

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Oral Argument

September 24, 2007
Jefferson City, Missouri
Volume 1

THE STAFF OF THE MISSOURI)
PUBLIC SERVICE COMMISSION,)
Petitioner,)
vs.) Case No. WC-2007-0394
CENTRAL JEFFERSON COUNTY UTILITIES,) Case No. SC-2007-0396
INC., RAINTREE PLANTATION, INC.,)
JEREMIAH NIXON, KENNETH MCCLAIN,)
NORVILLE MCCLAIN, AND THE)
NORVILLE MCCLAIN TRUST)
Respondents.)

BENJAMIN H. LANE, Presiding
REGULATORY LAW JUDGE

CONNIE MURRAY,
ROBERT M. CLAYTON, III,
COMMISSIONERS

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

2 JUDGE LANE: Good morning, ladies and
3 gentlemen. My name is Benjamin Lane. I'm the Regulatory
4 Law Judge assigned to this case.

5 That case is the Staff of the Missouri Public
6 Service Commission versus Central Jefferson County
7 Utilities, Inc., Raintree Plantation, Inc., Jeremiah
8 Nixon, Kenneth McClain, Norville McClain and the Norville
9 McClain Trust. Those are Case Nos. WC-2007-0394 and
10 SC-2007-0396.

11 We're here today because the Commission issued
12 an Order scheduling oral argument on Staff's pending
13 motion for partial summary determination in both of those
14 causes. And that order was issued on September the 13th.

15 Before we go any further, I -- I know that many,
16 if not all, of the attorneys that are representing the
17 parties here have -- have entered their written entries of
18 appearance. But for the record, please, and for the
19 Commissioners and the viewers, if you would please do so
20 orally.

21 Let's begin with the Complainant in this action,
22 Staff of the Missouri Public Service Commission.

23 MR. THOMPSON: Thank you, your Honor. Kevin
24 Thompson for the Staff of the Missouri Public Service
25 Commission, Post Office Box 360, Jefferson City, Missouri,

1 65102.

2 JUDGE LANE: Thank you, Mr. Thompson. For
3 Respondent, Central Jefferson County Utilities, Inc.

4 MR. COOPER: Yes, your Honor. Dean L. Cooper
5 from the law firm of Brydon, Swearngen & England, PC,
6 P.O. Box 456, Jefferson City, Missouri, 65102, appearing
7 on behalf of Central Jefferson County Utilities, Inc.

8 JUDGE LANE: Mr. Cooper, thank you very much.
9 For Raintree Plantation, Inc.?

10 MR. HOCKENSMITH: Dana Hockensmith, Hockensmith,
11 Tadlow & McKinnis, 12801 Flushing Meadow Drive, St. Louis,
12 Missouri, 63101. I'm also appearing on behalf of Jeremiah
13 Nixon and Kenneth McClain as well as Raintree Plantation,
14 Inc. Thank you.

15 JUDGE LANE: Thank you very much, sir. And the
16 Norville McClain?

17 MR. HOCKENSMITH: Just for the record, Norville
18 McClain is deceased.

19 JUDGE LANE: I understand that. He's still
20 technically a party, and he hasn't been dismissed. And
21 the Norville McClain Trust? Anyone here -- anyone here
22 for the Norville McClain Trust? No? No appearance.

23 And is there anyone here on behalf of the Office
24 of Public Counsel? Seeing none -- anyone here that -- any
25 party here that I -- that I've inadvertently left off the

1 list?

2 All right. Very well. This is the first one of
3 these that I've conducted. As far as procedure goes, what
4 I would suggest is we do something along the lines of what
5 you might get at the Court of Appeals in the sense of the
6 proponent of whatever action it is that -- that the
7 adjudicative body wants to take will be -- will present
8 their argument first.

9 Then there will be a change for the other side
10 to respond and then a brief reply period. What I'd like
11 to suggest is that this be treated like an extended oral
12 argument case would at the Court of Appeals.

13 So I don't know that it will take that long, but
14 I have no way of anticipating how long the Commissioner
15 questions may be concerning the parties. Certainly, we
16 don't have a real tight docket here where we need to worry
17 about other cases stacking up the room.

18 So what I'd like to suggest is that Staff, as
19 the Complainant in this action and the proponent of the
20 motion of partial summary determination be given a period
21 of 30 minutes to present arguments in favor of the motion,
22 20 minutes for the respondents.

23 I anticipate that the arguments that the
24 respondents would raise are the types of arguments that
25 would be common among all of them. Do I need to allocate

1 that time between the different respondents, or can you
2 work that out yourselves?

3 MR. COOPER: Yes. We can --

4 JUDGE LANE: All right.

5 MR. COOPER: Yes, your Honor. We can work it
6 out.

7 JUDGE LANE: All right. Very well develop. And
8 then let's go with a 10-minute rebuttal by Staff at the
9 conclusion of that. And, of course, we'll -- we don't
10 have a timer here. I'm not going to be keeping absolute
11 strict time on those limits, but those are kinds of
12 aspirational. And if the questions get hot and heavy,
13 then I'll extend the time appropriately.

14 All right. Commissioner Murray is here, and I
15 think we have a couple of others who may be watching via
16 video conference or joining us later. So please be
17 prepared for that should it occur.

18 And let's go head. Mr. Thompson, then, and
19 let's begin with your argument in favor of the motion for
20 partial summary determination.

21 MR. THOMPSON: Thank you, your Honor. May it
22 please the Commission.

23 On February 8th, 2000 -- 2007, the Commission
24 voted out its Report and Order in Case No. SO-2007-0071.
25 This was the lead case of a consolidated pair of cases

1 entitled In the Matter of the Application of Central
2 Jefferson County Utilities, Inc., for an Order Authorizing
3 the Transfer and Assignment of Certain Water and Sewer
4 Assets to Jefferson County Public Sewer District and in
5 Connection Therewith Certain Other Related Transactions.

6 In the ordered paragraphs of this Order, the
7 General Counsel of the Commission, that being me, was
8 peremptorily directed to bring an action against Central
9 Jefferson County Utility Company for penalties with
10 respect to several violations which the Commission found
11 in this order.

12 Concerned with the due process aspect of the
13 case, I filed this separate complaint. Now I seek partial
14 summary determination on the basis of the findings and
15 conclusions that the Commission has already made after a
16 full hearing in the case to which I referred SO-2007-0071.

17 JUDGE LANE: Mr. Thompson, didn't the Commission
18 in that same report and Order also authorize Staff to
19 bring a complaint, explicitly authorize Staff to bring a
20 complaint?

21 MR. THOMPSON: I believe that to be true, Judge.

22 JUDGE LANE: All right. Was that the result of
23 due process concerns, or was that another preemptory
24 action on the part of the Commission?

25 MR. THOMPSON: I have no idea why the Judge did

1 what the Judge did, why the Commission did what the
2 Commission did. I can only read the words and follow
3 them.

4 The order gave me a choice, and the choice that
5 I elected to pursue -- because you might remember that
6 Keith Krueger originally did file a complaint action in
7 Circuit Court, which has since, I think, been dismissed.
8 I chose to pursue this alternative for the reasons that I
9 mentioned.

10 JUDGE LANE: Thank you.

11 MR. THOMPSON: I'm not going to need any 30
12 minutes, Judge, to give you my position. My position is
13 simply this. The Commission has already heard the facts.
14 The Respondent, Central Jefferson, has already had a
15 hearing.

16 I don't believe the Commission will reach
17 different conclusions or different findings on the same
18 facts in another proceeding. So for purposes of judicial
19 economy, if nothing else, I think summary determination
20 lies.

21 The Commission has already found violations in
22 the 071 case on these facts against this Respondent. I'm
23 simply asking the Commission on the basis of the same
24 evidence to find the same violations again. If the
25 Commission chooses not to do so, we'll be more than happy

1 to go through another hearing.

2 Let me mention, also, that another reason for
3 bringing this as a separate complaint action is because
4 the transfer action involved only Respondent, Central
5 Jefferson County Utilities. It did not include any of the
6 other respondents that have been included in this
7 complaint action.

8 Now, I'm not asking for summary determination
9 against them. Only against Central Jefferson. Why have I
10 made them Respondents? Because they -- they are the
11 people who are ultimately responsible for the sad and
12 decrepit condition that this system is in. They are the
13 people with the money to fix it. They are the people with
14 the moral responsibility, and I argue the legal
15 responsibility to fix it. And so that's what I seek from
16 the Commission in this case. Thank you.

17 JUDGE LANE: All right. I think we may have a
18 couple of questions, or I certainly have a couple of
19 questions for you before you're -- you're done.

20 In their response to your motion, basically, the
21 -- the legal basis for your motion is collateral estoppel?
22 You're arguing that they're collateral estopped from
23 denying any of the facts that were found by the Commission
24 in the prior report and Order?

25 MR. THOMPSON: I certainly think they're

1 practically estopped. I mean, when confronted with the
2 transcript of what their witnesses said in that prior
3 hearing, can they deny it? Can they say they didn't say
4 those things?

5 JUDGE LANE: All right. I -- that's a good
6 enough answer there. They identified in their response
7 four elements that have to be satisfied for collateral
8 estoppel to apply.

9 MR. THOMPSON: That's correct.

10 JUDGE LANE: The first one of them is whether
11 the issue at stake is identical to the one alleged in the
12 prior action.

13 MR. THOMPSON: Well, that's a really good
14 question, Judge, because, see, the rule that you refer to
15 is a rule that applies to litigation in the Circuit Courts
16 of this state.

17 This is an administrative proceeding. An
18 administrative proceeding is somewhat different. It's
19 different with respect to the pleading rules. I would
20 suggest to you that unlike the fact pleading rules that
21 apply in Circuit Court here in Missouri that the Supreme
22 Court has made it clear that administrative proceedings,
23 particularly Public Service Commission, have notice
24 pleadings.

25 So given if you accept that as true, then I

1 would suggest to you that, yes, the first prong of
2 collateral estoppel is met.

3 JUDGE LANE: All right. The second prong is
4 whether the issue was actually litigated. Was this issue
5 actually litigated -- were all the issues raised in the
6 current motion for summary -- summary determination
7 actually litigated in the prior proceeding?

8 MR. THOMPSON: Not the liability of any
9 respondent other than Central Jefferson itself, which is
10 why I have not asked for summary determination with
11 respect to them.

12 But with respect to the issue of the violations,
13 yes, those were actually litigated as the Commission takes
14 pains to make clear in its report and Order that I've
15 previously referred to.

16 JUDGE LANE: The third element I saw was that
17 the issue in the prior litigation was critical and
18 necessary to resolution of the prior action. Do you
19 believe that it was critical and necessary for the
20 Commission to find facts relating to the safety and
21 adequacy of the water and sewer services being provided by
22 the Respondents or Central Jefferson in this case, or was
23 it a collateral issue?

