you think the company has the responsibility to make sure
18 its tariffs are clear?

19 MR. MILLER: Well, Judge, I think that's --
20 Commissioner, I'm so used to the term --

21 COMMISSIONER JARRETT: That's all right.

22 MR. MILLER: Well --

23 COMMISSIONER JARRETT: I don't take
24 offense.

25 MR. MILLER: I -- one, I think it is clear.

1 But two, could it be more clear if it were by way of
2 example? Do I think it could be more clear? Absolutely.
3 Do I think that those two terms are sufficiently clear in
4 terms of, gee, you know, which is bigger, your disposal or
5 your dumpster, and I think it's capable of being
6 discerned, but as I said, could it be clearer?
7 Absolutely.

8 COMMISSIONER JARRETT: Well, I appreciate
9 your indulgence, Judge. And counselor, thank you for
10 answering my questions.

11 MR. MILLER: Yes sir.

12 COMMISSIONER MURRAY: Judge, can I follow
13 up with a question?

14 JUDGE JORDAN: Yes, Commissioner.

15 COMMISSIONER MURRAY: Regarding the CIAC
16 fee, how did you indicate that that was calculated?

17 MR. MILLER: It's based upon the number of
18 seats -- of the 128 seats and the -- a number of gallons
19 per seat.

20 COMMISSIONER MURRAY: And was that
21 estimated at 40 gallons per seat as the tariff sets it
22 out?

23 MR. MILLER: No. It was times \$85 a seat,
24 Judge.

25 COMMISSIONER MURRAY: Okay. Well, I'm a

1 little confused as to the way the tariff reads. On page
2 2, Sheet no. 9 --

3 MR. HAAS: Your Honor, Sheet No. 9 is a
4 St. Louis County Sewer sheet.

5 COMMISSIONER MURRAY: Okay. And that was
6 attached to the Staff's report?

7 MR. HAAS: Yes, your Honor.

8 COMMISSIONER MURRAY: And why was that
9 attached?

10 MR. HAAS: It was presented as an
11 alternative method of how some companies calculate their
12 CIAC charges.

13 COMMISSIONER MURRAY: All right. And the
14 tariff itself is filed?

15 MR. HAAS: House Springs Sewer Company is
16 Sheet No. 3A.

17 MR. MILLER: It was filed effective
18 August 1, 1997, Judge.

19 COMMISSIONER MURRAY: No. I mean it was
20 filed in this case?

21 MR. HAAS: It is attached, report
22 Attachment A to the Staff's report.

23 COMMISSIONER MURRAY: All right. I
24 apologize. That was confusing. Yes, I have it, Judge.
25 Thank you.

1 All right. So we're looking at a tariff
2 which is just one sheet here?

3 MR. HAAS: Yes, your Honor.

4 COMMISSIONER MURRAY: And the Staff's
5 purpose for filing the St. Louis County Sewer Company
6 tariff sheet was to indicate that this might be a
7 different way to approach?

8 MR. HAAS: There are different ways that
9 the CIAC charge could have been approached, could have
10 been calculated.

11 COMMISSIONER MURRAY: But we are required
12 to enforce the company's filed tariff, are we not?

13 MR. HAAS: Yes, your Honor.

14 COMMISSIONER MURRAY: And under the
15 alternate tariff that Staff attached, I don't see --
16 unless I'm missing it, I don't see a definition of paper
17 service or full service restaurants there.

18 MR. HAAS: That's correct.

19 COMMISSIONER MURRAY: Since this really
20 seems to be just a legal question, I'm going to continue
21 to ask counsel questions for a moment. I'd like to ask
22 Staff's counsel, how do you interpret the definitions in
23 the tariff at issue for the paper service restaurant, for
24 example?

25 MR. HAAS: Those terms are not further

1 defined by the tariff, so the Commission would be making
2 essentially a finding of fact using what I would call an
3 objective standard of what is a paper service restaurant
4 and what is a full service restaurant.

5 COMMISSIONER MURRAY: And do you know
6 how those definitions are interpreted in the way that
7 St. Louis County Sewer Company applies its tariff which
8 has similar language and no definitions?

9 MR. HAAS: I do not know.

10 COMMISSIONER MURRAY: Is this a typical
11 tariff filing? I mean, is this something that we see
12 frequently?

13 MR. HAAS: I think it's common that sewer
14 companies do have a CIAC charge.

15 COMMISSIONER MURRAY: I'm sorry. Say that
16 again.

17 MR. HAAS: It is common for sewer companies
18 to have a CIAC charge. It may be better if you want to
19 get into some of the details, we can call one of the Staff
20 members from the water and sewer department.

21 MR. MILLER: I plan on doing that, Judge.

22 COMMISSIONER MURRAY: All right. Thank
23 you, Judge.

24 JUDGE JORDAN: You're quite welcome,
25 Commissioner. House Springs Sewer Company has concluded

1 its opening statement?

2 MR. MILLER: Yes, sir.

3 JUDGE JORDAN: And Staff? Would Staff like
4 to make an opening statement?

5 MR. HAAS: Yes, your Honor. Good morning
6 again. My name is William Haas.

7 The Complainants, Mr. and Mrs. Scrivner,
8 constructed a new Pogolino's restaurant within the service
9 territory of House Springs Sewer Company. House Springs
10 Sewer Company is a Commission-regulated sewer company. As
11 we have heard, House Springs Sewer Company's tariff
12 includes a provision for a CIAC, or contribution in aid of
13 construction fee. That fee is to be charged whenever new
14 construction is connected to the sewer system.

15 The CIAC depends upon the type of building
16 or the type of facility. For example, the fee for a
17 boarding house is \$110 per person, or the charge for a
18 country club is \$60 per member. But more to the point of
19 this case, the CIAC charge is \$1,700 for a paper service
20 restaurant and it is \$85 per seat for a full service
21 restaurant.

22 The tariff also provides that if a facility
23 is constructed which is not enumerated in the uses listed
24 below, the CIAC fee shall be \$2.80 per gallon times the
25 daily designed waste discharge.

1 It is the Staff's belief that after you
2 hear the testimony about the menu and the dishware and
3 glassware and silverware in the facilities at the
4 Pogolino's restaurant, that you will conclude that this is
5 a full service restaurant, and that House Springs Sewer
6 Company did charge the correct amount. Thank you.

7 JUDGE JORDAN: Commissioner Clayton, that
8 concludes the opening statements. We'll proceed with the
9 hearing. Did you have any inquiry before I terminate this
10 call?

11 CHAIRMAN CLAYTON: I do not, Judge. I want
12 to thank you for letting me chime in here. I think all
13 the other questions I had have already been asked by other
14 Commissioners, so I'll be watching the web cast. Thank
15 you.

16 JUDGE JORDAN: You're entirely welcome,
17 Commissioner. I'm going to hang up now. Thank you.

18 Well, Mr. Scrivner, it's time for you to
19 put on your evidence now. This is the part we call case
20 in chief. I will not make you take the witness stand if
21 you don't want to. You can address the Commission from
22 where you are, and I won't make you ask yourself questions
23 either. You can just tell the Commission what you want to
24 tell it.

25 MR. SCRIVNER: First, I'd like to --

1 JUDGE JORDAN: Excuse me. Go ahead, sir.

2 MICHAEL SCRIVNER testified as follows:

3 MR. SCRIVNER: I would like to start off
4 with the document labeled No. 1.

5 JUDGE JORDAN: One for the court reporter,
6 one for each of the parties and the rest up here. Thank
7 you.

8 MR. SCRIVNER: The document that I just
9 handed you has the general rules and regulations applying
10 to the sewer service. If you flip to the third page of
11 the handout, I have, as the Staff attorney just pointed
12 out, the CIAC fee shall be enumerated for uses listed. If
13 a facility is constructed which is not enumerated in the
14 uses below, CIAC fee shall be \$2.80 per gallon times the
15 daily designed waste discharge.

16 As you read down the list of the items,
17 there are -- in the restaurant category, there are paper
18 service and full service restaurants are the only two that
19 are listed. It is my contention that I do not fall in
20 either of those categories.

21 If we continue to handout No. 2, these are
22 the -- this is the definitions, kind of what Commissioner
23 Jarrett was asking. If you -- the first section there,
24 and some I have highlighted, the contents has the major
25 categories for restaurants. Years ago restaurants could

1 be classified either full service or paper service.

2 Today those things have changed, much like
3 service stations. Service stations are listed on the
4 tariff, but today there are no service stations as they
5 were 20 years ago. They're all convenience stores. The
6 convenience stores are not listed on the schedule.

7 If you read through, there's fast food,
8 there's fast casual, there's family style, there's casual
9 dining and there's fine dining. It's my contention that
10 my restaurant is a casual dining restaurant. We do focus
11 on carryout business. We have a large carryout business.
12 That business continues to grow every month. We are still
13 new. We've only been open a few months.

14 If you read down to the casual dining list,
15 it says, casual dining restaurant is a restaurant that
16 serves moderately priced food in a casual atmosphere.
17 Except for buffet style restaurants, casual dining
18 typically provides table service. Casual dining comprises
19 the market segment between fast food and fine dining
20 restaurants.

21 If you read the fine dining restaurants,
22 that is the only definition there that mentions full
23 service. A full service restaurant is different than
24 mine. I do not have linen tablecloths. I do not have a
25 lot of things that a fine dining restaurant would have.

1 If you'd like to see, I also have item
2 No. 3. These are -- and these are definitions from
3 Wikipedia, just online. I don't know if you have access
4 to pull that up where you are there, but this is just a
5 list of some -- there were over 300 restaurants, more than
6 that possibly listed that are considered casual dining
7 restaurants.

8 And I would also like to hand one other one
9 here. This is a handout -- or this is from the United
10 States Federal Government web page, if you do a web search
11 for restaurants there. I did a casual dining
12 restaurants, but if you look at the links on the left-hand
13 side, the Federal Government recognizes there are casual
14 dining, fine dining, fast casual and quick service, much
15 the same as Wikipedia definitions.

16 I'm not asking the Commission to change
17 anything on the tariff sheets, but I just believe that I
18 am not classified as either of those two restaurants, and
19 according to the rate table, the section at the very top
20 there, if it is in question, it says that you should be
21 charged \$2.80 per gallon times the daily design waste
22 discharge, which is what I'm asking. And that's all that
23 I have.

24 JUDGE JORDAN: All right. We'll go to
25 cross-examination now. Staff goes first.

1 CROSS-EXAMINATION BY MR. HAAS:

2 Q. Good morning again.

3 A. Good morning.

4 Q. I'd first like to ask a few questions about
5 Pogolino's menu.

6 A. Uh-huh.

7 Q. You serve pizza, correct?

8 A. As our main fare, yes.

9 Q. And you serve pasta?

10 A. Uh-huh.

11 Q. And you serve appetizers?

12 A. Uh-huh.

13 MR. MILLER: Is that yes, for the record?

14 JUDGE JORDAN: Yes, please, you'll have to
15 answer yes or no out loud.

16 THE WITNESS: Okay.

17 JUDGE JORDAN: The court reporter can't
18 pick up the nodding, and also keep your voice at a loud
19 enough volume so that the record can get it and also the
20 court reporter.

21 THE WITNESS: Yes, sir.

22 BY MR. HAAS:

23 Q. You serve sandwiches?

24 A. Yes.

25 Q. And you serve salads?

1 A. Yes.

2 Q. And you serve desserts?

3 A. Yes.

4 Q. And you serve hot drinks like coffee?

5 A. Yes.

6 Q. And you serve soft drinks like soda and

7 iced tea?

8 A. Yes.

9 Q. And you serve beer and wine by the glass?

10 A. Yes.

11 Q. Now, when someone orders an appetizer, that

12 appetizer is going to be served on a plate?

13 A. Yes.

14 Q. And you will bring a serving plate for each

15 person at the table to share in the appetizers?

16 A. Yes.

17 Q. And if someone orders a salad, they're

18 going to get a plate for that?

19 A. Yes.

20 Q. And then when they order the entree,

21 whether it's pizza or a pasta, they're going to have a

22 dinner plate?

23 A. Yes.

24 Q. And if they order dessert, they're going to

25 have a dessert plate?

1 A. Yes.

2 Q. And drinks, they're going to have a cup or
3 a glass?

4 A. Yes.

5 Q. And all of these are -- dishware and
6 glassware are types that need to be washed, they're not
7 thrown away?

8 A. Yes, if they're dining in.

9 Q. If they're dining in?

10 A. Yes.

11 Q. Okay. And then you also provide utensils,
12 forks, knives, spoons, and those also will need to be
13 washed?

14 A. Yes.

15 Q. Now I've got a few questions about your
16 facilities. You have inside eating for 128?

17 A. Yes.

18 Q. And -- but no outside seating?

19 A. Not yet.

20 Q. Not yet. What are your plans?

21 A. We do have plans for that, but that has not
22 been completed as of yet, and may not ever be completed.

23 Q. In the kitchen you would have a dishwasher?

24 A. Yes.

25 Q. And you have a garbage grinder?

1 A. No.

2 Q. Is one planned?

3 A. No. It's not needed.

4 Q. And how many restrooms do you have in the
5 restaurants?

6 A. One men's and one lady's with three stools
7 basically -- I'm sorry, three stools and one urinal.

8 Q. In one of the exhibits you presented, you
9 presented definitions from Wikipedia. What is the source
10 where Wikipedia gets its information?

11 A. I do not know that.

12 MR. HAAS: That's all the questions I have.
13 Thank you.

14 JUDGE JORDAN: Cross-examination from House
15 Springs?

16 CROSS-EXAMINATION BY MR. MILLER:

17 Q. Mr. Scrivner, I'm going to show you what
18 has been marked Exhibits 6, 7 and 8 and ask you, sir, are
19 those accurate depictions of the -- of your restaurant?

20 A. Yes.

21 Q. Okay. And --

22 JUDGE JORDAN: Counselor, do you have
23 copies for Staff and for the Bench as well?

24 MR. MILLER: Yes, I do here.

25 BY MR. MILLER:

1 Q. And, sir, there's an Exhibit 9 purports to
2 be a -- some kind of menu. Is that indeed a menu from
3 your restaurant?

4 A. Yes, it is.

5 Q. And Exhibit 10 likewise purports to be a
6 menu from your restaurant. Is it indeed such?

7 A. This was a menu when we first opened. We
8 did have to change it to what is currently Exhibit 9.

9 Q. Okay. So you started out with --

10 A. Started out with Exhibit 10, then changed
11 to Exhibit 9.

12 Q. What's the for why that you changed between
13 those two?

14 A. Pogolino's is a franchise restaurant. We
15 did some things differently on the first menu that the
16 franchise owner was not happy with. We had to change to
17 be more in compliance with the other restaurants in the
18 area.

19 Q. Okay. And whenever you say other
20 restaurants in the area, where else are they or --

21 A. There's a Pogolino's in DeSoto, Missouri,
22 and a Pogolino's in Festus, Missouri.

23 Q. And where is Pogolino's national
24 headquarters?

25 A. Festus.

1 Q. Okay.

2 A. Gentleman who owns the concept lives in
3 Festus.

4 Q. Okay. Sir, as I understand it from your
5 initial presentation, you admit that -- or you claim that
6 you're a -- a casual dining restaurant, correct, sir?

7 A. Yes.

8 Q. And do I take it that you're urging on the
9 Commission that the paper service is fast food and that
10 the only restaurant that fits in full service is fine
11 dining? Is that what you're saying?

12 A. No, sir. I'm saying that many years ago
13 restaurants could be classified into those two
14 classifications. Today that is not the case. Fast food
15 could be a paper service. Fast casual which is listed on
16 that definition sheet also could also be a paper service
17 restaurant. Examples of --

18 Q. Okay. So a fast food or fast casual,
19 depending on the circumstances, could both be paper
20 service, correct, sir?

21 A. Yes.

22 Q. Then the family style restaurant, which
23 according to the item you're presenting indicates that
24 it's got a fixed meal, fixed price, diners seated at
25 communal table, is that -- what kind of service restaurant

1 is that?

2 A. I do not think there's a category for that.

3 Q. I think I probably agree with you. But in
4 the fast -- the paper service restaurants, either fast
5 food or fast casual, you don't have somebody coming out
6 and taking your orders, do you?

7 A. I would have to look at the fast casual
8 again. In some fast casuals they may have waitress
9 service. I don't remember that. I'd have to read that
10 again.

11 Q. Okay. I'm talking about your definition,
12 sir, because you're urging on the Commission certain
13 definitions, correct, sir?

14 A. I am urging that there are different
15 categories of restaurants today.

16 Q. Okay. Now, but the -- somebody walks in
17 your restaurant and they sit down or did they -- are they
18 seated or they just grab their own seat?

19 A. Most of the time they are seated.

20 Q. Okay. So you walk in the door and there's
21 a host or hostess, and they determine how many people it
22 is and take them to the appropriate table, correct, sir?

23 A. Yes.

24 Q. Okay. And then waitress comes out; is that
25 how it works?

1 A. Or waiter, yes, sir.

2 Q. Waiter, waitress?

3 A. Wait staff.

4 Q. Wait staff. Somebody comes out to bring

5 them waters, correct?

6 A. Not -- no, not water. We don't do water

7 unless it's asked with the meal.

8 Q. Okay. So what's the first thing that your

9 staff is trained to do whenever they encounter a patron

10 for the first time?

