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STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

At a Hearing of the Public Service
Commission, held at Jefferson City,
Missouri, on the 12th day of
September, 1996.

CASE NO. EC-96-255

Deaconess Manor Association d/b/a
Orchard House,
Complainant,

vs.
Union Electric Company,
Respondent.

BEFORE:

THOMAS H. LUCKENBILL, Presiding
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE.
KARL ZOBRIST, CHAIRMAN,
M. DIANNE DRAINER,
COMMISSIONERS.

REPORTED BY:

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1 APPEARANCES:

2 PAUL H. GARDNER, Attorney at Law
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4 131 East High Street
5 Jefferson City, Missouri 65101

6 FOR: Deaconess Manor Association.

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11 St. Louis, Missouri 63166

12 FOR: Union Electric Company.

13 LEWIS R. MILLS, JR., Deputy Public Counsel
14 DOUGLAS MICHEEL
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17 FOR: Office of the Public Counsel
18 and the Public.

19 JEFFREY A. KEEVIL, Deputy General Counsel
20 P. O. Box 360
21 Jefferson City, Missouri 65102

22 FOR: Staff of the Missouri Public
23 Service Commission.

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PROCEEDINGS

(Written entries of appearance filed.)

ALJ LUCKENBILL: On the record. This is the evidentiary hearing in case No. EC-96-255, which involves Orchard House as a Complainant and Union Electric Company as a Respondent.

At this time the Commission would take entries of appearance, starting with Deaconess Manor Association, doing business as Orchard House.

MR. GARDNER: Paul H. Gardner of Goller, Gardner and Feather, 131 East High Street, Jefferson City, Missouri, representing Deaconess Manor Association, doing business as Orchard House.

ALJ LUCKENBILL: Staff?

MR. KEEVIL: Jeffery A. Keevil, deputy general counsel, P. O. Box 360, Jefferson City, Missouri 65102, appearing on behalf of the Staff of the Public Service Commission.

MR. NIEHOFF: William Niehoff for Union Electric Company, 1901 Chouteau Avenue, C-H-O-U-T-E-A-U, St. Louis, Missouri 63103.

MR. MICHEEL: Lewis R. Mills, Junior, deputy public counsel and Douglas E. Micheel, senior public counsel, appearing on behalf of the public and Office of the Public Counsel, P. O. Box 7800, Jefferson City,

1 Missouri 65102-7800.

2 At this time, your Honor, I would ask to be
3 excused from the proceedings.

4 ALJ LUCKENBILL: Are there any objections to
5 Mr. Micheel's motion to be excused from the remainder of
6 these proceedings?

7 MR. NIEHOFF: None by Union Electric.

8 ALJ LUCKENBILL: Hearing no objections to that
9 motion, Mr. Micheel, you are excused.

10 MR. MICHEEL: Thank you, Judge.

11 ALJ LUCKENBILL: Thank you. Off the record.

12 (Off the record.)

13 ALJ LUCKENBILL: We will at this time continue
14 the evidentiary hearing in case No. EC-96-255, which is
15 Deaconess Manor, doing business as Orchard House as
16 Complainant against Union Electric, Respondent. At this
17 time the Commission would hear opening statements, starting
18 with Orchard House.

19 MR. GARDNER: May it please the Commission. My
20 name is Paul Gardner. I'm the attorney for Orchard House.

21 Orchard House is a retirement facility located
22 in Webster Groves, Missouri, and it's designed, has always
23 been designed, to house retired persons. The facility is
24 owned by Deaconess Manor Association, a not-for-profit
25 Missouri corporation. It's managed by Life Care Services,

1 all known as LCS, which specializes in the development and
2 management of retirement communities. The average age of
3 Orchard House residents is 84.

4 Orchard House, the evidence will show, provides
5 services not generally available in standard apartment
6 complexes. Some of those services include one meal per day
7 in the dining room, an onsite home health registered nurse,
8 24-hour emergency call service, monthly health screening,
9 scheduled transportation, a physician on call 24 hours a
10 day to answer health questions, assist rails in the
11 bathrooms and various plans, social, cultural, educational,
12 and recreational activities.

13 Construction of Orchard House took place in 1988
14 and was essentially concluded in 1989. Orchard House
15 opened its doors to residents on August 7, 1989. Although
16 Orchard House is a component of a not-for-profit
17 corporation, it competes for residents with other
18 retirement facilities in the St. Louis area such as Tesson
19 Heights, Briarcrest Estates and Garden Villas. All of
20 those facilities, the evidence will show, market themselves
21 as facilities for senior citizens.

22 The genesis of the dispute in today's proceeding
23 involves the placement of Orchard House from the inception
24 of operations on the multiple-occupancy residential rate,
25 which I will refer to as a 007 rate. Orchard House was on

1 that rate from the inception of operations in August of
2 1989 until October 1995 when, due to a tariff change, it
3 was converted to the large general service rate. And the
4 buildings at issue are Buildings A and B. The other
5 buildings are not at issue with respect to proper rate
6 classification.

7 The evidence will show that the difference in
8 rate classification between placing Orchard House on the
9 residential rate and placing it on the large general
10 service rate averaged over \$38,000 per year during the
11 period of operations through September 1995.

12 Orchard House views the basic issues raised by
13 the testimony in this case as follows: First, did Union
14 Electric's tariffs allow application of the residential
15 rate of Orchard House's Buildings A and B from the
16 inception of operations in August of 1989 until Orchard
17 House was transferred to the large general service rate
18 effective October 1995?

19 Second, were the full range of rate
20 classification options made available to Orchard House
21 prior to construction of the electric distribution system?
22 And this issue is only relevant if this Commission
23 determines that the tariffs do not -- did not prohibit
24 Union Electric from placing Orchard House on the 007
25 residential rate.

1 Finally, did Union Electric properly refuse to
2 place Orchard House on the large general service rate when
3 Orchard House requested it in late 1991 and early 1992?
4 Now, the principle position of Orchard House in this case
5 is that Paragraph 1B, which defines apartments for rate
6 classification purposes in UE's tariffs, and Paragraph 4,
7 which is the billing paragraph establishing the 007 rate,
8 precluded application of the residential rate to Orchard
9 House between the inception of operations and the transfer
10 to the large general service rate in October 1995. And the
11 critical language is the date of construction.

12 The definition of apartments under Paragraph 1B
13 of the residential rate only classifies multiple-occupancy
14 buildings as apartments that were constructed prior to
15 June 1, 1981. That is the only rate application paragraph
16 in Union Electric's residential rate that could possibly
17 apply to Orchard House.

18 Secondly, the billing paragraph specifies that
19 the 007 residential rate is applicable only to buildings
20 constructed and served prior to June 1, 1981. Orchard
21 House was constructed in 1988, as I previously stated.

22 It's also the position, and the evidence will
23 show, put forth by Orchard House, that Union Electric, if
24 it wanted to apply the 007 rate, had to seek a proper
25 tariff waiver. That means they had to specify in their

1 tariff waiver application what rate provisions they wanted
2 to change. The evidence will show that Union Electric did
3 not properly seek or obtain a waiver of tariff provisions
4 1B and 4 by filing for a tariff waiver or variance with
5 this Commission.

6 What Union Electric filed was for a waiver from
7 the individual metering rule. Now, the evidence will show
8 that that is not the same as a written tariff waiver, that
9 a separate tariff waiver request had to be filed in writing
10 by Union Electric.

11 The evidence will also show that no meaningful
12 rate classification options or information that would
13 enable an intelligent rate classification choice was
14 communicated by Union Electric to representatives of
15 Orchard House. The project documentation discloses that no
16 rate classification option was offered, other than the
17 007 rate, prior to construction of the project. There is
18 testimony submitted by Union Electric that certain rate
19 classification options that would allow application of the
20 large general service were offered, but those offers were
21 not complete; and it was never communicated to Orchard
22 House the rate consequences of being on the residential
23 rate instead of the large general service rate.

24 Finally, the evidence will show that in late
25 1991 and early 1992 Orchard House was entitled to transfer

1 to the large general service rate. The evidence will show
2 that they met the criteria of ownership of their secondary
3 facilities. The evidence will show that they made the
4 proper request in writing. And even if they had made a
5 conscious, intelligent choice to be placed on the 007 rate,
6 a doubtful proposition given the rate consequences of that
7 choice, but even if that choice had been made, Union
8 Electric unlawfully improperly refused to transfer them to
9 the large general service rate or provide them with options
10 which would allow such a transfer. The evidence will show
11 that it was a naked refusal by Union Electric to place
12 Orchard House on the large general service rate when it was
13 requested in late 1991 and early 1992.

14 Finally, I think it's fair to say that this case
15 may well determine the extent of the protection afforded
16 customers by the tariff system, at least to customers of
17 Union Electric. It is the principle position of Orchard
18 House that if the tariff system is to have any meaning, it
19 has to be construed in favor of the customer in a way that
20 ensures that the customer will get the lowest possible
21 available rate. The evidence in this case will show that
22 that was not done, that the available rates were not
23 communicated, and that in fact Union Electric violated its
24 tariffs in placing Orchard House on the multiple-occupancy
25 residential rate.

1 ALJ LUCKENBILL: Thank you, Mr. Gardner.

2 Mr. Keevil?

3 MR. KEEVIL: May it please the Commission. For
4 those of you keeping score, I believe this is round three
5 of retirement facilities versus Union Electric, and based
6 on past experience, these things seem to have a tendency to
7 run somewhat lengthy. So I'm going to keep this as brief
8 as possible in the interest of expediting the rest of this
9 hearing.

10 As Mr. Gardner mentioned and as you will see in
11 the hearing memorandum, which has been filed previously in
12 this case, the first issue involves the tariff language
13 itself. Staff does not believe, as you will see in the
14 hearing memorandum, that there is any one single rate
15 classification which is appropriate for retirement
16 facilities such as Orchard House. There are, I believe, at
17 least three possible appropriate rate classifications in
18 Staff's opinion and residential and large general service
19 being two of those.

20 The fifth issue in the hearing memorandum is set
21 forth as whether there's any ambiguity in the tariffs of
22 Union Electric. And if you look at the hearing memo, you
23 will see that Complainants, as Mr. Gardner said, take the
24 position that, no, there is no ambiguity in the Union
25 Electric tariff, and the tariff -- this is my paraphrase --

1 the tariff plainly supports Complainant's position. Then
2 if you look further in the hearing memorandum, you will see
3 that Respondents take the position that, no, there is no
4 ambiguity in the tariffs and the tariffs clearly support
5 Respondent's position.

6 We, on the other hand, take the position that
7 there is indeed some ambiguity in the tariff. And I submit
8 to you the fact that the principle combatants in this
9 proceeding each claim that the tariff supports their
10 position lends some credence to our position that there is
11 ambiguity.

12 Now, based at least in part on this ambiguity,
13 this supports what I mentioned earlier. We believe that
14 the customer should be given the choice of which of the
15 appropriate rate classifications they wish to be served
16 under. So the question then in our position or in our mind
17 comes down to whether or not the customer was offered the
18 choice, the customer in this case being Orchard House.
19 This is basically the same issue as was presented in the
20 Friendship Village West County and South County case.

21 Now, were the appropriate options given to
22 Orchard House by Union Electric at the time of construction
23 of Orchard House? Frankly, we don't know. We weren't
24 there. Only Union Electric and Orchard House truly know
25 the answer to that question. There is conflicting evidence

1 on that issue, which you will be called upon to decide
2 between either Complainant or Respondent. Perhaps your
3 decision will be based on nothing more than your evaluation
4 of the credibility of the Complainant and Respondent
5 witnesses on that issue. We wish we knew the answer, we
6 Staff, but we weren't there so we really can't add much to
7 that argument among Complainant and Respondent.

8 If you decide in favor of Union Electric on that
9 issue, then as Mr. Gardner indicated, there's a further
10 question regarding whether the appropriate choices were
11 given or were offered again in 1991 or 1992 when Orchard
12 House requested they be switched over to the large general
13 service rate. And again, there's conflicting evidence
14 presented by Respondent and Complainant which you will have
15 to sift through and evaluate.

16 Bottom line, Staff's opinion comes down to, as I
17 said, did UE offer the choices, and did Orchard House
18 choose to be on the classification that they are on? If
19 that happened, Orchard House loses. If it did not, if they
20 were not offered the appropriate choices, then Orchard
21 House should prevail.

22 The final issue, if you want to call it an
23 issue, involves something which was set forth in the
24 procedural order, the application of the 60-month tariff of
25 Union Electric. For lack of a better term, that's what

1 I'll refer to it as. UE has a tariff which limits recovery
2 for damages in situations such as this to, I believe it is,
3 the current and prior 60 billing months. That tariff has
4 been approved by this Commission, and therefore, it, we
5 believe, is the operative tariff. Orchard House has taken
6 the position, I believe, that you cannot, by tariff,
7 supersede the statute of limitations, so we will brief that
8 one. Thank you very much.

9 ALJ LUCKENBILL: Thank you. Mr. Niehoff?

10 MR. NIEHOFF: Thank you very much. Good
11 morning. I am Bill Niehoff. I'm an attorney for Union
12 Electric Company, and I'm here this morning, obviously, in
13 connection with the Orchard House complaint case.

14 We've heard summaries of the Complainant's
15 position and the Staff's position. It's Union Electric's
16 position in this case that the evidence will clearly show
17 that Orchard House was served in the way that it was from
18 1989 until 1995 when the tariffs changed because of choices
19 it made in the design of this building back in 1988 and --
20 excuse me, 1987 and 1988 and also because of the Commission
21 order in 1988 that granted a variance from the separate
22 metering rules.

23 As was briefly touched upon, there have been two
24 prior cases, Tesson Heights and Friendship Village. We
25 agree with the Staff that this case is much closer to the

1 Friendship Village case. As you will recall, in that
2 particular case the Commission found in favor of Union
3 Electric. Like Friendship Village, Orchard House is not a
4 licensed care facility, which was one of the critical
5 issues in the Tesson case.

6 Orchard House is -- where we're concerned with,
7 Buildings A and B consists of residential apartments for
8 seniors who are, by the terms of the contract, required to
9 be able to live independently within the buildings. Like
10 Friendship Village, Orchard House in this case was offered
11 the options of large general service and primary service at
12 the time of the design. However, due to concerns that
13 Orchard House had with regard to segregating commercial
14 usage in Building B -- excuse me, Building C, which
15 consisted of about 28 individual store-type commercial
16 properties and its desire to segregate a commercial
17 restaurant from residential usage in Building A, it
18 rejected those options and requested the separate metering
19 that it did receive.

20 If you look at the complaint, which obviously
21 controls the issues that are presented here today, Count I,
22 as Complainant has indicated -- excuse me. I have a bit of
23 a cold. But Count I alleges only that Paragraphs 1B and 4
24 of Union Electric's residential rate preclude application
25 of that rate to Orchard House.

1 As you've heard here this morning, that's a
2 position that's supported only by Complainant and in
3 particular by Mr. Brown who's an expert witness, retained
4 expert witness for Orchard House. The Staff, including
5 Mr. Straub, has submitted testimony; Jim Ketter has had his
6 deposition taken in this case. These two men are assistant
7 managers of electric rates for the Commission. Between
8 them they have about 40 years experience in considering
9 electric rates. They both have intimate familiarity with
10 Union Electric's tariffs. Both have concluded that the
11 language that Mr. Gardner pointed to in 1B and 4 does not
12 preclude application of the rate to the Orchard House
13 complex.

14 Count II, again, is a discrimination count. We
15 believe that the prefiled testimony of Mr. Kovach has
16 addressed the various apartment complexes that are referred
17 to and allegedly treated differently by Union Electric.
18 Examination of Mr. Kovach's testimony will show that the
19 different treatment that may have been given to other
20 complexes is due to differences in those complexes and also
21 perhaps due to different choices that they made at the
22 design phase of the project, which were also offered to but
23 were rejected by Orchard House.

