

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Oral Argument

January 3, 2011

Jefferson City, Missouri

Volume 2

Staff of the Missouri Public)	
Service Commission,)	
)	
Complainant,)	
)	File No. WC-2010-0227
v.)	
)	
Aspen Woods Apartment)	
Associates, LLC, Barry Howard,)	
Aspen Woods Apartments, Sapal)	
Associates, Sachs Investing)	
Co., Michael Palin, Jerome)	
Sachs, and National Water &)	
Power, Inc.,)	
)	
Respondents.)	

HAROLD STEARLEY, Presiding
SENIOR REGULATORY LAW JUDGE
ROBERT M. CLAYTON, III, Chairman,
TERRY M. JARRETT,
KEVIN GUNN,
ROBERT S. KENNEY,
COMMISSIONERS

REPORTED BY:
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1 JUDGE STEARLEY: Today is Monday,
2 January 3rd, 2011 and the Commission has set this time
3 to hear oral argument on a pending motion for summary
4 determination in the case captioned The Staff of the
5 Missouri Public Service Commission versus Aspen Woods
6 Apartment Associates, LLC and the National Water and
7 Power, Incorporated, File No. WC-2010-0227.

8 My name is Harold Stearley and I'll be
9 the presiding officer over today's hearing. Our court
10 reporter this morning is Tracy Taylor. And we will
11 begin by taking entries of appearance starting with
12 Aspen Woods.

13 MR. PEARSON: Lowell Pearson from the
14 Husch Blackwell law firm representing Aspen Woods
15 Apartment Associates, LLC.

16 JUDGE STEARLEY: Thank you, Mr. Pearson.
17 For National Water and Power,
18 Incorporated?

19 MR. JOHNSON: Thank you, your Honor.
20 It's Craig Johnson, Johnson and Spordeder, 304 East
21 High, Suite 200, Jefferson City, Missouri here today
22 on behalf of National Water and Power, Inc.

23 JUDGE STEARLEY: Okay. Thank you,
24 Mr. Johnson.

25 For the National Apartment Association?

1 MR. BOUDREAU: Thank you, Judge. Let the
2 record reflect the appearance of Paul Boudreau on
3 behalf of National Apartment Association. My address
4 is Post Office Box 456, Jefferson City, Missouri.

5 JUDGE STEARLEY: Okay. Thank you,
6 Mr. Boudreau.

7 The Office of Public Counsel?

8 MS. BAKER: Thank you, your Honor.
9 Christina Baker, PO Box 2230, Jefferson City, Missouri
10 65102, appearing on behalf of the office of the Public
11 Counsel and the ratepayers.

12 JUDGE STEARLEY: All right. Thank you,
13 Ms. Baker.

14 And for the Staff of the Missouri Public
15 Service Commission?

16 MS. HERNANDEZ: Good morning. Jennifer
17 Hernandez appearing on behalf of the Staff of the
18 Missouri Public Service Commission. Our address is PO
19 Box 360, Jefferson City, Missouri 65102.

20 JUDGE STEARLEY: All right. Thank you,
21 Ms. Hernandez. We have two commissioners appearing by
22 video conference this morning in St. Louis and I just
23 want to check. Commissioners Gunn and Kenney, are you
24 able to hear us here in Jefferson City?

25 well, I'm not hearing any response.

1 Technology curse is back. It was my understanding
2 that their image would appear on our outer screens
3 whenever they spoke to us today so at this moment I
4 guess I will take a brief recess and will contact our
5 IT people and try and make sure we get them patched
6 into us here. So sorry for the inconvenience here.
7 Let me take a brief intermission.

8 (A recess was taken.)

9 JUDGE STEARLEY: All right. We are back
10 on the record. Sorry for the delay this morning. As
11 I usually start out all our hearings, I do need to ask
12 that everyone please turn off all cell phones,
13 Blackberries, any other electronic devices because
14 those devices do tend to interfere with our webcasting
15 and our recording.