11 A. The wait staff?

12 Q. Yes, sir.

13 A. The wait staff would come to the table,

14 find out what kind of drinks they would like, suggest

15 possibly appetizer, and come back and prepare those drinks

16 as the folks are deciding what they would like to eat.

17 Q. Okay. And do -- not to be particularly

18 repetitious, but those come out in a glass that is taken

19 back and washed to use again, correct?

20 A. Yes.

21 Q. Not made out of paper, right?

22 A. No.

23 Q. Okay. Or any derivative of paper?

24 A. No.

25 Q. Glass, correct?

1 A. Yes.

2 Q. So they go back, they come out and bring
3 the drinks. And Mr. Haas went through the appetizer, and
4 you give them forks for the appetizers, too, don't you?

5 A. They have forks with their meals, yes.

6 Q. So -- and are your napkins paper or cloth?

7 A. Napkins are paper.

8 Q. Okay. So we've got some paper there. So
9 then after they have ordered and then, for all dishes, a
10 person's given an individual plate if they request it,
11 correct, sir?

12 A. Yes.

13 Q. And after the person has finished their
14 meal, are they expected to bus their own tables?

15 A. No.

16 Q. Okay. You have busboys or busgirls?

17 A. Wait staff bus the tables.

18 Q. So the bottom line of it is, is that they
19 come in, they're taken -- or they're seated, somebody
20 comes and takes their drink order, brings them menus,
21 takes the order for their food, takes it back to the
22 kitchen, brings it back whenever it's done and how many
23 ever courses they get, and whenever they leave, they just
24 get up and go, correct, sir?

25 A. They stop -- the guests come to the

1 register to pay, but other than that, yes, they get up and
2 leave.

3 Q. Okay. And do -- is tipping allowed in your
4 restaurant?

5 A. Yes.

6 Q. In fact, what do you pay your wait staff an
7 hour?

8 A. They're half minimum wage.

9 Q. Do what?

10 A. Half of minimum wage, which is what the law
11 requires.

12 Q. And I presume that the reason why they work
13 for half the minimum wage is that because their tips are
14 expected to exceed the other half the minimum wage,
15 correct?

16 A. Yes.

17 Q. Okay. And they're being tipped for what?

18 A. They're being tipped for the service that
19 they provide.

20 Q. Okay. So the bottom line of it is that
21 part of your business model is that there are people there
22 who receive compensation from the customers based upon
23 going and getting their drinks, going and getting their
24 food, cleaning up their tables, that kind of stuff,
25 correct, sir?

1 A. Yes.

2 Q. And whenever you have a large party, say

3 20, 25 people, is there a gratuity included in the bill?

4 A. No.

5 Q. It's always up to the -- to the patron?

6 A. Yes.

7 Q. Okay. Do you do any catering?

8 A. No.

9 Q. You do -- you do some takeout as well,

10 correct, sir?

11 A. Yes.

12 Q. And are there any menu items that a person

13 cannot get on a takeout basis?

14 A. No.

15 Q. And are drinks available on a takeout

16 basis?

17 A. Yes.

18 Q. Okay. Styrofoam cups?

19 A. Yes, sir.

20 Q. The pizzas are available, takeout?

21 A. Yes.

22 Q. Cardboard box?

23 A. Yep. Yes, sir.

24 Q. The pastas are available, correct?

25 A. Yes.

1 Q. Styrofoam container?

2 A. Aluminum.

3 Q. Aluminum?

4 A. Aluminum and plastic.

5 Q. Salads are available on a takeout basis?

6 A. Styrofoam.

7 Q. Styrofoam. Okay. So kind of operating two
8 different restaurants, aren't you?

9 A. No. We operate the way that all
10 restaurants operate.

11 Q. Okay. You're talking about, you know, a
12 restaurant like an Applebee's, Chili's or something like
13 that, right?

14 A. All restaurants today -- not all
15 restaurants. Most restaurants today have a portion of
16 their business as carryout.

17 Q. Okay. How significant is your carryout
18 portion percentage-wise?

19 A. Our carryout percentage is increasing every
20 month. Currently we are only running about 20 percent,
21 but the two existing Pogolino's run about 40 percent. We
22 are still new. People are still getting to know us, still
23 getting our phone numbers posted on the refrigerator. So
24 we expect that business to continue to grow.

25 Q. You'd agree with me, sir, that the -- well,

1 you don't have any particular space in your restaurant
2 dedicated to the takeout portion of your business versus
3 the dine-in portion, correct?

4 A. They're not separate, no.

5 Q. Okay. So what is the primary difference
6 between, say, your restaurant and Chevy's?

7 A. Other than the food provided --

8 Q. Okay.

9 A. -- we are comparable to Chevy's. Chevy's
10 places a focus on carryout business. They have wait
11 staff. They have glasses, dishes, all the things that you
12 mentioned.

13 Q. Okay. Now, let's see. You've been to a
14 California Pizza Kitchen, correct?

15 A. No, I have not.

16 Q. Never have?

17 A. We don't have any of those in St. Louis, I
18 don't think.

19 Q. They do at the Galleria.

20 A. Oh, do they?

21 Q. Yeah. They're really good. Have you ever
22 been to -- well, you've been to an Applebee's, correct?

23 A. Yes.

24 Q. Difference between you guys and Applebee's?

25 A. Other than the food, there's not.

1 Q. Other than the type of food served --

2 A. That's right.

3 Q. -- yours is Italian and theirs is -- I
4 forget what they call it. Do you remember what they call
5 it?

6 A. No.

7 Q. But at any speed, so we can get a -- a
8 handle on this, basically other than the type of cuisine,
9 and yours is Italian and we've got Mexican and whatever
10 Applebee's calls it, basically same kind of operation,
11 right?

12 A. Yes.

13 Q. Is that yes?

14 A. Yes.

15 Q. Okay. Now, sir, you -- you say you're not
16 a full service restaurant. If you're not a full service
17 restaurant, are you saying that -- you're saying that
18 Applebee's, Chevy's, Chili's and all those restaurants
19 aren't full service either, correct?

20 A. Those restaurants are casual dining
21 restaurants.

22 Q. Okay. Well, your --

23 A. I do not have a definition of full service
24 restaurant, just like you -- there's not one in the
25 tariff. I could not find one anywhere. The only full

1 service definition that I could find was on the fine
2 dining list, it did say that that was full service. And
3 that is my contention, that those categories don't exist.

4 Q. Tell me, what's the nicest restaurant
5 you've been to in St. Louis?

6 A. Ruth Chris.

7 Q. Ruth Chris. And you'd agree it's full
8 service, correct?

9 A. Again, I have not seen a definition of full
10 service.

11 Q. Okay.

12 A. I would agree that they are a step above
13 us. They would be, I would definitely consider them fine
14 dining.

15 Q. So you would consider them in the
16 definitions that you use fine dining?

17 A. Yes.

18 Q. Other than the fact that they've got cloth
19 tablecloths and you don't and they serve different menu
20 items, what's the difference between what portion the --
21 or what's the difference between somebody walking in Ruth
22 Chris and somebody walking in your place in terms of what
23 happens and the food preparation, the wait staff and that
24 kind of thing, other than the price obviously? Tell me
25 the difference.

1 A. I would -- I mean, fine dining, there's a
2 lot of differences other than the tablecloths. They have
3 linen napkins. They have a, what I would consider to be a
4 more professional wait staff. They have -- their wait
5 staff has very nice uniforms that they're required to
6 wear. They have -- it is the decor, the dining
7 experience, the atmosphere of that restaurant is a lot
8 different than a casual dining restaurant.

9 Q. Okay. Let me ask you this, then. You --
10 obviously you've read this tariff, correct, sir?

11 A. Yes.

12 Q. Okay. And whenever you said you saw paper
13 service in terms of restaurant, what did you think that
14 meant?

15 A. I did not know the definitions of those
16 items. I did look through the tariff to see if I could
17 find a definition of those items.

18 Q. And the -- you noticed that it was a flat
19 tariff of \$1,700, correct?

20 A. Yes.

21 Q. And for full service, you noticed that it
22 was \$85 a seat, correct?

23 A. Yes.

24 Q. And I take it that you didn't -- or excuse
25 me. Do you have an understanding of what full service

1 means?

2 A. I still have not heard a definition of full
3 service.

4 Q. Okay. Would you -- well, tell me
5 something. Is a patron free to go up to -- say I'm a
6 tightwad. I go and get seated at my table and I decide
7 that I don't want to pay the waitress, but I've got a
8 little bit of a conscience, so I don't want her doing any
9 work. I'm not going to pay them. Question, is the patron
10 free to go up and order at the counter?

11 A. We have nothing stopping them from doing
12 that, no.

13 Q. Anybody ever done it?

14 A. Not that I can remember.

15 Q. Okay.

16 A. Not that it hasn't happened, but not that I
17 can remember.

18 Q. Is the patron free to go get refills of
19 their own drinks?

20 A. Again, it has not happened. They would
21 probably be shocked if it happened, but I don't think
22 anyone would stop them.

23 Q. Okay.

24 A. Drink machine is behind the counter, so
25 they would have to come around the counter to get to the

1 drink machine.

2 Q. So the counter you're talking about is
3 where they pay?

4 A. Yes.

5 Q. So you'd have to go in behind the cash
6 register to get the drinks, correct?

7 A. Yes.

8 Q. If you're going to serve yourself, correct?

9 A. Yes.

10 Q. And you'd have to go behind said same
11 counter if you were going to try to order food yourself,
12 correct?

13 A. You wouldn't have to go behind the counter.
14 You would come up to the counter.

15 Q. But that's all hypothetical because
16 nobody's ever done that before, correct, sir?

17 A. Not that I am aware, no.

18 Q. Your restaurant isn't set up for that, is
19 it?

20 A. For the guest to order at the counter?
21 They could order at the counter. They could not wait on
22 theirselves. It's not set up for them to get their own
23 drink refills or things like that.

24 Q. It's set up for them to be seated by a
25 person, be waited on by a person, correct, sir?

1 A. Yes.

2 Q. And what is it -- is it your contention
3 that the -- the tariffs should somehow read like the
4 Wikipedia definitions? Is that your contention?

5 A. My contention is that if you're going to
6 hold me accountable to those, there should be at least a
7 definition of what those items are.

8 Q. Okay. So bottom line of it is, you're not
9 saying you're not a full service restaurant, you're just
10 saying it isn't defined anywhere, correct?

11 A. Again, I have not -- and I searched
12 Wikipedia for a full service restaurant. There's no
13 definition in Wikipedia for a full service restaurant.

14 Q. I'm not interested in Wikipedia at this
15 moment. I want your definition, sir. Nobody from
16 Wikipedia is on the stand.

17 A. I understand.

18 Q. Are you a full service restaurant or not?

19 A. No.

20 Q. What is a full service restaurant?

21 A. I do not know.

22 Q. What is a paper service restaurant?

23 A. A paper service restaurant would be one
24 that serves everything they have in paper, I would assume.

25 Q. Okay.

1 A. But again --

2 Q. That would be your definition, correct,

3 sir?

4 A. Yes.

5 Q. So bottom line of it is that we have a -- a

6 paper service where everything is served on paper,

7 correct?

8 A. Yes.

9 Q. And then we have a full service restaurant

10 in the tariffs, correct, sir?

11 A. There are two listings in the tariffs, yes.

12 Q. Okay. And your contention is that you

13 don't meet either one of those?

14 A. Correct.

15 Q. Because you are casual dining?

16 A. Yes.

17 Q. What's your belief as to whenever you're

18 looking through the tariffs, what's your -- what is it

19 that causes you to believe that you're not a full service

20 restaurant?

21 A. I have been in the restaurant business for

22 over 30 years. I don't believe I am a full service

23 restaurant. That's based on my knowledge. And based on

24 the tariff structure when you read the rate table, it is

25 defined that if your restaurant is not listed, this is how

1 your fee is configured.

2 Q. You say you've been in the restaurant
3 business 30 years?

4 A. Yes, sir.

5 Q. Where all have you worked?

6 A. I started my career at -- working at
7 restaurants at Six Flags. I worked at Six Flags for a
8 number of years while I was in high school and college. I
9 have worked at a family dining restaurant that's no longer
10 in business, and I cannot remember the name of it at this
11 moment in time. I have worked -- I worked for Captain D's
12 seafood restaurant for 19 years prior to opening my own
13 restaurant, and I currently work for my own restaurant and
14 a company, Rally's restaurants in St. Louis.

15 Q. Okay. Restaurants at Six Flags are paper
16 service, correct, sir?

17 A. No.

18 Q. Okay.

19 A. Not all of them. Some are. Some are not.

20 Q. Okay. The Captain D's paper service?

21 A. Not all. Some are. Some are not. In this
22 area, they are all paper service, yes.

23 Q. Okay. The ones you worked at were paper
24 service, correct?

25 A. No. I had restaurants all over the United

1 States. I had restaurants in 13 states and some of those
2 were not paper service.

3 Q. Nobody seats you at a Captain D's, do they?

4 A. No. Did not have a hostess or wait staff.

5 Q. Okay. And the -- nobody seats you at a
6 Rally's?

7 A. No, there is no dining room.

8 Q. But at the family dining restaurant, is
9 it -- was it the kind of family style where they bring it
10 out in big bowls and you just dig in until you're done?

11 A. No. It was order off the menu.

12 Q. Okay. Did it have a wait staff?

13 A. Yes.

14 Q. Were you seated there or you grab your own?

15 A. I don't remember. I think you grabbed your
16 own. That was 30 years ago, almost 20 years ago.

17 Q. You discussed with me you've been in the
18 restaurant 30 -- business 30 years and so, therefore, you
19 know what the types are. So I'm going to ask you again,
20 based upon the testimony you just got through giving three
21 minutes ago, you full service or not?

22 A. No. I'm casual dining. That is the
23 definition that I have of my restaurant. That is my
24 understanding of what my restaurant is. It's not a new
25 term. That's a term that's been around for years.

1 Q. Whether or not it's casual dining or not, I
2 mean, you don't have -- you don't understand what full
3 service means; is that correct?

4 A. I could not find a definition. I do not
5 know what a full service restaurant is. To me, if you
6 read the definitions that I handed out, a full service
7 restaurant would be more like a Ruth Chris, but I do not
8 know that. That is my guesstimate and my opinion.

9 Q. Okay. You testified in response to one of
10 Mr. Haas' questions that you don't have a garbage grinder?

11 A. No.

12 Q. Do you just send it down the sewer?

13 A. We don't have anything to send down the
14 sewer. We have trash cans, and any food -- nothing goes
15 in the dishwasher with food on it.

16 Q. Okay. And so are you saying that whenever
17 people bring or send -- 'cause some people aren't fatties
18 like me, and so they don't eat everything on their plate
19 and part of somebody else's, so whenever somebody sends
20 food back, where does it go?

21 A. In the trash can.

22 MR. MILLER: Okay. I believe that that's
23 all. Thank you, sir.

24 JUDGE JORDAN: Before I take questions from
25 the Bench, I want to make sure I have the exhibits

1 straight. Mr. Scrivner, you've offered Exhibit No. 1, the
2 tariff, No. 2, the Wikipedia types of restaurants, No. 3,
3 the Wikipedia list of chains, Exhibit No. 4, USA Search
4 Casual Dining; is that correct?

5 MR. SCRIVNER: Yes.

6 JUDGE JORDAN: Okay. I'm admitting those
7 into the record.

8 (EXHIBIT NOS. 1 THROUGH 4 WERE RECEIVED
9 INTO EVIDENCE.)

10 JUDGE JORDAN: Mr. Miller, you've offered
11 Exhibit 6, 7, 8, 9 and 10; is that correct?

12 MR. MILLER: That's correct.

13 JUDGE JORDAN: And 6, 7 and 8 are the
14 photographs?

15 MR. MILLER: Yes, sir.

16 JUDGE JORDAN: 9 is a current menu?

17 MR. MILLER: Correct, sir.

18 JUDGE JORDAN: And 10 is the past menu?

19 MR. MILLER: Correct.

20 JUDGE JORDAN: Correct. And you've offered
21 those into evidence?

22 MR. MILLER: Yes, sir.

23 MR. MILLER: And I will admit them into the
24 record.

25 (EXHIBIT NOS. 6, 7, 8, 9 AND 10 WERE

1 RECEIVED INTO EVIDENCE.)

2 JUDGE JORDAN: And we don't have an
3 Exhibit 5 yet. Okay. Questions from the Bench,
4 Commissioner Murray?

5 COMMISSIONER MURRAY: Yes.

6 QUESTIONS BY COMMISSIONER MURRAY:

7 Q. Mr. Scrivner, what is the capacity, the
8 seating capacity of your restaurant?

9 A. 128 seats.

10 Q. Okay. Would you look at your Exhibit 1,
11 please, the tariff sheet.

12 A. Uh-huh.

13 Q. On the third page, Sheet 3A, in the second
14 paragraph, it says the CIAC fee shall be -- fee paid shall
15 be based upon the ultimate waste discharge design capacity
16 of a customer's facility. Do you see that?

17 A. Uh-huh.

18 Q. And then looking down at restaurants, under
19 full service restaurants, that fee is based upon \$85 per
20 seat --

21 A. Yes.

22 Q. -- capacity, correct?

23 And then if you look at paper service
24 restaurants, it's just a flat number, correct?

25 A. Yes. Yes.

1 Q. And would you agree that something like,
2 say, a Domino's carryout pizza facility or a Breadeaux or
3 a Pappa John's or any of the other pizza facilities where
4 people typically call in an order, have it delivered or go
5 there personally and wait for it to be prepared and then
6 take it home in a cardboard box, they order drinks, they
7 take them home in disposable containers, there's no
8 seating capacity, would you agree that that would require
9 a significantly different design capacity for the sewer
10 system than a restaurant such as yours that actually
11 seats, has a capacity to seat 128 customers who are served
12 with washable utensils?