24 MR. THOMPSON: That's a good question. I'm not
25 entirely sure I know what critical and necessary means in

1 this context. Was it -- was it an element, for example,
2 of the relief requested in that previous case? But,
3 factually, it was certainly so wrapped up and so bound up
4 with that question that I don't think it could have been
5 separated from it. So, yes, I believe it meets that third
6 prong as well.

7 JUDGE LANE: All right. You -- you referred to
8 this just briefly before, and I just wanted to just make
9 sure. Your opening statement in the prior action did not
10 contain any statement that authority for -- to file a
11 penalty action was being sought. Yes? True?

12 MR. THOMPSON: I don't think that was my opening
13 statement in the prior --

14 JUDGE LANE: Staff's opening statement. I'm
15 sorry.

16 MR. THOMPSON: Certainly. That's absolutely
17 correct.

18 JUDGE LANE: All right. So -- and the issue
19 that's presented by Staff to the Commission in its opening
20 statement was did it mention anything about authority to
21 file a penalty action, or did it focus on the statutory
22 element of whether the public interests would be served by
23 the asset transfer?

24 MR. THOMPSON: I believe it focused entirely on
25 whether or not the public interest would be served by the

1 asset transfer.

2 JUDGE LANE: All right. Nothing in the briefs,
3 nothing in the proposed findings and conclusions, nothing
4 -- nothing in any of those -- any of those documents
5 referred to authority to file a penalty action. Yes?

6 MR. THOMPSON: Well, Judge, I didn't try the
7 prior case, so my familiarity with all those things you've
8 referred to is -- is fleeting. I would say that I do not
9 believe there was any request for penalties or a mention
10 of penalties in the documents you refer to.

11 JUDGE LANE: All right. I wanted to touch
12 briefly on an argument that you made, which was that since
13 this is an administrative agency, the rules can be relaxed
14 a little bit.

15 My question to you would -- would be, can the
16 rules be relaxed in the context of -- of a -- of a penalty
17 -- of a request to seek penalties? That's a punitive type
18 action. That's something where due process -- due process
19 concerns are certainly heightened.

20 Do you think that the fact that authorization to
21 seek a penalty, financial penalty, against one or more of
22 the Respondents alters that analysis at all?

23 A I would refer back to the Supreme Court case
24 that I mentioned earlier, the name of which unfortunately
25 escapes me at the moment. But it's the lead case on the

1 pleading rules here at the PSC.

2 And the quote in that case, what the Supreme
3 Court said was it is enough if the pleadings fairly
4 present a matter within the jurisdiction of the Public
5 Service Commission. And that was, in fact, a complaint
6 case.

7 I do not believe that the Commission is
8 foreclosed from finding a penalty, from finding a
9 violation, let me say, of its rules of statutes that it
10 administers merely because the action has not been
11 denominated a complaint.

12 I think that when the evidence fairly makes out
13 a violation, fairly makes out misconduct on the part of a
14 utility, I think the Commission has all the authority it
15 needs to find a violation based on that evidence, whatever
16 the action was styled.

17 JUDGE LANE: All right. And finding a violation
18 is one thing. Authorizing a penalty action is a separate
19 thing. Yes?

20 MR. THOMPSON: Now we get to an interesting
21 point. The requirement that the Commission authorize the
22 General Counsel to seek penalties is a judge-made rule, as
23 I'm sure you're aware. The statute does not include any
24 such requirement.

25 And in the cases that discuss that requirement

1 that creates that judge-made mechanism, one thing they all
2 refer to and rely on it is the statute of limitations. It
3 is, as you know, a two-year statute of limitations, which,
4 until it was amended in mid '90s, was understood not to
5 start to run until the Commission made a finding that a
6 violation had occurred.

7 So there was ample opportunity for the matter to
8 be tried to the Commission and then tried again in Circuit
9 Court before any penalties were ever actually laid.

10 Now, the statute's been amended. It's been
11 amended to make it clear that it is not told by any
12 administrative proceedings. So now the two-year penalty
13 has to be understood to run from whenever it is the
14 violation actually occurred, not from when the Commission
15 finds it.

16 And I suggest to you that in amending that
17 statute that it's perfectly reasonable to understand it as
18 -- as the Legislature's intention to overturn the line of
19 cases requiring that the Commission authorize the general
20 counsel to seek penalties.

21 JUDGE LANE: So you're arguing that due to the
22 change in the statute of limitations, all of the case law
23 indicating that -- that there has to be a hearing and
24 there has to be an order of the Commission authorizing the
25 filing of a penalty action in Circuit Court, all that law

1 is no good anymore?

2 MR. THOMPSON: I believe that to be true.

3 JUDGE LANE: All right. Do you have any -- has
4 the Commission ever had occasion, in your knowledge, to
5 consider that particular issue?

6 MR. THOMPSON: None -- none that I know of.

7 JUDGE LANE: All right. Does it matter in terms
8 of the finding of a violation and whether a penalty action
9 should be authorized? Does it matter in your view that
10 the notice of violation -- that it's not final in the
11 sense that -- does it matter to your argument that simply
12 the issuing of a notice of violation without anything
13 more, whether it's been appealed administratively or in
14 the Circuit Court?

15 In other words, what I'm trying to say is does
16 the dependency of an appeal, both in the action below in
17 this particular case and the notice of violation with
18 regard to -- I think to the DNR violations, the fact those
19 -- there are -- there are administrative appeals pending
20 in those cases, does that matter at all to the finality of
21 the facts found?

22 MR. THOMPSON: Well, I don't know if you know
23 how it works when you go and you seek a penalty in any
24 Circuit Court. But you have to prove the violation again.
25 It's essentially a trial de novo in front of a Circuit

1 Court. So I don't think it matters, no.

2 JUDGE LANE: Well, I'm asking you here in the
3 Commission, do we give preclusive effect to a notice of
4 violation where all that there is in the record is a
5 notice of violation and there's been no adjudication, no
6 final adjudication of that issue.

7 MR. THOMPSON: I think the Commission has
8 already answered that question for you, Judge.

9 JUDGE LANE: Is there -- is there an appeal or
10 any review pending on that particular report and order
11 right now?

12 MR. THOMPSON: Absolutely.

13 JUDGE LANE: And my question is, does that
14 matter? Does that matter with regard to this motion in
15 this case?

16 MR. THOMPSON: In this report and order, the
17 Commission relied on those notices of violation. If you
18 mean the ones issued by the Department of Natural
19 Resources and the Environmental Protection Agency, the
20 Commission relied on those.

21 They had not yet been adjudicated as has been
22 pointed out by Respondents. And they were nonetheless
23 sufficient for the Commission in this proceeding. And so
24 I suggest to you they should be sufficient for the
25 Commission in the present proceeding as well.

1 JUDGE LANE: All right. So your position is
2 that the pendency of Circuit Court review of the prior
3 report and Order is utterly irrelevant to whether the
4 Commission should grant your motion for partial summary
5 determination at this proceeding.

6 MR. THOMPSON: Yes, Judge. That is absolutely
7 irrelevant.

8 JUDGE LANE: All right. Thank you very much.
9 That concludes my questions. Commissioner Murray?

10 COMMISSIONER MURRAY: I have a couple. Thank
11 you, Mr. Thompson. You talked about judicial efficiency,
12 and I was -- and I have to assume that the motion is
13 primarily to eliminate duplicative efforts where facts
14 have already been determined.

15 MR. THOMPSON: That's absolutely true,
16 Commissioner.

17 COMMISSIONER MURRAY: And is there any remaining
18 -- is there any -- at this point, is there any genuine
19 issue as to a material fact related to penalties?

20 MR. THOMPSON: I don't believe so.

21 COMMISSIONER MURRAY: And the Commission found
22 in the previous report and Order that a transfer was in
23 the public interest; is that correct?

24 MR. THOMPSON: That is correct.

25 COMMISSIONER MURRAY: And a part of the

1 reasoning for finding that that was in the public interest
2 was that there was not safe and adequate service being
3 provided; is that accurate?

4 MR. THOMPSON: That was part of the reason.
5 Additionally, that the current -- the company, Central
6 Jefferson, lacks the resources to repair those things.

7 And the owners of Central Jefferson have
8 indicated that they're not interested in pumping more
9 capital into Central Jefferson, whereas the purchaser has
10 a plan whereby the deficiencies will be remedied.

11 COMMISSIONER MURRAY: But in that action, there
12 was no allegation of violation of rules or statutes that
13 was determinative to that process -- to that proceeding;
14 is that correct?

15 MR. THOMPSON: That is correct. It was not --
16 it was not necessary for the Commission to find violations
17 in order to resolve the issue in the case, what shall we
18 call this, the companion case in order to determine that
19 the case was in the public interest and then to authorize
20 the transfer.

21 COMMISSIONER MURRAY: Have you come up with any
22 kind of an estimate as to how much time would be saved if
23 this motion were granted?

24 MR. THOMPSON: I think approximately six months.

25 COMMISSIONER MURRAY: All right. Now, there is

1 no one -- there are no customers that are currently
2 affected by anything we do in this particular proceeding;
3 is that correct?

4 MR. THOMPSON: That is correct.

5 COMMISSIONER MURRAY: So there's not a need for
6 expediency to protect customers?

7 MR. THOMPSON: No, there's not. So far as I
8 know, the transfer is going forward as authorized. This
9 has nothing to do with whether that will occur. And
10 that's the primary thing affecting customers.

11 COMMISSIONER MURRAY: Okay. And your -- I
12 believe your position is also that because there is a
13 trial de novo at the Circuit Court, whenever penalties are
14 sought that there can be no legitimate argument that the
15 Respondent did not receive due process; is that correct?

16 MR. THOMPSON: Absolutely. Absolutely. That
17 and the fact that Respondents in the case below had every
18 opportunity to limit the record to matters that were
19 material to the issue before the Commission. The fact
20 that the facts making out the violations came in suggests
21 that they waived that.

22 COMMISSIONER MURRAY: Okay. And those facts
23 were presented by the Staff witnesses; is that correct?

24 MR. THOMPSON: Both by the Staff and by the
25 company. Many -- many of the violations are predicated on

1 the evidence that the company put in.

2 COMMISSIONER MURRAY: And is it your position
3 that there were admissions of material facts in that
4 previous proceeding by the company?

5 MR. THOMPSON: Yes.

6 COMMISSIONER MURRAY: And how many of those
7 issues for which you're seeking summary determination were
8 admitted into the record by the company?

9 MR. THOMPSON: I can't tell you that offhand. I
10 don't know. What I can tell you is that the complaint I
11 filed in this matter is squarely based on the Commission's
12 report and order in the companion case. There are --
13 there are no violations alleged in this complaint action
14 that were not found in the companion case.

15 COMMISSIONER MURRAY: Okay. So the Commission
16 has already established the precedent of making findings
17 related to penalties in a proceeding for which that was
18 not the primary issue?