16 For preliminary matters, we currently
17 have a motion pending from Staff for leave to file an
18 affidavit of James Merciel. We haven't run a full
19 10-day response time on that, but I thought I'd just
20 bring it up here. I was not anticipating any
21 objections to that. And I don't see any from the
22 attorneys this morning, so I will grant that motion.

23 Are there any other preliminary matters
24 before we start up this morning?

25 All right. Well, hearing none, this is a

1 summary determination motion that was filed jointly by
2 Aspen Woods and National Water and Power. Since it's
3 your motion, Counselor, you can begin with some
4 opening statements or arguments. I don't know if
5 Mr. Johnson, Mr. Pearson, if you want to split time on
6 this or how you would like to proceed.

7 MR. JOHNSON: I lost the flip, your
8 Honor. Thank you. Craig Johnson. Today I represent
9 National Water and Power, Inc. or NWP. We have a
10 summary determination motion pending that we've
11 jointly filed with Aspen Woods. The issue's been
12 fully briefed.

13 I know this issue's come up in the past
14 several years. I know that Judge Stearley has handled
15 a case, the oral argument or some case that involved
16 the same issue in a different setting so I do not want
17 to reargue everything that we've filed in the brief.
18 We know that you're just as qualified and able to read
19 and comprehend the law as we are.

20 I would like to just give you an overview
21 of why we don't think there's Commission jurisdiction
22 here. And basically even though -- well, let me
23 describe the apartment complex. It's in the St. Louis
24 area, there's about 400-or-so apartment units. As I
25 understand it, there's like 6 or 7 different

1 structures. Each structure will have 50 or so
2 apartments within them.

3 The -- Aspen Woods gets their water
4 service from Missouri American Water, a regulated
5 utility. I think there are about 7 -- oh,
6 35 different metering points for these 400-plus
7 apartments. And I think they get their sewer service
8 from the St. Louis Metropolitan Sewer District who
9 takes their sewer usage readings from the water meter
10 readings from Missouri American Water.

11 Aspen woods has tenants. The tenants
12 sign leases. In the leases they sign documents that
13 agree to pay their share of the utility bills that are
14 passed through from Aspen Woods to the tenants. Aspen
15 woods is contracted with my client, who's in this
16 business nationally, National Water and Power.

17 And the service they provide is they take
18 the usage readings, they will subtract out common
19 usage -- common area usage, irrigation usage, perhaps
20 swimming pool, then they take the net that's -- that's
21 deemed to be tenant usage and they will use some sort
22 of an allocation formula to charge each apartment what
23 its share of the utility bills are. I think in the
24 facts of this case, the basis for allocation is square
25 footage of the units that are rented.

1 And when National Water and Power gets
2 those usage bills and they allocate them to the
3 tenants, they send them a bill that looks like a
4 utility bill. And they will charge them for late
5 payments if they don't pay their share of the bill on
6 time. They will charge them for a bounced check if
7 they do make a payment but the check bounces. They
8 charge them a monthly amount for NWP service in that
9 regard. I think the evidence in this case is it's \$3
10 or so per unit per month. But these are things that
11 we believe the tenant has agreed to in the lease.

12 And the basis for the -- the summary
13 determination motion is whether there has been a,
14 quote, "devotion to public use." Even though we've
15 had the statutes that define what a regulated water or
16 sewer utility are, and those statutes have been on the
17 books since 1913 or something like that, the courts
18 have implied or read those statutes to require that
19 private property be devoted to the public use before a
20 business that owns that private property is subject to
21 Commission jurisdiction and Commission regulation.

22 And in looking at the case law, it's kind
23 of all over the place. Every setting that the case
24 law gets applied to is different. But the Danciger
25 case involved a power plant. This was -- this was the

1 first case and it seems to be the one that everyone
2 wants to regurgitate about for 80-some years, but
3 it -- I'm not sure I'll get the facts of the case
4 straight. It's really not that important.

5 But when you look at this interesting
6 array of cases that we've had develop over the past
7 80-plus years, you get a situation where -- I think
8 it's the Cirese case where if you have a power plant,
9 you consume your own power, you have some apartment
10 buildings, you let -- you serve them with your power,
11 that that consumption of your own power and giving
12 that power to your tenants is not a devotion of public
13 use.