13 A. I would have to say that I'm not sure
14 exactly what the question is. Are you saying that a
15 restaurant that is strictly a carryout would use -- would
16 dispense less waste into the system?

17 Q. I'm asking you if you would agree with
18 that.

19 A. I would have to say that that would depend
20 on the volume of the restaurant. If a restaurant is
21 doing -- even with a carryout restaurant, there are dishes
22 in the restaurant. The food is cooked on a -- in a pan on
23 a plate. There are spoons. There are a lot of things
24 used. If a restaurant that is a carryout only was doing
25 five times the volume of my restaurant as far as sales,

1 they could potentially have just as much discharge as my
2 restaurant.

3 Q. So you're not agreeing that the design
4 capacity for a carryout which simply provides food to be
5 carried out would be any smaller than the capacity needed
6 to supply a 128-seat restaurant?

7 A. Normally it would be smaller, yes, but in
8 certain instances, again, depending on their sales volume,
9 there could be just as much.

10 Q. Now, if you look at the tariff down on
11 the -- there's a listing for taverns, bars, cocktail
12 lounges, and for the seating capacity there, the charge is
13 \$20 per seat?

14 A. Yes.

15 Q. Now, would you agree that the design
16 capacity for a sewer system to serve people who are only
17 sitting in a cocktail lounge being served cocktails with
18 glasses that need to be washed would be less than that
19 required for a restaurant with the same number of seats
20 that would be serving full service meals?

21 A. Yeah. With the same number of seats, yes.

22 Q. And when did you open your restaurant?

23 A. We opened the last week of August.

24 Q. Of '97?

25 A. Of last year, '08.

1 Q. '08. Why do I see -- why does your tariff
2 read '97?

3 MR. MILLER: That's when it went into
4 effect, Judge.

5 COMMISSIONER MURRAY: Oh, that's when the
6 tariff went into effect.

7 MR. MILLER: Yes, ma'am.

8 BY COMMISSIONER MURRAY:

9 Q. But you opened your restaurant in August of
10 '08?

11 A. Yes.

12 Q. And when you signed up for sewer service,
13 what did you sign up as?

14 A. There was -- I don't believe there was
15 ever -- and I could be wrong because the contractor
16 handled that. I don't believe there was any -- ever any
17 indication that we had to determine what classification we
18 were.

19 Q. What did you -- did you tell them you're --

20 A. The blueprints and plans of the restaurant
21 were submitted to Jefferson County and I believe to the
22 sewer company. I'm not sure about the -- what was done
23 because the contractor handled all that.

24 Q. And when did you receive your first bill
25 for sewer service?

1 A. The first bill for sewer service is -- I
2 have a copy of one bill here, but I am not sure if it was
3 the first. This bill is dated 11/1 to 1/31, so I'm
4 assuming there was probably one prior to that, but it was
5 just a partial, because the bills are for three months at
6 a time.

7 Q. And what are the -- what do the bills
8 represent that are shown on the last two pages of your
9 exhibit?

10 A. When we originally filed the complaint, I
11 did not have any of the bills from my restaurant at that
12 time. Those were water bills from the existing Pogolino's
13 restaurants. I do have Exhibit 5 that was missing. I
14 don't know if it's appropriate to hand you now, but I do
15 have a copy of those bills along with my bill for the
16 sewer service if you'd like to see that.

17 Q. I don't need to see it if it's -- if it was
18 applied \$85 per seat.

19 A. Okay.

20 COMMISSIONER MURRAY: Okay. I believe
21 that's all. Thank you.

22 JUDGE JORDAN: That's all the Commissioners
23 that we have questions from. I don't have any questions.
24 We will do recross if that -- if those questions generated
25 any questions from the parties. Does Staff have any

1 recross?

2 MR. HAAS: No, your Honor.

3 JUDGE JORDAN: And does the company have
4 any recross?

5 MR. MILLER: Yes, sir.

6 RE-CROSS-EXAMINATION BY MR. MILLER:

7 Q. Sir, if you would peruse Exhibits 16 and 17
8 and tell me whether or not that those are true and
9 accurate copies of the plans for your restaurant.

10 A. As best I can tell, they are true and
11 accurate copies. The floor plan appears to be correct.

12 Q. Okay.

13 A. The site layout appears to be correct.

14 Q. Sir, in conjunction with those plans, you
15 hired an architect, correct?

16 A. Yes. Actually, there were two architects
17 involved. I think you have one of each there, but there
18 were two architects involved in the -- one in the design
19 of the building and one in the layout of the lot, the site
20 plan.

21 Q. In conjunction with a portion of this, he's
22 got some detail with regard to things such as grease
23 traps, correct, sir?

24 A. Yes.

25 Q. And sir, this -- you guys followed the

1 requirements of the Missouri Department of Natural
2 Resources in terms of building this restaurant in terms of
3 what you've got to do, didn't you?

4 A. Yes.

5 MR. MILLER: Okay. And could I get another
6 exhibit sticker, please, ma'am?

7 (EXHIBIT NO. 19 WAS MARKED FOR
8 IDENTIFICATION BY THE REPORTER.)

9 BY MR. MILLER:

10 Q. Sir, I'm going to show you Exhibit 19,
11 which is a portion of the Code of State Regulations from
12 the Missouri Department of Natural Resources. I'm going
13 to direct your attention to the second page of this
14 exhibit, and ask you under food and drink establishments
15 how it is that the Missouri Department of Natural
16 Resources Clean Water Commission defines categories of
17 restaurants?

18 A. Looks like they have about four.

19 Q. What are they, sir?

20 A. They are fast food, they are cafe or
21 restaurant, they are restaurants serving alcoholic
22 beverages, and they are restaurants grinding garbage.

23 Q. According to the Missouri Department of
24 Natural Resources design standards, which one of those are
25 you?

1 A. Again, this is just a category. I'd have
2 to see definitions of what those mean. This is the first
3 time I've seen these definitions.

4 Q. Which of those -- you would agree that
5 you're not category No. 1, wouldn't you?

6 A. Yes.

7 Q. Okay.

8 A. Well --

9 Q. Now we've got category No. 2, which is?

10 A. Cafe or restaurant.

11 Q. Cafe or restaurant. Are you one of those?

12 A. I am a restaurant.

13 Q. Sure.

14 A. Again, I don't know what the definition
15 there is.

16 Q. Okay. Well, you don't know what the
17 definition of a restaurant is?

18 A. I don't know what their definition here
19 when they list cafe or restaurants.

20 Q. Okay. And then it has restaurants serving
21 alcoholic beverages, correct?

22 A. Yes.

23 Q. Okay. And I understand that you don't know
24 what their definition was, but in your definition, are you
25 a restaurant serving alcoholic beverages?

1 A. We are a restaurant selling beer and wine,
2 yes.

3 Q. Okay. So wouldn't it appear under the
4 standards that you designed your restaurant to, because
5 you said you complied with the DNR, that you designed a
6 category No. 3 there?

7 A. Again, I don't have the definitions. I
8 would either be a -- under the No. 2 or No. 3.

9 Q. Okay.

10 JUDGE JORDAN: Counselor, do you have a
11 copy of that for the rest of us?

12 MR. MILLER: I don't, but I will. I mean,
13 quite frankly, that's one that came up based upon
14 Commissioner Murray's questions, and I hadn't anticipated
15 using it as an exhibit. Sorry.

16 JUDGE JORDAN: Okay.

17 BY MR. MILLER:

18 Q. But under any fact pattern, you would agree
19 with me, would you not, sir, that not only does my client
20 not -- in their tariff not define those terms to your
21 satisfaction, but apparently the EPA and DNR don't define
22 what your restaurant is to your satisfaction either, do
23 they?

24 A. I don't know what these definitions are, so
25 I would have to see in this document if there is

1 definitions somewhere. Maybe they do define those.

2 Q. Let's go at it like this. From what you
3 see there, it's not a sufficient definition for you,
4 correct?

5 A. It's not sufficient in this one section
6 where it just gives a heading.

7 MR. MILLER: Okay. That's all the
8 questions I have, sir. Thank you.

9 JUDGE JORDAN: All right. This is the time
10 for redirect, when you would ask your witness any
11 questions that the previous questions have generated. Is
12 there anything further that you would like to tell the
13 Commission? And in particular let me direct your
14 attention to Exhibit 5. Did you want that entered into
15 evidence?

16 MR. SCRIVNER: Exhibit 5 is just copies of
17 some of my bills. I don't think it's pertinent right now.

18 I would like to state that I am not arguing
19 the fact that we have dishes or plates or glasses. I am
20 arguing the fact that I do not fully meet either of the
21 definitions listed, and the Commission's -- or the rate
22 schedule clearly states that if you are not defined, that
23 it tells how much you are to pay, and that's all I'm
24 asking.

25 JUDGE JORDAN: Okay. Anything else?

1 THE WITNESS: No, sir.

2 JUDGE JORDAN: Now, has that generated any
3 further questions from the Bench or from the parties? All
4 right.

5 MR. MILLER: Just one really quickly.
6 Really quickly.

7 FURTHER RECROSS-EXAMINATION BY MR. MILLER:

8 Q. Sir, in previous questions you would agree
9 that it makes a difference in terms of how the sewer
10 company should be able to charge depends on the sizing of
11 the capacity that you're using, correct?

12 A. I'm not sure I understand your question.

13 Q. Let me ask it like this. We discussed --
14 there was a discussion earlier about the Domino's paper
15 service type restaurants. I mean, it only makes sense to
16 you, doesn't it, that those places are going to use less
17 of the sewer capacity and, therefore, should pay less of a
18 bill?

19 A. We're not talking about the bill here.
20 We're talking about the connection fees. But those
21 restaurants if they are using less water, they have less
22 capacity. Yes, the Domino's probably should be paying
23 less in their monthly bill.

24 Q. Sure.

25 A. They should also be paying less in

1 connection fees.

2 Q. Bingo.

3 A. The \$10,000 that I was charged is quite a
4 lot of money. It's not -- and I told you I'd previously
5 worked at Captain D's for 19 years. Captain D's dispenses
6 more water into the system than I do, yet they were
7 classified as a fast food restaurant when they were
8 constructed.

9 Q. Okay. But basically, sir, then, what
10 you're saying is, in essence, is that both my client's
11 tariff and the Code of State Regulations promulgated by
12 the Department of Natural Resources are just antiquated
13 and neither the House Springs Sewer or the DNR should be
14 using those, right?

15 A. I am saying they are not clearly defined.
16 They can use whatever terms they wish to do those, but
17 they should be clearly defined. And if a full service
18 restaurant includes a casual dining it should say that it
19 includes casual dining restaurants. There are five major
20 groups of restaurants in the United States today, and --

21 Q. According to Wikipedia, right?

22 A. According to other sources, but yes.

23 Q. Well, but what you're --

24 A. There are -- there are numerous
25 publications, magazines out there that will give you the

1 same, you know, difference in casual dining, fine dining,
2 fast service, quick serve, those things.

3 Q. Sir, wouldn't it -- aren't you suggesting
4 that, I mean, these DNR guidelines we went through a
5 second ago have a tavern or bar not serving food, correct?

6 A. Yes.

7 Q. Then they've got fast food, and it puts in
8 parens paper service, correct, sir?

9 A. Yes.

10 Q. And then it's got cafe or restaurant,
11 correct?

12 A. Yes.

13 Q. And then it's got a restaurant serving
14 alcoholic beverages, correct?

15 A. Yes.

16 Q. And it's got a restaurant grinding garbage,
17 correct, sir?

18 A. Yes.

19 Q. But you're saying that for your purposes,
20 that in essence, every -- that our tariffs should have,
21 for instance, restaurants doing a percentage of takeout
22 business versus seating capacity? We'd need to do that
23 with somebody like yours, wouldn't we?

24 A. I don't -- I think that you would need to
25 define the restaurants in restaurant categories. The DNR

1 divides them into four separate groups, where the House
2 Springs Sewer District tariff only divides them into two.
3 There are clearly more than two groups and types of
4 restaurants out there today, and without a definition, the
5 tariff plainly says, if you're not listed below, this is
6 what your fee should be. In the --

7 Q. I'm sorry. Were you done?

8 A. Yes.

9 Q. I want to make sure I didn't step on you.

10 Sir, it's really not -- it's not quite
11 accurate, is it? They've got -- DNR's definition has fast
12 food and then cafe or restaurant and restaurant serving
13 alcoholic beverages and restaurant grinding garbage.
14 House Springs has paper service, correct?

15 A. Uh-huh. Yes.

16 Q. So that's one category. And they've got
17 full service, correct, sir?

18 A. Yes.

19 Q. And they've got a separate charge for a
20 grinder, correct, sir?

21 A. Yes.

22 Q. Okay. So all House Springs does is take
23 the definition that DNR uses and the EPA, which
24 promulgates them to DNR, and lumps the ones serving
25 alcoholic beverages and a cafe or restaurant together,

1 correct?

2 A. I don't see the definition, so I mean, that
3 makes sense that maybe that's what they're doing. I don't
4 know.

5 Q. Okay. But sir, then the thing of it is
6 that we went over a second ago, you had your restaurant
7 designed and paid an architect and engineers to design it
8 for 128 seat seating capacity, correct, sir?

9 A. Yes.

10 Q. And the discharge capacity was designed in
11 accordance with those DNR standards to handle that,
12 correct, sir?

13 A. Yes.

14 Q. And I presume, given the fact that you were
15 also doing carryout, that it was designed for an
16 additional load because you may have the place entirely
17 full and serving carryout, correct, sir?

18 A. You're asking me to make judgments on how
19 that was designed. That's designed by the county's
20 regulations and codes, and I really don't know how --

21 Q. And DNR?

22 A. -- those were -- yes. Those codes and
23 regulations had to be followed to get the permits for the
24 county, yes.

25 Q. Sure. Sir, you've had your restaurant full

1 before, haven't you?

2 A. No, we have not.

3 MR. MILLER: That's all the questions I
4 have.

5 JUDGE JORDAN: Further questions from the
6 Bench?

7 COMMISSIONER MURRAY: No questions.

8 JUDGE JORDAN: Further questions from
9 Staff?

10 MR. HAAS: No, sir.

11 JUDGE JORDAN: Any re-redirect?

12 MR. SCRIVNER: No.

13 JUDGE JORDAN: Mr. Miller, do you have
14 copies of your Exhibits 16 and 17 for the rest of the
15 parties?

16 MR. MILLER: Judge, I don't.

17 JUDGE JORDAN: Okay. You can file those
18 after the hearing.

19 MR. MILLER: I will file those after the
20 hearing, and obviously because it was followup on
21 Commissioner Murray's questions, I'll submit the DNR
22 guidelines from the Code of State Regulations as well.
23 I'll make copies at a break.

24 JUDGE JORDAN: Okay. Then I will admit
25 Exhibits 16, 17 and 19.

1 (EXHIBIT NOS. 16, 17 AND 19 WERE RECEIVED
2 INTO EVIDENCE.)

3 JUDGE JORDAN: We have no 18 yet; is that
4 correct?

5 MR. HAAS: Correct.

6 JUDGE JORDAN: All right. You may be
7 excused.

8 My clock says 11:22. We can break now.
9 I'm willing to go 'til noon. It is time for House
10 Springs' case in chief. What's the parties' preference?

11 MR. MILLER: Somebody pick. I don't care.

12 JUDGE JORDAN: Let's just go ahead, then,
13 if no one has preference.

14 MR. SCRIVNER: I'm here until we finish.

15 JUDGE JORDAN: Mr. Miller, are you ready to
16 call your first witness?

17 MR. MILLER: Yes, sir. Jim Merciel.

18 JUDGE JORDAN: Please state your name.

19 THE WITNESS: James Merciel.

20 JUDGE JORDAN: Raise your right hand,
21 please.

22 (Witness sworn.)

23 JUDGE JORDAN: Please be seated.

24 JAMES MERCIEL testified as follows:

25 DIRECT EXAMINATION BY MR. MILLER:

1 Q. State your name for the record, please,
2 sir.

3 A. James A. Merciel, Junior.

4 Q. Okay. Could you spell that for the court
5 reporter?

6 A. Yes. Merciel is spelled M-e-r-c-i-e-l.

7 Q. What do you do for a living, sir?

8 A. I'm on the Staff of the Public Service
9 Commission. I work in the water and sewer department.
10 I'm an engineer.

11 Q. Whenever you say you're an engineer, sir,
12 would you give us the benefit of your educational
13 background?

14 A. Okay. I have a bachelor of science degree
15 in civil engineering. Graduated 1976 from the University
16 of Missouri at Rolla, and I'm a Registered Professional
17 Engineer.

18 Q. Okay. And specifically within the
19 Commission as a -- actually, let me ask a better question.
20 What do you do on a normal day? What is it
21 that you do whenever you show up to work?

22 A. Well, we -- actually a variety of things.
23 We do work with the utilities in the context of formal
24 cases and informal inquiries, either from customers or
25 from the companies. We do inspections on the companies to

1 kind of keep in tune with what's going on in their service
2 area and with their customers.