24 Mr. Gardner made a passing reference to witness
25 credibility in this case, as did the Staff and as has been

1 referenced in the hearing memorandum. Union Electric does
2 believe that witness credibility is going to be an
3 important issue. Credibility involves not only whether a
4 witness is telling the truth, but also whether or not a
5 witness was able to see, hear, and relate the things that
6 they're testifying to in this case. That's important,
7 because, with regard to Orchard House, none of the
8 witnesses that have filed prefiled testimony were employed
9 by Orchard House in 1987 and 1988 when these decisions were
10 made.

11 Furthermore, since that time, the ownership of
12 Orchard House has changed. I believe that was in about
13 1993. When this project was built, it was owned by a
14 partnership of Taylor, Morley and Simon, a big developer in
15 Missouri and in St. Louis, David Sanders, who was an
16 architect and who was owner of HPI Engineering Consulting
17 and Deaconess -- I believe Deaconess Hospital had some role
18 in that partnership as well.

19 The reason that that's important is because the
20 three witnesses that were present and participated in these
21 decisions, of those three, one of them, Jerry Kovac was a
22 direct employee of HPI Engineering Consulting. He was a
23 direct employee of one of the owners of this project.

24 ALJ LUCKENBILL: Pardon me. Did you say Jerry
25 Kovac?

1 MR. NIEHOFF: I did. There's going to be some
2 confusion about that throughout this hearing.

3 ALJ LUCKENBILL: Okay. Thank you.

4 MR. NIEHOFF: There is a separate spelling, a
5 different spelling. Rich Kovach has an H at the end of his
6 name, and Jerry Kovac doesn't. There's no relationship
7 between the two men.

8 ALJ LUCKENBILL: Sorry about the interpretation.

9 MR. NIEHOFF: That's okay. Throughout the
10 hearing, I'm going to try and refer to Jerry Kovac
11 including the first name so we cut down the confusion.

12 But there were three witnesses, as I mentioned,
13 who were present at the time this building was designed and
14 at the time the decisions that resulted in it being metered
15 and served in the way it was, occurred. Those were Richard
16 Kovach of Union Electric Company, Jerry Kovac of HPI
17 Engineering, and Jim Ketter who was the assistant manager
18 of electric rates. Mr. Ketter and Mr. Jerry Kovac have
19 testimony in the record by deposition.

20 This testimony of these three witnesses, when
21 taken together, shows clearly and without contradiction
22 that Orchard House was offered the large general service
23 rate, that it was offered the primary service rate, and
24 that the developer rejected those two options because it
25 wanted the four meters; it wanted to segregate the

1 commercial usage in Building C from the restaurant in
2 Building A. That left only residential usage under a
3 master meter to the apartments on Building A and to
4 Building B, which consisted solely of residential
5 apartments.

6 The testimony of these three witnesses will also
7 show that Union Electric and the developer and the
8 Commission Staff and the Commission itself were fully
9 informed that the residential apartments in Building A and
10 Building B would be served on a residential billing rate.
11 In fact, this statement is included in the application for
12 variance that was granted in 1988.

13 We have two days in which to complete our
14 cross-examination of the witnesses, and we have, as I'm
15 sure you're aware, substantial prefiled testimony. It's
16 Union Electric's position that we will cross-examine on the
17 issues that we think are important today. We don't intend
18 to address everything that's been raised or resolved, or
19 can be addressed based on the prefiled testimony in the
20 brief. I wanted to make sure that everyone concluded that
21 because we didn't raise a particular issue in
22 cross-examination that somehow we concluded or concurred or
23 agreed with the Complainants in this matter.

24 With that, I'll conclude, and thank you very
25 much for your time.

1 ALJ LUCKENBILL: Thank you, Mr. Niehoff.

2 Vice Chair Drainer has a couple of questions for
3 Mr. Gardner regarding the corporate structure, I believe.

4 So --

5 COMMISSIONER DRAINER: Yes. Good morning,
6 Mr. Gardner.

7 Just based on the opening statements by Union
8 Electric counsel, I was wanting clarification. Is Orchard
9 House in a corporation that is partially owned by Deaconess
10 Hospital now?

11 MR. GARDNER: My understanding is that Orchard
12 House is a component of Deaconess Health Systems, and it's
13 fully owned by Deaconess Health Systems, I think. Am I
14 correct?

15 MR. FUNK: Yes.

16 COMMISSIONER DRAINER: Deaconess Hospital is a
17 part of that?

18 MR. GARDNER: Yes. That's correct.

19 COMMISSIONER DRAINER: All right. Thank you and
20 it is owned by Deaconess Health Systems?

21 MR. GARDNER: Correct.

22 COMMISSIONER DRAINER: Okay. Thank you very
23 much.

24 ALJ LUCKENBILL: Off the record.

25 (Off the record.)

1 (EXHIBIT NOS. 1 AND 2 WERE MARKED FOR
2 IDENTIFICATION BY THE REPORTER.)

3 (Witness sworn.)

4 _____

5 ALJ LUCKENBILL: On the record. While we were
6 off the record, we have premarked Exhibit 1, which is the
7 hearing memorandum in this case, and Exhibit 2, which is
8 the direct testimony of Ms. Bobbi Jo Haden.

9 Please proceed with direct, Mr. Gardner.

10 BOBBI JO GARDNER testified as follows:

11 DIRECT EXAMINATION BY MR. GARDNER:

12 Q. Ms. Haden, would you state your full name for
13 the record?

14 A. Bobbi Jo Haden.

15 Q. Before we proceed, do you have any special
16 requests to make at this time?

17 A. Yes. Due to a hearing loss in my left ear, I
18 would request that people speak loud and clearly so I can
19 hear you.

20 Q. Ms. Haden, let me direct you to Exhibit 2, which
21 is denominated direct testimony of Bobbi Jo Haden. Is that
22 direct testimony that you have filed in this case?

23 A. Yes.

24 Q. Have you had an opportunity to review that
25 testimony for purposes of any corrections?

1 A. Yes.

2 Q. Do you have any corrections or modifications to
3 make to that testimony at this time?

4 A. No, I do not.

5 Q. Would it be correct to say that at this time
6 your testimony is true and correct to the best of your
7 knowledge and belief?

8 A. That's correct.

9 MR. GARDNER: At this time I would offer
10 Exhibit 2, direct testimony of Bobbi Jo Haden, and I would
11 tender her for cross-examination.

12 ALJ LUCKENBILL: Thank you, Mr. Gardner. The
13 Commission will reserve ruling on the admissibility of
14 Exhibit No. 2 until after cross-examination by counsel.
15 Cross-examination by Staff?

16 CROSS-EXAMINATION BY MR. KEEVIL:

17 Q. Ms. Haden, simply for purposes of clarification,
18 I believe your testimony indicates that Orchard House pays
19 the electricity bill of Union Electric rather than each of
20 the individual residents. Is that correct?

21 A. That's correct.

22 MR. KEEVIL: That's really all I have,
23 Mr. Luckenbill.

24 ALJ LUCKENBILL: Mr. Niehoff?

25 MR. NIEHOFF: Thank you very much. Let me move

1 this so we can see one another.

2 ALJ LUCKENBILL: Off the record.

3 (Off the record.)

4 ALJ LUCKENBILL: On the record.

5 MR. NIEHOFF: Thank you very much, Judge.

6 CROSS-EXAMINATION BY MR. NIEHOFF:

7 Q. Ms. Haden, if at any time you can't hear me or

8 if I'm not clear, just raise a hand, and I'll stop and

9 rephrase any question I might have. Okay?

10 A. Thank you.

11 Q. You do have a copy of your testimony before you,

12 do you not?

13 A. Correct.

14 Q. Okay. When did you first begin working for

15 Orchard House?

16 A. October 27th, 1991.

17 Q. Okay. And you worked there until February of

18 1996. Is that correct?

19 A. That's correct.

20 Q. Okay. At which time you transferred. Was it

21 within the system?

22 A. I transferred to another LCS managed facility in

23 Pennsylvania.

24 Q. Okay. Based on that, it's true that you would

25 not have been an employee of Orchard House in 1987 or 1988

1 when this project was being designed. Is that correct?

2 A. That's correct.

3 Q. Okay. You don't have any firsthand knowledge of
4 the contents of any conversations or discussions or
5 meetings between Orchard House personnel and Union Electric
6 Company that occurred at that time?

7 A. No, I do not.

8 Q. Would it be accurate then too, since the
9 building was constructed, that you obviously had no input
10 into how the electric system was designed or how Orchard
11 House would receive its electric service?

12 A. I had no input into that. No.

13 Q. Okay. You said you left in 1996. At that time
14 were you familiar with the fees that were charged Orchard
15 House residents?

16 A. Yes.

17 Q. Okay. And could you tell me what the range of
18 fees were for residents under the capital plan?

19 A. Approximately \$900 a month up to about \$2,000 a
20 month.

21 Q. Okay. Now, when you're involved with the
22 capital plan, does that also involve an up-front payment by
23 those particular residents?

24 A. That was the monthly payment.

25 Q. Okay. Was there also, I guess, a payment made

1 before they moved in, a lump sum type payment?

2 A. Yes. There was an entrance fee.

3 Q. Okay. What was the range of that entrance fee?

4 A. I'd have to refer back to a document to be

5 accurate.

6 Q. Okay. Does the range in 1996 of about 65,000 to

7 125,000 sound accurate, sound in the range?

8 A. That's approximate. That's correct.

9 Q. Okay. Now, you also offer a lease program at

10 Orchard House. Is that correct?

11 A. Correct.

12 Q. And for a lease customer, they are not charged

13 the up-front entrance fee. Is that correct?

14 A. Correct.

15 Q. But they pay a somewhat higher monthly rental

16 payment?

17 A. Their monthly fee is higher. Correct.

18 Q. Okay. And for those residents in 1996 that were

19 on the straight lease plan, what were the range of charges?

20 A. It's approximately 50 percent higher than the

21 return of capital plan.

22 Q. Would it be accurate that the approximate range

23 of those fees would be from 1600 to \$3,000 --

24 A. That sounds correct.

25 Q. -- per month?

1 A. Correct.

2 Q. Okay. Are you able to tell us what percentage
3 of these monthly fees represents charges for electrical
4 usage at Orchard House?

5 A. I'm sorry. Could you repeat the question?

6 Q. Yeah. Of the monthly fees that we've described,
7 the monthly charges, are you able to tell us approximately
8 what percentage of that pertains to electrical charges for
9 apartment electric usage at Orchard House?

10 A. No. I could not accurately answer that.

11 Q. To your knowledge, have electric bills gone up,
12 down, or stayed the same from 1991 to 1995?

13 A. They have consistently gone up, depending on
14 seasonal variations, and then there was a decrease when we
15 were changed -- when our rate classification was changed in
16 1995.

17 Q. Were you aware that Union Electric had decreased
18 electric rates twice since 1993 and also gave a one-time
19 refund in 1995?

20 A. Just looking at the statements per month,
21 they've consistently gone up.

22 Q. Okay. You don't know whether or not Union
23 Electric's rates decreased during that time period?

24 A. No. I did -- was not aware of that.

25 Q. If you would, ma'am, please turn to Schedule E

1 of your testimony?

2 A. You said Schedule B or E?

3 Q. E. I apologize. That is a letter to you from
4 an organization identified as Carlton B. Fox. Is that
5 correct?

6 A. Correct.

7 Q. Okay. Did you retain Carlton B. Fox to review
8 utility bills?

9 A. Correct.

10 Q. Okay. This involved the bills of the electric
11 utilities as well as the other utility services used by
12 Orchard House?

13 A. Correct.

14 Q. Did Carlton B. Fox hold himself out to be expert
15 in the field of energy usage and billing?

16 A. That's how we referred to them, yes.

17 Q. If you would look at the last sentence of the
18 fourth paragraph of that letter, it indicates that -- it
19 indicates that Carlton B. Fox -- and I believe you dealt
20 with a Mr. George Neunreiter. Is that correct?

21 A. Correct.

22 Q. Okay. Mr. Neunreiter indicates that, "At this
23 time we are under further review of the rules and
24 regulations, and if it is determined that there is other
25 usage on these meters other than residential, we will file

1 a complaint with the Missouri Public Service Commission
2 requesting the rate be changed."

3 That language is in that letter?

4 A. That's correct.

5 Q. Okay. What they're referring to are the meters
6 for the residential usage -- or excuse me, the usage in
7 Buildings A and B. Is that correct?

8 A. I assume so, yes.

9 Q. Okay. It says that in the sentence immediately
10 prior. Is that correct?

11 A. Correct.

12 Q. Okay. Did Mr. Neunreiter ever inform you,
13 ma'am, that he found other than residential usage on the
14 meters for Building A and Building B?

15 A. Could you re--

16 Q. Did Mr. Neunreiter -- he indicated he was
17 conducting an investigation to determine whether or not
18 there was other than residential usage on meters for
19 Building A and Building B for the apartments. Did he ever
20 follow that up and say, "We have found that there was other
21 usage"? Did he ever make that statement to you?

22 A. I don't recall that conversation. No.

23 Q. Did you have a continuous relationship with
24 Mr. Neunreiter from the date of -- from 1992 up through
25 '95?

1 A. It wasn't -- we didn't meet often, but we did

2 maintain his services.

3 Q. During that period of time?

4 A. Uh-huh. That's correct.

5 Q. Okay. And -- strike that. You have also met

6 and dealt with Mr. Bradley Brown. Is that correct?

7 A. That's correct.

8 Q. Okay. And when did you first meet Mr. Brown?

9 A. I believe it was in late 1994.

10 Q. Okay. And did you ultimately retain Mr. Brown

11 to provide any services to Orchard House?

12 A. Yes, we did.

13 Q. Okay. Was that your decision?

14 A. Yes, it was.

15 Q. Okay. And you indicated you first met him in

16 1994. What were the -- how did that meeting come about?

17 A. I met with Richard Funk at that time, who was my

18 regional administrator, and I was informed through

19 conversations that other similar facilities were placed on

20 the large general service rate, which was always an effort

21 that Orchard House tried to achieve. And at that time I

22 was referred to Bradley Brown through those conversations.

23 Q. Were you referred to Mr. Gardner as well at that

24 time?

25 A. Not immediately thereafter, no.

1 Q. Was your first contact with either Mr. Gardner
2 or Mr. Brown in fact with Mr. Brown in 1994?
3 A. It was originally with Mr. Brown.
4 Q. Okay. Did you have a face-to-face meeting with
5 Mr. Brown?
6 A. Yes, at Orchard House.
7 Q. Did he explain to you his background with rates?
8 A. Yes.
9 Q. Okay. And his training and his expertise in
10 that area?
11 A. Yes.
12 Q. Okay. Did you at that time retain him to
13 provide any services to you?
14 A. Yes.
15 Q. Okay. Was this a written contract?
16 A. Yes.
17 Q. Do you have a copy of that contract with you?
18 A. No, I do not.
19 Q. Is a copy of that contract still in existence?
20 A. Yes.
21 Q. Do you know where it would be located?
22 A. At Orchard House.
23 Q. How was the fee basis for Mr. Brown's services
24 arranged?
25 A. It was based on a consultant fee, that if they

1 worked together, if we achieved a large general service
2 rate, 50 percent of our savings would then be extended to
3 Mr. Brown through Providence Consultants.

4 Q. Okay. Now, you indicated -- you called that a
5 consultant's rate. Would that be a contingent fee?

6 A. It was a contingent fee.

7 Q. Okay. And so in the event that -- well, strike
8 that.

9 How long was the -- were the savings to be paid
10 to Mr. Brown?

11 A. I'm sorry. Can you repeat the question?

12 Q. You said that under the fee contract, that
13 50 percent of the savings, if placed on the LGS rate, would
14 go to Mr. Brown. Is that correct?

15 A. That's correct.

16 Q. What period of time?

17 A. I believe it's for three years.

18 Q. Now then, if you would look very quickly at
19 page 5 of your testimony, lines 4 through 6, you indicate
20 that Mr. Brown conducted an investigation. Is that
21 correct?

22 A. That's correct.

23 Q. Did Mr. Brown communicate the findings of that
24 investigation to you in writing?

25 A. No. I believe that was not in writing but

1 through conversations.

2 Q. Has Mr. Brown ever communicated with you in
3 writing?

4 A. I'm sure he has. I don't have firsthand
5 knowledge of that information, but I'm sure it was done --
6 some was done in writing.

