

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

REPORTED BY: Monnie S. VanZant, CCR, CSR, RPR  
Midwest Litigation Services  
3432 W. Truman Boulevard, Suite 207  
Jefferson City, MO 65109  
(573) 636-7551

## 1 A P P E A R A N C E S

2 For Staff of the Missouri Public Service Commission:

3 Mr. Kevin A. Thompson  
4 Missouri Public Service Commission  
5 200 Madison Street  
6 P.O. Box 309  
Jefferson City, MO 65102  
(573) 751-6514

7 For Central Jefferson County Utilities, Inc.:

8 Mr. Dean L. Cooper  
9 Brydon, Swearengen & England  
312 E. Capitol  
P.O. Box 456  
10 Jefferson City, MO 65102  
11 (573) 635-7166

12 For Kenneth McClain, Jeremiah Nixon and Raintree  
13 Plantation, Inc.:

14 Mr. Dana Hockensith  
15 Attorney at Law  
12801 Flashing Meadow Drive  
16 St. Louis, MO 63131  
(314) 965-2255

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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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