14 But if, as in the Cirese case, they went
15 out and started soliciting other people to take their
16 excess capacity -- and I think there was evidence in
17 that case that they had bought meters to meter the
18 power and there were like 30 other people that they
19 had offered to sell electricity to, the court said
20 that -- going above and beyond just your own needs and
21 your apartment owners' needs and giving it to the rest
22 of the people indiscriminately was a devotion to the
23 public use.

24 we have the -- in my mind the WATS or the
25 wide Area Telephone Service hotel case, which is kind

1 of close on point even though the terms of the
2 occupancy are much different between a hotel and
3 apartment complex, but in the WATS resale case, this
4 Commission held that when the hotel resells telephone
5 service and marks it up quite a bit as they used to do
6 back in the '80s, that was not a devotion of private
7 property to the public use. It was just a -- a
8 activity of reselling phone service that -- that the
9 Commission said was incidental to the main purpose of
10 the hotel, which was to give lodging.

11 Again, I'm not going to try to
12 regurgitate all those cases. Those are the ones I
13 think are closest on point to this case here.

14 In looking at the devotion to public use
15 test, the courts try to express it as one side of the
16 coin to the other. Has there been a devotion to the
17 public use, is there an indiscriminate offering of
18 your service to everyone, or on the other side of the
19 coin, is this just a matter of private contract. And
20 I think even though that sounds like a simple concept,
21 it's not always that easy to decide if a particular
22 application is heads or a particular application is
23 tails.

24 In this case, when Aspen Woods leases
25 apartments, it takes applications, it does credit

1 checks, it does income checks, it does criminal
2 background checks and it doesn't accept everybody
3 unless they pass their app-- or criteria process. And
4 I think we submitted a supplemental affidavit that
5 indicated -- I can't remember the numbers, but maybe
6 20, 25 percent of the applications are rejected for
7 failure to meet your eligibility criteria.

8 So we think that when it comes to the
9 apartment business -- and I know we're talking just
10 about apartment complexes in this instance, but one of
11 my concerns is that if you hold that they're subject
12 to your regulation, where do you stop? I mean is the
13 college student that has the electric bill in his name
14 but has his roommates share the bill, is he going to
15 be a regulated utility as well?

16 I don't know how far you want to go with
17 this, but right now we're talking about apartment
18 complexes. We think this is clearly a matter of
19 private contract, that there has not been any devotion
20 of the property to a public use, an indiscriminate
21 offering.

22 And the other thing that concerns us is
23 that if this Commission believes it does have
24 jurisdiction to proceed, then we think the fairer way
25 to proceed rather than this complaint proceeding would

1 be to implement some sort of a rulemaking proceeding
 2 where all the stakeholders could get together, decide
 3 how big is this issue, how many people are there, how
 4 does it need to be regulated, does this need full boat
 5 regulation or do we need some sort of an abbreviated
 6 system of regulation? I mean what are the assets,
 7 what's the rate-base? what are we talking about here?

8 It doesn't really mirror the traditional
 9 utility that generates the power or pumps the water or
 10 provides the sewer service and makes the investment in
 11 those facilities. This is a little bit different than
 12 that.

13 But we think that that is a better way to
 14 go rather than a complaint proceeding. Because when
 15 you have a complaint proceeding, National Water and
 16 Power and Aspen Woods are bearing the brunt of this
 17 issue. And even though in past complaint proceedings
 18 that we've reviewed for purposes of this case, there's
 19 been a tendency for someone to capitulate and ask for
 20 certificate rather than to contest the jurisdictional
 21 issue because it's cheaper and easier to do that.
 22 That's come up quite a bit it appears to us in trailer
 23 parks situations or subdivision development
 24 situations.

25 But in this situation, we're talking

1 about a different industry, a fairly -- you know, an
2 industry that wants to keep their industry as private
3 as possible and not turn it over to what they think
4 might be undue governmental regulation or
5 interference.