7 Q. Okay. Has he ever communicated the findings of
8 his investigation to you in writing?

9 A. I can't recall, no.

10 Q. If you would, ma'am, turn to Exhibit G, please,
11 of your testimony.

12 ALJ LUCKENBILL: Just for clarification, that
13 would be Schedule G?

14 MR. NIEHOFF: Schedule G.

15 ALJ LUCKENBILL: Of Haden direct.

16 MR. NIEHOFF: I apologize.

17 BY MR. NIEHOFF:

18 Q. Do you need a moment to review that letter, or
19 are you familiar with its contents?

20 A. No. I'm familiar. I wrote the letter.

21 Q. Okay. That was a letter that you in fact wrote?

22 A. That's correct.

23 Q. Okay. Were you given any kind of a script for
24 that letter from an attorney or from Mr. Brown?

25 A. I worked with Mr. Brown on the content of the

1 letter.

2 Q. Okay. Did he make suggestions to you initially
3 about what to put in the letter?

4 A. Not initially, but through some conversations,
5 he did have some input.

6 Q. Did you give him copies of the letter to review
7 before it was mailed?

8 A. He -- yes, we did.

9 Q. Now, we talked earlier about the fact that there
10 are two different ways to become a resident of Orchard
11 House. One is through the capital plan. Is that correct?

12 A. Correct.

13 Q. And one is through a lease plan. Is that
14 correct?

15 A. Correct.

16 Q. There are two different types of agreements that
17 are signed, then, by those particular residents. Is that
18 correct?

19 A. Correct.

20 MR. NIEHOFF: Okay. I do have a
21 cross-examination exhibit, and we have three copies here.

22 ALJ LUCKENBILL: Off the record.

23 (EXHIBIT NO. 3 WAS MARKED FOR IDENTIFICATION BY
24 THE REPORTER.)

25 ALJ LUCKENBILL: You may proceed, Mr. Niehoff.

1 BY MR. NIEHOFF:

2 Q. Okay. Ms. Haden, what's been marked as
3 Exhibit 3 is titled "Lease Security Deposit" and then has a
4 lease addendum and a lease document attached to it as
5 well. Is that correct?

6 A. That's correct.

7 Q. Okay. In the upper left hand corner of the
8 first page of Exhibit 3, there's an Orchard House logo. Is
9 that correct?

10 A. That's correct.

11 Q. Okay. This document was prepared by or for
12 Orchard House. Is that correct?

13 A. Correct.

14 Q. Okay. For use in connection with the lease
15 option that we've discussed?

16 A. Correct.

17 Q. Okay. If you would, turn to the first -- which
18 is the third page of Exhibit 3, the first page of the
19 lease, and look at the second paragraph, if you would.
20 Could you read that paragraph into the record for me,
21 please?

22 A. The second paragraph?

23 Q. Yes, ma'am. It begins Witness--

24 A. "Lessor does hereby lease and rent unto and
25 lessee and lessee does hereby take as tenant under lessor,

1 the premises known and numbered as 21 North Old Orchard
2 Avenue, unit number, blank, Webster Groves, Missouri 63119,
3 to be used by lessee as a single-family private dwelling
4 from, blank, until, blank, unless sooner terminated as set
5 forth herein."

6 Q. Okay. This clearly refers to the apartments
7 being used by the lessee as a single-family private
8 dwelling. Is that correct?

9 A. That's correct.

10 MR. NIEHOFF: Okay. Thank you. Can we have
11 just a moment please?

12 ALJ LUCKENBILL: Off the record.

13 (Off the record.)

14 ALJ LUCKENBILL: On the record.

15 MR. NIEHOFF: That's all the questions I have of
16 this witness.

17 ALJ LUCKENBILL: Redirect, Mr. Gardner?

18 MR. GARDNER: No redirect.

19 ALJ LUCKENBILL: I'm sorry. Mr. Chairman, I
20 believe that -- do you have questions for the witness,
21 Mr. Chairman?

22 QUESTIONS BY CHAIRMAN ZOBRIST:

23 Q. Was there any retainer fee paid to Mr. Brown as
24 part of his consulting arrangement with Orchard House?

25 A. I'm sorry?

1 Q. Sorry.

2 A. That's okay.

3 Q. Was any money up front or what is sometimes
4 called a retainer fee paid to Mr. Brown during the course
5 of his representation of Orchard House's interests?

6 A. No, there was not.

7 CHAIRMAN ZOBRIST: All right. Thank you.

8 ALJ LUCKENBILL: I have just a couple of
9 questions.

10 QUESTIONS BY ALJ LUCKENBILL:

11 Q. Good morning, Ms. Haden.

12 A. Good morning.

13 Q. On page 3 of your direct testimony, starting at
14 line 15, you've testified, "In October 1991 Carlton B. Fox
15 Company requested that accounts 51-0156-00 and 51-0143-06
16 be placed on the large general service rate from Union
17 Electric's multiple-occupancy residential rate." And then
18 you reference your Schedule A. Isn't that correct?

19 A. That's correct.

20 Q. Now, as I turn to Schedule A, Schedule A is a
21 letter from Mr. Neunreiter, president of Carlton B. Fox,
22 apparently, to an official with Union Electric Company,
23 Mr. Gudiswitz, apparently, with a copy to you. Is this
24 letter the -- and this letter is dated November 17, 1995.
25 Is this the primary basis upon which you base your

1 statement that Carlton B. Fox made the request that you
2 reference on page 3 of your testimony?

3 A. It's not the only area. I met with George
4 Neunreiter shortly after arriving at Orchard House, and he
5 informed me at that time that he was striving to convert
6 Orchard House to the large general service rate.

7 Q. And that was in the latter part of October
8 1991? Is that --

9 A. I arrived and later -- I met with Mr. Neunreiter
10 shortly thereafter. I don't know the exact date. But we
11 were going through -- when going through our payables and
12 some of the contracts that were in place at the time, I
13 didn't know -- I wasn't familiar with his organization, so
14 I contacted him and scheduled a meeting.

15 Q. And he told you that he had made this request in
16 October '91?

17 A. He informed me that he was currently working
18 with Union Electric to convert to the large general service
19 rate, but he did not reference -- during our conversation,
20 did not reference a letter. It was just a conversation
21 that took place.

22 ALJ LUCKENBILL: Thank you. That's all I have.
23 Redirect or anything based on our questions from the
24 bench?

25 MR. GARDNER: No redirect, your Honor. And I at

1 this point offer Exhibit 2 into evidence.

2 ALJ LUCKENBILL: Mr. Gardner has moved for the
3 admission of Exhibit No. 2 into the record. Are there any
4 objections to the admission of Exhibit No. 2?

5 (No response.)

6 ALJ LUCKENBILL: Hearing none, Exhibit No. 2
7 will be received into the record.

8 (EXHIBIT NO. 2 WAS RECEIVED IN EVIDENCE.)

9 ALJ LUCKENBILL: Thank you.

10 CHAIRMAN ZOBRIST: I'd like to ask just one
11 follow-up question.

12 QUESTIONS BY CHAIRMAN ZOBRIST:

13 Q. Does Mr. Neunreiter still work for Carlton B.
14 Fox Company?

15 A. Yes, he does.

16 CHAIRMAN ZOBRIST: Thank you.

17 ALJ LUCKENBILL: Thank you, Ms. Haden. You may
18 step down.

19 THE WITNESS: Thank you.

20 (Witness excused.)

21 _____

22 ALJ LUCKENBILL: Off the record.

23 (Off the record.)

24 ALJ LUCKENBILL: Please proceed, Mr. Niehoff.

25 MR. NIEHOFF: Okay. We would move for the

1 exhibit -- excuse me, the admission of Exhibit No. 3, which
2 was treated in the testimony of Ms. Haden.

3 ALJ LUCKENBILL: I'm sorry. I didn't catch that
4 last part. You will move --

5 MR. NIEHOFF: I would move for the admission of
6 Exhibit No. 3.

7 ALJ LUCKENBILL: Union Electric Company has
8 moved for the admission of Exhibit No. 3 into the record.
9 Are there any objections to the admission of that document
10 into the record?

11 MR. GARDNER: I don't object to the portion
12 Mr. Niehoff read. Frankly, I haven't had an opportunity to
13 review the whole document, because we just received it.
14 And I guess at this point, I would like to reserve
15 objections on grounds of relevancy to portions of the
16 document. At least for the record I would like to reserve
17 that objection.

18 MR. NIEHOFF: If I may just in clarification,
19 Judge, this was a document produced in response to
20 discovery requests. It was a document produced to us by
21 Orchard House, so they've clearly had the time.

22 ALJ LUCKENBILL: The Commission will receive
23 Exhibit No. 3. The objection will go to the weight
24 afforded the evidence rather than to its admissibility.

25 (EXHIBIT NO. 3 WAS RECEIVED IN EVIDENCE.)

1 ALJ LUCKENBILL: Off the record.
2 (Off the record.)
3 (EXHIBIT NO. 4 WAS MARKED FOR IDENTIFICATION BY
4 THE REPORTER.)

5 ALJ LUCKENBILL: While we were off the record,
6 we have premarked Exhibit No. 4, which is the direct
7 testimony of Richard Funk.

8 Mr. Gardner, if you would call Mr. Funk to the
9 stand.

10 MR. GARDNER: I would call Mr. Richard Funk.
11 (Witness sworn.)

12 _____
13 ALJ LUCKENBILL: Please be seated. Please
14 proceed, Mr. Gardner.

15 RICHARD LAWRENCE FUNK testified as follows:
16 DIRECT EXAMINATION BY MR. GARDNER:

17 Q. Mr. Funk, would you state your full name for the
18 record?

19 A. Richard Lawrence Funk.

20 Q. Could you state your business address?

21 A. It's 12503 Village Circle Drive, Sunset Hills,
22 Missouri.

23 Q. What is your current position?

24 A. I'm regional administrator for Life Care
25 Services Corporation.

1 Q. Are you the same Richard Funk who's filed direct
2 testimony denominated as Exhibit 4 in this proceeding?

3 A. I am.

4 Q. Do you have any corrections or modifications to
5 make to that testimony?

6 A. No.

7 Q. Having made no corrections or modifications, is
8 this testimony true and correct to the best of your
9 knowledge and belief?

10 A. Yes.

11 Q. And you are sponsoring this testimony in this
12 proceeding. Correct?

13 A. Yes, I am.

14 MR. GARDNER: I tender the witness.

15 ALJ LUCKENBILL: Thank you, Mr. Gardner.

16 Cross-examination, Mr. Keevil?

17 MR. KEEVIL: Very briefly.

18 CROSS-EXAMINATION BY MR. KEEVIL:

19 Q. Mr. Funk, on I guess page 1 of your testimony,
20 you say that, as regional administrator for LCS, you have
21 oversight responsibilities for Friendship Village South
22 County, Friendship Village West County, John Knox Village
23 in Higginsville, and Orchard House. When you say oversight
24 responsibilities, what does that encompass?

25 A. All three of those -- or all of those facilities

1 with the exception of Friendship Village of South County
2 has an onsite administrator. I serve that role at
3 Friendship Village in South County. And so the
4 administrator with respect to the facilities report to me,
5 and I monitor the operations of those facilities and direct
6 those administrators.

7 Q. How long have you held your current position?

8 A. This current position since 1994.

9 Q. Were you employed by LCS prior to 1994?

10 A. I've been employed with Life Care Services since
11 1988 in various capacities.

12 Q. You mentioned the two Friendship Village
13 facilities. In the -- and I forget the case number. I
14 apologize. You testified on behalf of Friendship Village
15 West County and Friendship Village of South County in their
16 complaints brought against Union Electric Company. Is that
17 correct?

18 A. Yes.

19 Q. In your testimony, I believe it's page -- it's
20 the last page, page 6, at the top of the page, you refer to
21 Schedule C-1 attached to your testimony as a copy of
22 Orchard House literature filed with this Commission in
23 case -- you say case No. 89-7. I believe that is case
24 EO-89-7.

25 Is that intended to refer to the variance case,

1 sir, that case reference you have at the top of page 6?

2 Page 6, line 3, I believe.

3 A. Yes. I believe it is.

4 Q. Okay. So that was the case where Union Electric
5 applied for a variance from the Commission's master -- or
6 individual metering rule. Correct?

7 A. Yes.

8 Q. Okay. You say that this Orchard House
9 literature, which you have attached to your testimony, was
10 filed in that case. Who filed it in that case, sir, if you
11 know?

12 A. I don't know offhand.

13 Q. Then on what do you base the statement that it
14 was filed in that case?

15 A. Conversations with the consultants and with
16 Orchard House in this case, Mr. Brown, Mr. Gardner.

17 Q. Mr. Brown and Mr. Gardner told you that
18 Schedule C-1, attached to your testimony, was filed in that
19 other case?

20 A. That's my understanding. That's my
21 recollection.

22 Q. So you don't know if UE or the Staff of the
23 Commission or Orchard House or anyone else for that matter
24 filed that schedule in that case?

25 A. Yeah. I don't know.

1 Q. Turning to the schedule itself, it doesn't
2 appear -- where did this copy come from, sir?

3 A. C-1?

4 Q. Yes.

5 A. It came from Orchard House.

6 Q. So have you checked the files of the Commission
7 in that case which you reference to ascertain whether this
8 document was filed in that case?

9 A. No, I haven't.

10 MR. GARDNER: Let me interject something. The
11 Commission can take notice of its own records, and if
12 there's some question as to whether this is in the record,
13 then I would move that we take notice of the case file in
14 EO-89-7 so that we can verify whether or not this in fact
15 was filed. That way we can resolve that issue one way or
16 another, if that's what you're looking for.

17 MR. KEEVIL: Well, at first I was trying to
18 ascertain if this witness was familiar with who filed that
19 document allegedly in that case. Now it appears that he
20 doesn't even know, based on his own knowledge, whether the
21 document was filed or not in that case. Frankly, this
22 is --

23 MR. GARDNER: Well, you may recall, if you read
24 the testimony, that the application was filed by Union
25 Electric. Now, again, you know, I think the easy thing to

1 do here is to find out -- is to take notice of the record
2 and just examine the record, if you have some question as
3 to whether this is a document filed in that case. I can
4 represent to you that it was from my own personal
5 knowledge, but --

6 ALJ LUCKENBILL: Mr. Gardner, why is it relevant
7 whether this document was filed in EO-89-7?

8 MR. GARDNER: Because it sets forth the services
9 that were provided at the inception of the project, since
10 that application for variance was filed prior to initiating
11 operations. And one of the points we wanted to make was
12 that the services provided in conjunction with this
13 facility that make it different than a normal apartment
14 complex have been provided from the inception of the
15 project. In other words, it's been the same sort of
16 facility all along.

17 CHAIRMAN ZOBRIST: Well, let me just ask,
18 regardless of whether it was filed in the case Mr. Keevil
19 is talking about, that doesn't change your contention that
20 these services were offered from the beginning, does it?

21 MR. GARDNER: No. But I wanted to make sure
22 that we had some documentary proof that they were.

23 CHAIRMAN ZOBRIST: Well, I'm just trying to
24 avoid having to discuss whether or not it was filed in a
25 case that is of historical value to this Commission but

1 nothing more. If this witness can testify of his own
2 knowledge that Schedule C reflects the services that have
3 all occurred at this facility, we don't need to have a
4 battle over whether it was filed in another case, do we?

5 MR. GARDNER: No. I think he can testify to
6 that, but I think he was documenting his testimony on that
7 point.

8 ALJ LUCKENBILL: If it's -- off the record.

9 (Discussion off the record.)

10 ALJ LUCKENBILL: On the record. Please
11 proceed.

12 MR. KEEVIL: Let me check something just
13 briefly, Mr. Luckenbill, if I could.

14 BY MR. KEEVIL:

15 Q. Mr. Funk, are you aware of any other complaints
16 which the facilities you have oversight responsibilities
17 for are currently considering against Union Electric?