3 We do handle customer complaints, such as
4 -- this one is a good example. My complaint originally
5 came from Mr. Scrivner's builder. It wasn't from him.
6 And we handle these complaints on an informal basis. This
7 is an example of one that went formal. We review the
8 technical aspects of utility operations, plant operations,
9 plant design, that sort of thing. We do work with the
10 Department of Natural Resources quite a bit.

11 Q. Okay.

12 A. There's probably other things I'm leaving
13 out, but that's an overview.

14 Q. Your answer was far, far better than my
15 question. Sir, so you were who this -- the informal
16 complaint was originally directed to?

17 A. Well, yes. I did get a call from Ed Boyer.
18 He was the -- it's my understanding he was the builder.
19 He's the one who built the building. Unbeknownst to me at
20 the time, the company had also called our office to
21 inquire about this situation. I did not take that call.
22 That went somewhere else.

23 Q. Okay. And what were you asked to do by
24 Mr. Boyer on behalf of Mr. and Mrs. Scrivner?

25 A. Well, Mr. Boyer was basically complaining

1 about the amount of the contribution in aid of
2 construction charge. We discussed it a little bit. He
3 was making points that he wasn't sure if this restaurant
4 fit what was in the tariff. And also we discussed water
5 usage at some of the other Pogolino's restaurants. I'm
6 not sure all that was on the first call. We might have
7 had a series of calls to get all that information out.
8 But it was about the amount of the connection charge.

9 Q. Okay.

10 A. After taking the complaint, I did contact
11 Mrs. Fribis with the company, ,and discussed the
12 possibility of using another provision in the tariff, and
13 that's what appears on the very top of the page that we've
14 been talking about where it does provide that the company
15 can charge the CIAC charge based on water usage. I think
16 it's \$2.80 per gallon per day of water usage. I believe
17 it says for customers not enumerated below, that's in the
18 table we've been talking about, that that charge could
19 apply.

20 I proposed that on the -- both the idea
21 that maybe this restaurant isn't exactly a full service
22 versus paper service like was contemplated and also
23 because of, you know, possibly lower water usage based on
24 the other two restaurants. We didn't know what the water
25 usage would be because the restaurant wasn't built yet.

1 Q. Okay. And sir, you reviewed the design
2 capacity of the sewer system in conjunction with this,
3 correct, sir?

4 A. Well, no, I didn't. Actually, the sewer
5 design capacity -- well, I should be asking, are you
6 asking about the company's system or the building?

7 Q. The building, sir.

8 A. Okay. Well, I didn't review it. It was my
9 understanding that it was designed for 128 seats, which is
10 the number that would apply to the tariff if the table
11 were used.

12 Q. Okay. And, sir, the -- in terms of you
13 work with the DNR guidelines, correct, sir?

14 A. We do.

15 Q. And in conjunction with -- is there an
16 exhibit up there? I don't know where that went.

17 A. I've got my copy of what you have.

18 Q. You've got your copy of this?

19 A. Yes, I do.

20 Q. Okay. Sir, in accordance with how the DNR
21 classifies restaurants, how would it -- for the purpose of
22 the Clean Water Commission, how would they categorize
23 this?

24 A. Well -- well, I'm not sure, but Department
25 of Natural Resources really would not classify this

1 restaurant. What this document is is a design guide for
2 engineers in designing a sewage treatment facility. And
3 this list here is, along with other types of possible
4 customers, if you don't have actual water usage, an
5 engineer could use this for estimating water usage in
6 order to design a treatment facility.

7 So I would -- I would have to say that
8 Department of Natural Resources really doesn't get into
9 evaluating restaurants like this and -- and -- now, I do
10 believe, given the choices that we have either in the
11 tariff or on this paper, if we were limited to those
12 choices, I would say it's a full service restaurant. I
13 don't know if they serve alcoholic beverages or not.

14 So I mean, if that's the only choice we
15 had, but again, I -- there is a provision in the tariff to
16 go on water usage, and that may be appropriate in this
17 case in my opinion.

18 Q. Well, sir, if we -- if we do that, go based
19 on water usage, I mean, like St. Louis County's tariff was
20 attached, correct, sir?

21 A. Yes, it was.

22 Q. And so don't you then have to, if you're
23 going to do it based upon water usage, the rest of the
24 tariffs, I mean, there's no way that -- other than one
25 Applebee's is going to look like another one within the

1 same county, there's no way to categorize restaurants; is
2 there?

3 A. Well, if -- if it's based on water usage,
4 the only reason to do any categorization at all is to do
5 an estimate, and then after -- after some period of time,
6 say one year of review, the actual water usage for that
7 particular customer is used to calculate the charge.

8 That was the purpose of -- well, that's how
9 it would be done with House Springs' provision at the very
10 top, that 2.80 per gallon, and that's how the St. Louis
11 County tariff. The table, although it looks like similar
12 to the one House Springs, that's only for an estimate, and
13 then -- and then water usage is reviewed after some time,
14 and that's how the charge is calculated. It's based on
15 actual usage.

16 Q. But in terms of the -- would that not
17 create a situation where if the Commission decides that
18 they can't utilize the classifications that are in the
19 approved tariffs, doesn't that give every restaurant in
20 this good state who has a -- that's not a paper service
21 restaurant the ability to come in and go, no, give us our
22 money back on our CIACs because we're really not a full
23 service restaurant and go back and base it on something
24 else? They can do that, couldn't they?

25 A. Well, your question was about every

1 restaurant in the state, and no, that's not true.
2 Possibly every restaurant in this company's service area
3 could do that.

4 Q. And St. Louis County?

5 A. No. St. Louis County is -- well, the
6 company no longer exists, but that's based on water usage.
7 That doesn't apply the same way that House Springs does.

8 Q. Okay.

9 A. So actually they all would come back
10 inherently to have their bill adjusted to the proper
11 amount based on water usage, and that's the most common
12 way to do it.

13 Q. Okay. So basically every -- everyone who
14 has a tariff similar to this or that's based upon the DNR
15 rates would have the opportunity to come back to do that,
16 correct, sir?

17 A. Most, yes. Most.

18 MR. MILLER: That's all I have.

19 JUDGE JORDAN: Cross-examination from
20 Staff?

21 MR. HAAS: No questions.

22 JUDGE JORDAN: Mr. Scrivner, any questions
23 for this witness?

24 MR. SCRIVNER: Yes.

25 CROSS-EXAMINATION BY MR. SCRIVNER:

1 Q. Sir, you said when you gave us your
2 educational background and your job description of what
3 you do on a daily basis, but when asked about
4 classifications, given the current classifications, you
5 said that you could not determine what this restaurant
6 would fall under; is that correct?

7 A. Well, I did.

8 Q. You were guessing?

9 A. I believe I started saying that. I do
10 believe I also --

11 Q. If you had to pick --

12 MR. MILLER: Let him answer.

13 THE WITNESS: Okay. I also said given the
14 choices, I believe it's a full service restaurant. Now,
15 we don't have the definitions. To me, it's clearly not a
16 paper service. I might also point out this -- this table
17 is patterned after other companies, some that date back
18 into the '50s, which I believe as you pointed out, and
19 which I agree, McDonald's didn't have inside seating.

20 You know, it was pretty clear, I think,
21 years ago what was paper service and what was full
22 service. You probably did have the family style
23 restaurants and the fine dining restaurants. There might
24 have been some difference there, but paper service was
25 very, very different, very different than what it is

1 today. So I -- I don't -- I don't believe Pogolino's is a
2 paper service restaurant.

3 BY MR. SCRIVNER:

4 Q. Just given the choices, if you had to
5 choose one of those choices, you would pick that choice?

6 A. Correct. It would go full service.

7 MR. SCRIVNER: Okay. Thank you.

8 JUDGE JORDAN: Commissioner Murray, any
9 questions?

10 COMMISSIONER MURRAY: Yes.

11 QUESTIONS BY COMMISSIONER MURRAY:

12 Q. Good morning, Mr. Merciel.

13 A. Good morning, Commissioner.

14 Q. I just want to follow up there, a question
15 you mentioned. You were asked about McDonald's. Even
16 though McDonald's now has seating indoors, don't they
17 always serve on disposable -- disposable papers and, I
18 mean, they don't serve on dishes that have to be washed;
19 is that correct?

20 A. That would be correct. It's still a paper
21 service. I was saying even paper service today is
22 different than paper service was in the '50s and early
23 '60s when you'd go up to the window. So yes, it is still
24 a paper service.

25 Q. And then I want to ask you about the Staff

1 investigation report. The -- on page 2 of that report, do
2 you have that in front of you?

3 A. Yes, I do.

4 Q. Well, excuse me. Rather than that, let me
5 ask you from the tariff. Do you have a copy of the
6 tariff?

7 A. Yes, I have that, too.

8 Q. On Sheet 3A, second paragraph, the CIAC
9 shall be based upon the ultimate waste discharge design
10 capacity of a customer's facility; is that correct?

11 A. Yes.

12 Q. Now, if -- there is a certain capital cost
13 to provide the design capacity for a sewer system; is that
14 correct?

15 A. Yes.

16 Q. And that is the initial cost, that's a
17 construction cost?

18 A. Yes.

19 Q. And then if it turns out that a capacity --
20 a facility was provided the sewer service based upon that
21 design capacity, those construction costs went in, if it
22 turned out that that facility didn't actually use that
23 full capacity, those initial costs would not decrease,
24 would they, of providing the capacity?

25 A. Well, I guess the best answer is no, but

1 the company does not provide specific capacity for each
2 specific customer. It -- you would increase construction
3 facilities or expand treatment facilities, in this case
4 actually wholesale service from another utility, but you
5 do that as your system grows.

6 In other words, if Pogolino's connects with
7 128 customers, you're not -- you're not spending enough
8 money to build the gallons per day in your treatment plant
9 to serve Pogolino's specifically, if that makes sense.
10 Rather, you're taking your water flow from all of your
11 customers and you're designing your treatment facility to
12 serve your service area.

13 Q. Okay. Let me ask you --

14 A. I'm sorry. I confused you more.

15 Q. If you have a restaurant that's capable of
16 seating 128 customers, in order to provide a sewer system
17 for that facility that is capable of serving all of those
18 customers, it has to meet certain design capacity limits,
19 does it not?

20 A. It would.

21 Q. And there is a cost in construction to
22 provide that facility with that capacity?

23 A. Yes.

24 Q. And that is whether or not that full
25 capacity is used; is that correct?

1 A. Well, yes. You're going on -- well, I find
2 it difficult to answer because, again, we're not -- the
3 company does not have to build specific capacity for each
4 specific customer. So -- so just because Pogolino's or
5 somebody else proposes a restaurant, the company is not
6 expending funds up front to serve that restaurant.

7 Q. But they have to be able to serve?

8 A. Whatever the customers are actually
9 discharging to the sewer, the company does need to be able
10 to treat.

11 Q. Or what is the potential that that facility
12 could discharge to the sewer system, they have to be able
13 to provide that, do they not?

14 A. Potential, right. Typically we don't see a
15 lot of -- there -- well, for sewage flow you have daily
16 peaks, daily variations. You could have a customer that
17 maybe goes into business, you know, operates for six
18 months and their business increases or something changes
19 and flow goes up. There's -- I just don't think there's a
20 lot the company has to do to provide for something in case
21 something happens with a customer because that's not --
22 that's just not the norm.

23 Q. If they supply service to a facility, don't
24 they have to be capable of providing the service at peak
25 usage?

1 A. Well, yes, but again, the peaks are more --
2 you don't have seasonal peaks and day-to-day peaks. For
3 example, water companies have peak flows in the summertime
4 because people are watering lawns. That does not
5 translate into sewage flow. Sewage flow is a little more
6 constant than that. You do have -- obviously businesses
7 are closed some days.

8 With recreational developments, we see
9 that, like a lake development where people come out 4th of
10 July and Memorial Day, but they're not there in the
11 wintertime. Those treatment plants, yes, you do have a
12 peak that you need to plan for.

13 This is more of a community that operates
14 year round, and I think you would see fairly constant
15 flows from day to day throughout the year. As to the
16 specific customer, on the -- on the utilities that base
17 their charge on water usage, that's why you make an
18 estimate, you make your best guess, but you take --
19 usually it's one year of water use. I'm going to refer to
20 the St. Louis County tariff.

21 Q. And I understand the St. Louis County
22 tariff allows for adjustment if the actual usage turns out
23 different from the estimated usage. But the tariff this
24 Commission approved did not have that language in it. So
25 how could we force the company to provide an adjustment

1 based upon actual usage when it wasn't in the tariff?

2 A. Yeah. Well, it is in the tariff in the
3 first part, that very first paragraph on House Springs.
4 It doesn't provide for the one year going back to review
5 it. It just says times the daily design waste discharge,
6 and I'm not sure how you land on design.

7 Q. I'm sorry. Point out the language you're
8 speaking of.

9 A. On House Springs on page 3A, the very --
10 the very first thing there, and on our example, the copy
11 we filed it's circled, the CIAC fee shall be enumerated
12 for uses listed. If a facility is constructed which is
13 not enumerated in the uses listed below, the CIAC fee
14 shall be \$2.80 per gallon times a daily design waste
15 discharge.

16 Q. And for that to apply, you have to agree
17 that this is not a full service restaurant or a paper
18 service restaurant?

19 A. You have to -- right. Correct. You would
20 have to agree that this table doesn't apply to Pogolino's.

21 Q. And if you say that, is there any
22 restaurant that would qualify as either a paper service
23 restaurant clearly under this tariff or as a full service
24 restaurant clearly under this tariff or would every
25 restaurant fall under the 2.80 per gallon daily usage?

1 A. Well, that's a good question. I don't know
2 what the answer is. Certainly there is the potential that
3 other customers -- perhaps what was asked before, yeah,
4 it's a possibility other customers could believe that they
5 don't apply in the table. That's the good thing about
6 using water usage. You don't have to argue about what
7 customers are doing, who they are, what type of customer
8 it is. You simply go into the water usage and they pay
9 for what they're discharging.

10 Q. But Mr. Merciel, it appears to me that you
11 are arguing for a tariff other than the tariff we have
12 before us. That may indeed be a more preferable way to
13 have a tariff, but we have a tariff before us that we have
14 to interpret, and I don't think a tariff would include
15 extraneous language such as restaurants paper services,
16 restaurants full service, seating capacity. There are two
17 classifications there for restaurants?

18 A. Correct.

19 Q. And anything that is not enumerated here is
20 subject to the per gallon usage set out above, but
21 restaurants are set out here and they're set out in two
22 different categories as one or the other?

23 A. That is correct.

24 Q. So I think this tariff may be a little bit
25 different than what you're saying you would prefer.

1 A. Well --

2 Q. Would you agree?

3 A. I would tend to agree with you, yeah. Yes,
4 it is different, and when I contacted the company about
5 using this language on the top, the per gallon use, I
6 tried to make it clear to Mrs. Fribis that I didn't think
7 they had to do that. The way the tariff is, I think it's
8 reasonable to do it, but I don't think it's --

9 Q. I'm sorry. Reasonable to do what? Please
10 be clear.

11 A. I'm sorry. I do think it's reasonable to
12 use the per gallon charge, the 2.80, but I don't think the
13 company's required to do it. I don't think the tariff is
14 clear enough to where -- to where they need to do that.

15 We do have this list here and I -- I just
16 have a hard time with -- part of my dealing with the
17 informal complaint was some of the other restaurants were
18 using, rather than this -- well, where House Springs has
19 85 gallons, \$85 per seat, when you do the math, that
20 calculates to about 30 gallons per seat. Any other
21 restaurants are using like 14 gallons. One of them used 7
22 gallons.

23 Q. Mr. Merciel, when would have been the time
24 to object to that? When the tariff was filed, would it
25 not?

1 A. That's correct.

2 Q. This Commission approved this tariff?

3 A. Yes.

4 Q. It has the effect of law?

5 A. Yes.

6 Q. Is that correct?

7 A. That's correct.

8 Q. Did Staff object to the tariff at the time

9 that it was proposed?

10 A. No.

11 COMMISSIONER MURRAY: Thank you. I think

12 that's all I have.

13 THE WITNESS: Okay.

14 JUDGE JORDAN: Recross from Staff?

15 MR. HAAS: Just one question.

16 RE CROSS-EXAMINATION BY MR. HAAS:

17 Q. Mr. Merciel, you are presenting your

18 opinion today in this matter?

19 A. That's my opinion, yes.

20 Q. And you are not being called as the Staff

21 witness on this case?

22 A. I am not appearing as the Staff witness at

23 this time.

24 MR. HAAS: Thank you.

25 MR. MILLER: Sir, you don't have --

1 JUDGE JORDAN: Excuse me.

2 MR. MILLER: Is it mine or Mr. Scrivner's
3 turn? No, it's Mr. Scrivner's turn. Should be. Sorry.

4 JUDGE JORDAN: Go ahead.

5 MR. SCRIVNER: I have no questions.

6 JUDGE JORDAN: Okay.

7 REDIRECT EXAMINATION BY MR. MILLER:

8 Q. Sir, you don't have any earthly idea what
9 the daily design waste discharge is for this, do you?

10 A. I do not.

11 Q. Okay.

12 A. I don't think that was calculated by
13 anybody designing the building, that I know of. It's
14 possible they did, but I don't know of one.