19 MR. THOMPSON: That is correct.

20 COMMISSIONER MURRAY: And General Counsel's
21 position here is -- is based solely on what the Commission
22 did in the companion case?

23 MR. THOMPSON: Yes, ma'am.

24 COMMISSIONER MURRAY: So if the Commission was
25 wrong in that -- in the way it decided that case and what

1 it included in the report and Order in that case, then it
2 would not be appropriate to grant Staff's motion?

3 MR. THOMPSON: If -- if you look at the same
4 facts, the same evidence and may reach a different
5 conclusion, then, yes, you would not grant summary
6 determination.

7 COMMISSIONER MURRAY: When I say if the
8 Commission was wrong, if the Commission was incorrect,
9 though, in determining facts that were not necessary to
10 the decision that was before it, does that negate Staff's
11 position here that -- that those issues have already been
12 determined, that those facts have already been found?

13 MR. THOMPSON: Let me make sure I get this
14 right. I think what I'm saying is this: I have some
15 question as to whether you need to find violations in a
16 complaint case brought for that purpose where there's a
17 complaint filed and an opportunity for them to answer a
18 complaint or whether you can do it in the course of doing
19 something else. I have some questions about that.

20 I will not say that I know what the answer is,
21 but just that it raises a question for me. And,
22 certainly, it was referred to by the Respondents in their
23 application for rehearing. It raised a question for them,
24 too.

25 The reason I'm bringing summary determination is

1 not -- as I said, from the point of view of judicial
2 economy, what I'm saying is take notice of the record that
3 was before you in this other case, and then I'm asking you
4 to please reach the same conclusions and make the same
5 findings and thereby find the same violations.

6 It's not quite the same, I don't think, as
7 saying, you've already done it, so, therefore, closed.
8 It's more, as I said, based on economy. If you look at
9 the same things, won't you find the same answers that you
10 did the first time?

11 COMMISSIONER MURRAY: So, basically, you're
12 asking us to examine that evidence again and reach the
13 same conclusions and thereby grant your motion for summary
14 determination on those issues?

15 MR. THOMPSON: That's exactly right. And avoid
16 several days of hearing.

17 COMMISSIONER MURRAY: All right. Thank you.

18 MR. THOMPSON: Thank you.

19 COMMISSIONER CLAYTON: Mr. Thompson -- Judge,
20 may I go ahead?

21 JUDGE LANE: Yes. I'm sorry.

22 COMMISSIONER CLAYTON: Do you have any other
23 questions you wanted to ask?

24 JUDGE LANE: No, I don't.

25 COMMISSIONER CLAYTON: Okay. Mr. Thompson, on

1 that line of thinking -- and I'm going to try to work
2 through this. But the fact that there is a record, you're
3 suggesting that that record is sufficient for facts in --
4 in this case, correct?

5 MR. THOMPSON: I am suggesting that. Yes.

6 COMMISSIONER CLAYTON: Okay. You're asking us
7 to rely on the facts that were found in the previous case
8 and that we don't have to ask any further questions?

9 MR. THOMPSON: I'm -- I'm asking you to rely on
10 a record in the previous case to reach the same result.

11 COMMISSIONER CLAYTON: Okay. I understand. But
12 by doing that, we deprive the parties an opportunity to
13 refute things that were found within that record. Is that
14 correct?

15 MR. THOMPSON: That would be true.

16 COMMISSIONER CLAYTON: Okay. And if those
17 issues or those facts were not part of the previous case
18 and they chose not to and was -- was not their obligation
19 to refute those facts at the prior hearing, then aren't
20 we, in fact, depriving parties of due process by just
21 accepting those previously found facts?

22 MR. THOMPSON: No. I don't think so. Because
23 they made it into the record. They had every opportunity
24 to keep it out. They --

25 COMMISSIONER CLAYTON: But they have no -- they

1 have no obligation to keep that information out. I mean,
2 it was not relevant to the case necessarily, didn't have
3 to be particularly found by the Commission to approve the
4 transfer. Would you agree with that?

5 MR. THOMPSON: I would agree with that.

6 COMMISSIONER CLAYTON: And even if there were no
7 quality of service problems associated with this utility,
8 we -- we would not have to find any quality of service
9 problems to approve that transfer be in the public
10 interest. Would you agree with that?

11 MR. THOMPSON: I think you would have to know
12 something about the state of the system to approve the
13 transfer. I mean, the reason the transfer was in the
14 public interest, part of that reason was because the
15 system was in a decrepit state.

16 And the current operator/owner has -- has no
17 plan for fixing it.

18 COMMISSIONER CLAYTON: I understand. Let's
19 assume that the utility was in great condition.

20 MR. THOMPSON: Okay.

21 COMMISSIONER CLAYTON: Was operating
22 appropriately, safe and adequate service at just and
23 reasonable rates. Make that assumption.

24 MR. THOMPSON: Yes, sir.

25 COMMISSIONER CLAYTON: They want to sell the

1 utility and they want to sell -- the owners want to sell
2 the utility to a new entity, so you're not going to have
3 claims of problems and quality of service.

4 We can approve that transfer. We don't have to
5 find prior quality of service problems to find that its in
6 the public interest if a new owner comes in, correct?

7 MR. THOMPSON: Correct.

8 COMMISSIONER CLAYTON: So we could find a public
9 interest finding for any type of transfer. It just so
10 happens that in this case that was one factor that -- that
11 played in in assisting the Commission in making a
12 decision?

13 MR. THOMPSON: Well, if you look at the factors
14 that are set out and I believe the case is Fifi (ph.)
15 Trunk Sewer, that talks about what the Commission should
16 look to in determining whether the public interest
17 supports a transfer, part of that is whether or not the
18 service is going to be interrupted, that that's the
19 primary purpose for the Commission's review, to make sure
20 that safe and adequate services are not interrupted.

21 So to me, it seems like it's inevitably part of
22 that question as to just what is the quality and nature of
23 the services now and what will be -- may be after the
24 transfer. So I don't know that it's all that immaterial.
25 I think it's part of the Commission's necessary inquiry in

1 doing a transfer case.

2 COMMISSIONER CLAYTON: This Commission could
3 have approved the transfer as being in the public interest
4 regardless of whether quality of service was an issue.
5 Can you think of an example where -- where this Commission
6 has turned down a transfer where the new operator had a
7 proven track record or where the Staff had found
8 sufficient findings to support that they had the financial
9 capability, the -- the technical knowledge and the -- the
10 experience and knowledge in how to run a utility? Can you
11 think of when we've ever turned down a transfer?

12 MR. THOMPSON: No, sir.

13 COMMISSIONER CLAYTON: So quality of service may
14 be a part of it, but it's not absolutely essential. Would
15 you agree with that?

16 MR. THOMPSON: I would agree with that.

17 COMMISSIONER CLAYTON: Okay. So if it's not
18 essential, then how can we use these facts that were found
19 by the Commission in a prior case when they had no
20 obligation to refute those facts because it was not
21 essential? How can we move forward on those facts that
22 were previously found and -- and not offer an opportunity
23 for the parties to refute those facts?

24 MR. THOMPSON: I think you can if you want to.
25 I don't think you have to.

1 COMMISSIONER CLAYTON: Okay.

2 MR. THOMPSON: Does that make sense?

3 COMMISSIONER CLAYTON: Okay. That's fine. I
4 appreciate that answer. Let me go back and ask some very
5 general questions. I want to make sure that I'm clear.
6 This is a motion for -- for summary determination --
7 partial summary determination. Against which parties
8 would it be applied?

9 MR. THOMPSON: Only Central Jefferson County
10 Utilities, Inc.

11 COMMISSIONER CLAYTON: Okay. So only the
12 utility. And it is not a motion against Raintree
13 Plantation?

14 MR. THOMPSON: No.

15 COMMISSIONER CLAYTON: Nor any of the
16 shareholders?

17 MR. THOMPSON: That's correct.

18 COMMISSIONER CLAYTON: Okay. So we'd still have
19 to go forward with a hearing, an evidentiary hearing,
20 against those entities if -- if we -- if they stay in as
21 parties?

22 MR. THOMPSON: That's true.

23 COMMISSIONER CLAYTON: Okay. All right. So is
24 there any saving of -- is there any judicial economy
25 that's achieved by granting summary judgment, all things

1 being equal?

2 MR. THOMPSON: The issues will be re -- much
3 reduced. If you -- in other words, the hearing against
4 the other Respondents would simply be why should they be
5 liable for the violations committed by Central Jefferson?

6 If you rehear the case against Central
7 Jefferson, then the issues are going to be did Central
8 Jefferson -- were there violations and who is liable?

9 COMMISSIONER CLAYTON: So it sounds to me that
10 -- and -- and, you know, I don't have the complaint here
11 in front of me and how it's been worded. So the complaint
12 against the other parties solely relates to -- to
13 liability that if we find wrongdoing on the part of the
14 utility that it then flows through to the other parties?

15 MR. THOMPSON: There are two theories for that.
16 Yes.

17 COMMISSIONER CLAYTON: Okay. Okay. I assume
18 you would agree that your argument for judicial economy
19 improves if the other parties are dismissed. If they are
20 dismissed, then you would -- you have no other parties and
21 you'd have summary judgment. So that plays into your
22 position. Would you agree with that?

23 MR. THOMPSON: That is correct. But Central
24 Jefferson in and of itself has made it clear it has no
25 resources to correct any deficiencies, and I assume that

1 would include paying the penalties.

2 COMMISSIONER CLAYTON: Okay. Specifically --
3 find the motion. You set out in your ordered paragraphs a
4 number of different facts. Can you identify the most
5 important facts that you are asking this Commission to
6 rely on from the prior case?

7 I mean, you've got 30, 35, 36 -- you've got a
8 lot of paragraphs here setting out facts. Can you give me
9 like the base -- the most important five facts that you're
10 asking this Commission to rely on from the previous case?

11 MR. THOMPSON: I'm asking you to rely on all the
12 ones from the previous case. I don't know how I would be
13 able to say which five are the most important.

14 COMMISSIONER CLAYTON: what is the standard that
15 has to be established for granting relief you've requested
16 in your complaint?

17 MR. THOMPSON: No issue of material fact and the
18 moving party has to have a right to determination as a
19 matter of law. And it has to be in the public interest.

20 COMMISSIONER CLAYTON: I -- maybe I mis -- I'm
21 not making myself clear. In your complaint against the
22 utility, what standard has to be proven by you to -- for
23 -- for this Commission to side with Staff? What do we
24 have to -- what do you have to --

25 MR. THOMPSON: Are you talking about the

1 standards for summary determination or the standard for
2 finding --

3 COMMISSIONER CLAYTON: The standard in the
4 complaint. The standard of rule finding a violation, of
5 either rules, tariff or law.