18 A. No. There are none.

19 Q. There are none?

20 A. (Witness shakes head.)

21 MR. KEEVIL: No further questions.

22 ALJ LUCKENBILL: Thank you, Mr. Keevil.

23 Mr. Niehoff?

24 MR. NIEHOFF: Thank you very much.

25 CROSS-EXAMINATION BY MR. NIEHOFF:

1 Q. Mr. Funk, I will make the same statement that I
2 did to Ms. Haden. If I -- for some reason if you can't
3 understand me or can't hear me, please raise your hand and
4 I'll try and accommodate you. I'm fighting a bit of a
5 cold.

6 Mr. Funk, in addition to your current duties,
7 you're currently pursuing a degree in law, are you not?

8 A. Yes.

9 Q. And that's at St. Louis University School of
10 Law?

11 A. Yes.

12 Q. What year are you in?

13 A. Well, I started my third year of the evening
14 program.

15 Q. It's a four-year program there?

16 A. Four to five.

17 Q. Okay. Mr. Funk, did you write all the testimony
18 that you've submitted in this case?

19 A. Yes.

20 Q. Okay. You authored each and every word that's
21 contained in that?

22 A. Yes, with consultation with representation just
23 to make sure that I'm wording it in a proper way.

24 Q. At its inception, Orchard House was owned by a
25 partnership of Taylor, Morley, Simon, the Deaconess

1 organization -- I've forgotten the exact name -- and a
2 corporation -- or by a man named David Sanders. Is that
3 correct?

4 A. Taylor, Morley, Simon was a 45 percent owner.
5 Deaconess Hospital was a 45 percent owner, and SanDave,
6 which is a corporation which David Sanders headed, was a
7 10 percent owner.

8 Q. Okay. Mr. David Sanders headed that
9 corporation, SanDave, and that was an owner of Orchard
10 House at the start of the project. Correct?

11 A. Yes.

12 Q. It was a partnership, was it not?

13 A. Yes.

14 Q. Okay. Were you aware that the person retained
15 to design this electric system, Mr. Jerry Kovac was an
16 employee of a company owned by David Sanders?

17 A. Yes.

18 Q. You were aware of that, HPI Engineering
19 Consulting?

20 A. I became aware of that during the course of this
21 situation before us.

22 Q. Based on your investigation, that's an accurate
23 statement. Is that correct?

24 A. Yes. Uh-huh.

25 Q. With regard to the physical layout of Orchard

1 House, particularly referring to Building A, the
2 residential portion, and Building B, these consist of
3 individual residential-type apartments, do they not?

4 A. Yes.

5 Q. Okay. People have their own key to these
6 apartments, do they not?

7 A. Yes.

8 Q. Okay. They each contain facilities for
9 cooking. Correct?

10 A. They contain those facilities. However, most of
11 those facilities are not utilized.

12 Q. Okay. They contain those facilities, do they
13 not, sir?

14 A. Yes.

15 Q. Okay. They have permanent facilities for
16 sanitation, including showering and restrooms. Is that
17 correct?

18 A. Yes.

19 Q. We've heard from Ms. Haden, sir, that there are
20 two ways to become a resident of Orchard House. One is
21 through the capital return plan or through the lease
22 option. Is that correct?

23 A. Yes.

24 Q. Okay. And the amount of the monthly fees that's
25 charged the residents of Orchard House depends upon whether

1 they are in under the capital return plan or under the
2 lease program. Is that correct?

3 A. The amount charged on a monthly basis varies
4 depending on which one of those plans they're on.

5 Q. Okay. Now, sir, if you would look at your
6 testimony, I assume you have a copy of that before you, do
7 you not?

8 A. Yes.

9 Q. Okay. Page 4. And if you would, I'm going to
10 refer you to lines 20 through 24. Your testimony states
11 there, sir, that residents pay a monthly fee which covers
12 the cost of services provided by Orchard House, including
13 but not limited to utilities, excluding telephone. Is that
14 correct?

15 A. Yes.

16 Q. That's what your testimony states?

17 A. Uh-huh.

18 Q. The fee then includes whatever charge there may
19 be for electric usage by those apartments. Is that
20 correct?

21 A. Yes.

22 Q. Okay. Your testimony, direct testimony -- you
23 did not submit anything beyond the direct. Is that
24 correct?

25 A. That's correct.

1 Q. Okay. It's six pages long. I believe the
2 purpose that you stated was that you were going to provide
3 a description, including a description of some of the
4 services provided the residents. Is that correct?

5 A. Yes.

6 Q. Okay. And, in fact, you listed some services on
7 page 5 of your testimony, and they go one through
8 fourteen. Is that correct?

9 A. Yes.

10 Q. Okay. Now, would it be accurate, Mr. Funk, that
11 these same services could be contracted for by any private
12 individual in a -- for example, in their own home?

13 A. It may be a little difficult to find someone
14 who's willing to contract for you to do a 24-hour emergency
15 call service.

16 Q. Well, we've all seen security programs that have
17 a panic button advertised on TV, have we not?

18 A. I don't know if we all have or not.

19 Q. Okay. Are you aware of any, sir?

20 A. Yes.

21 Q. Okay. You've seen that advertised. Correct?

22 A. I've seen that advertised. However, they're not
23 onsite to provide emergency service. They have to -- most
24 of those ring to a hospital or some other central location
25 where they dispatch an ambulance.

1 Q. You don't have a hospital on the premises at
2 Orchard House either, do you?

3 A. No, we do not.

4 Q. If someone required emergency health care, they
5 would also have to be transported by ambulance. Is that
6 correct?

7 A. If they needed to go to a hospital.

8 Q. Okay. You've looked -- if we could look at your
9 list for a minute, sir, on page 5, you've indicated that
10 the following services, which -- let me just clarify for
11 myself. Your testimony indicates at line 21 that the
12 monthly fee covers the cost of services. Is that correct?

13 A. Yes.

14 Q. Page 4, line 21. These are the services that
15 the monthly fee covers. Is that correct?

16 A. These services are included in that monthly fee,
17 yes.

18 Q. Okay. No. 1, one meal per day, people can
19 obviously contract or obtain that on their own if they were
20 living somewhere other than Orchard House, could they not?

21 A. If they could find someone that would be willing
22 to provide that.

23 Q. Okay. They're -- well, obviously, No. 2, paid
24 water, sewer, electric heating and cooling, these things
25 could be contracted for, could be handled by an accountant

1 for an individual outside of Orchard House, could they not?

2 A. I'm not aware of any accountant that does that.

3 Q. You're not aware of any bill paying services,
4 sir?

5 A. I'm not.

6 Q. Okay. Onsite home health registered nurses,
7 No. 3, there is a trend developing in health care for home
8 health services. Is that correct?

9 A. A trend developing?

10 Q. Yes --

11 A. I'm not sure I understand that question.

12 Q. -- for more utilization of home health care.

13 It's a service that's available through all the major
14 hospitals in the St. Louis area. Is that right?

15 A. I'm not aware of one that will allow you to
16 contract for under four hours of service at a time; whereas
17 at Orchard House they can come for any amount at any time
18 it's needed.

19 Q. Are you aware of Deaconess Hospital having a
20 home health service available through it?

21 A. Yes. Yes.

22 Q. Do you know anything about that?

23 A. Yes.

24 Q. And so that service could, in fact, be utilized
25 by someone in the privacy of their own home, could it not?

1 A. Yes, per four-hour increment or more.

2 Q. You refer to 30 days nursing care with an
3 endowment contract in No. 4. Is that an item that's only
4 available with the capital return plan?

5 A. Yes.

6 Q. That's not available to lessees. Correct?

7 A. Correct.

8 Q. Mr. Funk, in No. 6 you've listed as monthly
9 health screening. That's a service someone could obtain
10 through their own personal physician, could they not, or
11 through an HMO?

12 A. For an additional charge, I'm sure they could.

13 Q. Okay. Well, you make a charge for it, don't
14 you?

15 A. Well, it's -- the idea is that it's a package of
16 services that we're grouping together.

17 Q. Nonetheless, there is a charge. Is that
18 correct?

19 A. Yes.

20 Q. With regard to transportation, people can make
21 arrangements through cabs, buses, friends for their own
22 transportation, can they not?

23 A. It would be possible, but not on a -- probably
24 not on a regularly scheduled basis.

25 Q. You've indicated some of the others without

1 going through here and hitting every single one, house
2 keeping on a bi-weekly basis, clearly that's something
3 someone could contract for in their own home, is it not?

4 A. Yes.

5 Q. Assist rails in the bathroom. That's clearly
6 something someone could install. Is that correct?

7 A. Yes.

8 Q. Okay. Lever handles on doors wouldn't be
9 entirely difficult to install either?

10 A. It might be if you're 84 years old.

11 Q. You could have someone do it for you, couldn't
12 you?

13 A. Yes.

14 Q. You indicated in your preamble or your -- on the
15 first page of your testimony, sir, that you were the
16 administrator or had administrative oversight
17 responsibility for John Knox Village. Correct?

18 A. Yes.

19 Q. John Knox Village is a retirement community
20 similar to Orchard House or Friendship Village?

21 A. Yes.

22 Q. Okay. And this is not located in Union
23 Electric's territory, is it?

24 A. I don't believe so.

25 Q. Do you know what the -- whether the individual

1 residential units at John Knox were billed on residential
2 rate?

3 A. I don't know.

4 Q. In your position as administrator of Orchard
5 House, sir, do you -- are you able to tell us approximately
6 what the entire operating budget is on an annual basis for
7 Orchard House?

8 A. I believe it's around \$3 million.

9 Q. Okay. How many employees does Orchard House
10 have?

11 A. Somewhere around sixty.

12 Q. Mr. Funk, were you involved in responding to
13 data requests submitted by Union Electric to Orchard House?

14 A. Yes.

15 Q. Okay. Are you aware that -- strike that.
16 Orchard House does not have a nurse on duty
17 24 hours a day. Is that correct?

18 A. That's correct.

19 Q. Okay. Would it also be true that Orchard House
20 has been classified as residential since 1994 for purposes
21 of income tax -- excuse me, for tax purposes?

22 A. Real estate tax, yes.

23 Q. Okay. Does Orchard House currently have a
24 waiting list?

25 A. Yes.

1 Q. Orchard House has full occupancy at the present
2 time?

3 A. Close to it.

4 Q. Okay. That's been its history since it opened
5 or shortly after it opened. Is that correct?

6 A. No.

7 MR. NIEHOFF: Okay. I don't have any other
8 questions.

9 ALJ LUCKENBILL: I don't have any questions.
10 Redirect?

11 MR. GARDNER: Yeah. Just a couple.

12 REDIRECT EXAMINATION BY MR. GARDNER:

13 Q. Mr. Funk, I think you indicated that Orchard
14 House employs about sixty employees. Is that right?

15 A. Yes.

16 Q. Could you describe some of the things those
17 employees do?

18 A. Well, we have --

19 MR. NIEHOFF: I'm going to object as being
20 beyond the scope of the cross-examination, your Honor.

21 MR. GARDNER: No. UE elicited that testimony,
22 so I think I'm entitled to go into that.

23 MR. NIEHOFF: Well, about the number.

24 ALJ LUCKENBILL: I'll allow it.

25 THE WITNESS: We have dietary employees that

1 operate that department. We have maintenance workers. We
2 have housekeepers. We have individuals who assist
3 residents in their health needs and their apartments that
4 are beyond the scope of the home health nurses. They help
5 with getting dressed. If they need dressing changes or
6 getting their contacts in or getting their bed made, things
7 that they're unable to do, employees do that. And then we
8 have the general clerical staff, receptionist. We have
9 attendants who monitor the 24-hour call system onsite.

10 BY MR. GARDNER:

11 Q. Do you know of any apartment complexes that have
12 sixty employees?

13 MR. NIEHOFF: I would object to it. Beyond the
14 scope of the direct.

15 ALJ LUCKENBILL: Sustained.

16 MR. NIEHOFF: This is cross-examination.

17 ALJ LUCKENBILL: Sustained.

18 MR. GARDNER: Nothing further.

19 ALJ LUCKENBILL: Thank you.

20 Mr. Funk, before you step down, sir, do you want
21 to move for the admission of Exhibit No. 4?

22 MR. GARDNER: Yeah, I do. I move for admission
23 of Exhibit 4.

24 ALJ LUCKENBILL: Thank you, sir. Are there any
25 objections to the admission of Exhibit No. 4?

1 (No response.)

2 ALJ LUCKENBILL: Hearing none, Exhibit No. 4
3 will be received.

4 (EXHIBIT NO. 4 WAS RECEIVED IN EVIDENCE.)

5 ALJ LUCKENBILL: You may step down. Thank you,
6 Mr. Funk.

7 (Witness excused.)

8 _____

9 ALJ LUCKENBILL: Off the record.

10 (The lunch recess was taken.)

11 (EXHIBIT NOS. 5 THROUGH 9 WERE MARKED FOR
12 IDENTIFICATION BY THE REPORTER.)

13 (Witness sworn.)

14 _____

15 ALJ LUCKENBILL: While we were off the record we
16 premarked Exhibit No. 5, which is the direct testimony of
17 Bradley Brown. Exhibit No. 6 has been premarked, which is
18 the surrebuttal testimony of Bradley Brown. Exhibit No. 7
19 is the deposition of Richard Kovach. Exhibit No. 8 is the
20 deposition of James Ketter. Exhibit No. 9 is the
21 deposition of Jerome Kovac, Junior.

22 Please proceed with direct, Mr. Gardner.

23 BRADLEY BROWN testified as follows:

24 DIRECT EXAMINATION BY MR. GARDNER:

25 Q. Mr. Brown, would you state your full name for

1 the record?

2 A. Bradley Brown.

3 Q. And please state your address, sir.

4 A. 1045 Stone Hill Highway, Hermann, Missouri.

5 Q. Are you the same Bradley Brown who has filed

6 direct testimony and schedules and surrebuttal testimony

7 and schedules marked as Exhibits 5, 6, 7, 8, and 9 in this

8 case?

9 A. Yes.

10 Q. Do you have any corrections to make to any of

11 your testimony at this time?

12 A. A few.

13 Q. Could you identify those, please?

14 A. Yes.

15 Q. And please identify them by line -- by page and

16 line in your testimony.

17 A. All right. In my direct testimony, page 8,

18 line 6, should read "Building B would contain 83

19 apartments" instead of "apartment." There should be an S

20 on that word.

21 In my surrebuttal, page 11, line 7, should read,

22 "Yes. These include Garden Villas," and then I want to

23 insert "Council Apartments and Delcrest II."

24 ALJ LUCKENBILL: How do you spell Council?

25 THE WITNESS: C-O-U-N-C-I-L.

1 ALJ LUCKENBILL: Thank you.

2 THE WITNESS: Page 8 --

3 CHAIRMAN ZOBRIST: Can I just ask, do you want
4 to delete something?

5 THE WITNESS: No. I just want to insert
6 "Council Apartments." That should read "Garden Villas,
7 Council Apartments and Delcrest II," and then it goes on
8 from there.

9 Page 8, line 10. In the parentheses there, it
10 should be "42-44" instead of "43."

11 And then page 31, line 26, should read "rate
12 consultant in October 1991," should be inserted, and then
13 it would read "by letter dated March 31st, 1992."

14 ALJ LUCKENBILL: I'm sorry. I'm not clear on
15 that.

16 THE WITNESS: Okay. That last line 26, should
17 read "rate consultant in October 1991 by letter dated
18 March 31st, 1992."

19 BY MR. GARDNER:

20 Q. Aren't you leaving out a word "and" 1991?

21 CHAIRMAN ZOBRIST: No. It makes sense. At
22 least it makes sense to me.

23 MR. NIEHOFF: It doesn't to me, but --

24 CHAIRMAN ZOBRIST: He made the request for
25 placement of the buildings on the rate in October 1991. In

1 other words, he wanted them placed on the rate in October

2 1991 --

3 THE WITNESS: Correct.

4 CHAIRMAN ZOBRIST: -- on letter dated March 31.

5 THE WITNESS: Right. The March 31 letter

6 related back to the October '91 date.

7 CHAIRMAN ZOBRIST: I mean, whether it makes

8 sense substantively, I guess, is another issue. I

9 understand what I think Mr. Brown has said.