15 Q. Okay. So the bottom line of it is, is that
16 the Commission has the choice of deciding that this is a
17 paper service restaurant, a full service restaurant or
18 deciding that, in essence, there is no CIAC fee because we
19 don't know what the daily design waste discharge is; you
20 agree with that or not?

21 A. Well, we don't know what the daily design
22 discharge is, that's true.

23 Q. Okay. But we do know this isn't a paper
24 service restaurant, correct?

25 A. I would agree with that.

1 Q. Well, but riddle me this. Basically you
2 have a 128-seat restaurant that we went through where
3 you're seated and you go through and you're provided
4 glassware, dishware that's prewashed, whatever. But
5 aren't they also operating a to-go paper service
6 restaurant under the same roof?

7 A. Well, I believe so, and that was their
8 argument. It's not really completely full service. It's
9 a combination.

10 Q. Well, it's two. They've got 128 seats
11 because, you know, if you've got a -- the only reason why
12 they wouldn't have 128 seats is maybe because they don't
13 advertise that much, but they've got every capacity in the
14 world to have 128 warm bodies in the seats and dishing out
15 pasta and pizzas and whatever at the same time from the
16 counter, don't they?

17 A. They do.

18 Q. So you'd have to agree with me, wouldn't
19 you, that in essence there are two restaurants there?

20 A. I'm having a hard time saying two
21 restaurants, but I understand your point. They do have
22 the seating plus carryout, and if you combine those, I
23 think that's what you're getting at.

24 Q. Sure.

25 A. I would agree with that.

1 Q. Okay. Cool. And sir, you went through a
2 little bit of this capacity argument. You would agree
3 with me that the way in which House Springs' tariff is
4 written, that once they get the initial contribution in
5 aid of construction, that they can't go back and go, wait
6 a minute, you're now this booming success so we want to go
7 back and reassess your CIAC, can they?

8 A. Correct. That is not provided in the
9 tariff.

10 Q. So the bottom line of it is, is that all
11 that's provided in the tariff is they get their initial
12 shot and whatever happens after that is whatever happens,
13 correct?

14 A. Yes.

15 Q. Okay. So if the restaurant is a dismal
16 failure versus something that has got people lined up from
17 House Springs to Clayton to try to get in, it doesn't
18 change, correct?

19 A. That's correct.

20 Q. Okay. And House -- the sewer company has
21 to make arrangements to handle that customer if it's that
22 landoff a success, correct, sir?

23 A. That is correct.

24 Q. And the way in which the tariff is designed
25 for them and approved was either paper service or full

1 service, correct, sir?

2 A. By the table, yes.

3 Q. Okay. And in terms of what you were

4 discussing in terms of this fairness argument to use the

5 none of the above is a number we have no earthly idea

6 about, correct?

7 A. Strictly speaking, that's correct, because

8 we don't have a design flow. We would have to wait a

9 while and review actual flow. That would be the only way

10 to do it.

11 Q. Well, now wait a second. Wait a second.

12 You're an engineer, sir, correct?

13 A. Yes.

14 Q. Okay. You tell me where in that tariff

15 that there's any kind of discussion about actual usage.

16 It reads daily design, correct, sir?

17 A. It reads daily design, that's correct.

18 Q. What does design capacity mean as an

19 engineer?

20 A. That means something somebody contemplated

21 to happen. Well, an engineer.

22 Q. That means how big the system is, what it

23 can handle, correct?

24 A. Well, yes, in this case the restaurant.

25 Q. Sure.

1 A. Yeah.

2 Q. Sure. So the bottom line of it is, is that
3 the Scrivners never calculated what -- or haven't
4 presented here anything that would allow anyone to
5 determine a different CIAC other than those enumerated in
6 the restaurants paper service or restaurants full service,
7 correct, sir?

8 A. Well, that's correct.

9 MR. MILLER: Okay. Got it. That's all the
10 questions I have.

11 JUDGE JORDAN: Further cross from Staff?

12 MR. HAAS: No questions.

13 JUDGE JORDAN: Mr. Scrivner, any more
14 cross-examination?

15 MR. SCRIVNER: I would like to comment on
16 something, but it doesn't refer to this gentleman. Is
17 that okay?

18 JUDGE JORDAN: Well, no, not really. If
19 you'd like to say something in closing, then you may add
20 it.

21 MR. SCRIVNER: Okay. Then no questions for
22 this gentleman.

23 JUDGE JORDAN: Any more questions from the
24 Bench?

25 COMMISSIONER MURRAY: No questions. Thank

1 you.

2 JUDGE JORDAN: Then you're through. You
3 can stay if you wish. Does anyone anticipate calling this
4 witness again?

5 MR. MILLER: I doubt it, Judge. Here would
6 be my thought: Is that if he's going to be somewhere in
7 the building or on a cell phone, you know, that would be
8 super if he could leave it, because I wouldn't want him to
9 have to sit here and wait, but if I think of something
10 brilliant, I might want him.

11 JUDGE JORDAN: You can stay and watch if
12 you like or you can go back to your office.

13 Ready for your next witness?

14 MR. MILLER: Judge, well, one of two
15 things. I have no six-minute witnesses if we're planning
16 on taking a break at noon or if we're going to work
17 through. I mean, I don't care, but if we're going to
18 break at noon, I'd just as soon wait to put my witness on
19 so I can start and finish.

20 JUDGE JORDAN: Let's go ahead and take a
21 break and we'll resume here in one hour from now.

22 (A BREAK WAS TAKEN.)

23 JUDGE JORDAN: We're back on the record.
24 We're in House Springs' case in chief. Counselor, are you
25 ready to call your next witness?

1 MR. MILLER: I am. I hope I pronounce this
2 right. Steve Loethen.

3 JUDGE JORDAN: Please raise your right
4 hand.

5 (Witness sworn.)

6 JUDGE JORDAN:
7 STEVEN G. LOETHEN testified as follows:

8 DIRECT EXAMINATION BY MR. MILLER:

9 Q. State your name for the record, please, and
10 spell your last name.

11 A. Steven, S-t-e-v-e-n, G. Loethen,
12 L-o-e-t-h-e-n.

13 Q. By whom are you employed, sir?

14 A. Missouri Public Service Commission.

15 Q. And what's your job title?

16 A. Utility Operations Technical Specialist II,
17 I guess.

18 Q. Okay. And what do you do on a -- whenever
19 you get up in the morning, show up down here or wherever
20 you show up, what do you do physically?

21 A. Primarily I do -- my job title, do
22 inspections on the various systems we regulate. I also
23 deal with complaint issues that we have, work on rate
24 cases. Mainly on the rate cases we look at used and
25 usefulness issues, complaints, overall operations of

1 the -- mainly operations of the system, but we also get
2 into billing and, you know, the overall management of
3 systems and everything.

4 Q. Okay. And in conjunction with House
5 Springs Sewer Company, have you made inspections of their
6 systems?

7 A. Yes. I've done inspections every year
8 since I started.

9 Q. How long have you been with the Commission?

10 A. Nine years as of January 11th.

11 Q. And in terms of the -- do you make
12 inspections in terms of, A, just that the systems appear
13 to be maintained and operating, or do you do anything with
14 regard to capacity, or what do your inspections consist
15 of?

16 A. During our inspections we look at overall
17 operations. We look at the capacity issues, if system's
18 getting close to the capacity, making sure the company's
19 aware of it and they have things in place to expand the
20 plant or do the necessary things to make sure they're not
21 overloading their plants or whatever. Look at operations.
22 We look at billings, their billing complaints. We look at
23 the collection systems, make sure they're maintaining them
24 properly.

25 Q. Okay. And in terms of House Springs Sewer

1 Company, they get dings on their inspections or what kind
2 of outfit are they?

3 A. When I started, they had quite a few
4 issues. They've been improving greatly over the years.
5 They've got one of the best -- best or only manhole
6 inspection programs out there. They've -- they still have
7 some issues, but most of the issues they have are because
8 of the way the plants were originally constructed or
9 capacity issues on some of them. But most of the things
10 that we ask them to do they come out and take care of
11 and -- but they've -- they have improved their operations
12 greatly.

13 Q. Okay. The House Springs Sewer, I take it
14 from the testimony you just gave, has had some issues
15 where they have had to increase capacity?

16 A. Not necessarily capacity, but they've made
17 some improvements to some facilities. But some of them
18 they're getting close to capacity, and they have to make
19 sure that they're looking at expanding plants. Some
20 plants they've taken offline and put on new facilities
21 that have come on board, plants they were having problems
22 with, and they went ahead and took them out of service and
23 hooked them up to a newer plant with the capacity that
24 could handle all that.

25 Q. Okay. So once a -- in terms of capacity,

1 once you sign a customer up, do they have the -- does
2 House Springs Sewer have the obligation to provide for the
3 sewer needs of that customer?

4 A. Yes.

5 Q. And what way is there if they don't --
6 strike that.

7 The contributions in aid of construction
8 are what sewer companies like this use to expand capacity,
9 correct, sir?

10 A. It's one of the ways, yeah.

11 Q. Sure. And the -- those fees are kind of in
12 essence in anticipation of the -- in terms of the tariffs
13 filed in this case, based upon either categories or what
14 they're designed to discharge, correct?

15 A. Yeah. When a plant is being constructed,
16 it has to be built according to design guides that are set
17 up by -- we have design guides. The Department of Natural
18 Resources has design guides. They're very similar.
19 There's some discrepancies, but not much. But yeah, the
20 plant has to be built according to design guides.

21 Q. Okay. And their design guides are based
22 upon the design waste discharge, correct?

23 A. Yes.

24 Q. Okay. And the actual discharge may be less
25 than that, for instance, if a place didn't do very well,

1 correct?

2 A. In most places it is less, residential or
3 commercial.

4 Q. Okay. But whenever you determine whether
5 or not that -- I mean, the capacity of House Springs
6 Sewer, do you go and -- I mean, do you utilize the flow
7 capacities or the discharge capacities that the DNR
8 suggests are what given entities will discharge?

9 A. Yes. The DNR has design guides that we
10 use, and when we take number of customers out there
11 currently on the facility, like if a facility's made for
12 80 lots, if you will, in the subdivision, if they're
13 getting close to, we'll take like 70 lots times whatever
14 the design guide is, and then that figures out your
15 gallons per day. We know about how much percentage of the
16 plant's being used right now.

17 In some cases that varies, such as you have
18 a -- if you have a housing where there's, you know,
19 smaller homes compared to one bathroom or multi-dwelling
20 or, you know, the 3.7 is your average on homes, so you
21 obviously -- you have some areas that you might have one
22 or two people living in a home compared to families in
23 larger homes, so --

24 Q. Right.

25 A. -- there's variations in all the design

1 guides.

2 Q. Okay. And Exhibit 19, are those the -- the
3 design guides that you were just talking about?

4 A. Yeah. Yes, it is.

5 Q. Okay. And is -- before House Springs signs
6 up, because there was a discussion about, oh, gee, the
7 capacity's never really an issue. If somebody's operating
8 at -- if House Springs, for instance, was operating close
9 to capacity and wants to take on or agrees to take on an
10 additional customer like a restaurant, what have they got
11 to do?

12 A. Basically you go by design guides. That's
13 how they have built their system for design guides for
14 your peak flows, your peak usages. That's how it has to
15 be built, so that's how you would have to bill for the
16 CIAC charges.

17 Q. So the bottom line of it is, is that in
18 order to accept a new customer, they've got -- the sewer
19 system has to have the treatment capacity set out in those
20 guidelines, correct, sir?

21 A. Yes.

22 Q. And if you find that they don't have that
23 capacity, what do you do?

24 A. They -- they either have to expand the
25 facilities or in some cases the actual customers or

1 whoever's wanting to hook up to the system, whether it be
2 a subdivision or a commercial property, they would have to
3 actually do the expansion and contribute it to the
4 company.

5 Q. Okay. So two ways --

6 A. And there's other ways.

7 Q. I'm sorry, sir.

8 A. There's other ways. That's not cut and dry
9 two ways, but that's some of the common ones, yeah.

10 Q. That's actually how I was going to phrase
11 the question. The two most common ways are either by a
12 contribution in aid of construction or the customer will
13 contribute directly, for instance, build the facility and
14 then it's connected, fair?

15 A. That's the two most common I'm aware of.

16 Q. Sure. But under any fact pattern, fair
17 statement that in order to accept this customer, that
18 House Springs either has to, A, reserve a portion of the
19 capacity that it currently has, or B, expand capacity?

20 A. Yes.

21 Q. And they have to expand capacity based upon
22 those DNR guidelines, correct?

23 A. Yes.

24 Q. And in terms of your auditing -- try to
25 quiet down.

1 In terms of your auditing, the amount that
2 they have to have reserved is likewise set out in those
3 guidelines, correct, sir?

4 A. Yes.

5 Q. In terms of the capacity that House Springs
6 Sewer has been required to either, A, reserve, or B,
7 expand to meet, what category is that based on?

8 A. On design guide.

9 Q. And on the design guide, what does the
10 Popogalo's (sic) restaurant fit under?

11 A. It's my opinion they're a full service
12 restaurant.

13 Q. And you're the guy who's been doing these
14 auditing and telling House Springs capacity-wise what
15 they've got to have, correct, sir?

16 A. Yes.

17 Q. And you have on behalf of the Commission
18 utilized the DNR guidelines and say you have to either
19 reserve or create additional capacity for a full service
20 restaurant, correct, sir?

21 A. This specific area was developed or the
22 mains were put in before I was around, so not me
23 personally, but it was built according to design guides.

24 Q. Okay. In fact, you or someone who had the
25 same job title you do?

1 A. Correct.

2 Q. Thank you for the clarification. And is
3 there any way that -- strike that.

4 And you are responsible as well in
5 conjunction with your auditing to determine whether or not
6 that the sewer companies are following the rate guidelines
7 and tariffs that they have filed here with the public and
8 had approved by the Commission?

9 A. Yes.

10 Q. And what rate guideline in terms of the
11 CIAC fee does Pogolino's fit into?

12 A. The full service restaurant, it's my
13 opinion.

14 Q. And --

15 A. I should correct that. I personally am not
16 the one that -- the question -- the previous question, I
17 personally am not. Water and sewer staff would be. I'm
18 not personally the one that makes those decisions, but the
19 water and sewer staff would be.

20 Q. People who you have real regular
21 interaction with here within the department as well,
22 correct?

23 A. Correct.

24 Q. You're the field guy, they're the bean
25 counters, and you work in combination, correct?

1 A. Correct.

2 Q. You go out and get the data. They compile
3 it, tell you, and then you go out and deal with the sewer
4 companies?

5 A. That's correct.

6 Q. Got it. Okay. And you have -- or have you
7 been to the Pogolino's restaurant?

8 A. Yes, I have.

9 Q. And you heard the description of how you
10 come in and get seated and have glassware, dishware. Was
11 that your experience there?

12 A. Yes.

13 Q. And in terms of the -- how many sewer
14 companies or districts are you responsible for?

15 A. That I personally inspect?

16 Q. Yeah.

17 A. It varies. If there's a rate increase
18 or -- it varies, but, I've been to almost all of ours
19 except for about 40, which I think we regulate about 120,
20 130. All the systems we regulate I've been to probably
21 three-fourths of them.

22 Q. Okay. And are you aware of any other CIAC
23 fees that have the same categories with regard to
24 restaurants that House Springs does?

25 A. This rate chart is on -- is in some other

1 tariffs. As pointed out previously, some of them have
2 variations of it, but yes, that rate chart is in some
3 other tariffs also.

4 Q. Okay. And you don't -- you don't happen to
5 know the daily design waste discharge, do you?

6 A. For?

7 Q. Pogolino's.

8 A. No, I don't.

9 Q. The -- well, based upon the tariffs that
10 have been filed and approved, then, there would be no way
11 that -- or excuse me. You'd have to have the daily design
12 waste discharge calculated if that were going to be
13 determined in accordance with that, correct?

14 A. I don't quite understand your question.

15 Q. All right. If something wasn't on that
16 list, the -- you'd have to know the daily design discharge
17 in order to compute it, right?

18 A. If it wasn't on this list, then you would
19 use the 2.80 per gallon.

20 Q. Okay. But the -- the Pogolino's restaurant
21 in terms of where it fits in the category is on that list;
22 is that correct, sir?

23 A. I believe so. It's a full service
24 restaurant.

25 MR. MILLER: That's all, sir. Thank you.

1 JUDGE JORDAN: Cross-examination from
2 Staff?

3 MR. HAAS: No questions, your Honor.

4 JUDGE JORDAN: Mr. Scrivner, any questions
5 for this witness?

6 MR. SCRIVNER: Just one.

7 CROSS-EXAMINATION BY MR. SCRIVNER:

8 Q. You mentioned that you visit quite a few
9 other sewer districts and are familiar with this rate
10 chart, that it's used in several others. Are there also
11 other charts out there that have more than two categories
12 for restaurants?

13 A. Not that I'm aware of.

14 Q. The DNR document, is that the same one that
15 you handed him --

16 A. Yes.

17 Q. -- that we had earlier?

18 MR. MILLER: Yes, sir.

19 BY MR. SCRIVNER:

20 Q. Okay. It lists more than two categories.
21 Does any of the other sewer districts use something
22 comparable to what the DNR uses?