6 But what I'm here trying to say is that
7 if you decide to assert jurisdiction, we would ask
8 that this complaint proceeding be dismissed or held in
9 abeyance so that you can decide what it is you're
10 going to do and apply it equally to everybody that
11 fits within the -- the pigeon hole that you decide
12 needs to be regulated.

13 And with that, I'd be happy to answer any
14 questions or wait and let other people make
15 presentations and we can do a round robin or whatever
16 you want to do.

17 JUDGE STEARLEY: Questions for
18 Mr. Johnson?

19 CHAIRMAN CLAYTON: Good morning,
20 Mr. Johnson. Glad to see you getting out into other
21 areas other than telecommunications. It's nice to see
22 you again.

23 MR. JOHNSON: So happy to be here.

24 CHAIRMAN CLAYTON: We don't see you very
25 often. I wanted to just ask you from the perspective

1 of your clients that have a national perspective, in
2 how many states are -- in how many states is -- is
3 either National Water and Power or similar entities
4 operating right now? I'm assuming it's more than one.

5 MR. JOHNSON: I can't give you a number,
6 but yes, based on the information I've gotten from
7 them, it is either -- it must be close to half of the
8 states have addressed this issue in some fashion or
9 another.

10 CHAIRMAN CLAYTON: And when you say
11 "states have addressed this issue," you're referring
12 to a public utility commission or public service
13 commission or what do you mean states have addressed
14 it?

15 MR. JOHNSON: I've asked for this state
16 analysis to be provided me but nobody's got one or
17 wanted to take the time to do it and they haven't
18 wanted to pay me to do it. But it's my understanding
19 some states have given this to the legislature and
20 they've decided what needs to be done and who we're
21 going to have do it.

22 Other states have given it to Department
23 of Agriculture, Weights and Measures have come in.
24 And since they're the official weigher and measurer,
25 they've decided it appropriate to give them

1 jurisdiction to make sure the allocation system is
2 fair.

3 CHAIRMAN CLAYTON: Have any states deemed
4 this entity or a similar entity as a public utility
5 subject to the laws of the Public Services Act, do you
6 know?

7 MR. JOHNSON: I don't feel comfortable
8 giving you an absolute. It's my impression that what
9 they've -- several states have given the issue to the
10 Commission, but the issue's been constrained to
11 determining whether or not the allocation methodology
12 is fair, equitable and whether they're passing through
13 the utility costs appropriately.

14 Now, whether they've also given the
15 Commission jurisdiction over late charges, bounced
16 check charges and whether the tenant should have to
17 pay the -- the apartment owner or the billing vendor
18 for the services of doing the allocation, I can't tell
19 you.

20 CHAIRMAN CLAYTON: Okay. Are you
21 familiar with any rules or regulations or some
22 statutory framework, regulatory framework where your
23 client believes is the most equitable way of setting
24 out some rules of the game, what is appropriate, what
25 is inappropriate? Are you prepared to supply us

1 perhaps with some draft regs?

2 MR. JOHNSON: I would be happy to supply
3 you with what my client thinks is the best system.
4 And if I can get my hand on the regs, I'll be happy to
5 send them to you. I know from speaking to the general
6 counsel, they've gone through this in several states
7 and that they're very familiar with the issue. And
8 they've got some ideas. It's just that I don't have
9 that sort of thing with me right here today.

10 CHAIRMAN CLAYTON: Okay. Well, from my
11 perspective, it seems to me that there are greater
12 policy issues involved than just referring to your
13 client. Of course, your client is -- or clients are
14 bearing the issues associated with this case. I look
15 forward to hearing what Staff has to say and perhaps
16 we'll be able to continue this discussion.

17 MR. JOHNSON: Sure.

18 CHAIRMAN CLAYTON: Thank you.

19 JUDGE STEARLEY: Any other questions of
20 Mr. Johnson?

21 COMMISSIONER JARRETT: Yes. Thank you,
22 Judge.

23 Good morning, Mr. Johnson.

24 MR. JOHNSON: Good morning.

25 COMMISSIONER JARRETT: I don't know if

1 you can answer this question or maybe it's
2 Mr. Pearson. I was looking at one of the filings.
3 It's an affidavit provided by James Mathes.