10 MR. NIEHOFF: Okay. That's fine with me.

11 ALJ LUCKENBILL: You're saying that the request

12 was made in October of '91. Okay. We'll talk about this

13 later. Thank you.

14 CHAIRMAN ZOBRIST: It's for the rate to become

15 effective in October 1991.

16 THE WITNESS: Well, the request was made -- in

17 October 1991 the request was made, and that request was

18 referred to in the March 31st, '92, letter. I'm actually

19 trying to clarify things with this addition, but I'm not

20 sure it's getting accomplished.

21 MR. GARDNER: I think it makes more sense with

22 the word "and" after "1991."

23 MR. NIEHOFF: It's his testimony.

24 MR. GARDNER: I know.

25 THE WITNESS: All right. Let me read the whole

1 sentence.

2 Yes. "And" should be in there, because actually
3 I -- that is a document than I'm thinking of. "And" is
4 correct.

5 ALJ LUCKENBILL: So it would read, "large
6 general service rate through its rate consultant in October
7 1991" --

8 THE WITNESS: "And by letter." Short of looking
9 at a document, I can confirm that, but I -- that is
10 correct.

11 ALJ LUCKENBILL: Very well.

12 THE WITNESS: Glad Paul brought that to my -- on
13 page 24, line 18, that first word should just be
14 "involve." The S should be deleted.

15 And on line 20, same page, "portion" should be
16 "portions." Should be an S on the end of portion. And
17 that ends all the changes I need to make.

18 BY MR. GARDNER:

19 Q. Mr. Brown, having made those changes and
20 additions to your testimony, is the testimony, the direct
21 and the surrebuttal testimony, filed in this case by you
22 true and correct to the best of your knowledge and belief?

23 A. Yes, it is.

24 MR. GARDNER: I would tender the witness for
25 examination.

1 ALJ LUCKENBILL: Thank you, Mr. Gardner.

2 Mr. Keevil, cross-examination?

3 MR. KEEVIL: Thank you, Mr. Luckenbill.

4 CROSS-EXAMINATION BY MR. KEEVIL:

5 Q. Mr. Brown, I have -- something tells me

6 Mr. Niehoff is going to ask most of the questions I would

7 ask and then some, so I'm going to try to keep this as

8 short as possible.

9 On page 2 of your direct testimony, you refer to

10 two cases before this Commission, the Friendship Village

11 South County and West County versus Union Electric and the

12 Tesson Heights versus Union Electric cases as being the

13 cases in which you have testified as an expert witness.

14 Are there any other cases before any utility regulatory

15 bodies in which you have testified?

16 A. No.

17 Q. You say you are the owner and the principle of

18 Providence Consultants. How many other consultants are

19 employed by Providence Consultants?

20 A. Just myself.

21 MR. KEEVIL: I think that's all I'm going to ask

22 at the present time, Mr. Luckenbill.

23 ALJ LUCKENBILL: Thank you, Mr. Keevil.

24 Mr. Niehoff?

25 MR. NIEHOFF: Thank you very much, Judge. I

1 hope no one's disappointed if this doesn't take all
2 afternoon. As I said at the start, we have a lot of things
3 we can address in the brief and believe that's the best way
4 to go sometimes.

5 CROSS-EXAMINATION BY MR. NIEHOFF:

6 Q. Mr. Brown, you've sat here this morning, and
7 you've given us a number of corrections to the brief --
8 excuse me, to your testimony that you've made. Is that
9 correct?

10 A. Yes.

11 Q. And indicated there wouldn't be any other
12 changes that you would make to that testimony?

13 A. Not that I know of.

14 Q. Okay. Do you have before you, sir, your
15 surrebuttal testimony?

16 A. Yes, I do.

17 Q. Would you turn to page 3 of that document? Did
18 you write this testimony, Mr. Brown?

19 A. Yes, I did.

20 Q. Okay. Mr. Brown, if you would look at, please,
21 lines 19, 20, 21, and 22 of that testimony. There is a
22 statement there that "HPI personnel were not provided
23 information by Union Electric which would enable Orchard
24 House to compare the rate differential between the 007 rate
25 and the large general service rate." Correct?

1 A. Yes, sir.

2 Q. There are then page citations to Schedule C,
3 which is the deposition of Jerry Kovac. Is that correct?

4 A. That's correct.

5 Q. Okay. Would you turn, sir, to page 13 -- you
6 cited page 13, 15, 20, and 21 as your source of information
7 for that statement that Union Electric did not provide
8 information to Orchard House. Is that correct? That's in
9 the testimony?

10 A. That's correct.

11 Q. Okay. Turn to that page, please, if you would,
12 that first one, page 13 of Mr. Kovac's testimony, Mr. Jerry
13 Kovac.

14 ALJ LUCKENBILL: You mean his deposition?

15 MR. NIEHOFF: His deposition.

16 ALJ LUCKENBILL: Thank you. Page 13 of his
17 deposition.

18 MR. NIEHOFF: Yeah. And I apologize. I believe
19 for the record that's Exhibit 9.

20 ALJ LUCKENBILL: That is Exhibit No. 9.

21 BY MR. NIEHOFF:

22 Q. Okay. Tell us where on that page, Mr. Brown,
23 that it states that Union Electric did not give Orchard
24 House information sufficient enough to make the rate
25 comparison.

1 A. Well, actually, that particular 13 refers to
2 line 17 and 18 in my surrebuttal testimony where I'm
3 discussing the fact that HPI did not make rate
4 classification decisions for Orchard House or conduct the
5 comparisons.

6 Q. Okay.

7 A. And that refers to -- it actually starts on
8 page 12, and then it goes into page 13. He actually
9 answers on page 13 at the top.

10 Q. Okay. Beginning on page 12, line 23 of
11 Exhibit 9, the question was, "Do you know enough about
12 those rate classifications to determine whether one
13 classification would be more favorable to a facility than
14 would another classification? And I'm talking about
15 operating costs."

16 "ANSWER: We surely can determine that if --
17 space if we need to do that."

18 That testimony's contained in Mr. Jerry Kovac's
19 deposition. Is that correct?

20 A. That's right.

21 Q. That is not a statement, is it, sir, that he did
22 not have enough information necessary to make a comparison
23 of the rate differential between the 007 rate and the large
24 general service, is it?

25 A. That's true. But goes on down to lines 5

1 through 7, he states, "But that's not something that's done
2 in every instance."

3 Q. That's not a statement that he didn't have
4 information sufficient to make that comparison, though, is
5 it Mr. Brown?

6 A. Well, I think you're confusing my testimony
7 here. At the top -- that sentence has nothing to do with
8 whether Mr. -- whether Union Electric provided information
9 to Jerome Kovac. Lines 16 and 17 in my testimony just say,
10 "The need for this protection for Orchard House is
11 reinforced by the fact that HPI Engineering personnel, who
12 Mr. Kovac states he worked with, did not make rate
13 classification decisions for Orchard House or conduct
14 comparisons between secondary rate classifications."

15 Now, there's nothing in that sentence to imply
16 that he wasn't given any documentation from Union Electric.

17 Q. Well, if you recall my question, sir, at the
18 start of cross-examination, I referred you to page 3,
19 lines 20 through 22. Those are words that you put in this
20 testimony, is it not? Are they not?

21 A. Well, yeah. All the words in this testimony I
22 put in.

23 Q. All right. What I'm asking you and what you've
24 demonstrated, I believe, is that on page 13, there's
25 nothing to support the statement that Union Electric did

1 not provide information. Is that correct?

2 A. That's correct.

3 Q. Okay.

4 A. That page 13 was in reference to the earlier
5 sentence above that.

6 Q. Well, let's look on. The next citation you
7 have, sir, is to page 15 of Mr. Kovac's -- Mr. Jerry
8 Kovac's deposition. You have that before you. Would you
9 refer me to, sir, language on that page which indicates
10 that "Union Electric did not give Orchard House information
11 sufficient to make a rate comparison."

12 A. I believe this page is also in my testimony to
13 support the previous sentence.

14 Q. Okay. So there's nothing on page 15 which
15 supports the statement at page 3, lines 20 through 23. Is
16 that correct?

17 A. That's correct.

18 Q. The final reference, Mr. Brown, that you've made
19 is to pages 20 and 21 of Mr. Jerry Kovac's deposition. If
20 you would look at those pages for me, sir. Tell me where
21 in there it states that Union Electric didn't give Orchard
22 House sufficient information to conduct a rate comparison
23 between residential and large general service rates.

24 A. Once again, I believe pages 20 and 21 are
25 supporting the previous statement to the last statement.

1 Q. So none of the pages, sir, that you referred to
2 in your testimony support the statement that you've made
3 that Union Electric did not provide sufficient information
4 to Orchard House to allow it to make a rate comparison. Is
5 that correct?

6 A. Not in these pages of Jerome Kovac's deposition.

7 Q. Would you like to further correct your testimony
8 at this point to reflect that fact? Would you like to
9 strike that sentence?

10 A. No.

11 Q. Even though it has no support in the record or
12 none that you have provided today?

13 MR. GARDNER: I'll object to that. I'll be glad
14 to provide the support from Mr. Richard Kovach's
15 deposition. I have the page which corresponds with the
16 page he cited.

17 MR. NIEHOFF: Well, the --

18 MR. GARDNER: And if you really want --

19 MR. NIEHOFF: Mr. Brown has drafted his own
20 testimony. We have it there. This is my
21 cross-examination.

22 ALJ LUCKENBILL: That's correct.

23 MR. NIEHOFF: I object to the interposition of
24 comments by Mr. Gardner in this regard.

25 ALJ LUCKENBILL: What we have is a request of

1 Mr. Brown whether he wants to strike that sentence, and I
2 believe his sentence is "No, I do not."

3 MR. NIEHOFF: Thank you.

4 BY MR. NIEHOFF:

5 Q. If you would look at page 20 of Mr. Jerry
6 Kovac's deposition, Mr. Brown, line 11. Do you have that
7 before you?

8 ALJ LUCKENBILL: Line 11 on page?

9 MR. NIEHOFF: Twenty of Exhibit 9, Jerry Kovac's
10 deposition.

11 ALJ LUCKENBILL: Thank you.

12 THE WITNESS: Yes. I've got it.

13 BY MR. NIEHOFF:

14 Q. The question is asked, is it not, "In the scope
15 and course of your work, have you ever calculated the
16 electric utility operating cost consequences of choosing a
17 particular rate classification?"

18 The answer was "yes."

19 That testimony is included. Correct?

20 A. Yes, sir.

21 Q. Looking down at lines --

22 MR. GARDNER: Okay. At this point I'm going to
23 insist on my right under the rules of deposition that the
24 whole passage be read, and here's what the whole passage
25 says --

1 MR. NIEHOFF: You know, let me interpose an
2 objection.

3 MR. GARDNER: Fifty-seven --

4 MR. NIEHOFF: Excuse me, your Honor. If he has
5 an objection and feels something else should be included
6 from the deposition, he will have the opportunity on
7 redirect to do so.

8 MR. GARDNER: No. No.

9 MR. NIEHOFF: The deposition has been
10 submitted. This is my cross-examination.

11 MR. GARDNER: Under the rules --

12 ALJ LUCKENBILL: Pardon me.

13 MR. NIEHOFF: This is my cross-examination.

14 ALJ LUCKENBILL: Counsel, do you have an
15 objection?

16 MR. GARDNER: I do have an objection. It was an
17 incomplete reading of the deposition. And under the rules,
18 I'm included to require that the remainder of the
19 deposition be read that's pertinent to the portion he read
20 and not on redirect but immediately. That is the rule.

21 MR. NIEHOFF: That is not the rule of
22 completeness, and especially during cross-examination of an
23 exhibit that this witness put in.

24 MR. GARDNER: It's a short portion, but I think
25 it needs to be read; and I think I'm entitled to insist on

1 it right now under the rules.

2 ALJ LUCKENBILL: Mr. Niehoff, did you read the
3 entire question and the entire answer?

4 MR. NIEHOFF: The entire question beginning at
5 line 11 through the answer at line 15, yes, I did. You
6 know, I --

7 ALJ LUCKENBILL: As long as the entire question
8 and answer is read, that's fine. If you want to pursue it
9 on redirect, that's fine.

10 MR. NIEHOFF: Thank you very much, your Honor.

11 BY MR. NIEHOFF:

12 Q. Proceeding to the bottom of page 20, Mr. Brown,
13 beginning at line 23, there's a question asked, "When
14 you've made those calculations in the past, what sort of
15 information do you rely on?"

16 The answer at line 25 is, "UE's published
17 rates."

18 Do you see that, sir?

19 A. Yes, sir.

20 Q. I believe you've indicated, Mr. Brown, that you
21 are employed by Providence Consultants. Is that correct?

22 A. Well, it's a business I own.

23 Q. Okay. You're the sole employee of that
24 business?

25 A. That's correct.

1 Q. The professional address is 1045 Stone Hill

2 Highway in Hermann, Missouri. Is that correct, sir?

3 A. That's correct.

4 Q. That is both a business and a residence, is it

5 not?

6 A. Yes, it is.

7 Q. Okay. So your educational background, sir, is

8 in electrical engineering. Is that correct?

9 A. Part -- most of it.

10 Q. You have a bachelor of science in electrical

11 engineering?

12 A. Yes.

13 Q. What year did you graduate?

14 A. 1980.

15 Q. Okay. You've had some post graduate work at

16 Avila College in Kansas City. Is that correct?

17 A. Avila.

18 Q. Avila. I apologize for the mispronunciation.

19 During your education at Avila and at Rolla, you did not

20 take any courses in utility matters. Is that correct?

21 A. Well, I took transmission and distribution

22 classes.

23 Q. Okay. Is that a power systems course?

24 A. Power systems, yes. Motors, generators courses.

25 Q. Okay. But you took nothing with regard to rate

1 analysis as pertains to the electric utility industry. Is

2 that correct? In college, sir.

3 A. I think that would be safe to say.

4 Q. Okay. You have testified twice previously, once

5 in the Tesson case and once in the Friendship Village

6 case. Is that correct?

7 A. That's correct.

8 Q. And again, as Mr. Ketter established, that's the

9 extent of your testimony before public utility service

10 commissions?

11 A. That's correct.

12 Q. It was earlier -- at least as of the most recent

13 testimony, you indicated you hadn't written any scholarly

14 papers on utility matters. Is that still true?

15 A. That's true.

16 Q. You haven't published anything on utility

17 matters?

18 A. No.

19 Q. You haven't presented any seminars or formal

20 presentations to groups regarding utility rates?

21 A. I wouldn't characterize them as seminars.

22 Q. You've never designed or helped design an

23 electric distribution system?

24 A. No.

25 Q. Before you began Providence Consultants, you

1 were employed at Bendicks Corporation. Is that correct?

2 A. That was one of the facilities I was employed

3 at.

4 Q. From 1981 to 1985?

5 A. Correct.

6 Q. And your work there was in the quality control

7 department. Is that correct?

8 A. Correct.

9 Q. And then, sir, from June of 1985 until 1987, '86
10 or '87 you managed investment real estates. Is that true?

11 A. That's correct.

12 Q. From February or March until June of '88 you
13 worked for a company called Industrial Service Laboratories
14 as a sales engineer?

15 A. Yes.

16 Q. The next position you held, sir, I believe in
17 June or July of 1988 was for a company called Power Motion,
18 again, as a sales engineer?

19 A. Yes.

20 Q. You then worked from 1988 until 1990 selling
21 automation equipment?

22 A. Yes.

23 Q. Between 1990 -- June 1990 and April 1991, were
24 you employed anywhere formally?

25 A. No.

1 Q. The prior two cases that you've been associated
2 with and have testified in, have they also involved
3 Mr. Gardner as the attorney?

4 A. Yes.

5 Q. We heard from -- well, strike that.

6 Mr. Brown, have you heard of PURPA?

7 A. Yes.

8 Q. Okay. Do you know what the letters stand for?

9 A. Well, I did at one time.

10 Q. Okay. As you sit here today, you can't tell us
11 what the letters stand for?

12 A. It doesn't come to mind.

13 Q. You don't know -- strike that. Maybe you do
14 know. Do you know when PURPA was enacted?

15 A. I know that, you know, the initial discussions
16 of it were back in the late seventies.

17 Q. Okay. Do you know when it was enacted?

18 A. Well, my recollection is on the federal level it
19 was enacted before states enacted it, so I suppose there's
20 a couple of times of -- depending on which particular
21 agency you're talking about. It could have a couple of
22 different periods of enactment, if that's the correct
23 word. I know the Missouri Public Service Commission, I
24 believe, enacted it June 1, 1981, or at least it was to be
25 enacted by the utility companies at that point.