23 A. No. As far as I know, they just have the
24 paper service and full service on the tariffs, in the
25 tariffs.

1 MR. SCRIVNER: All right. Thank you. No
2 further questions.

3 JUDGE JORDAN: Okay. Commissioner Murray,
4 any questions for this witness?

5 COMMISSIONER MURRAY: Just briefly.

6 QUESTIONS BY COMMISSIONER MURRAY:

7 Q. Good afternoon, Mr. Loethen. Can you tell
8 me, do you know how many --

9 MR. MILLER: Judge? The Judge told me
10 during a break that I needed to try to keep my voice down
11 and you, who are softly spoken, there was an issue about
12 raising it. I don't mean to interrupt you.

13 COMMISSIONER MURRAY: All right. Thank
14 you.

15 JUDGE JORDAN: I have the same issues.

16 BY COMMISSIONER MURRAY:

17 Q. Do you know if House Springs serves any
18 other full service restaurants?

19 A. I believe just one at this time.

20 Q. Do you know if they serve any paper service
21 restaurants?

22 A. Yes, they do have some paper service
23 restaurants.

24 COMMISSIONER MURRAY: I don't think I have
25 any other questions for you. Thank you.

1 JUDGE JORDAN: Recross from Staff?

2 MR. HAAS: No, thank you.

3 JUDGE JORDAN: Recross from Mr. Scrivner?

4 RE-CROSS-EXAMINATION BY MR. SCRIVNER:

5 Q. Can you tell me what the other restaurant
6 that's considered full service is?

7 A. I don't know it by name. No, I don't.

8 MR. SCRIVNER: Thank you.

9 JUDGE JORDAN: Redirect?

10 MR. MILLER: I can't think of anything. I
11 know that's disappointing, but I can't.

12 JUDGE JORDAN: Then you're free to go, or
13 you may stay if you like. Will anyone be recalling this
14 witness?

15 MR. MILLER: No.

16 JUDGE JORDAN: You won't be far?

17 THE WITNESS: No.

18 JUDGE JORDAN: Okay.

19 MR. MILLER: I'm going to call Mr. Scrivner
20 real quick.

21 JUDGE JORDAN: I won't swear you again.
22 You're still under oath.

23 (EXHIBIT NO. 20 WAS MARKED FOR
24 IDENTIFICATION BY THE REPORTER.)

25 MICHAEL SCRIVNER testified as follows:

1 DIRECT EXAMINATION BY MR. MILLER:

2 Q. Sir, I'm going to show you from the
3 Restaurant Industry Business White Papers the definition
4 of a full service restaurant, and I want you to read it
5 out loud, if you would, please, and to then tell me
6 whether or not that you agree with that definition.

7 A. Overview. A full service restaurant is
8 generally characterized by two main concepts. First, a
9 dozen or more main course items are featured on the menu.
10 Also, food is cooked to order and not chosen from a
11 cafeteria line. For example, full service restaurants can
12 be categorized in terms of price, menu or atmosphere.
13 They can be formal or casual. Many full service
14 restaurants can fit into more than one category.

15 Q. Okay. Have you got a problem with that
16 definition?

17 A. I do not have a problem with the
18 definition. It is not clearly defined. It says
19 restaurant is generally characterized, and that full
20 service restaurants can be categorized. It doesn't say
21 that they are.

22 Q. According to that definition, sir, you're a
23 full service restaurant, aren't you?

24 A. I do not know how you would categorize main
25 course items. Entrees on our menu, we do not have 12. We

1 do have some sandwiches, we do have some salads, but they
2 are not necessarily depending on your definition of that.
3 So no, I would say that that's still a general
4 description.

5 Q. Okay. And I --

6 A. And it also says other categories. I'm
7 sorry.

8 Q. Yeah. Other categories and types of full
9 service restaurants, correct, sir?

10 A. It just says they can fit into more than
11 one category, which could mean fast service, could mean
12 paper. A full service restaurant could be paper. It
13 doesn't say anything about glassware or --

14 Q. Okay. You'd agree with me that the -- that
15 the more glassware, dishware and that type of items that
16 it is -- that the restaurant is designed to use, the
17 greater capacity that my client has to make available,
18 wouldn't you?

19 A. Yeah. The design daily waste discharge.

20 Q. Okay.

21 A. The more dishes you have and the more --

22 Q. Sure.

23 A. -- restrooms you have, the more discharge
24 you would have, yes.

25 Q. Sure. And you told us previously that your

1 restaurant was designed in accordance with -- on those
2 plans in accordance with the DNR guidelines, so,
3 therefore, your restaurant's design discharge capacity is
4 for 128 seat restaurant, correct, sir?

5 A. Yes.

6 Q. And you heard from Mr. Loethen's testimony
7 that the sewer district -- or excuse me, House Springs
8 Sewer Company is required to reserve if they have the
9 capacity or expand to be able to handle the design
10 discharge that's shown in the DNR formula? You heard
11 that, didn't you?

12 A. Yes.

13 Q. Well, sir, how come it's fair, then, if
14 House Springs Sewer has to reserve if they've got it,
15 expand to meet your needs if they don't, how come it's
16 their contribution in aid of construction isn't fair?

17 A. The contribution in aid of construction is
18 not based on your design daily discharge. Those fees, as
19 far as I can tell, have nothing to do with the design
20 daily discharge. That was my argument from the beginning
21 that I think it should be.

22 Q. Well, sir, you haven't presented us with
23 anything that tells us what the design daily design waste
24 discharge is --

25 A. I --

1 Q. -- correct?

2 A. No, I have not. I did not know that it was
3 needed. That has been calculated by the EPA, and it was
4 part of the construction plans. It's in the engineering
5 drawings. I contacted -- on the break, I tried to get
6 those numbers and get that information. I could not get
7 those. He may have them by now, but the gentleman that
8 has that information for me was not in his office. But
9 that number is out there somewhere.

10 Q. I understand, but the -- if you've got it,
11 it would merely be from somebody who was passing it along
12 and that wasn't a witness you presented during your case,
13 correct?

14 A. I understand, yes. It would be from the
15 EPA, a letter from the EPA determining how big our pipe
16 had to be coming out of the building, the sewer pipe and
17 all those things.

18 Q. Okay. But not to beat a particularly --
19 well actually, now, I'm going to go back to my last
20 question. If they had to reserve the capacity for you as
21 a full service restaurant as shown in the DNR guidelines
22 that Mr. Loethen tells us they're required to, then why is
23 it not fair to ask you to make the contribution in aid of
24 construction in order to compensate them for the capacity
25 that they have to reserve for you? How come that isn't

1 fair?

2 A. I am not asking them to not receive the
3 contribution in aid of construction. I am asking for a
4 fair amount based on the rate table and the first
5 paragraph there.

6 Q. Well, sir, without being finky here, you
7 haven't presented a scintilla of evidence which indicates
8 what that number would be, have you?

9 JUDGE JORDAN: We've heard that question
10 and the answer.

11 MR. MILLER: Okay.

12 JUDGE JORDAN: And the pronunciation is
13 scintilla.

14 MR. MILLER: I learned something. Thank
15 you.

16 BY MR. MILLER:

17 Q. I think that's -- by the way, you're
18 familiar with the Slingers Restaurants, correct, sir?

19 A. Yes.

20 Q. Describe it.

21 A. I have never eaten there.

22 Q. Okay.

23 A. I drive past there all the time. I've
24 never eaten there. They are full -- they are a three-meal
25 period restaurant. They serve breakfast, lunch and

1 dinner. That is about all I know about them. I've never
2 had a meal there.

3 MR. MILLER: That's all the questions I
4 have.

5 JUDGE JORDAN: Cross-examination from
6 Staff?

7 MR. HAAS: No, your Honor.

8 JUDGE JORDAN: Mr. Scrivner, I won't have
9 you cross-examine yourself, but you may respond to the
10 questions and answers that you've given so far.

11 MR. SCRIVNER: I don't think I have
12 anything at this time. Thank you.

13 JUDGE JORDAN: Commissioner Murray?

14 COMMISSIONER MURRAY: No further questions.
15 Thank you.

16 JUDGE JORDAN: I have none.

17 MR. MILLER: Pat Fribis.

18 JUDGE JORDAN: And state your name, please.

19 THE WITNESS: Patricia Ann Fribis.

20 JUDGE JORDAN: Please raise your right
21 hand.

22 (Witness sworn.)

23 PATRICIA FRIBIS testified as follows:

24 DIRECT EXAMINATION BY MR. MILLER:

25 Q. State your name for the record.

1 A. Patricia Ann Fribis.

2 Q. Spell it for the court reporter.

3 A. P-a-t-r-i-c-i-a, Ann, A-n-n, Fribis,
4 F-r-i-b-i-s.

5 Q. What do you do for a living?

6 A. I'm the owner and president of House
7 Springs Sewer Company.

8 Q. And roughly how many people or customers
9 does House Springs Sewer have?

10 A. Approximately 1,200 to 1,300.

11 Q. When did you first become aware of the
12 tariffs that are shown, part of which is described in rate
13 schedule Exhibit C?

14 A. Well, the company was started in 1985, and
15 this is the most current tariff that we follow, and I
16 became aware of it when it originated, I believe
17 August 1st, 1997.

18 Q. Okay. And when did you first become aware
19 of the proposed restaurant of Pogolino's?

20 A. Approximately February or March of 2008, my
21 operator, my wastewater operator came back to the office
22 and said there was a new building going in on Walters
23 Place, and we were not aware of any new development. No
24 one had applied for sewer service from there, and so I
25 told him the next day to stop there and talk to the

1 builder and see what was going in.

2 Q. Okay. And what kind of report did you get
3 back?

4 A. He -- next day he called me and told me
5 that a restaurant was going in, which I was really
6 surprised about because we were not aware of it. And I
7 told him to stop there and talk to the developer again and
8 tell him we needed to be notified of this, what size the
9 restaurant was going to be, how much capacity we would
10 need for the restaurant. Also we needed a set of plans
11 and we needed application filled out. And my operator
12 stopped the next -- that day or the next day and talked to
13 the developer, Mr. Boyer, and he -- my operator got his
14 phone number.

15 I called him then and told him that I
16 needed an application for sewer service filled out and a
17 set of plans. So the -- Mr. Boyer gave my operator the
18 Scrivners' name and phone number, and then I called and
19 talked to Mrs. Scrivner.

20 JUDGE JORDAN: Can you speak up a little
21 bit?

22 THE WITNESS: Sure.

23 BY MR. MILLER:

24 Q. When was the first time you physically laid
25 eyes on the building or building site with regard to this

1 restaurant?

2 A. I think I went past it the next day or
3 there shortly thereafter and was surprised that we had not
4 been notified in any way of this new development.

5 Q. What state of construction was it in?

6 A. The building was actually starting to go
7 up. So 30, 40 percent completed.

8 Q. Was the shell up yet?

9 A. It was starting to go up, yes.

10 Q. And you hadn't had any contact from the
11 developer or the Scrivners prior to that point?

12 A. That is correct.

13 Q. Or anyone on their behalf?

14 A. That is correct, yes.

15 Q. So then when do you get the plans and the
16 application?

17 A. Well, I called Mrs. Scrivner and talked to
18 her and told her we needed an application filled out,
19 asked her what kind of restaurant it was going to be, how
20 many seats were in it, and she wasn't sure of a lot of the
21 answers to that at that point.

22 I told her there was a connection fee based
23 on what kind of restaurant it was, and I sent her an
24 application for sewer service, which is I believe in the
25 evidence.

1 Q. Okay.

2 A. And at the bottom I put paper service
3 \$1,700, full service \$85 a seat.

4 Q. Is Exhibit 15 the application that you just
5 referred to?

6 A. Yes, it is.

7 Q. And when was the next contact that you had
8 from the Scrivners after that application was received?

9 A. Once I received this, then I had to call
10 the City of Burns Mill, who is -- who we contract for the
11 sewage to be treated in that area, and notified them of
12 the size building that was going in and what kind of
13 building.

14 And the man that I contacted was Mr. Bill
15 Sehie, and he was surprised it was a restaurant, and it
16 was his first knowledge also because he saw the building
17 going up. He had capacity at his plant but really hadn't
18 planned on it for a restaurant. I mean, once he commits
19 to that, then other developments cannot be put on that
20 plant.

21 Q. Okay.

22 A. I mean, there's just a certain number of
23 restaurants, beauty shops, homes, whatever can go on that
24 plant.

25 JUDGE JORDAN: Excuse me, ma'am. Can you

1 tell our court reporter how to spell the name Sehie?

2 THE WITNESS: Bill Sehie, S-e-h-i-e.

3 JUDGE JORDAN: And is the name Scrivner or
4 Scrivner?

5 MR. SCRIVNER: Scrivner.

6 THE WITNESS: I apologize.

7 JUDGE JORDAN: Thank you.

8 BY MR. MILLER:

9 Q. So you talked to Mr. Sehie and asked him if
10 he would reserve that amount of capacity?

11 A. Uh-huh.

12 Q. Is that yes?

13 A. Yes, that is right. And he would have to
14 talk to his board.

15 Q. To see whether or not they had the
16 capacity?

17 A. To see if they would accept this.

18 Q. And in terms of them providing those
19 services of treating in this area, is that something
20 that's done by contract?

21 A. Yes, it is.

22 Q. So although you are the sewer provider, you
23 subcontract in essence the treatment of it out?

24 A. Yes.

25 Q. If they hadn't had the ability to reserve

1 that capacity, what would you have had to do in order to
2 provide service to this building?

3 A. I would have had to decline him.

4 Q. Okay. And Mr. Sehie had to go back to his
5 board to make sure that they had the capacity?

6 A. Yes.

7 Q. And whenever -- is there any other land in
8 this area?

9 A. Yes.

10 Q. And so somebody else wanted to come in and
11 build an Applebee's next door, would it be an issue of
12 whether or not that the -- the Burns Mill treatment plant
13 that you have a contract with could handle it?

14 A. Yes.

15 Q. And if it didn't, they've either got to
16 expand or you've got to decline it, correct?

17 A. That is correct.

18 Q. Is the Burns Mill treatment plant close to
19 capacity or do you know?

20 A. I don't know.

21 Q. But you knew -- did know that it was
22 something that the -- in terms of whether or not that they
23 were willing to reserve that amount of capacity for you
24 was something that required a full board decision?

25 A. Yes.

1 Q. Now, you have another full service
2 restaurant in your territory?

3 A. Yes, we do.

4 Q. And that would be Slingers?

5 A. Slingers.

6 Q. Describe that restaurant for me, please.

7 A. It is a sit-down restaurant. You walk in,
8 usually find your own place to sit down. You're served by
9 a waitress, glass dishes, silverware.

10 Q. Okay. Do they pay the CIAC fee?

11 A. They did many, many years ago, yes.

12 Q. Okay. Based on a full service restaurant?

13 A. Yes.

14 Q. And you have some paper service restaurants
15 in your service territory?

16 A. Yes, we do.

17 Q. Those are?

18 A. Hardee's, Captain D's, Kentucky Fried
19 Chicken, Sonic, Happy Woc. I believe that's all.

20 Q. You have an Imo's, too, correct?

21 A. Imo's Pizza. I'm sorry.

22 Q. Okay. And do any of those institutions
23 have a place where you can go in and sit down and dine?

24 A. Yes, Hardee's, Kentucky Fried Chicken,
25 Captain D's and Happy Woc.

1 Q. Okay. And what's the newest of those
2 restaurants?

3 A. It would be Happy Woc.

4 Q. Did they pay their paper service --

5 A. Yes.

6 Q. -- CIAC fee?

7 A. Yes, they did.

8 Q. CIAC. I'm sorry. Now, what's -- strike
9 that.

10 Had you ever had prior to this any
11 complaint that somehow the word full service wasn't clear
12 enough for anybody like Slingers?

13 A. No, I have not.

14 Q. And you mentioned the fact that the
15 restaurant was -- was going up and that nobody from the
16 builder or the operator of the restaurant came to say,
17 gee, can we -- once we get this built, can we hook on?

18 A. That's correct.

19 Q. Okay. And did it require -- whenever you
20 went to Burns Mill, did you have to burn a favor or were
21 they just requesting, yeah, that's okay? What was the
22 deal?

23 A. Well, they weren't happy with it, but we
24 have a very good working relationship between the City of
25 Burns Mill and House Springs Sewer Company, and I talked

1 them into it. I mean, I just said, you know, the
2 building's going up. The people didn't know they were
3 supposed to contact us. When I did talk to them, they
4 just said, we didn't know we were supposed to do these
5 things.

6 And so then I went ahead and prepared a
7 connection agreement, which is a legal document between
8 the customer and my company, and it has to be notarized,
9 signed, notarized, and then I have it recorded in
10 Jefferson County recorder's office.

11 Q. Okay. Have they ever signed that sewer
12 agreement?

13 A. No, sir, they have not.

14 Q. Can they continue on like that without a
15 signed agreement with you forever?

16 A. Well, I sent them a certified letter, I
17 believe it is a piece of evidence also, and gave them 'til
18 November 15th to return the signed and notarized document,
19 and I still do not have it.

20 Q. Okay. Have they paid their CIAC?

21 A. They have paid their CI -- yes. They have
22 paid that fee. They have not paid their inspection fee of
23 \$35.

24 Q. And what's that for?

25 A. That's for when the actual inspection is

1 done of the lateral into the main, I send my workmen out
2 there and they inspect it to make sure it's on rock and
3 make sure it's done correctly, and that fee is also in my
4 tariff that I'm allowed to charge.