4 MR. JOHNSON: Yes. I'm familiar with it.

5 COMMISSIONER JARRETT: All right. One of
6 the attachments to that I assume -- is that the lease
7 or is it the --

8 MR. JOHNSON: I think the first affidavit
9 had attached to it their eligibility criteria, a page
10 that they gave the applicant that said this is the
11 stuff we need from you.

12 COMMISSIONER JARRETT: Right. It looks
13 like occupancy guidelines, application process, all of
14 that.

15 MR. JOHNSON: I believe Staff has
16 attached to its complaint, or maybe Mr. Merciel's
17 affidavit, some more of the lease documents.

18 COMMISSIONER JARRETT: Right. But the
19 document I'm talking about is -- it says Madison at
20 Aspen Woods. And there appears to be some sort of
21 logo and then Madison there in the top left-hand
22 corner. And then later on in the document it refers
23 to the policy of Madison Apartment Group, LP. I'm
24 just wondering who is Madison Apartment Group, LP.

25 MR. JOHNSON: I'm going to defer that

1 question to Mr. Pearson.

2 COMMISSIONER JARRETT: Okay.

3 MR. JOHNSON: Sorry.

4 COMMISSIONER JARRETT: Mr. Pearson?

5 MR. PEARSON: Yes, thank you, your Honor.

6 There's a fairly complicated ownership situation here
7 so if you'll -- I'm sorry. I thought I had it on. I
8 apologize.

9 The owner of the Madison at Aspen Woods
10 complex is Aspen Wood -- Aspen Woods Apartment
11 Associates, LLC. That LLC, in turn, has various
12 investors who also invest in other apartment
13 complexes. And those complexes have some commonality
14 of supervision and management, but they are all
15 separately owned.

16 So Commissioner, could you give me the
17 name again of the entity that you were asking about?
18 I apologize.

19 COMMISSIONER JARRETT: Sure. It is
20 Madison Apartment Group, LP.

21 MR. PEARSON: I don't off the top of my
22 head have any further information on that entity, but
23 of course, could provide it in a supplemental filing.

24 COMMISSIONER JARRETT: I appreciate that.
25 I'll get back to you now, Mr. Johnson.

1 If I'm a tenant of Aspen Woods and I come in and say,
2 you know, I don't want to deal with National anymore
3 or the apartment complex, I'm going to go directly to
4 Missouri American Water and have them put a meter in
5 for me and I'll just deal directly with them for my
6 water, could I do that?

7 MR. JOHNSON: Not without my permission.

8 COMMISSIONER JARRETT: All right. What
9 if I'm a new tenant and I want to do that or I'm
10 not -- I've been accepted to be a tenant but I'm not a
11 current tenant and I say, well, I don't want to do
12 this water thing, I just want to work directly with
13 American Water -- Missouri American Water. Can I do
14 that?

15 MR. JOHNSON: If what you want to do
16 requires a meter be installed that just discretely
17 measures your usage, then I think you need to make
18 arrangements with Aspen Woods and their plumbers and
19 whatnot to get that thing installed.

20 If they agree to that and it's done, I
21 don't know why you couldn't, recognizing that it's
22 going to complicate their job in not treating all
23 tenants the same way in how the -- the usage is passed
24 through, if you will.

25 COMMISSIONER JARRETT: Right. Well, I'm

1 just asking can I do that?

2 MR. JOHNSON: I don't see any legal
3 prohibition.

4 COMMISSIONER JARRETT: well, I'm asking
5 will Aspen Woods let me do that?

6 MR. JOHNSON: Ask them.

7 COMMISSIONER JARRETT: Mr. Pearson?

8 MR. PEARSON: To my knowledge, no one's
9 ever asked so I honestly don't know the answer to that
10 question.

11 COMMISSIONER JARRETT: Okay. Say I'm a
12 tenant of Aspen Woods and I turn on my faucet and
13 brown water comes out and it stinks. Who do I call
14 for service?