6 MR. THOMPSON: I think the principle one would
7 be to find that the system was not safe and adequate.

8 COMMISSIONER CLAYTON: Okay. Now, let me ask my
9 previous question this way. On your allegations about
10 them not offering safe and adequate service, can you
11 identify for me the facts that are supported by admissions
12 through either a request for admissions or through data
13 requests where the utility has either admitted or
14 acknowledged certain facts?

15 And in asking this question, I'm trying to
16 separate out what information came up during
17 cross-examination --

18 MR. THOMPSON: I understand.

19 COMMISSIONER CLAYTON: -- that perhaps wasn't
20 rehabilitated. I'm looking for admissions that have been
21 made on which you're relying.

22 MR. THOMPSON: Right. I can't do that because
23 in writing the complaint, I relied on the report and
24 Order. I did not rely on the evidence that the Commission
25 reviewed in reaching its findings in the report and order.

1 Okay? So the evidentiary citations in the complaint --

2 COMMISSIONER CLAYTON: Okay.

3 MR. THOMPSON: -- are simply the same ones the
4 Commission included in its report and Order.

5 COMMISSIONER CLAYTON: I understand. So none,
6 basically, would be the answer to that?

7 MR. THOMPSON: That would be the answer.

8 COMMISSIONER CLAYTON: Okay. That would be the
9 answer to that. Okay. I think you answered this question
10 for the Judge. Is it Staff's position that -- that the
11 Commission in that prior case was within its rights to go
12 ahead and approve Staff moving forward with a Circuit
13 Court complaint based on its findings without need of
14 additional hearing?

15 MR. THOMPSON: I believe the Commission was
16 within its rights, yes.

17 COMMISSIONER CLAYTON: Okay. And, basically,
18 this motion for partial summary judgment is a perpetuation
19 of that argument, meaning that you have no additional need
20 for evidentiary hearing?

21 MR. THOMPSON: Not against Central Jefferson.
22 That's correct.

23 COMMISSIONER CLAYTON: Against Central
24 Jefferson. So -- so, basically, authorizing the
25 Commission in -- or the Staff to move forward in the last

1 case based on the evidence and this motion right here
2 without additional evidentiary hearing based on those
3 facts pretty much legally is one in the same thing?

4 MR. THOMPSON: That's correct.

5 COMMISSIONER CLAYTON: Now, if the Commission
6 found -- and I can't remember the exact language in -- in
7 the Order on rehearing or reconsideration or what we dealt
8 with. But if the Commission, as I recall, said that we
9 couldn't move forward to Circuit Court without additional
10 evidentiary hearing -- I'm not saying that's necessarily
11 the case.

12 I'm trying to remember the conversations in
13 agenda and the language that was written up in the Order.
14 But I thought that perhaps we had decided to move forward
15 with additional evidentiary hearings in the complaint
16 process.

17 And I may be corrected by somebody. I'm sure I
18 will. But if we do partial summary judgment, isn't that
19 inconsistent with that decision that the Commission made
20 as a matter of policy?

21 MR. THOMPSON: If, in fact, that's the decision
22 the Commission made. And I'm not -- I don't know that it
23 was or wasn't.

24 COMMISSIONER CLAYTON: Okay. You don't recall
25 any additional findings that we made on the Order of

1 Rehearing or Recross Examination?

2 MR. THOMPSON: I'm sorry. I don't.

3 COMMISSIONER CLAYTON: You don't. Me neither.

4 Okay. Okay. Mr. Thompson, in your review of the case law
5 -- and there's -- there's no case directly on point for an
6 administrative action relating to this issue; is that
7 correct?

8 MR. THOMPSON: You mean for the summary
9 determination?

10 COMMISSIONER CLAYTON: For summary determination
11 based on previously found facts, collateral -- basically,
12 you're arguing that they're estopped from arguing against
13 findings that have already been made; is that correct?

14 MR. THOMPSON: I don't think that's exactly what
15 I'm arguing. No. I think what I'm arguing is that if you
16 have the same evidence, you're going to reach the same
17 answer.

18 COMMISSIONER CLAYTON: I understand that. I
19 understand that. I understand that's your argument.
20 Okay. So if we would be -- if we were in a court of law,
21 would you agree with me that this type of motion for
22 partial summary judgment would not be appropriate?

23 MR. THOMPSON: Based on a previous proceeding in
24 a court of law or in an administrative tribunal?

25 COMMISSIONER CLAYTON: No. Let say it's the

1 Circuit Court or previous Circuit Court case and a -- and
2 an existing court case.

3 MR. THOMPSON: Well, then the rule would be, I
4 think -- I would be seeking collateral estoppel.

5 COMMISSIONER CLAYTON: Okay. What is your
6 support for your claim that administrative law
7 participants or administrative hearing participants do --
8 are not afforded the same type of due process that would
9 be provided in a -- in a court of law?

10 MR. THOMPSON: Oh, I think they are. But I
11 think they've had all the process that's due. They've had
12 a hearing. They only get one.

13 COMMISSIONER CLAYTON: But it was a hearing on a
14 completely different matter.

15 MR. THOMPSON: But the facts came in. I mean,
16 it would certainly be elevating form over substance to say
17 that the Commission is unable to find a violation against
18 a company where the facts that have come into the record
19 make out a violation simply because it's not a complaint
20 case.

21 After all, remember, they're going to get a
22 trial de novo in Circuit Court anyway. How many hearings
23 do they need?

24 COMMISSIONER CLAYTON: I -- I understand you're
25 saying that. Well, let's take -- let me -- let me ask you

1 another question.

2 Do the -- the information that was received by
3 the Commission was part of a contested case. Do you
4 believe that it requires a contested case for such
5 finding? For example, what if --

6 MR. THOMPSON: Absolutely.

7 COMMISSIONER CLAYTON: What if we had an
8 uncontested case and information was presented to the
9 Commission that was unrefuted, no cross-examination,
10 although they'd been given an opportunity and they were
11 present on a particular topic, do you think that in an
12 uncontested case proceeding that those facts could be
13 adopted by the Commission and used later against a party?

14 MR. THOMPSON: In the Supreme Court's decision
15 in Yarborough versus McHenrick, City of Yarborough versus
16 McHenrick, they made it clear that procedural requirements
17 of Chapter 536, other than the requirement for written
18 Findings of Fact and Conclusions of Law, can be waived.

19 Therefore, any proceed -- any procedural
20 inadequacy or irregularity at the hearing level that's not
21 objected to was waived. So to go back to your
22 hypothetical, if there were an uncontested case and
23 evidence came to the Commission of a violation and there
24 was no objection that the proceeding should have been a
25 contested case proceeding, then, yes, I think the

1 Commission can use it.

2 COMMISSIONER CLAYTON: Without additional
3 hearing?

4 MR. THOMPSON: I think so. I mean, you have a
5 right to notice in a hearing, but you don't always get it
6 if you sleep on your rights.

7 COMMISSIONER CLAYTON: Let's -- let's -- if
8 during, let's say, an uncontested case facts are
9 established or presented that would suggest some sort of
10 complaint violation, do you believe the mere presence of
11 those facts through the hearing is enough for Staff to
12 proceed to have to -- to Circuit Court on a complaint?

13 MR. THOMPSON: That's my theory on the basis of
14 what I explained to you about the amendment of the statute
15 of limitations, yes.

16 COMMISSIONER CLAYTON: So then you would never
17 need a finding by the Commission. It would always be the
18 Staff moving forward with a complaint at the Circuit
19 Court.

20 MR. THOMPSON: If, in fact, I'm right on that
21 theory, that's true. The Commission --

22 COMMISSIONER CLAYTON: You don't -- you wouldn't
23 even -- you won't even need us, would you, Mr. Thompson?
24 I could call in sick. It wouldn't matter.

25 MR. THOMPSON: It depends on what kind of relief

1 you want. You understand? In other words, if I want to
2 go get penalties, then on the theory that I explained to
3 you, I think if I have facts in my possession that I think
4 would support penalties, then in -- in light of that
5 legislative action, yes, I think today I could just go
6 straight into Circuit Court and file a suit for penalties.

7 But what if the relief you want is something
8 different? What if you want an order from the Commission
9 requiring the company to make changes to make its system
10 safe and adequate? That you can only do in front of the
11 Commission. You can't do that in Circuit Court.

12 COMMISSIONER CLAYTON: Okay. Can you tell me --
13 for how many years have you been with the Commission?

14 MR. THOMPSON: Since January of 1999.

15 COMMISSIONER CLAYTON: '99. My how the years
16 pass. And in that time, can you tell me how many cases --
17 how many complaint cases that have proceeded directly to
18 the Circuit Court and bypassed the Commission?

19 MR. THOMPSON: None.

20 COMMISSIONER CLAYTON: Okay. Can you tell me
21 how many cases have gone through the Commission as
22 traditionally its been done and proceeded to the Circuit
23 Court where a trial de novo was held?

24 MR. THOMPSON: There have been many penalty
25 cases that have gone through the Commission and on to

1 Circuit Court. And in every case, there has been an
2 opportunity for a trial de novo. There has not always
3 actually been a trial de novo.

4 COMMISSIONER CLAYTON: How many instances has
5 there been a trial de novo?

6 MR. THOMPSON: I don't know on that.

7 COMMISSIONER CLAYTON: You don't know. Can you
8 think of one?

9 MR. THOMPSON: Not offhand, I can't. I can
10 certainly get that information to you. But I -- I don't
11 know offhand.

12 COMMISSIONER CLAYTON: Does the statute say that
13 a proceeding is trial de novo when it goes to the Circuit
14 Court?

15 MR. THOMPSON: No. This is a judge-made rule.

16 COMMISSIONER CLAYTON: So it's a rule that says
17 it's trial de novo?

18 MR. THOMPSON: It's case law.

19 COMMISSIONER CLAYTON: Okay. And a Circuit
20 Court is not able to simply adopt the facts that were
21 found at the administrative level?

22 MR. THOMPSON: No, they can't.

23 COMMISSIONER CLAYTON: Cannot do that. They
24 have to make separate findings?

25 MR. THOMPSON: That's what the case law says.

1 They have to have a separate proceeding.

2 COMMISSIONER CLAYTON: Okay. Okay. I don't
3 think I have any other questions. Thank you,
4 Mr. Thompson.

5 MR. THOMPSON: Thank you.

6 COMMISSIONER MURRAY: A little bit of follow-up,
7 Judge.

8 JUDGE LANE: Yes. Commissioner Murray?

9 COMMISSIONER MURRAY: Mr. Thompson, did -- are
10 you -- are you familiar with the Staff versus the --
11 versus Hurricane Deck Holding Company, et al.?

12 MR. THOMPSON: I am.

13 COMMISSIONER MURRAY: And does that support your
14 position?

15 MR. THOMPSON: Are you referring to the
16 Commission's decision in that case?

17 COMMISSIONER MURRAY: Yes.

18 MR. THOMPSON: I haven't read it recently, so I
19 don't, frankly, know.

20 COMMISSIONER MURRAY: Well, that would -- that,
21 in fact, was a complaint case. And the Commission issued
22 an order granting in part and denying in part Staff's
23 motion for summary determination.