1 Q. So Missouri enacted PURPA in 1981?

2 A. Yes.

3 Q. Okay. Mr. Brown, are you familiar with this

4 Commission's individual metering rules?

5 A. Yes.

6 Q. What's the citation for that? Do you know

7 offhand?

8 A. I believe offhand it's CSR 240-050. I could

9 look it up, but it's something --

10 Q. Okay. That's not necessary. When is the first

11 time, sir, that you had an occasion to read those

12 individual metering rules?

13 A. Well, at least in the Tesson Heights case.

14 Possibly before that.

15 Q. Do you know if those rules contain any

16 provisions for obtaining a variance from them?

17 A. Well, I'm supposed to be exact with my answers.

18 I ought to take a look at it.

19 Q. Feel free.

20 A. Your question again?

21 Q. Do you know if those rules contain a provision

22 for obtaining a variance?

23 A. Yes, they do.

24 Q. Okay. When is the first time, sir, that you

25 read that provision?

1 A. Well, at least in the Tesson Heights case.

2 Possibly before.

3 Q. What time frame is that, sir? 1994?

4 A. Approximately.

5 Q. Okay. Sir, if you were to assume that Orchard

6 House had not obtained a variance from the Commission's

7 metering rules and that Building C and the restaurant in

8 Building A were -- had their own meter on the large general

9 service rate and that, accordingly, each of the individual

10 apartments in Building A and Building C were individually

11 metered, would you agree that those would be on the

12 residential rate under Union Electric's tariff?

13 MR. GARDNER: Are you hypothesizing that there

14 are residential units in Building C or --

15 BY MR. NIEHOFF:

16 Q. If I said Building C, I misspoke. I meant

17 Building A and Building B.

18 A. Okay. Can you restate the question please?

19 Q. Yes, sir. If the apartments, the separate

20 apartments in Building A and in Building B had been

21 individually metered, those would have been on the

22 residential rate for Union Electric. Is that correct?

23 A. They certainly may have been.

24 Q. Okay. Mr. Brown, you spent some time in your

25 surrebuttal testimony discussing the qualifications of

1 Jerry Kovac in connection with his representation of HPI.

2 Are you a licensed engineer, sir?

3 A. No.

4 Q. Okay. Have you ever designed an electrical
5 distribution system?

6 A. No.

7 Q. Did you recall -- you were at Jerry Kovac's
8 deposition, were you not?

9 A. That's correct.

10 Q. Do you recall, sir, that he testified that he
11 had designed, I believe the number was, hundreds of
12 electrical systems for buildings?

13 A. I believe, without looking at his deposition,
14 I'm not sure if he used the word design or not.

15 Q. Okay. Did you want to take a minute and look at
16 the deposition or --

17 A. To quickly answer your question, I probably
18 should. Can you give me a page number that -- I only
19 mention that because a lot of people do CAD/CAM work and
20 lay systems out, but they don't necessarily design them.
21 That's why I'm -- I wouldn't have any problem -- well, I
22 ought to look at it.

23 CHAIRMAN ZOBRIST: Do you have a reference for
24 him?

25 MR. NIEHOFF: Excuse me?

1 CHAIRMAN ZOBRIST: Do you have a reference for
2 him?

3 MR. NIEHOFF: I'll have to look for myself. I
4 recall that --

5 ALJ LUCKENBILL: Off the record.

6 (Off the record.)

7 ALJ LUCKENBILL: On the record.

8 BY MR. NIEHOFF:

9 Q. Yeah. I believe the reference I was thinking of
10 was page 18 and 19 of Mr. Kovac's deposition, Mr. Jerry
11 Kovac; specifically, the conversations in the context of
12 calculations. And the question at line 23, page 18 is
13 that, "Is this the only project where you've worked at
14 providing load data to Union Electric, or are there other
15 projects you've worked on?"

16 Skipping over to the next page, 19, lines 1 and
17 2, "Oh, no. There's hundreds of others, I would assume,
18 over the last twenty years."

19 Do you recall that testimony being given, sir?

20 A. Yes. But that particular testimony doesn't talk
21 about designing the electrical distribution system. It's
22 just talking about providing load data to Union Electric on
23 those projects.

24 Q. Mr. Brown, you recall hearing that Mr. Jerry
25 Kovac was employed by HPI Engineering Consultants. Is that

1 correct?

2 A. That's correct.

3 Q. You are aware that HPI Engineering Consultants
4 was owned by -- one of the owners was David Sanders. Is
5 that correct?

6 A. I believe that is correct. I --

7 Q. That's what Mr. Jerry Kovac testified to.

8 A. Okay. I don't personally know that, but --

9 Q. Okay. Mr. Brown, let me just refer back to a
10 question I'd asked earlier. Looking back at page 11 of
11 Mr. Jerry Kovac's deposition, if you would, please, for a
12 minute, and I believe these were questions by Mr. Gardner
13 at that point. We're beginning on page 11, line 8, there's
14 a question, and the answer follows through to line 16. Is
15 that correct? Do you see that?

16 A. Yes, I do.

17 Q. And does that indicate that Mr. Jerry Kovac was
18 involved in designing and drafting electric distribution
19 systems in response to that question?

20 A. Well, I don't think it's very clear in there. I
21 mean, Mr. Gardner asked a question saying that he was
22 involved in designing and drafting electrical distribution
23 systems, but in his answer, Jerome Kovac didn't really say
24 that that was correct.

25 Q. Okay. You had testified in your surrebuttal and

1 really your direct some about the Delcrest apartment

2 complex. Is that correct?

3 A. That's correct.

4 Q. And it's -- I think when you made one of your

5 corrections, it was to identify this as Council Apartments

6 and Delcrest II?

7 A. That's correct.

8 Q. That's the same facility you're describing. Is

9 that right? I mean, Council Apartments is Delcrest II, or

10 the owners of it?

11 A. Well, I think Council Apartments would be

12 equivalent to possibly Delcrest I.

13 Q. Okay.

14 A. Because it was the first.

15 Q. With regard -- I'm sorry. Did you finish? I

16 didn't mean to --

17 A. Well, it is a little confusing, because they

18 have had a couple of different names out there. Originally

19 it was called Council Apartments. The new addition, as far

20 as I remember, was called Delcrest II from the very

21 beginning, sort of implying Delcrest I. So it could be

22 that they changed Council Apartments and named it

23 Delcrest I.

24 Q. Okay. And I don't mean to pick over that

25 point. I just wanted to be clear what I'm referring to

1 when I ask you -- I have a couple of questions. You've
2 testified that the Delcrest project for which a variance
3 was obtained -- I believe you attached the application for
4 the variance to your direct testimony. Is that correct?

5 A. Let me check to make sure.

6 Q. Okay.

7 A. I believe so.

8 ALJ LUCKENBILL: Off the record.

9 (Discussion off the record.)

10 ALJ LUCKENBILL: Please proceed, Mr. Niehoff.

11 MR. NIEHOFF: Thank you.

12 BY MR. NIEHOFF:

13 Q. I believe my question was in connection with the
14 Delcrest apartment complex and the fact that you had
15 attached an application of Union Electric for variance for
16 what's been identified in there anyway as I think
17 Delcrest II. Is that right? That's Exhibit S or
18 Schedule S of your direct testimony?

19 A. That's correct.

20 Q. Okay. You're aware, sir, are you not, that
21 there were two buildings to be constructed as part of that
22 Delcrest project. Is that correct?

23 A. If you characterize a hallway as a building,
24 yes.

25 Q. There was one building and a connecting building

1 between the existing Delcrest 1 apartments. Is that
2 correct?

3 A. Once again, if you characterize a hallway as a
4 building, yes.

5 Q. Okay. That connecting building, sir, does not
6 contain any facilities for eating, living, sleeping,
7 permanent cooking, or sanitation. Is that correct?

8 A. That's correct.

9 Q. Okay. You've been here throughout the morning,
10 and you've heard that Taylor, Morley, Simon was involved in
11 the development of the Orchard House project. Is that
12 correct?

13 A. Yes.

14 Q. All right. Were you aware that Taylor, Morley,
15 Simon was one of the bigger developers in the St. Louis
16 area?

17 A. I've heard the name. I don't know how they
18 rank.

19 MR. NIEHOFF: Okay. I don't have any other
20 questions, your Honor.

21 ALJ LUCKENBILL: Thank you, Mr. Niehoff.

22 Mr. Chairman, do you have any questions?

23 QUESTIONS BY CHAIRMAN ZOBRIST:

24 Q. Mr. Brown, with regard to the variance that UE
25 sought that pertains to this case, what effect on this

1 proceeding, this complaint case does that variance have in
2 your opinion? I'm not asking for a legal opinion, of
3 course. I'm asking for what factual bearing it has on
4 Orchard or its contentions.

5 A. Well, Orchard House wanted a single meter on
6 each building, and to comply with the rule -- and I don't
7 have the number right offhand. I think --

8 Q. I know the rule.

9 A. Okay. They needed to get a variance from the
10 individual metering rule to get a single meter per
11 building, and that's the only effect the variance
12 application had.

13 Q. In your opinion, does it have any relevance to
14 the proper rate that should have been charged for
15 electricity to that structure?

16 A. The variance had no relevance to the rate.

17 Q. Is there, in your opinion, anything that this
18 Commission should imply from the variance request that was
19 made and the Commission's order in that case that granted
20 that variance?

21 In other words, let me just say it straight.
22 Can this Commission imply from that action that the parties
23 contemplated that a residential rate would be charged and
24 that that charge would be appropriate?

25 A. What parties are you -- Orchard House you mean?

1 Q. Right. My question is this -- I just want to
2 make certain that I understand the position of both
3 parties -- do you have an opinion as to whether the
4 Commission today can infer from the decision that it made
5 in that variance case that a residential rate that was
6 charged by Union Electric during the time in question here
7 was appropriate?

8 A. I have an opinion.

9 Q. Okay. What is it?

10 A. My opinion is the variance had nothing to do
11 with what rates should have been applied.

12 Q. Your opinion is that the rate question is
13 separate and apart completely from the issue of the
14 variance?

15 A. Yes, sir.

16 Q. Okay. Now, were you present at any discussions
17 that were held back in the 1987/88 period between -- I keep
18 calling it Orchard Home, I'm sorry -- Orchard House and
19 their representatives and the representatives of Union
20 Electric?

21 A. No. I personally was not involved at that time.

22 Q. Were you involved at all in the communications
23 between the parties in this case in 1991/1992?

24 A. No, I wasn't.

25 Q. All right. So you yourself are only offering

1 expert opinion in this case. Is that correct?

2 A. That's correct.

3 Q. All right. Have you interviewed any of the
4 individuals from the consulting firm? I think it's --

5 A. HPI.

6 Q. Well, the Carlton Fox is what I'm talking
7 about. Is that the right name?

8 MR. GARDNER: That's the name of the firm.

9 MR. NIEHOFF: That's correct.

10 BY CHAIRMAN ZOBRIST:

11 Q. Have you spoken with any of the Carlton Fox
12 people about this case?

13 A. I personally haven't.

14 Q. Okay. Is --

15 A. I believe Mr. Gardner has, but I haven't.

16 Q. Okay. Well, I'm trying to probe any facts that
17 you may be relying upon in rendering your opinion here
18 today. So what you're telling me is that you have not
19 based any of your opinions here that you've offered here
20 today upon any information that you've collected from the
21 Fox consultants. Is that correct?

22 A. Not from Carlton Fox. That's correct.

23 Q. Okay. But you have spoken with the engineering
24 firm. Is that correct?

25 A. Well, HPI Engineering, yes. We deposed Jerome

1 Kovac, who was the lead -- I hate to say engineer, because
2 he doesn't have an engineering degree. But he was the lead
3 person from the consulting firm in dealing with Union
4 Electric on the electric system.

5 Q. Right. And he, in that capacity as an
6 engineering consultant, was representing the interests of
7 Orchard House. Is that correct?

8 A. Well --

9 Q. Without evaluating the job that he did, he was
10 there --

11 A. I would tend -- yeah.

12 Q. He was their agent, though, wasn't he?

13 A. Well, he was employed by HPI to get the
14 distribution system laid out, and in that position, he
15 dealt a lot with Union Electric. But it was obvious from
16 the deposition that he didn't know anything about the
17 rates.

18 Q. That's not my question. My question is, whose
19 interest was he serving in whatever capacity he was
20 operating? Union Electric's or Orchard House?

21 A. Orchard House.

22 Q. All right. Now, besides the information that we
23 have on the record and his deposition, is there any other
24 information that you're relying upon in expressing your
25 opinions here today that you gleaned from HPI?

1 A. Just from documents I've read that HPI has
2 authored.

3 Q. And these are documents that we have here in the
4 record?

5 A. Yes, sir.

6 Q. All right. I just have one other question, and
7 I don't know if you can answer this. But on the hearing
8 memorandum, which I don't know whether you've read, there
9 was a reference that UE did not provide Orchard House with
10 the option of totalized large general service. Does the
11 word "totalized" have any significance as opposed to large
12 general service?

13 A. Well, they're actually two different options,
14 and I lay those two different options out in my
15 surrebuttal. One option -- non-totalized is you've just
16 got a meter on each building, and it's a separate account
17 and it's billed as such. Totalized would be where they
18 take the readings from each of the buildings and add them
19 together and send just one bill.

20 Q. Okay. You said you have not testified before a
21 public service commission, except for this case and the two
22 others that you mentioned. Have you ever been employed by
23 a public utility commission?

24 A. No, I haven't.

25 Q. Have you ever served as a consultant to a public

1 utility commission?

2 A. No.

3 Q. To a public advocate or Office of the Public
4 Counsel in any matter?

5 A. No, sir.

6 CHAIRMAN ZOBRIST: Nothing further.

7 ALJ LUCKENBILL: I have no questions for
8 Mr. Brown. Redirect?

9 REDIRECT EXAMINATION BY MR. GARDNER:

10 Q. Mr. Brown, I want to cover some completion
11 material from what's been marked as Exhibit 9, which is the
12 deposition of Jerome Kovac. It's attached to your
13 testimony as Brown Surrebuttal Schedule C-1. I want to
14 follow up on material read into the record by Mr. Niehoff.
15 I'm looking at page 20.

16 A. Yes.

17 Q. Line 16.

18 A. Yes.

19 Q. It says,"QUESTION: Do you know what" -- and
20 this is a question directed to Mr. Jerome Kovac. Correct?

21 A. Yes.

22 Q. "QUESTION: Do you know what facilities you did
23 that for?

24 "ANSWER: I can't recall any off the top my
25 head, but I'm drawing a blank.

1 "QUESTION: Do you know whether you made those
2 calculations for Orchard House?

3 "ANSWER: I'm almost certain that I didn't.

4 "QUESTION: When you've made those calculations
5 in the past, what sort of information do you rely on?

6 "ANSWER: UE's published rates."

7 At page 21, beginning with line 1.

8 "QUESTION: When you've made those calculations,
9 have you made those in terms of recommending a particular
10 rate, or were you requested to do so by someone?

11 "ANSWER: More often than not, it's more of a
12 calculation to determine operating costs based on a
13 particular rate. It's not so much a comparison between one
14 rate and the other. It's more informational for owners at
15 their request.

16 "QUESTION: Okay. Now, you said you were almost
17 certain you did not make those calculations for Orchard
18 House. What's the basis of that certainty in your mind?

19 "ANSWER: Well, we knew they weren't going to
20 have primary metering, and from an electrical construction
21 standpoint, the rate that's applied other than primary, the
22 equipment that's installed is irrelevant to the rate that
23 is applied."

24 One follow-up question on that. What is he
25 referring to with primary metering in that question and

1 that answer?