15 MR. JOHNSON: well, I would -- knowing
16 the situation, I would call Aspen Woods first so that
17 they could see if they could fix the problem so you
18 can trace it back to see if the source of the poor
19 water quality is there at the complex or whether you
20 have to go back to Missouri American.

21 COMMISSIONER JARRETT: So the tenant
22 would then have to call Missouri American?

23 MR. JOHNSON: I don't -- I think at that
24 point in time I think Aspen Woods would have to call
25 Missouri American because Aspen Woods is the customer.

1 COMMISSIONER JARRETT: Okay. Are they
2 bound by contract to do that, I mean under the lease?

3 MR. JOHNSON: Not to my knowledge. I
4 haven't read such terms in the lease.

5 COMMISSIONER JARRETT: Okay. I believe
6 you said in your opening argument that the tenants get
7 a bill that looks like a utility bill.

8 MR. JOHNSON: Yes. It's my understanding
9 that my client will assign everybody an account number
10 and so they allocate the usage and they've got an
11 account number that shows up. And according to
12 Mr. Merciel, this thing does resemble a utility bill
13 in several respects.

14 COMMISSIONER JARRETT: Okay. If I've got
15 a question about my bill, who do I call?

16 MR. JOHNSON: Call NWP. That's the
17 instructions on there. They become the interface
18 between the tenant and the -- Aspen Woods for purposes
19 of questions about the bill.

20 COMMISSIONER JARRETT: All right. And if
21 I don't get my question answered to my satisfaction,
22 is there anybody I can appeal that to?

23 MR. JOHNSON: Well, there's some language
24 in there that suggests that you've got so many days to
25 dispute the bill with -- with NWP, but that's -- if

1 you can't get the dispute resolved with NWP in
2 whatever the dispute resolution time frame is, I'm not
3 sure where they go from there.

4 COMMISSIONER JARRETT: Okay. I noticed
5 there was a lot of talk about a pass-through, that
6 there's no profit on the water. Is that factually
7 accurate? I don't know if I understood that
8 correctly.

9 MR. JOHNSON: Well, it's my understanding
10 that when they pass it through, they subtract the
11 common usage out and then so they have a net usage
12 that's solely allocable to all of the tenants or all
13 the apartment complexes.

14 And then I think in the industry they
15 call it RUBS, Ratio Utility Billing System. They've
16 got some sort of system, whether it's based on
17 occupancy or square footage or some combination, that
18 they try to make sure that all of the tenants through
19 whatever ratio they use get billed their portion and
20 that portion aggregated is going to match the usage
21 that was assigned only to the tenants.

22 So from that standpoint, it's intend to
23 be a pass-through. But because the owners, through
24 contract with NWP and the leases, put the financial
25 burden of that on the tenants, the tenants pay an

1 additional \$3 a month to my client. So I'm not sure
2 if that \$3 a month is for utility service or for -- if
3 it's for administration services. But if you assume
4 that that is something they're paying in addition to
5 the charges just for water and sewer, then the -- that
6 \$3 is going to make the total not match strictly just
7 the usage itself.

8 COMMISSIONER JARRETT: Right. And who
9 determines what rate or what charge is made to the
10 customer, to the tenant? Would that be Aspen Woods?

11 MR. JOHNSON: I think Aspen Woods and NWP
12 agree to a methodology that they're going to use. But
13 after that, the formula and its application and the
14 calculation is NWP's responsibility.

15 COMMISSIONER JARRETT: All right. I
16 don't think I have any more questions right now.
17 Thank you, Mr. Johnson and Mr. Pearson. Appreciate
18 it.

19 JUDGE STEARLEY: Commissioners Gunn and
20 Kenney, do you have any questions?

21 COMMISSIONER GUNN: I just have a couple.

22 JUDGE STEARLEY: Okay.

23 COMMISSIONER GUNN: I just have a couple
24 questions. Is --

25 MR. JOHNSON: Which way do I look?

1 COMMISSIONER GUNN: Is that okay? Can
2 everybody hear me?

3 JUDGE STEARLEY: Yes, we can hear you
4 just fine.

5 COMMISSIONER GUNN: Mr. Johnson, you said
6 that some of the concern in response to Chairman
7 Clayton's questions has been dealt with in state
8 legislature. Have any state consumer protection
9 agencies or attorney generals been involved in some of
10 these billing issues?