24 MR. THOMPSON: That's correct. As I recall, the
25 Commission granted summary determination against Hurricane

1 Deck Holding Company and denied summary determination
2 against the directors and officers who had also been
3 included as Respondents. And Staff then dismissed as to
4 those additional respondents. The case has been in
5 abeyance since then.

6 COMMISSIONER MURRAY: Okay. And what do you
7 mean it has been in abeyance?

8 MR. THOMPSON: I don't recall the reason, but
9 for some reason, Staff has not pursued the penalty action
10 against Hurricane Deck. There was -- there was a reason
11 not to.

12 COMMISSIONER MURRAY: Did not go to Circuit
13 Court to pursue it?

14 MR. THOMPSON: I don't believe it has. No.

15 COMMISSIONER MURRAY: Well, there the Commission
16 had looked at the record in the complaint case, the
17 pleadings and the testimony and determined that there were
18 no material -- there were no issues -- genuine issues as
19 to material facts based on the pleadings.

20 Here, Staff is asking us to look outside the
21 pleadings in this complaint case to things that are on the
22 record with this Commission and determine that result of
23 that there are no -- there are no genuine issues as to a
24 material fact; is that correct?

25 MR. THOMPSON: That's true.

1 COMMISSIONER MURRAY: And some of those things
2 that Staff is asking us to look at in the other record
3 were admissions against interest. Is that your
4 understanding?

5 MR. THOMPSON: That is correct.

6 COMMISSIONER MURRAY: And does an admission
7 against interest in a proceeding where the parties are
8 under oath as they were here -- is an admission against
9 interest in that instance more significant than an
10 admission against interest where a party may have said
11 something to another individual and that's -- that's
12 presented as evidence that they've already admitted that?

13 MR. THOMPSON: Well, as -- as I recall the law
14 of evidence, I think an admission against interest can be
15 made under either circumstance. I mean, you can bring in
16 -- one of the exceptions to the hearsay rule is admission
17 against interest.

18 So you could put on a witness to say that well,
19 so-and-so said this. And that's an admission.
20 And, therefore, it comes in. He doesn't have to have been
21 under oath when it was said.

22 COMMISSIONER MURRAY: But I'm just -- I'm trying
23 to determine whether -- if -- if a party has been under
24 oath and admitted something under oath in a previous --

25 MR. THOMPSON: I think it certainly makes it

1 easier to prove. You have a transcript or a deposition.

2 COMMISSIONER MURRAY: Now, if we don't grant
3 Staff's motion for summary determination as to these
4 issues, then I'm assuming that Staff would bring in the
5 relevant portions of that previous record in
6 cross-examination on the stand.

7 MR. THOMPSON: That's certainly what Staff would
8 do, as well as whatever new evidence Staff was able to
9 develop through discovery.

10 MR. THOMPSON: Oh, I have a note here telling me
11 that the Hurricane Deck penalty action, in fact, is
12 pending before Judge Callahan and that we filed a motion
13 for summary judgment in that case. So I apologize for
14 being incorrect. A lot of cases. I can't remember them
15 all.

16 COMMISSIONER MURRAY: I understand. All right.
17 I think that's all I have for you right now. Thank you,
18 Mr. Thompson.

19 COMMISSIONER CLAYTON: Don't leave yet,
20 Mr. Thompson.

21 MR. THOMPSON: Yes, sir.

22 COMMISSIONER CLAYTON: What -- can you recall --
23 and if you don't recall, what are the differences between
24 the Hurricane Deck case, that summary determination and
25 this summary determination?

1 MR. THOMPSON: Really, I don't think any.

2 COMMISSIONER CLAYTON: In that case, we did --
3 we -- we -- we released the officers and directors.

4 MR. THOMPSON: Right.

5 COMMISSIONER CLAYTON: And proceeded against the
6 entity as if it were a utility.

7 MR. THOMPSON: That's correct.

8 COMMISSIONER CLAYTON: Because I don't think
9 it's a certificated utility.

10 MR. THOMPSON: Right. It's not. And that was
11 the gravity of the complaint in that case.

12 COMMISSIONER CLAYTON: So was the complaint for
13 penalties? Was it a complaint that they were violating
14 State law by acting as a utility without being
15 certificated?

16 MR. THOMPSON: Yes, sir.

17 COMMISSIONER CLAYTON: Do you recall that?

18 MR. THOMPSON: Yes, sir.

19 COMMISSIONER CLAYTON: Both? Either? Or? Do
20 you recall?

21 MR. THOMPSON: It -- it made out that they were
22 acting -- they were violating state law by acting as a
23 utility by engaging in conduct that only a certificated
24 utility can engage in.

25 And as an additional count, it asked for

1 authority to seek penalties against Hurricane Deck for
2 that action.

3 COMMISSIONER CLAYTON: And -- and what was the
4 information or the previous findings that were used to
5 support the partial determination summary?

6 MR. THOMPSON: In that case, it wasn't previous
7 findings. We didn't -- we didn't support that with a
8 previous case. We supported it with other types of
9 information.

10 COMMISSIONER CLAYTON: Do you recall that type
11 of information? Was it admissions -- either in request
12 for admissions or data requests? Or do you recall?

13 MR. THOMPSON: I assume it was information of
14 that sort.

15 COMMISSIONER CLAYTON: If you know.

16 MR. THOMPSON: I don't know. No. The one thing
17 I do know is it was not relying on any findings in a
18 previous case.

19 COMMISSIONER CLAYTON: Okay. And in this case,
20 you're relying on everything from the previous case in the
21 Commission's report and Order?

22 MR. THOMPSON: I'm relying on the evidence in
23 the previous case and asking the Commission to reach the
24 same findings.

25 COMMISSIONER CLAYTON: Okay. I thought you said

1 it a little differently earlier. But I'll leave it alone.

2 Thank you.

3 MR. THOMPSON: Thank you, Commissioner. Thank
4 you.

5 JUDGE LANE: Thank you very much.

6 MR. COOPER: Good morning, your Honor.

7 JUDGE LANE: Good morning.

8 MR. COOPER: As stated previously, my name is
9 Dean Cooper. I'm here for Central Jefferson County
10 Utilities, Inc.

11 I think I have to start by saying that I'm a
12 little unfamiliar with -- with utilizing formal appellate
13 procedures for these types of arguments here at the
14 Commission, so I -- I don't know that I have prepared in
15 the same way that I would have for such an argument.

16 One thing I do want to mention before I go on is
17 that, as we stated previously, Mr. Hockensmith is here for
18 -- for some of the other Respondents in this matter, and
19 we would like, to the extent we need to, to reserve some
20 time -- reserve probably just one minute for
21 Mr. Hockensmith to address a couple of the issues that --
22 that arose previously today.

23 JUDGE LANE: Certainly.

24 MR. COOPER: I think that -- that Central
25 Jefferson's argument is and continues to believe that its

1 adequately set forth in its opposition pleading in this
2 matter, and so I won't go into the -- into the detail of
3 that. I believe you -- your Honor touched on some of
4 those arguments in your questions for Mr. Thompson, and
5 perhaps will -- will do so in questions for me later.

6 However, there is one aspect to that argument that I
7 would like to provide some additional information. I
8 think that there is probably a better case than the one
9 utilized in that argument to cite for the proposition that
10 collateral estoppel depends upon those four -- four items,
11 four elements that were included in my argument. And that
12 case is Consumer Finance Corporation V Reams, R-e-a-m-s.
13 That's a Court of Appeals, Western District decision from
14 2005 cited as 158 Southwest 3rd, 792.

15 So I'd like to go ahead and hand you a copy of
16 that if that would be acceptable.

17 JUDGE LANE: All right. We'll take official
18 notice of this, I believe.

19 MR. COOPER: and I'm not even sure that -- that
20 that's necessary, your Honor. It's --

21 MR. THOMPSON: Thank you.

22 MR. COOPER: What it does do is -- is it tracks
23 a little more closely and a little more recently with --
24 with the elements that -- that you had talked about
25 earlier today.

1 As a part of that case as well, you'll see the
2 Western District making a distinction between the
3 offensive use of collateral estoppel as opposed to the
4 defensive use.

5 I think there's other case -- case law out there
6 in the world that -- that favors that or doesn't favor
7 that -- that distinction.

8 However, certainly in 2005, the Western District
9 made the statement that generally offensive use of -- of
10 collateral estoppel is less favored than defensive use of
11 that doctrine.

12 I do think that's what the -- what the Staff is
13 -- is asserting here as an offensive use of collateral
14 estoppel.

15 Touching on that, again, for a moment, I think
16 that Mr. Thompson's argument blends two ideas to some
17 extent. I think really the questions for the Commission
18 are two-fold.

19 It's -- it's, one, can the Commission utilize
20 that -- that earlier transfer case through collateral
21 estoppel or issue preclusion to find certain issues in
22 this case. I think that's one question for you.

23 If the question (sic) is no, then the question
24 is more of a -- a standard summary determination standard,
25 which is are the facts -- well, the facts and entitlement

1 of law must be reviewed in the light most favorable
2 against whom the summary judgment is sought or, in this
3 case, Central Jefferson.

4 I think that if you find that there is a
5 material issue of fact as to any of those facts that --
6 that are cited by the Staff, I think that grounds don't
7 lie for -- for summary determination in this matter.

8 We very quickly got into some of the same
9 questions that have -- have been raised by Central
10 Jefferson in the appeal of that earlier transfer case. I
11 think it was -- it was pointed out that that -- that
12 earlier transfer case, SO-2007-0071, has been appealed to
13 the -- to the Circuit Court.

14 It's pending before the Circuit Court at this
15 time, Case No. 07AC-CC00444. Questions of whether it was
16 appropriate for the Commission to even make the findings
17 that are relied upon in this case are at issue in that
18 case.

19 The question of whether it was appropriate for
20 the Commission ultimately to purport to authorize its
21 Staff to pursue penalties is very much at issue in that
22 case. And I think that case is probably a fair ways away
23 from -- from a final determination.

24 But let me say this. If the Staff truly
25 believes or the Commission truly believes that -- that its

1 authorization of the Staff to seek penalties was
2 sufficient in that -- that earlier case, I'm not sure what
3 we're doing here today. Because what the Commission -- or
4 what the Staff is seeking in this case appears to be the
5 same thing that -- that shows up in that earlier transfer
6 case that's -- that's on appeal.

7 Part of what Mr. Thompson's answer to that
8 question was, Well, he's pursuing the action against other
9 parties in this case. There's more here than Central
10 Jefferson.

11 Again, if that's -- if that's the purpose, then
12 I don't think this summary determination does any good in
13 terms of judicial economy. I think you do have to go back
14 and you do have to go through the evidence as to those
15 other parties. I don't think the collateral estoppel
16 theory will work against any of those other parties that
17 weren't a part of the transfer case.