2 A. Well, there is a rate that is the primary rate,
3 and it's available generally -- generally to anybody, but
4 only large customers can benefit from the rate, and as such
5 they get primary metering for that rate, which includes
6 your regular demand and usage meter and then also a power
7 factor type meter, KVARH.

8 Q. Okay. Is the large general service rate a
9 primary rate?

10 A. No, it's not. It's a secondary rate.

11 Q. Mr. Niehoff also talked about material in your
12 testimony. I think it's your surrebuttal at page 3. And
13 he cited to the deposition of Jerome Kovac and asked you to
14 find references in that to support your statement that HPI
15 personnel were not provided information by Union Electric
16 which would enable Orchard House to compare the rate
17 differential between the 007 rate and the large general
18 service rate. Let me direct your attention to Brown
19 Surrebuttal Schedule A-1. That's Exhibit 7?

20 MR. NIEHOFF: Let me object for the record
21 please. Exhibit A-1 is a deposition of Richard Kovach. As
22 we know from looking at the testimony, Mr. Brown said he
23 drafted -- he doesn't refer to Mr. Richard Kovach's
24 deposition in support of that statement. He only refers to
25 Mr. Jerry Kovac's deposition. So I object to Mr. Gardner

1 taking statements maybe in other sources and trying to help
2 his witness redraft his testimony.

3 ALJ LUCKENBILL: Do you want to respond to the
4 objection?

5 MR. GARDNER: Yeah. I think we're entitled to
6 clarify an error. In this particular case I think what we
7 will be able to show here is that there should have been an
8 additional reference to the deposition of Richard Kovach.
9 He simply left that reference out of his citation, and I
10 think some evidence of that is that it's page 14 of Richard
11 Kovach's deposition.

12 I think it's understandable that Mr. Brown might
13 have confused -- might have left out Mr. Richard Kovach's
14 deposition given the name similarity, but the page number
15 is the same.

16 MR. NIEHOFF: I renew my objection, your Honor.
17 That's -- you know, he had an opportunity -- several
18 opportunities to correct that testimony.

19 ALJ LUCKENBILL: I'll sustain the objection.
20 However, I will advise you that that could be brought out
21 in briefs.

22 MR. GARDNER: If this is admitted into evidence,
23 it will probably be obviated, Judge, so --

24 ALJ LUCKENBILL: All right.

25 MR. GARDNER: That's all I have.

1 ALJ LUCKENBILL: Do you care to move for the
2 admission of any of these exhibits?

3 MR. GARDNER: I move for admission of Exhibits
4 5, 6, 7, 8, and 9.

5 ALJ LUCKENBILL: Orchard House has moved for the
6 admission of Exhibits 5, 6, 7, 8, and 9. Are there any
7 objections to the admission of those documents into the
8 record of this case?

9 MR. KEEVIL: I don't know that I would call it
10 an objection so much, Mr. Luckenbill. I would like to
11 point one minor point out so that depositions which are
12 admitted here reflect the court reporter's official copies
13 or whatever they call it. In the deposition of Mr. Ketter,
14 the member of the Staff, that's Exhibit No. 8. I believe
15 it was marked originally B-1. As you know, when you get
16 the deposition, they send you an errata sheet. You read
17 the deposition. You see if there were any errors in
18 transcription made and fill out the errata sheet, sign it,
19 and send it back to the court reporter.

20 We did that. Mr. Gardner didn't apparently have
21 the chance to get that copy in with the copy he has here as
22 Exhibit 8. And the only -- like I said, this is not a big
23 issue. I'm just doing this so they match.

24 Page 8 of Mr. Ketter's deposition, line 8, he --
25 the deposition which you have refers to professional

1 practice. That should be promotional practice. It's a
2 reference to the Commission's promotional practices rule,
3 and like I said, substantively it really doesn't make any
4 difference. But I just want to make sure these depositions match
5 what the court reporter shows the official version.

6 We did send that into the court reporter. Like
7 I said, I don't think Mr. Gardner had a chance to get that
8 in before he had the copy made. So --

9 MR. GARDNER: I haven't seen the correction
10 page, but I don't object to that, if you want to include it
11 at a later date.

12 ALJ LUCKENBILL: Very well. So noted. Hearing
13 no objections, to the admission of Exhibits 5, 6, 7, 8, and
14 9, those will be admitted into the record.

15 (EXHIBIT NOS. 5 THROUGH 9 WERE RECEIVED IN
16 EVIDENCE.)

17 ALJ LUCKENBILL: You may step down, Mr. Brown.
18 Thank you.

19 (Witness excused.)

20

21 ALJ LUCKENBILL: Off the record.

22 (Off the record.)

23 (EXHIBIT NOS. 10 AND 11 WERE MARKED FOR
24 IDENTIFICATION BY THE REPORTER.)

25 (Witness sworn.)

1 ALJ LUCKENBILL: On the record. While we were
2 off the record, we have premarked Exhibit No. 10, which is
3 Mr. Kovach's rebuttal, and Exhibit No. 11, which is
4 Mr. Kovach's cross-surrebuttal.

5 Please proceed with direct, Mr. Niehoff.

6 MR. NIEHOFF: Thank you very much, your Honor.

7 RICHARD J. KOVACH testified as follows:

8 DIRECT EXAMINATION BY MR. NIEHOFF:

9 Q. Would you please state your name?

10 A. Richard J. Kovach.

11 Q. Your professional address, sir?

12 A. P. O. Box 149, St. Louis, Missouri 63166.

13 Q. By whom are you employed?

14 A. Union Electric Company.

15 Q. Have you prepared written testimony for this
16 matter today?

17 A. Yes, I have.

18 Q. If you would, sir, do you have Exhibit No. 10
19 before you?

20 A. Yes, I do. That would be my -- it's not direct
21 testimony. I believe it's called rebuttal testimony.

22 Q. Okay.

23 A. Filed on July 25th.

24 Q. Does that rebuttal testimony contain certain
25 schedules?

1 A. Yes, it does.

2 Q. If you were asked the questions that are set
3 forth in Exhibit 10 today, would your answers be the same?

4 A. Yes, they would be.

5 Q. Are there any corrections, additions, or
6 deletions which you would wish to make at this time to that
7 testimony?

8 A. I have one minor correction, I think, that is
9 required for clarity. And that would be on page 27,
10 line 24. On that line the phrase "monthly load factors
11 of," after the word "of" the word "the", T-H-E, should be
12 inserted. So that would read "the monthly load factors of
13 the aggregate of the residential apartment units." That
14 would be my only correction.

15 Q. Have you further submitted testimony in this
16 matter that is now the cross-surrebuttal of Richard J.
17 Kovach?

18 A. Yes, I have.

19 Q. And that contains additional schedules as well?

20 A. Yes, it does.

21 Q. If you were asked those questions, would you
22 make the same answers as are set forth there?

23 A. Yes, I would.

24 Q. And do you have any corrections, additions, or
25 deletions to that testimony?

1 A. No, I do not.

2 MR. NIEHOFF: We would offer at this time the
3 testimony, the rebuttal, Exhibit 10, and the
4 cross-surrebuttal of Richard J. Kovach, Exhibit 11, into
5 evidence.

6 ALJ LUCKENBILL: Thank you, Mr. Niehoff. The
7 Commission will reserve ruling on the admissibility of
8 Exhibits 10 and 11 until after cross-examination.
9 Mr. Keevil, cross-examination?

10 MR. KEEVIL: I have no questions.

11 ALJ LUCKENBILL: Mr. Gardner?

12 MR. GARDNER: No questions.

13 ALJ LUCKENBILL: I have a couple of questions.

14 QUESTIONS BY ALJ LUCKENBILL:

15 Q. Good afternoon, Mr. Kovach.

16 A. Good afternoon.

17 Q. You might have to help me through this a little
18 bit.

19 A. I'll do the best I can.

20 Q. Thank you, sir. I believe that in your
21 testimony you've referenced paragraph 4 of UE's 2(M) small
22 general service rate. Is that correct?

23 A. Could you give me a page number where you see
24 that in my testimony?

25 Q. Well, I see -- actually, I see a reference to

1 the 3(M) rate on page 35 of your rebuttal, line 23. And
2 let me just get to the question, and maybe you can clear
3 this up for me. There was some discussion in the testimony
4 of, if a customer is on the 2(M) small general service rate
5 and then their usage goes above 100 kilowatts in a
6 one-month period, then that customer would be moved up to
7 the large general service rate. Is that --

8 A. That is correct, except that is only if that
9 increase over 100 occurs during a summer billing month, and
10 that would be the summer months of June through September.
11 If that would occur in the winter, that would not move the
12 customer up to the large rate.

13 Q. Why is it that in this case where -- I mean,
14 first of all, I understand that Orchard House was not on
15 the 2(M) small general service rate. But can you explain
16 to me why it is that they do not become qualified for the
17 3(M) LGS where their usage exceeds 100 kilowatts in a
18 one-month period in the summer time?

19 A. Are you referring to the usage of the apartment
20 units, or are you referring to the two meters that they
21 have for the commercial restaurant and office buildings?

22 Q. Well, let's discuss the usage of the apartment
23 units. Did that usage exceed 100 kilowatts in a one-month
24 period in the summer time?

25 A. Because of the number of apartments, yes, it

1 did.

2 Q. All right. Now, did that make the apartment
3 building qualify for the 3(M) LGS service?

4 A. No, it did not.

5 Q. Why not?

6 A. Because the usage in the apartments is
7 residential and meets the applicability paragraphs of the
8 residential rate, and by doing so, that is the only rate
9 that those two meters on those apartments, the dwelling
10 units, would qualify for.

11 Q. So we get back to the issue, which is, is it
12 commercial or residential? I mean, in other words, my line
13 of questioning here really begs the question, which is, is
14 it commercial or residential. Would you agree with that?

15 A. Well, yes. I believe it gets back to that. We
16 believe it's residential, has always been residential, and
17 that was not changed in any way, shape, or form by the
18 variance order that was received by the Commission.

19 Q. Thank you.

20 A. Because it would have been residential either
21 way.

22 Q. Thank you, Mr. Kovach.

23 A. You're welcome.

24 Q. Back in '87 and '88 when Orchard House was being
25 constructed, did Orchard House make an informed decision

1 about its electric service classification to the best of
2 your knowledge?

3 A. Well, we believe they did, because all large
4 development companies, professional engineering
5 organizations, architectural engineering organizations are
6 on our mailing list for the way distribution systems are
7 laid out and also for copies of our rate tariffs.

8 And generally, when we meet with organizations
9 like that at preconstruction time, generally they've
10 already completed their analysis, and they pretty much know
11 what they want and what they would like to plan for, for
12 their project and development.

13 And that was pretty much the case in the -- when
14 we met with Orchard House. We did suggest other
15 alternatives to them that they may want to consider, but it
16 occurred to me that they pretty much had their mind made up
17 on what they would like to have. And they gave us some
18 reasons for that.

19 And when we met, we just talked about various
20 alternatives, as I suggested and pointed out in my
21 testimony, but after talking about those and quickly
22 dismissing other options, it went right back to really what
23 they had originally asked us for.

24 Q. Is it your belief that Orchard House had a
25 legitimate opportunity to make an informed decision about

1 its electric service classification?

2 A. Yes. I believe they did. Mr. Kovac, Mr. Jerry
3 Kovac in his deposition indicated that he had all the rate
4 information on our rates in his office, and he had made
5 such calculations in the past. Now, the superiors that he
6 was reporting to, we don't have any information basically
7 on what discussions they had or how they arrived at their
8 decision on what to request from Union Electric. But as I
9 say, that was a consulting engineering group with
10 architects and engineers, and I think they had the
11 wherewithal to make an intelligent decision for their
12 project.

13 ALJ LUCKENBILL: That's all the questions I
14 have. Is there recross based on my questions, Mr. Keevil?

15 MR. KEEVIL: No.

16 ALJ LUCKENBILL: Mr. Gardner?

17 MR. GARDNER: Yeah. I have one.

18 RECROSS-EXAMINATION BY MR. GARDNER:

19 Q. Can you identify in the deposition where
20 Mr. Jerome Kovac stated that he was involved in calculating
21 rate classification?

22 A. I don't believe that's what I said. I believe I
23 said making rate calculations.

24 Q. Okay. Is there anyplace in his deposition you
25 recall where he testified that he made comparisons between

1 the large general service rate and any other rate?

2 A. I believe he said in there that he was capable
3 of doing that.

4 Q. My question to you is whether there was anyplace
5 in his deposition where he stated that he did that for
6 Orchard House.

7 A. I would have to look for it.

8 Q. Okay. You can't identify --

9 A. I can't cite you a location.

10 Q. Well, it's in the record, so --

11 A. I'll let Mr. Niehoff do that in the brief.

12 MR. GARDNER: That's fine. That's all I have.

13 ALJ LUCKENBILL: Thank you, Mr. Gardner.

14 MR. NIEHOFF: We move for the admission of the
15 Exhibits 10 and 11.

16 ALJ LUCKENBILL: Thank you. Union Electric has
17 moved for the admission of Exhibits 10 and 11. Are there
18 any objections to the admission of those exhibits into this
19 record?

20 MR. GARDNER: No objection.

21 ALJ LUCKENBILL: Hearing no objections,
22 Exhibits 10 and 11 will be received.

23 (EXHIBIT NOS. 10 AND 11 WERE RECEIVED IN
24 EVIDENCE.)

25 ALJ LUCKENBILL: Mr. Kovach, you may step down.

1 THE WITNESS: Thank you.

2 ALJ LUCKENBILL: Thank you, sir.

3 (Witness excused.)

4 _____

5 ALJ LUCKENBILL: Off the record.

6 (Off the record.)

7 (Witness sworn.)

8 _____

9 (EXHIBIT NO. 12 WAS MARKED FOR IDENTIFICATION BY
10 THE REPORTER.)

11 ALJ LUCKENBILL: On the record. While we were
12 off the record, we have premarked Exhibit No. 12, which is
13 the rebuttal testimony of Staff witness Michael W. Straub.
14 Also I believe Mr. Niehoff had a statement he wanted to
15 make at this time.

16 MR. NIEHOFF: We had -- Union Electric had
17 indicated its desire to use its tariff sheets pertaining to
18 limitations on refunds, sheets that I had were 169 through
19 170.1. Mr. Gardner and myself with, I suppose, the
20 concurrence of the judge indicated that parties would be
21 able to refer to tariffs in the briefs without the need to
22 formally enter them. And that was the substance of the
23 stipulation.

24 ALJ LUCKENBILL: That's my understanding.
25 Mr. Gardner, anything you want to say about that?

1 MR. GARDNER: No. I agree with Mr. Niehoff's
2 characterization of the agreement.

3 ALJ LUCKENBILL: Very well. Mr. Keevil, if you
4 will proceed with direct examination of Mr. Straub, please.

5 MR. KEEVIL: Could I ask one question very
6 briefly of what was just said?

7 ALJ LUCKENBILL: Yes, you may.

8 MR. KEEVIL: I thought originally it was the
9 currently effective tariffs that you were --

10 MR. NIEHOFF: Right.

11 MR. KEEVIL: Okay. I don't think you just said
12 that when you made your statement.

13 MR. GARDNER: No. I don't want it to be just
14 currently effective tariffs, because we're talking about a
15 period of time here where there's some tariffs that are no
16 longer in effect that may be relevant to our arguments.

17 MR. NIEHOFF: I don't have any objection.

18 ALJ LUCKENBILL: Right. So -- go ahead,
19 Mr. Keevil.

20 MR. KEEVIL: I wouldn't have an objection to
21 those being introduced, but I don't know that we can
22 take -- what you're talking about doing, as I understand
23 it, is taking official notice of tariffs which are no
24 longer in effect. Is that right?

25 ALJ LUCKENBILL: That's what Mr. Gardner is

1 suggesting.

2 MR. KEEVIL: I think in order to -- like I say,
3 I have no problem with those being introduced as evidence.
4 But I don't know that you can take official notice of
5 those, because there wouldn't be the access to them that
6 there are of the currently effective tariffs, which are on
7 public file down here in the tariff room.

8 MR. GARDNER: Well, canceled tariffs are on file
9 too in the same place. They're in different books.

10 ALJ LUCKENBILL: Off the record.

11 (Off the record.)