5 Q. Why haven't you sent an inspector?

6 A. Oh, I have. It has been inspected, yes.

7 Q. They just haven't paid the fee?

8 A. That's correct.

9 Q. Okay. Sorry. You billed them that fee?

10 A. It's in the legal document of the
11 connection agreement that I prepared.

12 Q. Okay. Got it. Tell us the effect on the
13 House Springs Sewer if the Commission doesn't follow the
14 tariff that it approved in this case.

15 A. The effect --

16 Q. Yes.

17 A. -- of the --

18 Q. Okay. What I'm getting at is, do you then
19 have a customer who's -- can utilize the full capacity of
20 the design of their sewer system without having had to pay
21 for it?

22 A. Well, that's not fair to my other
23 customers.

24 Q. But would you agree with that statement,
25 that you have somebody that can utilize the entirety of it

1 without having paid for it?

2 A. Yes.

3 Q. Have your other customers paid in
4 accordance with that tariff?

5 A. Yes, they have.

6 MR. MILLER: That's all the questions I
7 have of you, ma'am.

8 JUDGE JORDAN: Cross-examination from
9 Staff?

10 MR. HAAS: No questions.

11 JUDGE JORDAN: Cross-examination from
12 Mr. Scrivner?

13 MR. SCRIVNER: Just maybe one or two.

14 CROSS-EXAMINATION BY MR. SCRIVNER:

15 Q. Can you tell me what the fee was charged to
16 the Speakeasy restaurant?

17 A. Speakeasy restaurant when I went in and
18 talked to them, they were a paper service only restaurant.
19 That's what they were serving their food on the day I went
20 in to observe it.

21 Q. Okay. Because I mean, when I went in
22 there, they had plates and china and a dishwasher in the
23 kitchen. So they were charged the 1,700?

24 A. They were charged 1,700, yes.

25 Q. Okay.

1 A. They're no longer in business.

2 Q. Yeah. They just closed a few weeks ago.

3 There is -- are you concerned at all that there's a lot of
4 commercial property available there if House Springs was
5 barely able to allow us to connect?

6 A. I'm aware of it, yes.

7 MR. SCRIVNER: I don't think I have any
8 further questions, Judge.

9 JUDGE JORDAN: All right. Questions from
10 Commissioner Murray?

11 COMMISSIONER MURRAY: Thank you.

12 QUESTIONS BY COMMISSIONER MURRAY:

13 Q. Ms. Fribis, is it?

14 A. Uh-huh.

15 Q. Your counsel gave you or questioned you
16 about a document, I think it was called Exhibit 15. Is
17 that the application?

18 A. That's correct.

19 COMMISSIONER MURRAY: And I'd like to
20 inquire of the Judge, is that in evidence?

21 JUDGE JORDAN: I do not show that we've
22 received Exhibit 15.

23 COMMISSIONER MURRAY: I have not seen it
24 myself.

25 JUDGE JORDAN: I have no record of it being

1 moved into evidence.

2 MR. MILLER: Judge, I would move, then, in
3 order to make life simpler -- Kellene, tell me if you
4 would please, tell me what I've got in and I'm going to
5 offer everything that I haven't offered so far.

6 THE REPORTER: I'd have to go back through.

7 MR. MILLER: Well, for convenience sake
8 now, I'd offer 15.

9 JUDGE JORDAN: Yes, it's marked. And
10 counsel, did you have copies for the rest of us? We'll
11 add that to the list.

12 COMMISSIONER MURRAY: I thought that this
13 was '08 when this was constructed, this restaurant. These
14 dates are '05 on this application. Oh, well, this is a
15 different restaurant, though; is that right?

16 THE WITNESS: No, that should be --

17 COMMISSIONER MURRAY: Sorry. That does not
18 fit with what I'm looking at.

19 JUDGE JORDAN: The document I'm looking at
20 marked as Exhibit 15 is headed Application for Sewer
21 Service. The name of the applicant or owner is MCMM, LLC.
22 The address is 30 Walters Place, House Springs, Missouri.
23 A name written underneath it, I can't tell if that's --

24 MR. SCRIVNER: Judge, that is our company.
25 That is my company, MCMM.

1 JUDGE JORDAN: Okay. Your -- are you
2 telling me that the owner of Pogolino's is MCMM, LLC?

3 MR. SCRIVNER: Yeah. That's the way we set
4 it up, is our name, our business name.

5 JUDGE JORDAN: Okay. Are you telling me
6 that -- are you telling me that Michael and Christy
7 Scrivner are not the owners of Pogolino's?

8 MR. SCRIVNER: Yes, we are.

9 JUDGE JORDAN: Then where does MCMM, LLC
10 come in?

11 MR. SCRIVNER: That's the name we gave
12 ourself instead of our name being Pogolino's because there
13 are already Pogolino's.

14 JUDGE JORDAN: Are you members of the
15 limited liability company called MCMM?

16 MR. SCRIVNER: Yes, me and my wife.

17 JUDGE JORDAN: Okay. If I understand
18 correctly, a limited liability company is a separate
19 entity at law. That raises an issue with respect to -- to
20 advocacy. What I will do is I will treat your testimony
21 as a witness on behalf of MCMM, LLC. However, you are not
22 licensed to practice law, are you?

23 MR. SCRIVNER: No, sir.

24 JUDGE JORDAN: Well, I won't be able to let
25 you do cross-examination any further because you are not

1 licensed to represent MCMM, LLC. I see a date on this
2 application of April 15th, '08.

3 COMMISSIONER MURRAY: Okay. What dates was
4 I looking at? Anticipated start of construction, April 1,
5 '05, anticipated completion of construction, 7/1/05, but
6 then the date this is dated 4/15/08.

7 BY COMMISSIONER MURRAY:

8 Q. Can someone -- since this is your exhibit,
9 can you explain what those dates mean?

10 A. I did not fill that out. That was filled
11 out on their behalf.

12 Q. Did you question those dates or understand
13 those dates?

14 A. Well, I called the number on there and
15 talked, spoke with her, and wanted to get a better idea of
16 what size restaurant. She wasn't sure at the time. So
17 then I had my operator pick up the plans from Mr. Boyer,
18 and that's the two rolled-up plans sitting there.

19 Q. All right. And then the application was
20 returned to you, but what was the document that has never
21 been signed?

22 A. The Agreement for Sewer Service which
23 becomes a legal document and I have recorded. I've not
24 received that. And a couple copies were sent. The first
25 time after I received the application, I sent a copy, and

1 I called many times asking for that to be signed and
2 notarized, and she said Mr. Boyer was taking care of it on
3 their behalf. And I called Mr. Boyer, and he said he
4 could not sign that and have it notarized on the owner's
5 behalf.

6 So then I sent the certified letter, I
7 believe in October, and gave them 'til November 15th to
8 have it returned to me, signed and notarized, and I still
9 have not received it.

10 Q. So you have no completed Agreement to
11 Provide Sewer Service?

12 A. Right. And in the certified letter I said
13 I would terminate service as of November 15th. That's
14 when our first hearing was scheduled, so I let it go, and
15 I haven't done anything 'til after this hearing. But I
16 have a contract with the water company that, if I so
17 desire, I can have the water turned off at the restaurant,
18 and obviously a restaurant can't operate without water, so
19 it would put them out of business.

20 Q. What about any kind of monthly billing?

21 A. Okay. Their first monthly billing went out
22 November 1st, and how I do that for commercial property is
23 I base it on the prior three months water usage, and that
24 bill went out November 1st, and that was paid. And now
25 billing will go out again February 1st, next Monday,

1 February 2nd, for the last three months of water usage,
2 and I get that information from the water company, Public
3 Water District No. 6.

4 Q. And the only thing that's in arrears then
5 is the \$35 inspection fee?

6 A. At this time, yes.

7 Q. Would you take a look at your tariff rate
8 Schedule C, Sheet 3A?

9 A. Yes.

10 Q. And can you give me an example or a couple
11 of examples of facilities that would fall under the
12 category of those which are not enumerated below? Do you
13 have any such facilities that you serve?

14 A. For CIAC fees?

15 Q. Yes.

16 A. We have an animal shelter which is called
17 Open Door Animal Sanctuary. They take pets of any kind
18 that are not wanted and they try to find a home for them.
19 They have kennels. And we based our CIAC on that.

20 Q. And there's clearly no category listed --

21 A. Right.

22 Q. -- that that would fit into?

23 A. Yeah, that's very unique. I can't think
24 off record of anything else.

25 Q. And if you had been told that there was not

1 the capacity available to serve this restaurant, you said
2 you would have had to deny them?

3 A. I would have had to deny them, yes.

4 Q. Is there -- what would be the logical next
5 step if new businesses in the area were being denied
6 because of lack of capacity for sewer service?

7 A. What would be the next step? Well, before
8 a piece of property is usually sold, the realtor contacts
9 us to see if we have capacity, and if we do, then we write
10 a letter stating we do to make the sale go easier, and the
11 intention of what the property will be used for, because
12 no one wants to buy a piece of property thinking they have
13 sewer available and then not have it. So that's the
14 normal procedure.

15 Q. So that's determined prior to the property
16 being sold?

17 A. That is correct, yes. And many times I
18 have to tell them, you know, we have a treatment plant
19 down the road a mile, but it's the owner's responsibility
20 to have the engineering report done, the feasibility
21 report, and if they can afford and make that piece of
22 property worth the price they're paying for it if they
23 have to go on sewers. I mean, some just aren't. Some are
24 just too far away or we don't have the capacity for them.

25 Q. Is House Springs Sewer Company in

1 compliance with all of the -- this Commission's rules and
2 regulations as far as you know?

3 A. As far as I know, yes, we are.

4 Q. And how about DNR?

5 A. Yes, we are, with DNR.

6 COMMISSIONER MURRAY: All right. I don't
7 think I have any other questions. Thank you.

8 JUDGE JORDAN: Staff, any recross?

9 MR. HAAS: No, thank you.

10 JUDGE JORDAN: Any redirect?

11 MR. MILLER: Yes, real quickly.

12 REDIRECT EXAMINATION BY MR. MILLER:

13 Q. Whenever Commissioner Murray was asking you
14 about what's the next logical step, if you've got somebody
15 that's -- where it's economically feasible to expand
16 capacity to provide for them, that's what you do, isn't
17 it?

18 A. Well, that is correct, yes. In this
19 certain incidence, we don't service -- we don't have a
20 treatment plant. City of Burns Mill does. So, like, we
21 have just a brand new plant called the Yorktown Wastewater
22 Treatment Plant, and it's -- the developer put in almost
23 all the money to build it. Cost about \$1.3 million, and
24 we put in some money to service his new subdivision that's
25 being built, and now an existing subdivision would like to

1 go on sewers, and they are going -- we're going to expand
2 the plant, but it will mostly be at all their expense.

3 Q. Okay. Because obviously either reserving
4 capacity or creating new capacity costs you money?

5 A. Absolutely.

6 Q. Okay. And if you don't get the CIACs, what
7 other way have you got to be compensated for the capacity
8 that you've had to reserve to keep Mr. Loethen happy about
9 life?

10 A. I would have to apply for a loan,
11 personally put in money. Money just isn't generated
12 enough from the sewer fees that we charge to put a lot
13 aside to expand plants.

14 Q. Okay. So it has to be based upon, if
15 somebody's needing that capacity, by CIACs, correct?

16 A. Yes, that's correct.

17 MR. MILLER: That's all I have.

18 JUDGE JORDAN: Any cross from Staff based
19 on that?

20 MR. HAAS: No questions.

21 JUDGE JORDAN: Commissioner Murray,
22 anything based on that?

23 COMMISSIONER MURRAY: No, thank you.

24 JUDGE JORDAN: Then we're done.

25 MR. MILLER: Let's talk about -- we can lay

1 out the exhibits. I'm getting ready to rest, and what I
2 wanted to do was go through exhibits, unless I can rest
3 and do the exhibits after Mr. Haas finishes.

4 JUDGE JORDAN: I don't really care. If you
5 want to wrap it up now, that's fine.

6 MR. MILLER: Okay. Then I want to see the
7 Exhibit 11 -- okay, 12, 14 I'm not going to use. Okay.
8 Move for the admission of 11, which is just the tariff.

9 JUDGE JORDAN: That's a page from an
10 exhibit we have already; is that correct?

11 MR. MILLER: Yes, Judge, it's subsumed in,
12 I believe, Exhibit 1.

13 JUDGE JORDAN: It's just a free page, free
14 of the others?

15 MR. MILLER: That's correct, Judge. It's
16 just there for convenience.

17 JUDGE JORDAN: I don't hear any objection,
18 so I'll admit it.

19 (EXHIBIT NO. 11 WAS ADMITTED INTO
20 EVIDENCE.)

21 MR. MILLER: I would move for the -- 12,
22 13. Where's 13? That's why I normally bring my
23 paralegal. Oh, that was the definition that I used.

24 JUDGE JORDAN: It's the white paper, is it
25 not, 13?

1 MR. MILLER: Yes, Judge. I'd move for the
2 admission of 13.

3 JUDGE JORDAN: I hear no objection, so that
4 will be admitted.

5 (EXHIBIT NO. 13 WAS ADMITTED INTO
6 EVIDENCE.)

7 MR. MILLER: 12 and 14 were not utilized.
8 Did we put the -- move for the admission of 16 and 17, the
9 plans previously identified.

10 JUDGE JORDAN: Admitted.

11 (EXHIBIT NOS. 16 AND 17 WERE ADMITTED INTO
12 EVIDENCE.)

13 MR. MILLER: And with that, I rest.

14 JUDGE JORDAN: Do we have Exhibit 12?

15 MR. MILLER: No, Judge, I withdrew that. I
16 did not -- didn't offer it because I didn't properly
17 identify it.

18 JUDGE JORDAN: And Exhibit 14?

19 MR. MILLER: Same situation, Judge.

20 JUDGE JORDAN: The same. All right.

21 MR. MILLER: Actually, wait. I'd move for
22 12 which Ms. Fribis did describe being the Agreement for
23 Sewer Service. I'm sorry.

24 JUDGE JORDAN: Agreement to Provide Sewer
25 Service?

1 MR. MILLER: Right.

2 JUDGE JORDAN: And 14 is not offered.

3 MR. MILLER: That's correct. And Judge,
4 we -- let me see if I can find -- did we discuss 15?

5 MS. FRIBIS: I believe that was the
6 application for sewer service.

7 MR. MILLER: Correct. Move for admission
8 of 15 as well.

9 JUDGE JORDAN: I don't think I have a
10 physical copy of No. 13. You handed that, the witness
11 described it and laid foundation, but I don't think we
12 have that physically.

13 MR. MILLER: There it is, Judge.

14 JUDGE JORDAN: Thank you.

15 MR. MILLER: There's 12. There's 12, and
16 Judge, we did discuss, and actually if I didn't, I would
17 move for 19. I'm just looking. That's the DNR guideline.

18 JUDGE JORDAN: Right. It's the
19 regulations.

20 MR. MILLER: I'm going to rest.

21 JUDGE JORDAN: All right. There are not
22 sufficient copies of these exhibits for everyone, and the
23 plans are large blueprints, and that's Exhibits 16 and 17.
24 So counsel will be filing those after the hearing
25 according to our regulations which set forth when you have

1 to do that and in what format; is that correct?

2 MR. MILLER: That's correct, Judge.

3 JUDGE JORDAN: Then we are ready for

4 Staff's case.

5 MR. HAAS: Staff calls James Busch.

6 JUDGE JORDAN: Please raise your right

7 hand.

8 (Witness sworn.)

9 JUDGE JORDAN: Please be seated.

10 JAMES A. BUSCH testified as follows:

11 DIRECT EXAMINATION BY MR. HAAS:

12 Q. Mr. Busch, please state and spell your

13 name.

14 A. My name is James A. Busch, B-u-s-c-h.

15 Q. Where are you employed?

16 A. I'm employed with the Missouri Public

17 Service Commission.

18 Q. What is your position?

19 A. I'm the manager of the water and sewer

20 department.

21 Q. What are your duties?

22 A. I have general supervision of the water and

23 sewer department. We review tariff filings from the

24 company. We review small water and sewer rate requests,

25 large company rate requests. We investigate customer

1 complaints. We investigate company inquiries. We deal
2 with legislative issues, national issues.

3 Q. Do you have any other related work history?

4 A. Related work history? I began work at the
5 Public Service Commission in 1997. I've worked in the
6 procurement analysis department. I worked there for two
7 and a half years. I moved to OPC about five years. OPC
8 is the Office of the Public Counsel. I was a regulatory
9 economist in both of those positions. I came back to the
10 Commission in 2005 as a Regulatory Economist iii in the
11 energy department. I also am an adjunct faculty member of
12 the Columbia College. I teach macro and micro economics
13 and managerial economics.

14 Q. What were your duties in regard to this
15 case?

16 A. General supervision of our investigation,
17 and as you probably heard from the previous testimony of
18 the previous Staff witnesses, there was some little
19 differing of opinion about how to handle the situation, so
20 it was my role to make the ultimate Staff decision as to
21 the contents of the report.

22 Q. You just mentioned the contents of the
23 report, I'd like to hand you a copy of Exhibit No. 18.

24 MR. HAAS: Your Honor, I would like to
25 point out that Exhibit No. 18 was filed in the case as a

1 highly confidential document, but the Commission has
2 granted the Staff's motion to classify that as a public
3 document. So even though it's stamped HC, it is, in fact,
4 a public document.