18 And so, again, I don't think that the summary
19 determination does anything for either the Commission's
20 efficiency or where it -- how it resolves this case. The
21 Commission, frankly, is not looking at the same things in
22 this case that it looked at in that transfer case.

23 There was some discussion about that earlier.
24 It's -- it's in my -- my pleadings, but I think it bears
25 restating that if you go back to the transfer case, if you

1 look at the issues list that was filed by the parties to
2 that case that was accepted by the Commission, if you look
3 at the opening statements of all the parties, not just the
4 Staff, but all the parties, if you look at briefs of the
5 parties, if you look at the Proposed Findings of Facts and
6 Conclusions of Law of the parties in that case, you will
7 find no mention of anyone seeking authority for the Staff
8 to seek penalties in some future matter.

9 You won't seek any -- you won't find any mention
10 of anyone seeking a finding that Central Jefferson was not
11 providing safe and adequate service. It just doesn't
12 exist.

13 To the extent Central Jefferson has had a
14 hearing on those -- those issues, it was very much a
15 stealth hearing because not only did Central Jefferson not
16 know those issues were being tried. No other party in
17 that case -- in that case knew those issues were being
18 tried.

19 I think that is very important to looking at the
20 question of collateral estoppel or issue preclusion in
21 this matter. And, in fact, I think it -- it bears heavily
22 upon more than one of the alternates that the Commission
23 needs to look at in determining whether collateral
24 estoppel will apply here.

25 Mr. Thompson made mention that he doesn't

1 believe that -- that the notice requirements are the same
2 in -- in administrative hearings as opposed to Circuit
3 Court proceedings, traditional difficult matters. In a
4 very general sense, I probably agree with that statement.

5 But I think that when you're talking about a
6 complaint action, an action that seeks penalties against
7 an entity, I think you've crossed over into -- into a
8 different matter altogether.

9 I think that -- and, again, these cites come
10 from some of the arguments that are at Circuit Court right
11 now. But if you look to Section 536.063, you'll see a
12 requirement in administrative proceedings for how they
13 should be initiated in terms of writings, seeking what
14 affirmative relief is sought, you know, what relief is
15 sought or proposed and the reason for granting it.

16 Reasonable opportunity shall be given for the
17 preparation and presentation of evidence bearing on any
18 issue raised or decided or relief sought or granted. If
19 you look to the Commission's own chapter, 393.270.1, calls
20 for a complaint in writing when there is concern as to the
21 -- and this is a quote -- purity, pressure or price of
22 water or the adequacy, sanitation or price of sewer
23 service.

24 Again, I think that's a specific requirement for
25 certain notice before the Commission can go down the path

1 of complaint type actions and whether under the
2 circumstances Staff is requesting to be authorized to
3 pursue penalty actions.

4 393.270.1 also states that before proceeding
5 under a complaint, the Commission shall cause notice of
6 such complaint and the purpose thereof to be served on the
7 person or corporation affected thereby.

8 Again, something that -- a notice provision that
9 is just not found or a -- a type of notice that's just not
10 found in that earlier transfer case. And I think this
11 keeps that case from -- from being utilized in any sort of
12 collateral estoppel sort of way in the case that's before
13 you here.

14 The Commission's own decision in -- in the
15 transfer case cites to the Fifi Trunk sewer case. And,
16 again, this came up earlier. But that case said that the
17 obvious purpose of the provision requiring Commission
18 authority before a transfer can take place was to ensure
19 the continuation of adequate service to the public
20 certified utility.

21 It says to that end the Commission has
22 previously considered such factors as the applicant's
23 experience in the utility industry, the applicant's
24 history of service difficulties, the applicant's general
25 financial health and ability to absorb the proposed

1 transaction and the applicant's ability to operate the
2 assets safely and efficient -- efficiently.

3 I think that you'll also find that if you read
4 that case that the Court's preference to applicant really
5 refers to the new entity, the entity is going to -- that's
6 going to take over those operations.

7 The question of whether something is or isn't
8 detrimental to the public interest in terms of a transfer
9 application is -- is a focus on the new -- the new
10 owner/operator.

11 Can that new owner/operator provide safe and
12 adequate service? I don't think it has anything to do
13 with what service is prior to -- to that new opener
14 operator taking over.

15 There was some discussion about admissions
16 against interest. And I think it is kind of a -- a
17 two-fold kind of caveat in regard to that. Not -- not
18 admitting there are any admissions against interest in
19 that transfer case.

20 I think you have to keep in mind that admissions
21 against interest are no more than evidence. They are
22 evidence -- it constitutes evidence. It can be raised.
23 It can be used against a party. It -- it -- really, I
24 suppose it's an exception to the hearsay rule as much as
25 anything.

1 But even if you have that type of evidence,
2 barring some sort of collateral estoppel, I think you go
3 back to the standard for summary judgment or summary
4 determination, and the Commission in that situation must
5 weigh is there any other evidence? Is there -- is there
6 evidence that still creates a material issue of fact? And
7 if there is, summary determination does not lie in that
8 situation.

9 That's all I have at this time. And -- and,
10 certainly, I would entertain questions.

11 JUDGE LANE: Commissioner Murray?

12 COMMISSIONER MURRAY: Yeah. I have a couple of
13 questions, Mr. Dean. If -- you -- you indicated earlier
14 that if the authorization that the Commission granted in
15 the previous report and Order to seek penalties was
16 adequate, why are we here?

17 And the -- that's -- that's a very good point, I
18 think. If -- and if that is the case, that authorization
19 was adequate against Central Jefferson utilities, could
20 Staff proceed separately in Circuit Court against Central
21 Jefferson under that order and then separately seek
22 authorization to go to Circuit Court for penalties again
23 the other respondents here assuming that the Commission
24 was correct and that was an adequate direction to the
25 Staff in the previous report and Order?

1 MR. COOPER: I think the first half of your --
2 the answer to the first half of your question is probably
3 yes. If -- if you assume that that -- that Order is
4 adequate and it's not overturned on appeal, the Commission
5 -- or the Staff can likely proceed to Circuit Court with
6 the penalty action.

7 Now, there's -- there's a lot of arguments in
8 that. And, certainly, when -- when the Staff first filed
9 an action at the Circuit Court, I believe that Central
10 Jefferson filed a Motion to Dismiss, making the same
11 arguments it's made in its appeal to the 0071 case.

12 I don't know about the answer to your -- to your
13 second question. I've not given that sufficient thought
14 to -- to really offer an opinion, I don't think, as to
15 whether the Commission -- or the Staff can pursue a
16 complaint case here at the Commission against those other
17 parties at the same time.

18 COMMISSIONER MURRAY: Okay. And then I have a
19 question regarding the argument related to collateral --
20 collateral estoppel. Isn't it true that Staff is not
21 really asking us to use the prior findings as collateral
22 estoppel, but, rather, to look at the evidence in the
23 prior record and using that evidence make -- reach the
24 same conclusions?

25 MR. COOPER: I -- I heard Mr. Thompson say that

1 today. I -- I don't agree that that's the appropriate
2 question for the Commission. Okay.

3 I -- going back to what I said before, I think
4 the -- the Commission either can go down the collateral
5 estoppel route or it can apply a traditional summary
6 determination summary judgment for a test of the evidence
7 that may be presented to it. But I think it has to be one
8 or the other.

9 I -- I'm just not familiar with -- well, we've
10 -- we've looked at this before, and so, you know, we think
11 we'd probably find the same way again, so let's -- let's
12 go there. I think it has to fit into one of those first
13 two categories.

14 COMMISSIONER MURRAY: Okay. And your position
15 as to the -- as to any admissions against interest that
16 may be in the prior records, is that -- even if -- even if
17 it is thoroughly an admission against interest, which
18 would prove a material fact in the complaint proceeding,
19 that it would have to come before us as evidence in this
20 case, and even if the party had admitted that fact
21 previously that the party ought to be given another
22 opportunity to refute that fact?

23 MR. COOPER: Okay. I -- I think it's certainly
24 -- the party certainly has the opportunity to present
25 evidence that would be contrary to -- to that fact, yes.

1 Now, maybe it can be done. Maybe it can't be done. It's
2 going to be very issue-specific in the end.

3 But -- but, yes, I think that -- I think that
4 that testimony is no more than -- no more than evidence.
5 And the question is, is that the only evidence, or is
6 there contrary evidence that still raises an issue as to a
7 fact?

8 COMMISSIONER MURRAY: Thank you.

9 JUDGE LANE: Commissioner Clayton?

10 COMMISSIONER CLAYTON: Thank you, Judge.
11 Mr. Cooper, I'm -- I'm following your -- your arguments
12 here. Basically, what you're saying, by breaking it out
13 into two separate issues, one being collateral estoppel or
14 issue preclusion, which, frankly, I haven't heard the word
15 issue preclusion in a long time, but by breaking it out,
16 you're assessing that issue in one and then the whole
17 issue of the position for partial summary determination
18 the second.

19 Basically, what -- what -- what this Commission
20 is being asked to do, and I'm asking for you to correct
21 me, what -- what we're being asked to do is to adopt
22 evidence and findings from another case in this case to
23 support new findings.

24 And what they're asking us to do is to do that
25 without giving your client an opportunity to refute those

1 previous findings. And if we do that, if we -- if we
2 adopt those new things -- these old facts and the new
3 facts and don't give you a chance, we're precluding you
4 from relitigating the issue. We are estopping you from --
5 from trying to refute what has already been established;
6 is that correct?

7 MR. COOPER: I -- I think that's correct,
8 Commissioner. And I think that it's a -- it -- it raises
9 an important due process issue. And -- and, again it ends
10 up going back, unfortunately, to -- to that 0071 case.

11 But the way you tie a case, a transfer case, is
12 certainly different than the way you try a complaint case.
13 And I think that if you do not know that there is a
14 complaint case being tried, your strategy, your evidence,
15 presentation, any number of things are going to be
16 different.

17 And so to -- to think that through that transfer
18 case the Commission already has all the evidence that
19 there is, I -- I think would just be wrong.

20 COMMISSIONER CLAYTON: You -- you do not believe
21 that the information from the prior case is inadmissible
22 in this case, do you?

23 MR. COOPER: Well, it -- I guess I need to make
24 a little bit of a distinction. Certainly, the -- the
25 testimony from the prior case given under oath can be

1 utilized -- as testimony under oath can be used. I think
2 when you get into some of the citations for some of the
3 findings that are alleged in this case, you'll find
4 references to -- to some documents that go beyond sworn
5 testimony. And so I think there is a question as to some
6 admissibility as to some of the evidence.

7 COMMISSIONER CLAYTON: Some of the evidence.

8 MR. COOPER: Some of the evidence that's cited.

9 COMMISSIONER CLAYTON: There may be some
10 relevant information on some of the issues. You just
11 can't accept the old -- old case into the new case without
12 reviewing it?