12 (EXHIBIT NO. 13 WAS MARKED FOR IDENTIFICATION BY
13 THE REPORTER.)

14 ALJ LUCKENBILL: While we were off the record,
15 we premarked Exhibit No. 12, which is the rebuttal
16 testimony of Michael W. Straub, and we premarked Exhibit
17 No. 13, which is a three-page document which is tariff
18 sheet Nos. 169, 170, and 170.1 of Union Electric Company.
19 And it's my understanding that these tariff sheets, which
20 have been marked Exhibit 13, are -- took effect on
21 November 6, 1994, and are currently in effect. Is that
22 correct, Counselors?

23 MR. NIEHOFF: That's my understanding, your
24 Honor.

25 MR. GARDNER: Yeah. I'm assuming that's true.

1 I don't have certain knowledge of it.

2 ALJ LUCKENBILL: Very well. Mr. Niehoff, did
3 you want to move that these tariff sheets become part of
4 the record in this proceeding?

5 MR. NIEHOFF: I would, your Honor.

6 ALJ LUCKENBILL: Are there any objections to
7 admission of Exhibit No. 13 into the record of this
8 proceeding?

9 (No response.)

10 ALJ LUCKENBILL: Hearing --

11 MR. GARDNER: No.

12 ALJ LUCKENBILL: Hearing none, Exhibit No. 13 is
13 received.

14 (EXHIBIT NO. 13 WAS RECEIVED IN EVIDENCE.)

15 MR. NIEHOFF: Thank you, your Honor.

16 ALJ LUCKENBILL: You're welcome. Mr. Keevil, if
17 you would proceed with direct, please.

18 MR. KEEVIL: Thank you.

19 MICHAEL W. STRAUB testified as follows:

20 DIRECT EXAMINATION BY MR. KEEVIL:

21 Q. Mr. Straub, would you state your complete name
22 for the record, please?

23 A. Michael W. Straub.

24 Q. And by whom are you employed and in what
25 capacity?

1 A. I'm employed by the Missouri Public Service
2 Commission as the assistant manager of rates in the energy
3 department.

4 Q. Do you have before you a copy of the -- what
5 purports to be the rebuttal testimony of Michael W. Straub?

6 A. Yes, I do.

7 Q. And I believe this has been marked for purposes
8 of identification as Exhibit 12?

9 A. Yes.

10 Q. Was this testimony prepared by you or under your
11 direct supervision?

12 A. Yes, it was.

13 Q. Do you have any corrections you wish to make to
14 this testimony?

15 A. Just one. On page 4, line 13, I show the date
16 of August 26, 1996. That should be August 26, 1995.

17 Q. All right. With that correction, if I were to
18 ask you the same questions contained in Exhibit 12, would
19 your answers be the same today as they are in Exhibit 12?

20 A. Yes, they would.

21 MR. KEEVIL: I would offer Exhibit 12 and tender
22 the witness for cross-examination, Mr. Luckenbill.

23 ALJ LUCKENBILL: Thank you, Mr. Keevil.
24 Cross-examination, Mr. Niehoff?

25 MR. NIEHOFF: I believe it goes to Complainant

1 first, according to the hearing memorandum and what we
2 discussed last time.

3 ALJ LUCKENBILL: Is it in the hearing memorandum
4 that way?

5 MR. NIEHOFF: Yes.

6 ALJ LUCKENBILL: Okay. That's fine.

7 Mr. Gardner?

8 CROSS-EXAMINATION BY MR. GARDNER:

9 Q. Mr. Straub, there's some references in your
10 testimony to a paragraph 6. I'm looking at page 18,
11 line 5. You say, "Further, paragraph 6 of the tariff that
12 was effective during this period defines the type of
13 structures to which the rate does not apply."

14 And I don't see paragraph -- I don't see what
15 paragraph 6 reference you're making. I don't see any
16 schedule attached that contains that reference, and I'm
17 wondering if you're referring to something that's already
18 in the record and, if not, if you have a copy of that.

19 A. I believe -- I don't have a copy of the tariff,
20 but I believe paragraph 6 used to be paragraph 5 of the
21 residential tariff, and that's going on memory. I would
22 have to look at the canceled tariffs and the current
23 tariffs again. I do recall at one point we had a numbering
24 change of the paragraphs.

25 MR. GARDNER: May I approach the witness, your

1 Honor?

2 ALJ LUCKENBILL: Yes, you may.

3 BY MR. GARDNER:

4 Q. I'm handing you what is a document containing

5 qualifications of Richard J. Kovach, and just for

6 clarification purposes, I'm handing you a portion of that

7 document that he has marked -- made part of his

8 Schedule 1. And in particular, at the top it says,

9 "Service Classification 1(M) Residential Service Rate."

10 There is a paragraph 5. Is that the paragraph you're

11 referring to?

12 A. Yes.

13 Q. Okay.

14 A. Yes. Under the current tariff, that would

15 probably be paragraph 6.

16 Q. Okay.

17 ALJ LUCKENBILL: Mr. Gardner, what is that

18 document that you have in your hand?

19 MR. NIEHOFF: Your Honor, those are schedules

20 that were --

21 MR. GARDNER: These are schedules attached to

22 Mr. Kovach's rebuttal testimony.

23 ALJ LUCKENBILL: It is schedule what?

24 MR. GARDNER: It's Schedule 1. I don't recall

25 the exhibit number.

1 MR. NIEHOFF: Exhibit No. 10.
2 ALJ LUCKENBILL: Schedule 1 attached to Exhibit
3 No. 10.
4 MR. GARDNER: And for more specific
5 identification, it's eighth revised sheet No. 30(M) for the
6 record.
7 ALJ LUCKENBILL: Thank you. Please proceed.
8 Thanks for the clarification.
9 BY MR. GARDNER:
10 Q. Do you recall when what you refer to as
11 paragraph 6 was originally made a part of Union Electric's
12 tariffs?
13 A. No. Not right offhand.
14 Q. Do you know whether it was prior to June 1,
15 1981?
16 A. I don't recall.
17 Q. Okay. That's something you would just have to
18 look at in the tariffs?
19 A. Yes.
20 MR. GARDNER: At this point I guess I'd like to
21 ask that a late filed exhibit number be reserved for the
22 equivalent to this eighth revised sheet No. 30(M) and that
23 that be introduced in the record so that we can make a
24 determination as to when -- whether it existed prior to
25 June 1, 1981.

1 ALJ LUCKENBILL: Off the record.

2 (Off the record.)

3 ALJ LUCKENBILL: I'm going to reserve as
4 late-filed Exhibit No. 14 the predecessor of sheet
5 No. 30(M)?

6 MR. GARDNER: Correct. And it may be the same
7 sheet number, but just an earlier version of the tariff
8 prior to February 15, 1981.

9 MR. NIEHOFF: Is it 30(M)? I apologize.

10 MR. GARDNER: Yeah. I think so.

11 MR. NIEHOFF: Okay. Thank you.

12 MR. GARDNER: That's all I have.

13 ALJ LUCKENBILL: Mr. Niehoff?

14 MR. NIEHOFF: We don't have any questions for
15 Mr. Straub.

16 ALJ LUCKENBILL: I have just one or two.

17 QUESTIONS BY ALJ LUCKENBILL:

18 Q. Good afternoon, Mr. Straub.

19 A. Good afternoon.

20 Q. There has been a great deal said about load in
21 the testimony in this case. Isn't it true that load is a
22 measure of the variability of the usage of electricity of a
23 particular customer?

24 A. Well, normally when you refer to the definition
25 of load, most people refer to the demand of the customer,

1 that the demand that the customer puts onto the system,
2 because the distribution service facilities are built to
3 meet the customer's demand, demand load. Those are
4 generally what everyone is referring to. The load of this
5 building may be a certain KW. Therefore, it would require
6 a certain size line to provide it service.

7 Q. All right. Well, let me follow up on that
8 then. When people generally say -- for example, they
9 say -- would people say the demand of that customer is
10 100 kilowatts?

11 A. Yes.

12 Q. Does that mean the peak demand?

13 A. Generally, that's what they're referring to,
14 yes.

15 Q. Because they're going to build a system that can
16 meet that peak requirement?

17 A. Exactly.

18 Q. So that's demand?

19 A. Yes. Energy, KWH, is the use of that demand
20 over time, for one hour.

21 Q. So again, is load a measurement of the
22 variability in the usage of electricity? Is that what load
23 is?

24 A. To me -- I guess it depends on the text that
25 you're using it in. To me when you talk about the load of

1 a customer, you're generally referring to his demand
2 requirements and what is necessary to serve him.

3 If you get into the definition of energy in the
4 apparent and real power, then you get into a definition of
5 load, I believe, and I'm really cold on this. And I don't
6 have my glossary with me explaining this. So a lot of
7 times they refer to load as the part of the power that
8 actually does the work, and that's, again, why I say it
9 depends on the text that it's used in.

10 A lot of contractors, building contractors
11 primarily, you know, when they're talking load, they're
12 really talking the requirements of the system or the
13 requirements of the building. And it's generally a demand
14 requirement, measured as a demand, because that is why --
15 that's how you build a system, based on the demand.

16 Q. Do you have any personal knowledge about any
17 kind of contacts -- well, do you have personal knowledge
18 about any of the discussions what were made between Orchard
19 House representatives and Union Electric representatives
20 with respect to Orchard House having an ability to make an
21 informed decision about its electric service
22 classification?

23 A. No. I have no firsthand knowledge.

24 ALJ LUCKENBILL: That's all I have. Redirect?

25 MR. KEEVIL: I don't have any. At this time I

1 would offer Exhibit 12.

2 ALJ LUCKENBILL: Recross based on my questions?

3 MR. NIEHOFF: None for -- well, I think

4 Mr. Gardner goes first.

5 MR. GARDNER: None.

6 ALJ LUCKENBILL: No recross. Exhibit No. 12 --

7 Mr. Keevil has moved for the admission of Exhibit No. 12,

8 which is Mr. Straub's rebuttal testimony. Are there any

9 objections to the receipt of Exhibit No. 12 into the

10 record?

11 MR. NIEHOFF: No objections from Union Electric.

12 MR. GARDNER: None, your Honor.

13 ALJ LUCKENBILL: Thank you. Hearing none,

14 Exhibit No. 12 will be received into the record.

15 (EXHIBIT NO. 12 WAS RECEIVED IN EVIDENCE.)

16 MR. KEEVIL: Mr. Luckenbill, at this time might

17 be a good time also for me to move the admission of

18 Exhibit 1, which was the hearing memorandum, which was

19 marked at the beginning of the hearing this morning.

20 ALJ LUCKENBILL: Mr. Keevil's moved the

21 admission of the hearing memorandum, which has been marked

22 Exhibit No. 1. Are there any objections to the receipt of

23 the hearing memorandum into the record?

24 MR. GARDNER: None.

25 ALJ LUCKENBILL: Hearing none, Exhibit 1 is

1 received.

2 (EXHIBIT NO. 1 WAS RECEIVED IN EVIDENCE.)

3 ALJ LUCKENBILL: Anything else in the record
4 right now?

5 (No response.)

6 ALJ LUCKENBILL: Off the record.

7 (Off the record.)

8 (Witness excused.)

9

10 (EXHIBIT NOS. 14 AND 15 WERE MARKED FOR
11 IDENTIFICATION BY THE REPORTER.)

12 ALJ LUCKENBILL: On the record. While we were
13 off the record, we have premarked Exhibit No. 14, which is
14 the -- which are two canceled tariff sheets, sheet
15 No. 30(M) and sheet No. 31 (M). We've also premarked
16 Exhibit No. 15. Off the record.

17 (Off the record.)

18 ALJ LUCKENBILL: While off record, we have
19 premarked Exhibit No. 15, which are each canceled tariffs
20 of Union Electric Company. They are sheet Nos. 139(M),
21 139(A) as in Alfa, sheet No. 169, and 170.

22 Does anyone want to move for the admission of
23 either or both of these exhibits?

24 MR. GARDNER: Yeah. Complainant moves for the
25 admission of Exhibits 14 and 15.

1 ALJ LUCKENBILL: Orchard House has moved for the
2 admission of Exhibit No. 14 and 15. Are there any
3 objections to the receipt of Exhibit No. 14?

4 MR. KEEVIL: Well, I suppose I can make this an
5 objection, if I need to. I suppose relevancy would be the
6 objection, but my basic question here is, I'm not clear for
7 what purpose 14 is being offered. And perhaps I can -- if
8 explained to me, I will no longer have an objection
9 perhaps. I don't know.

10 ALJ LUCKENBILL: Mr. Gardner, could you explain
11 the purpose for which Exhibit No. 14 is being offered into
12 the record?

13 MR. GARDNER: Mr. Straub has indicated that he
14 thought that what is now paragraph 6 of the residential
15 rate creates an ambiguity in paragraphs 1B and 4. And my
16 contention is that the ambiguity is diminished if it's
17 recognized that paragraph 6 was in effect prior to the
18 promulgation of the modification to paragraph 1B and
19 paragraph 4. In other words, it reduces -- diminishes the
20 argument of ambiguity, because you simply have more recent
21 tariff provisions. And to the extent there's more recent
22 tariff provisions, the more recent provisions will
23 prevail. That's my argument. I'm not asking it be
24 accepted. That's the purpose for offering it. It goes to
25 the ambiguity issue that Mr. Straub has raised.

1 ALJ LUCKENBILL: Thank you, Mr. Gardner. Given
2 that purpose, is there an objection to the admission of
3 Exhibit No. 14?

4 MR. KEEVIL: I guess, again, I would object just
5 simply as to relevancy. When Mr. Straub quotes what he
6 believes to have been the applicable tariff in effect at
7 the time of his testimony and to the extent that the tariff
8 subsequently changed, I don't know it would be relevant.

9 ALJ LUCKENBILL: Any other objections to Exhibit
10 No. 14?

11 MR. NIEHOFF: We would just like to clarify
12 we're not conceding with any arguments or agreeing with any
13 arguments made by Mr. Gardner.

14 ALJ LUCKENBILL: The Exhibit No. 14 will be
15 received into the record. The objection made by Staff
16 counsel will go to the weight afforded the evidence rather
17 than to its admissibility.

18 (EXHIBIT NO. 14 WAS RECEIVED IN EVIDENCE.)

19 ALJ LUCKENBILL: Orchard House has moved for the
20 admission of Exhibit No. 15. Are there any objections to
21 the receipt of Exhibit No. 15 into the record?

22 (No response.)

23 ALJ LUCKENBILL: Mr. Gardner, let me ask for my
24 own clarification again now, for what purpose have you
25 offered Exhibit No. 15?

1 MR. GARDNER: Well, Mr. Niehoff offered, I
2 think, Exhibit 13 in order to make sure that we had in the
3 record the 60 prior billing periods limitation, and it's at
4 least arguable as to whether a billing limitation that
5 changed over time can be applied retroactively -- in fact,
6 I think we made this position in the hearing memorandum --
7 could be applied retroactively to limit overcharge recovery
8 incurred prior to the current tariff being promulgated.

9 That's why I wanted the previous tariff
10 provisions, to document possibly that there were no such
11 limitations during the full period of the overcharge.

12 ALJ LUCKENBILL: Thank you. I understand. I
13 appreciate your comment on that. Any objections to the
14 receipt of Exhibit No. 15?

15 MR. NIEHOFF: I would again just clarify that
16 Union Electric doesn't agree with the arguments made. I
17 wanted to make that position clear.

18 ALJ LUCKENBILL: Understood. Hearing no
19 objections but at the same time understanding that UE's not
20 acquiescing the argument on this point, Exhibit No. 15 will
21 be received into the record.

22 (EXHIBIT NO. 15 WAS RECEIVED IN EVIDENCE.)

23 ALJ LUCKENBILL: Are there any other matters
24 that need to be taken up on the record this afternoon?

25 MR. GARDNER: Not from Complainant, your Honor.

1 ALJ LUCKENBILL: Hearing none, this evidentiary
2 hearing is hereby adjourned. Off the record.

3 WHEREUPON, the hearing and oral argument of this
4 case was concluded.

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