5 JUDGE JORDAN: Thank you for that
6 clarification.

7 BY MR. HAAS:

8 Q. Mr. Busch, can you identify Exhibit 18?

9 A. Exhibit 18 is the Staff Report of
10 Investigation in Case No. SC-2008-0409, House Springs
11 Sewer Company versus Michael and Christy Scrivner.

12 Q. And based upon the Staff's investigation of
13 this case, what is the Staff's position as to whether
14 Pogolino's was properly classified as a full service
15 restaurant for purposes of the CIAC charge?

16 A. I think if you go on page 4 of our Staff
17 recommendation in the first paragraph, basically Staff's
18 recommendation was that House Springs Sewer is not in
19 violation of its tariff by charging Pogolino's restaurant
20 as a full service restaurant.

21 Q. In the Staff recommendation, you have
22 suggested or proposed an alternative that's a compromise.
23 Is that still your alternative recommendation?

24 A. That is an alternative, if there is a
25 finding that Pogolino's is, as Mr. Scrivner has pointed

1 out, not fully defined as a full service or a paper
2 service. But since the filing of our report, as was
3 pointed out, Mr. Loethen has visited Pogolino's
4 restaurant. We've reviewed the menu items, and it is
5 Staff's recommendation that they are a full service
6 restaurant at this time.

7 MR. HAAS: Your Honor, I would move for the
8 admission of Exhibit 18, Staff Report of Investigation.

9 MR. MILLER: I don't have any objection.

10 JUDGE JORDAN: Admitted.

11 (EXHIBIT NO. 18 WAS RECEIVED INTO
12 EVIDENCE.)

13 BY MR. HAAS:

14 Q. The Staff Report of Investigation says that
15 it's prepared by James Busch, which is you, and
16 James A. Merciel. Would that be the Mr. Merciel that
17 testified earlier today?

18 A. Yes, that's the same Mr. Merciel that was
19 here today.

20 Q. Did you receive any other input from any
21 other people in preparing this document?

22 A. Yes. Mr. Steve Loethen, who previously
23 testified today, also assisted me in my decision-making
24 and writing of this report.

25 MR. HAAS: Your Honor, that's all the

1 questions I have.

2 JUDGE JORDAN: Cross-examination by House
3 Springs?

4 MR. MILLER: Yes, and I will be brief for
5 once in my life.

6 CROSS-EXAMINATION BY MR. MILLER:

7 Q. Sir, direct your attention to page 2, if
8 you would for me, please, about Staff's findings and
9 conclusions.

10 A. I'm there.

11 Q. You indicated the -- by the way, this was
12 roughly when the restaurant was opening that you were
13 making these determinations, correct, sir?

14 A. I believe that's correct. July 25th, 2008
15 is when this was filed.

16 Q. Okay.

17 A. I can't be exactly for sure when the
18 company restaurant opened its doors. I think it was
19 roughly around that same time frame.

20 Q. Sure. And subsequently you've had the
21 benefit of Mr. Loethen's visiting the restaurant and
22 reporting back, correct?

23 A. That's correct.

24 Q. And the -- you've heard the testimony here
25 today about the fact that it has pasta items, salad items,

1 sandwich items, in addition to pizza items, desserts and
2 beer and wine menu, correct, sir?

3 A. That is correct.

4 Q. Does any of the information that --
5 provided by Mr. Loethen or in conjunction with this
6 hearing in any way support or contradict your opinion that
7 it is indeed a full service restaurant?

8 A. From the testimony that I've heard today, I
9 believe that it supports the position that it's a full
10 service restaurant.

11 Q. And, sir, this -- the idea of the
12 compromise that was suggested, that was prior to any
13 experience in terms of what the -- before you guys had
14 seen the menu, correct?

15 A. That is correct.

16 Q. And you were initially informed and told
17 you were looking at basically a pizza house, correct?

18 A. That's what -- from the complaint that the
19 Scrivners had filed, it sounded like it was -- they set up
20 the 40 percent takeout, they're just a pizza parlor. I
21 tried to base my experience as a frequent customer at
22 various restaurants and tried to figure out what that fit
23 in like.

24 I could have seen where it would have been
25 a restaurant where there's very limited seating, mostly

1 takeout, and I could see where that's not really a full
2 service nor a paper service. But upon reading and seeing
3 the menu, appetizers, an entree where you get a salad, the
4 fact you can get beer, wine, soda, you know, lends me to
5 believe it is more of a full service restaurant and a full
6 service restaurant.

7 Q. Sure. And the idea that if a huge chunk of
8 your business is somehow takeout, you either, A, don't
9 need 128 seats, or 2, you're in essence operating a
10 takeout and a eat-in restaurant, aren't you?

11 A. The thing that I -- when I heard that it
12 was a takeout restaurant as well as, yes, it could have
13 128 people sitting in having a meal plus a pretty good
14 chunk of takeout business going on. So the ovens, the
15 cookware would -- the kitchen would be running a lot more
16 than a normal restaurant that is just dine-in only or a
17 restaurant that is just takeout only.

18 Q. And, sir, in terms of the idea of a
19 compromise, the capacity to -- for that compromise isn't
20 anywhere in there filed an approved tariff, is it?

21 A. No, it's not. It's based -- the tariff is
22 based upon the design flow. So this was just a way that
23 staff tried to present to the customer and company an
24 alternative to try to solve this situation.

25 Q. Sure. And I'm not picking on you for that.

1 It's just the concept that following the tariff, there are
2 full service restaurants and the CIAC fee is based upon
3 their seats, correct?

4 A. Yes.

5 Q. And you were just going -- because you were
6 told that, gee, it's just this pizza restaurant in the
7 complaint, that you go through and go, gee, if that's
8 really the case, you know, how can we show them a little
9 love in this deal, and then you are presented with the
10 menu that says, gee, full service restaurant. Is that
11 pretty much how it went down?

12 A. We were trying to be open to the concerns
13 of the restaurant and of the company and trying to look at
14 alternative ways to solve this situation, and so that's
15 why we offered the alternative.

16 MR. MILLER: That's all the questions I
17 have.

18 JUDGE JORDAN: One question before we go to
19 questions from the Bench. The Staff report, does that
20 have an exhibit number?

21 MR. HAAS: 18.

22 JUDGE JORDAN: Thank you. Don't want to
23 lose track. And now questions from the Bench.
24 Commissioner Murray, any questions for this witness?

25 COMMISSIONER MURRAY: Yes, I do. Thank

1 you.

2 QUESTIONS BY COMMISSIONER MURRAY:

3 Q. Good afternoon, Mr. Busch.

4 A. Good afternoon, Commissioner.

5 Q. Was the Staff aware that -- I've got to get
6 the name of the restaurant correct -- Pogolino's was owned
7 by a limited liability company?

8 A. I just found that out ten minutes ago. I
9 was rather shocked and one of my notes to myself.

10 Q. You heard my questioning of Ms. Fribis
11 earlier when I asked her about facilities that they serve
12 that might fit within the uses not enumerated or not
13 listed below?

14 A. Uh-huh.

15 Q. And she mentioned that they serve an animal
16 sanctuary, which obviously would not fall under any of
17 these categories?

18 A. Uh-huh.

19 Q. Would you agree that restaurants are set
20 out below and that a restaurant is determined to be either
21 a paper service restaurant or a full service restaurant?

22 A. According to the tariff, restaurants are
23 enumerated and they are divided into two categories.

24 Q. So they -- you would agree that they don't
25 fit into that not enumerated in the uses listed below?

1 A. In this restaurant, no, I don't believe
2 that it's -- doesn't fall in that category. I believe
3 that there could be a restaurant that may be more harder
4 to define than this restaurant is, that may not be exactly
5 that, but as far as I can tell, this restaurant does fit
6 neatly into those categories of the full service.

7 Q. And although Staff had attempted to come up
8 with some kind of a resolution that might make everybody
9 happy, would you agree that when a company is following
10 its tariff, that the Commission cannot force it to come up
11 with some kind of a compromise that is not in accordance
12 with their tariff?

13 A. I don't want to speak for what the
14 Commission can do. I know the Staff cannot force the
15 company to do something that is not in line with what
16 their tariff is. I would -- I'm not an attorney, so I
17 don't want to go down to what the Commission can or cannot
18 do.

19 Q. All right. But you would agree that if a
20 company is complying with its tariff, that it is -- well,
21 that's a circular argument. If it's complying, it's not
22 in violation with its tariff?

23 A. I would agree with that. If it's not
24 violating it's tariff, it's in compliance with its tariff.

25 Q. And that when the Commission has approved a

1 tariff, it has the full effect of law, it is an
2 enforceable tariff?

3 A. That is my understanding, yes.

4 COMMISSIONER MURRAY: I can't think of any
5 other questions right now. Thank you.

6 JUDGE JORDAN: Commissioner Jarrett, any
7 questions?

8 COMMISSIONER JARRETT: Good afternoon,
9 Mr. Busch. How are you today?

10 THE WITNESS: Good afternoon. How are you
11 doing?

12 COMMISSIONER JARRETT: Very good. Thank
13 you. I don't have any questions. So thank you.

14 JUDGE JORDAN: Any recross from House
15 Springs based on those inquiries?

16 MR. MILLER: No, sir.

17 JUDGE JORDAN: Any redirect from Staff?

18 MR. HAAS: No, thank you.

19 JUDGE JORDAN: We're done.

20 COMMISSIONER MURRAY: Judge, may I?

21 JUDGE JORDAN: Yes, Commissioner.

22 COMMISSIONER MURRAY: I'm not quite exactly
23 sure how to say this, but I'd like to inquire of counsel
24 for Staff and counsel for the company regarding the fact
25 that we have a party before us who is a limited liability

1 company but is not being represented by counsel.

2 JUDGE JORDAN: Feel free. This would be a
3 good time.

4 COMMISSIONER MURRAY: I'd like to hear both
5 counsel's position on that.

6 MR. HAAS: I just learned about that at the
7 same time everyone else did today. The complaint was
8 filed by individuals. As a limited liability company, it
9 should have been represented by an attorney, and I'm not
10 sure how we go about fixing that now. We need some
11 research done.

12 COMMISSIONER MURRAY: Do we have
13 jurisdiction to even be hearing this?

14 MR. HAAS: The complaint itself was filed
15 by the individuals, and so, I mean, the Commission had
16 jurisdiction to hear a complaint being presented by
17 individuals, and it's -- the problem is once we learned
18 that it's different, I just -- I'll have to research that.
19 I'm sorry.

20 MR. MILLER: Now it's my turn. I'm going
21 to move to dismiss the complaint because they're not a
22 real party in interest, and they've committed fraud on
23 this tribunal because they weren't the party in interest
24 that they represented themselves to be, and given the fact
25 that they indeed have formed and do business as a limited

1 liability company, they're not properly before you.

2 JUDGE JORDAN: Anything further?

3 COMMISSIONER MURRAY: I'm finished. Thank
4 you.

5 JUDGE JORDAN: I will add for the record
6 that this is the first time also, the first clue that any
7 separate entity was involved in this was the exhibit on
8 which I read the name of the limited liability company,
9 just for the Commission's clarification.

10 Closing arguments from Staff? The
11 Commission will take your motion to dismiss under
12 consideration.

13 MR. HAAS: Yes, your Honor, thank you. The
14 Commission has heard the uncontested evidence today that
15 Pogolino's has a full menu, appetizers, salad, entrees,
16 pizzas, sandwiches, desserts, drinks. Pogolino's
17 provides -- uses glassware and dishes and cutlery that
18 must be washed. Pogolino's has a wait staff. The wait
19 staff works for tips, which are part of their payment for
20 their service.

21 Although the tariff does not give a
22 specific definition for full service restaurant, it does
23 provide just two kinds of restaurants, paper service and
24 full service. And with the description that I've just
25 given, Pogolino's is a full service restaurant, and the

1 Commission should find that they were properly charged the
2 full service restaurant CIAC. Thank you.

3 JUDGE JORDAN: Any closing arguments from
4 House Springs?

5 MR. MILLER: Yes, sir. I would agree with
6 Staff counsel's arguments and only amplify them a tad,
7 being the fact that what is foisted upon the Commission is
8 to come up with, in essence, a new definition because they
9 don't happen to like the ones that are in the tariff.

10 The ones that are in the tariff are pretty
11 simple, full service and paper service. Clearly not paper
12 service, and obviously there was some discussion of the
13 paper service type restaurants that fit within the -- that
14 category and were charged by House Springs the CIAC fee
15 based upon paper service restaurants.

16 There's apparently great objection with
17 regard to the idea of full service and limited service.
18 Those so closely mirror the DNR regulations with the only
19 difference the DNR regulations is the fact of whether or
20 not that you serve liquor or not. Other than that, the
21 categories are exactly the same. They are paper service,
22 a restaurant, a restaurant that serves liquor, and one
23 with a grinder. House Springs has a separate charge for a
24 grinder.

25 So all they've done is taken those two

1 categories, which are the categories under which House
2 Springs has to reserve capacity or create capacity in
3 order to take on that customer or otherwise they'll be in
4 violation of the operating regulation of this Commission.

5 House Springs in conjunction with this had
6 to go to their contract provider and get them to take on
7 this additional customer, thereby limiting the number of
8 other customers that could be served by the House Springs
9 Sewer Company.

10 So, therefore, not only does it follow the
11 tariff, but it follows logic. And in terms of the idea
12 that it's not, quote/unquote, full service or, gee, that's
13 just a term that I just have no idea what it could ever
14 mean, it's really kind of like the United States Supreme
15 Court of definition of pornography. That's not defined
16 anywhere either, but as I believe Judge Blackman said, I
17 kind of know it when I see it. And I think that a full
18 service -- if it walks like a duck, quacks like a duck,
19 it's probably a duck.

20 And any restaurant that you go in and are
21 seated and are brought differing and continuous courses on
22 glassware, on china, that require -- pastas that require
23 baking in ovens on dishes, and that patrons are not
24 encouraged or -- to -- or it's not how it works for them
25 to get up and become part of the -- of the service

1 equation, if that's not a full service restaurant, I'm
2 short on what is.

3 And the idea that somehow because of the
4 fact that Pogolino's is, in essence, getting a freebie
5 because they're not paying -- they're operating two
6 restaurants under one roof. They're operating a 128-seat
7 sit-down restaurant, and they're operating a paper service
8 to-go restaurant. And the fact that they're getting a
9 freebie for the paper service restaurant shouldn't be held
10 against or House Springs shouldn't be punished 'cause they
11 probably should have charged them the 1,700 bucks on top
12 of that for a paper service restaurant.

13 The simple fact of the matter is, is that I
14 think we've pretty conclusively proven that even had the
15 correct party been before the court, that Pogolino's is a
16 full service restaurant, and given that, the applied
17 tariff should be followed.

18 The idea of somehow giving them a break
19 with regard to going outside the tariff, in many ways a
20 noble gesture. However, it was based upon the concept of
21 the explanation that was given to them by the Scrivners,
22 which is, oh, gee, this is just a pizza takeout
23 restaurant. And then as Mr. Busch explained, once it was
24 open, once you saw the menus and saw all that stuff and
25 the evidence that he heard from the witness stand today,

1 it becomes even more clear to him that for the purposes of
2 these calculations that it's full service.

3 The definition and the procedure sought to
4 be foisted on this Commission would, in essence, require a
5 case-by-case review of what each restaurant is, and if,
6 for instance, it did more takeout than it did sit-down or
7 expanded its sit-down capacity, it would have to be
8 revisited each time and every time.

9 I contend that the tariff was filed and it
10 was followed, and following it means classifying it as a
11 full service restaurant and approving the CIAC fee. Thank
12 you.

13 JUDGE JORDAN: Thank you. Let's talk about
14 written arguments. I'll ask the reporter, will you be
15 notifying parties when the transcript is ready?

16 THE REPORTER: No. I'll just file it with
17 the Commission.

18 JUDGE JORDAN: All right. Then I'll let
19 the parties know when the transcript is ready and we'll
20 set a briefing schedule then. Do you have any thoughts on
21 how much time you would like to brief this if you decide
22 to brief it?

23 MR. MILLER: I don't know. 30 days. Do we
24 want, Judge, to -- because of the fact that Mr. Haas said
25 that he wouldn't mind to get something on it, I wouldn't

1 mind to set a first briefing schedule and then a case in
2 chief briefing schedule. The first briefing is on the
3 identity of the party.

4 JUDGE JORDAN: Right. And your motion to
5 dismiss, you'd like to argue that first. Does Staff have
6 any ideas on this?

7 MR. HAAS: Mr. Miller's proposal is
8 acceptable.

9 JUDGE JORDAN: Is there anything that we
10 need address while we are on the record?

11 MR. MILLER: No, Judge.

12 JUDGE JORDAN: Then we are adjourned.

13 WHEREUPON, the hearing of this case was
14 concluded.

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3 COUNTY OF COLE) ss.

4 I, Kellene K. Feddersen, Certified
5 Shorthand Reporter with the firm of Midwest Litigation
6 Services, and Notary Public within and for the State of
7 Missouri, do hereby certify that I was personally present
8 at the proceedings had in the above-entitled cause at the
9 time and place set forth in the caption sheet thereof;
10 that I then and there took down in Stenotype the
11 proceedings had; and that the foregoing is a full, true
12 and correct transcript of such Stenotype notes so made at
13 such time and place.

14 Given at my office in the City of
15 Jefferson, County of Cole, State of Missouri.

16

17 Kellene K. Feddersen, RPR, CSR, CCR
18 Notary Public (County of Cole)
My commission expires March 28, 2009.

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