13 MR. COOPER: Right.

14 COMMISSIONER CLAYTON: And I think the way that
15 your client -- you're asking for your client to get an
16 opportunity to refute the evidence that was established;
17 is that correct?

18 MR. COOPER: Correct.

19 COMMISSIONER CLAYTON: Okay. I want to ask --
20 and -- and I guess just to finish that thought, if -- if
21 we allow your client an opportunity to attempt to refute
22 certain findings that were made in the other case, then I
23 would assume we still have sufficiently disputed facts in
24 this case to support an order moving forward with --
25 without additional evidentiary hearing?

1 MR. COOPER: Could you -- could you ask that
2 again, Commissioner? I'm not sure I followed that
3 question.

4 COMMISSIONER CLAYTON: If your client is -- I
5 mean, there -- there are still material facts that would
6 have to be established in this case. Even if that
7 information came in as evidence, you're disputing that
8 evidence -- that the -- the accuracy or the factual nature
9 of that evidence, so we still have issues of material
10 facts that have to be decided in this case?

11 MR. COOPER: And in which case the motion for
12 partial summary determination should be denied.

13 COMMISSIONER CLAYTON: Right. Okay. Lastly,
14 are you familiar with the Hurricane Deck decision that the
15 Commission did?

16 MR. COOPER: Only -- I was not involved in that
17 case. I have read it at one point in time, but I can't
18 say that I've read it real recently.

19 COMMISSIONER CLAYTON: Me, too. Me, too. Well,
20 I will say, I'm interested to see exactly what information
21 we relied upon in granting that motion for partial summary
22 judgment. I just don't recall either. It's been -- it's
23 been some time, so I'll need to review that again, also.

24 MR. COOPER: I -- I think, in the end, when -- I
25 will add this in regard to that Hurricane Deck decision.

1 I think that -- I -- well, I'd be curious to know whether
2 the same arguments were raised in that -- that case that
3 have been raised by my client here. I think that that
4 would make a difference.

5 Two, I want to say that there was not an appeal
6 of the underlying decision perhaps in that case, which
7 would also differentiate it here as the 0071 case, has
8 been appealed and is being challenged by Central
9 Jefferson.

10 But, again, that's what -- if -- if the
11 Commission would want some sort of brief on that, we
12 probably would need to have an opportunity to file a
13 pleading in that regard.

14 COMMISSIONER CLAYTON: Last -- last line of
15 questions. Mr. Cooper, do we have provisions in our rules
16 that allow for requests for admissions?

17 MR. COOPER: I believe -- well, I don't know
18 whether you specifically do or not. I think that --

19 COMMISSIONER CLAYTON: And then if we do not, do
20 you believe that we -- that before the Commission you have
21 perhaps involved requests for admissions like you can have
22 in Circuit Court?

23 MR. COOPER: I think you can.

24 COMMISSIONER CLAYTON: Okay. And if you had
25 sufficient admissions in that instance, that would --

1 could possibly provide for summary determination? You
2 would agree with that?

3 MR. COOPER: Could possibly.

4 COMMISSIONER CLAYTON: There are differences in
5 admissions, admissions against -- statements against
6 interest are just merely evidence while potentially
7 admission in a filed pleading could support summary
8 judgment. Even if it would --

9 COMMISSIONER CLAYTON: Okay. I almost feel like
10 we're lawyers around here. Great. Thanks.

11 MR. COOPER: We should be careful going there.

12 JUDGE LANE: Well, Mr. Cooper, I have a few
13 questions for you.

14 MR. COOPER: Yes, your Honor.

15 JUDGE LANE: You mentioned earlier trial by
16 stealth. Didn't Mr. England indicate at the local public
17 hearing in the transfer case that Central Jefferson knew
18 that penalties were a possibility?

19 MR. COOPER: He -- he may have.

20 JUDGE LANE: All right.

21 MR. COOPER: I -- I don't think that that
22 indicates some sort of the awareness this -- that a
23 penalty case was being tried. That's -- that's a long
24 way, I think, from indicating that there's a complaint or
25 penalty case being tried.

1 JUDGE LANE: Okay. If -- if the Commission were
2 to deny Staff's motion and -- and permit a full
3 evidentiary hearing before authorizing Staff to file a
4 penalty action, assuming that law is still good, does
5 Central Jefferson plan to present any new evidence to
6 refute the evidence that was adduced in the transferred
7 case? Is there anything new, or are we just going to be
8 rehashing the same stuff?

9 MR. COOPER: I can't tell you that here today.
10 I can't tell you that we've -- that we have decided on a
11 -- on a trial or hearing strategy.

12 JUDGE LANE: Well, from a due process
13 standpoint, if you don't have any evidence that you
14 weren't unable to present before, what's the due process
15 concern there?

16 MR. COOPER: Well, I think that you have to keep
17 this in mind as well, your Honor, that not all the -- not
18 all the evidence is evidence that -- that may be presented
19 by -- by the Respondent in this case.

20 There were opportunities for cross-examination
21 of -- of Staff witnesses in this case. There are any
22 numbers of -- number of ways that the facts can be
23 established but the hearing process.

24 JUDGE LANE: I understand that. But I mean, my
25 -- I guess what I am -- what I'm trying to get at is if we

1 have another hearing, is -- is there going to be something
2 new? Do you -- were you prevented in the prior proceeding
3 by not having advance knowledge that this issue was going
4 to be tried in the terms of the pleadings, in terms of the
5 opening statements, in terms of all of those things?

6 Is there any evidence, whether it -- whether
7 you're the proponent of the evidence or whether Staff was
8 the proponent of the evidence, is there any evidence that
9 you were unable to present in that proceeding that you
10 would like to present should the Commission deny Staff's
11 motion for summary determination and grant a hearing?

12 MR. COOPER: Again, I think it's difficult to --
13 it's difficult to answer that standing here without having
14 gone through a -- a hearing or trial strategy in that
15 situation.

16 But to give you an example, during the course of
17 that case, at a minimum, the company provided a pleading
18 to the Commission responding to various allegations that
19 were made at the local public hearing. The information
20 contained in that pleading was never offered to the
21 Commission.

22 One would think that would be the sort of thing
23 that -- that if you knew there was going to be a complaint
24 that it -- it might be offered in response to those
25 allegations.

1 JUDGE LANE: All right. So -- okay. I hear you
2 there. Do -- is it Central Jefferson's position that they
3 can retry fact issues this Commission has made in the
4 transfer case or all fact issues or just those that were
5 collateral to that proceeding? Collateral in the sense
6 that it didn't go directly to the issue framed by the
7 pleadings, which was whether the transfer was in the -- in
8 the public interest. Or not against the public interest.

9 MR. COOPER: Well, I think, your Honor, if you
10 go through Central Jefferson's response in opposition to
11 the motion for partial summary determination, you'll find
12 that actually Central Jefferson does admit some of those
13 -- those factual allegations that have been made.

14 And I don't remember how many. But there are
15 some that -- that are admitted. I mean, certainly, to
16 that extent, Central Jefferson doesn't believe those
17 issues need to be retried or evidence presented on -- as
18 to those issues.

19 On the other hand, I think we believe that --
20 that the other issues where there is a material difference
21 as to fact that -- that they must be retried.

22 JUDGE LANE: All right. So you think you should
23 get a second bite at the apple with regard to the issues
24 about which there is a genuine issue of material fact?

25 MR. COOPER: Well, and I'm not sure we ever got

1 our first bite at the apple on those issues. If one
2 doesn't know, again, that the case or the complaint case
3 is being tried, I'm not sure you've ever had a first bite
4 of the apple. I think this is the first bite of the
5 apple.

6 JUDGE LANE: Thank you very much. Any follow-up
7 questions from Commissioner Murray?

8 COMMISSIONER CLAYTON: I -- I want to follow-up
9 on the Judge's line of questioning. I think they're
10 important questions.

11 If you get away from the whole issue of
12 preclusion or estoppel that -- that -- that this is the
13 opportunity due process, the whole case will be decided
14 here, not based on the older facts, you still have an
15 obligation to refute facts that have been previously
16 established.

17 So let's say we -- let's say we deny the -- the
18 -- the whole concept of estoppel and that you can come in
19 and attempt to refute facts. You still have an obligation
20 to come in with evidence that is contrary to the facts
21 that we've previously found, correct?

22 MR. COOPER: Well --

23 COMMISSIONER CLAYTON: I mean, they base their
24 evidence -- let's assume they are basing their evidence on
25 -- they come in, drop part of the transcript, part of the

1 findings. If all else being equal, if you remain silent,
2 we can -- we can find for Staff if you don't refute those
3 facts. They've made their prima fascia showing, correct?

4 MR. COOPER: Well, let's back up just a little
5 bit, Commissioner. I think you're right. If they drop in
6 -- offer into evidence portions of the transcript, it's --
7 it's -- it's proper evidence, it's admitted into evidence.

8 COMMISSIONER CLAYTON: It's relevant. Sure.

9 MR. COOPER: So on and so forth, and there's no
10 other evidence and the Commission chooses to believe that
11 evidence, I -- I think it can make those findings.

12 Where I think I differ with you a little bit is
13 I think you referred to those -- those prior findings as
14 opposed to the evidence. And -- and I still believe that
15 those findings are -- are not evidence of anything.

16 COMMISSIONER CLAYTON: Okay. Let -- let's drop
17 the findings. Let's just take the evidence that supports
18 the findings, the transcript, the -- the testimony and
19 cross-examination of witness -- witnesses. That
20 information that supports the findings.

21 We don't rely on the previous report and order,
22 but we can rely on that testimony, the information that
23 came out of that hearing process. You'd agree with that?

24 MR. COOPER: Yes.

25 COMMISSIONER CLAYTON: Yes.

1 MR. COOPER: Yes.

2 COMMISSIONER CLAYTON: Okay. Now, Staff shows
3 its card -- I mean, basically, they're saying, here is our
4 case. And they file this motion for partial summary
5 judgment.

6 Can we decide -- I mean, do -- do you have a
7 requirement to offer to us in advance somehow how you are
8 going to refute those -- refute that testimony that was
9 presented in the prior case?

10 MR. COOPER: I think it depends on what form the
11 hearing takes in that situation. There is -- there is
12 some indication that through the answer part of this
13 process.

14 COMMISSIONER CLAYTON: Have you filed your
15 answer?

16 MR. COOPER: We have.

17 COMMISSIONER CLAYTON: You have filed the
18 answer?

19 MR. COOPER: We have filed the answer as well as
20 affirmative defenses that were a part of that answer. I
21 think there is some notice that takes place there.

22 There is some notice that's taken place through
23 this process. That's -- you know, for any -- when I was
24 in civil court more often, a motion for summary
25 determination tended to be a decent discovery tool once in

1 a while.

2 And so it probably has worked here as well to
3 some extent. There's notice in our response that tells
4 you how we would approach some of those factual issues.
5 From there, I think it depends on whether we end up with a
6 live hearing as the Commission has done from time to time
7 or we end up with a -- a pre-filed testimony sort of
8 process.

9 I -- I think there's more notice as to how far
10 you respond to the prefiled testimony process.

11 COMMISSIONER CLAYTON: Can you direct me which
12 pleadings that you or your client have filed which would
13 set out the -- the specific evidence that would refute the
14 testimony in the prior cases suggested by the Judge rather
15 than just general denials?

16 Do you provide any specific information that
17 would -- it doesn't have to be a whole lot. It just -- it
18 has to --

19 MR. COOPER: Well, we certainly made an attempt
20 to do that in -- in Central Jefferson's response and
21 opposition to motion for partial summary determination.
22 We went through each of the 48 -- each of the 48 factual
23 allegations -- I say 48. There may actually be more than
24 that.

25 COMMISSIONER CLAYTON: Okay.

1 MR. COOPER: No. 48. There's 48 paragraphs
2 contained in the original motion for partial summary
3 determination. We've gone through each of the factual
4 allegations which is something less than the 48. I think
5 it's about 39 of them or so. And we have made citations
6 to the record.

7 Now, let me make this point as well. Even once
8 you look at -- at facts, I think you have other questions
9 of how those facts are going to be applied that are raised
10 in our affirmative defenses.

11 So I don't think just the facts get you all the
12 way to an ultimate commission decision.

13 COMMISSIONER CLAYTON: Okay. Thank you. No
14 more questions.

15 JUDGE LANE: Thank you. Any follow-up,
16 Commissioner Murray?

17 COMMISSIONER MURRAY: No, thank you.

18 JUDGE LANE: All right. Mr. -- Mr. Cooper,
19 thank you very much. Mr. Hockensmith?

20 MR. HOCKENSMITH: Good morning, Judge and
21 Commissioners. Again, I'm Dana Hockensmith. I represent
22 Raintree Plantation, Inc., Kenny McClain -- Kenneth
23 McClain and Jeremiah Nixon.

24 I had intended to only address one issue, but I
25 will now address two in right of your last question --

1 couple of last questions. And originally, I intended to
2 get up here simply to say that since I don't really have a
3 dog in this specific hunt, it is only a motion, as
4 Mr. Thompson said, against Central Jefferson County
5 Utility, and not my clients, I simply wanted to get up and
6 make one thing clear so that by my being quiet, it wasn't
7 argued at a later time that I had somehow acquiesced in a
8 certain proceeding.

9 And that is this: Whether or not the summary
10 judgment -- or -- I'm used to being in court -- motion for
11 partial determination is granted, my clients, if their
12 motions to dismiss are not granted -- and, of course, that
13 is still pending before the Commission, and certainly, we
14 believe that they should be granted.

15 But if they're not granted, we intend to
16 relitigate everything. We were not a party to the
17 original proceeding. We had no opportunity whatsoever to
18 participate.

19 We were not -- not only was Central Jefferson
20 County Utility not put on notice that penalties were an
21 issue. My clients were certainly not put on notice. And
22 so I want to make it clear so that it's not argued later
23 that now by being quiet that we have acquiesced in any way
24 in accepting any of the evidence or findings that was
25 previously presented before the Commission.

1 I would say -- because it's been discussed at
2 length here, that in terms of evidence that was presented
3 at the prior hearing, that is deemed admissible at a later
4 hearing, certainly, transcripts in evidence can be put in
5 in that fashion because it would be otherwise admissible.
6 But that will have to be determined in the second hearing.

7 So I wanted to make that clear that we will be
8 expecting and -- and -- and desiring to go forward with a
9 full and complete hearing on all of the issues.

10 That leads me to address the second issue, which
11 I am only addressing because it was raised just a minute
12 ago with Mr. Cooper. Mr. Cooper is at somewhat of a
13 disadvantage as to what evidence would be presented at the
14 second hearing because he's not as close to the situation
15 in terms of the underlying facts and the background as I
16 have been.

17 I will tell you that what happened at the first
18 hearing was that because there was no notice that it was
19 -- and I was present at the first hearing, so, certainly,
20 the transcript reflects what it reflects.

21 But I am speaking from having observed the first
22 hearing. It was about the transfer. It was not about
23 penalties. And when items of -- of evidence came in that
24 could possibly be evidence on any violation, Central
25 Jefferson did not make any attempt to rebut that because

1 that wasn't the issue.

2 I will give you examples. In the evidence,
3 there were a number of notices of violation from the
4 Department of Natural Resources. There were also some
5 notice of non-compliance from the Environmental Protection
6 Agency.

7 Those are nothing more than notices and notices
8 of non-compliance. They have never been litigated.
9 Neither DNR or EPA has ever proceeded with any of those
10 things. And all that was heard was the fact that those
11 violation notices existed.

12 In a subsequent hearing, my clients would be
13 ready and fully intend to present all of the facts
14 surrounding those notices of violation. And you're going
15 to find a completely different picture existing than what
16 the Staff has portrayed to this Commission in the past.

17 In fact, we believe we will be able to present
18 some evidence that on -- that the Department of Natural
19 Resources will admit that they don't even have regulations
20 to cover some of the notices that they have issued to
21 Central Jefferson County Utility.

22 And we will also present evidence that shows
23 that, under their own regulations, the discharges for
24 which the notices were issued are permitted and that, in
25 fact, they're permitted all over the State and that they

1 don't constitute a failure to provide safe and adequate
2 service.

3 Other evidence -- and I'm trying to let you know
4 that there will be much additional evidence on a second
5 hearing. It was -- evidence came out that there was some
6 lead in the water at the first hearing.

7 So if there's an allegation of unsafe water
8 service, it's because of the lead. That's what they
9 allege. On behalf of my clients, we will show that the
10 Department of Natural Resources approved the exact
11 procedure that my clients were using for its water
12 service.

13 Now, I'm not going to go into a bunch of other
14 stuff. But I just wanted to make it clear since the
15 questions were asked, will there be other evidence? There
16 will be lots of other evidence that will give this
17 Commission a completely different picture than what was
18 presented at the transfer hearing.

19 Of course, I hope not to be here because I hope
20 you grant my clients motions to dismiss. That's all I
21 have. Any questions?

22 JUDGE LANE: Commissioner Murray, anything?

23 COMMISSIONER MURRAY: I don't believe I have any
24 questions. Thank you, though.

25 MR. HOCKENSMITH: Thank you.

1 JUDGE LANE: Questions? All right. Thank you
2 very much.

3 MR. HOCKENSMITH: Thank you.

4 JUDGE LANE: Mr. Thompson?

5 MR. THOMPSON: Thank you, Judge. May it please
6 the Commission. With respect to -- and in response to
7 Mr. Cooper, this is a motion for partial summary
8 determination.

9 I haven't attempted to use collateral estoppel
10 offensively or inoffensively or in any other way. What
11 I've done is supported a complaint, a motion for
12 determination on part of that complaint by reference to
13 evidence adduced in a prior case.

14 And I did not attach that transcript to my
15 motion, but I could have in the same way that you can
16 support a motion for summary judgment by attaching a
17 deposition transcript to it or any other admissible offer
18 of proof. Because that, of course, is what summary
19 judgment is all about, or summary determination, which is
20 based on.

21 It's an offer of proof. I've made an offer of
22 proof saying, Look, I've got the goods. Give me
23 determination on the part of the complaint I'm asking for,
24 and here's a demonstration of the evidence that I'm going
25 to bring you at least this evidence if we go to hearing in

1 support of that.

2 His obligation in response, then, is to come
3 forward not with denials. He's already done that in his
4 answer. To come forward with evidence, with an offer of
5 proof showing you what he's going to bring to you to show
6 that there are material facts still out there to be
7 determined.

8 And just as I did, he referred to the
9 transcript. He didn't attach any affidavits. He didn't
10 attach any depositions. He referred also, just as I have,
11 to evidence adduced in the other case. So that's what
12 this is about.

13 Secondly, with response to what Mr. Hockensmith
14 has told you, I will tell you for Staff, I will be only
15 too thrilled if, in fact, he can bring you evidence and
16 adduce evidence that shows that the situation at this
17 water and sewage facility is not as dismal as the
18 Commission found in the companion case because that would
19 mean that life for those ratepayers is much superior to
20 what the Commission has found.

21 I think you should give Mr. Hockensmith that
22 opportunity. I would think you would want to hear that
23 evidence. Thank you. Questions?

24 JUDGE LANE: Thank you. Any questions from the
25 Commissioners?

1 COMMISSIONER MURRAY: None.

2 JUDGE LANE: I have none.

3 MR. THOMPSON: Thank you.

4 JUDGE LANE: Well, thank you very much for a
5 helpful and, I think, illuminating argument. And I
6 appreciate your time and effort in being here today.

7 And I think you shed some light on some -- some
8 issues for the Commission in considering the motion. Are
9 there any other issues we need to discuss?

10 MR. COOPER: One other, your -- your Honor.
11 And I had mentioned this to Mr. Thompson earlier. Purely
12 from an administrative standpoint, I wonder if it wouldn't
13 be helpful for the Commission to go ahead and consolidate
14 these two cases?

15 I think up to this point, people have filed
16 essentially the same pleadings in two places through EFIS.
17 And I -- I guess that's a roundabout way of moving for
18 consolidation in the two cases.

19 MR. THOMPSON: Staff has no objection to
20 consolidation.

21 JUDGE LANE: Of course, we don't -- we don't
22 have -- we don't have OPC here. But I have been wondering
23 the same thing myself as the issues are essentially
24 identical, it's just one is water one is sewer.

25 So we could consider that an oral request to

1 consolidate and I think take it up on what evidence we
2 have in the order so far. And if there's an objection,
3 OPC will be given an opportunity to express objection.
4 Any other matters?

5 MR. COOPER: No, your Honor.

6 JUDGE LANE: All right. Very well. Thank you
7 very much. We are adjourned, then.

8 MR. THOMPSON: Thank you.

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REPORTER'S CERTIFICATE

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4 STATE OF MISSOURI)
) ss.
5 COUNTY OF OSAGE)

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7 I, Monnie S. VanZant, Certified Shorthand
8 Reporter, Certified Court Reporter #0538, and Registered
9 Professional Reporter, and Notary Public, within and for
10 the State of Missouri, do hereby certify that I was
11 personally present at the proceedings as set forth in the
12 caption sheet hereof; that I then and there took down in
13 stenotype the proceedings had at said time and was
14 thereafter transcribed by me, and is fully and accurately
15 set forth in the preceding pages.

16

17 IN WITNESS WHEREOF, I have hereunto set my hand and
18 seal on September 25, 2007.

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Monnie S. VanZant, CSR, CCR #0539

23

Registered Professional Reporter

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