11 MR. JOHNSON: It's my understanding that
12 some states have given enforcement responsibilities to
13 the attorney general, that they consider this in those
14 states to be a matter of consumer protection that was
15 not strictly appropriate to give just to the state
16 utility commission in that state. Does that answer
17 your question?

18 COMMISSIONER GUNN: It does. Thank you.
19 In a follow-up to Commissioner Jarrett's question,
20 what -- who determines what the consumer service
21 standards are for NWP? Is it just the market or -- or
22 do you look to tariffs for guidance or any other
23 standards? If -- if -- in order of resolving consumer
24 complaints or -- or training on phones or any of that
25 situation, who -- who determines what those standards

1 are?

2 MR. JOHNSON: If we're speaking in
3 Missouri and we assume the Commission has no
4 jurisdiction or has asserted no jurisdiction, the
5 standards are strictly a matter of contract; one
6 contract between the tenant and apartment owner and
7 the other contract between the apartment owner and the
8 billing vendor, which in this case would be NWP.

9 But other than those contracts, I don't
10 think there would be any higher governmental authority
11 to -- to set those standards. And there's no
12 standards that they would have to live by,
13 Commissioner.

14 COMMISSIONER GUNN: Does Missouri -- is
15 it NWP's position that Missouri American Water has no
16 involvement in any of those standards, has no
17 responsibility in making sure that those standards are
18 met?

19 MR. JOHNSON: Well, I'm not sure I can
20 answer the question, but in my mind, part of the issue
21 is the fact that -- and when -- I say it's a fact, but
22 I'm assuming that under Missouri American's rate
23 structure and tariff structure they've got different
24 rates for industrial customers or commercial customers
25 than they do for residential.

1 And in this situation, I think they
2 probably have a different rate structure for an
3 apartment complex of 400-plus units than they would
4 for an individual house sitting next door to this
5 complex.

6 And so there are savings from the
7 utility's perspective from not having to do the
8 metering and the billing for all of the 400-plus
9 units. And it's almost -- to me, it's a question
10 of -- I don't want to say rate design, but there's a
11 special rate there that acknowledges this situation
12 exists and that's what this rate structure is for.
13 And I think I'm dancing around the answer to your
14 question, but it's probably because I forgot the
15 thrust of the question.

16 COMMISSIONER GUNN: well, let me ask you
17 this: One of the major concerns is that essentially
18 you could cont-- according to what -- what the
19 position is, is you could contract around standards
20 that are set in a tariff for whatever -- whatever that
21 be, whether that be rates, whether that be customer
22 service, whatever is said in a tariff that the
23 arrangement that we have set up allows people to
24 contract around that.

25 And so any -- any pricing or any of those

1 things set in the tariff can be contracted around
 2 through the type of arrangement that you're talking
 3 about. Not saying that that's what's happening here,
 4 but saying that's one of the major concerns.

5 So I'm asking what NWP's position is in
 6 regard to whatever responsibilities Missouri American
 7 has to ensure that -- if any, and they may not because
 8 there's no requirement to, to ensure that any -- any
 9 of those things that are required of Missouri American
 10 in the tariff are being complied with by NWP and Aspen
 11 Woods?

12 MR. JOHNSON: Okay. Thank you. I
 13 understand the question now. I think NWP's position
 14 is that the customer here is Aspen Woods, the
 15 utility's Missouri American Water. If there's any
 16 tariffs, they're going to have to be Missouri American
 17 Water's tariffs.

18 And if those tariffs contain provisions
 19 that pertain to Missouri American -- pertain to Aspen
 20 Woods, then those provisions in those tariffs have to
 21 be complied with. It's just -- since National Water
 22 and Power is not the customer of Missouri American,
 23 none of those tariffs could apply to it.

24 COMMISSIONER GUNN: Thank you. I'm going
 25 to move onto another quick issue. So the billing

1 allocation, the water is allocated on a formulaic
2 usage, not actual usage. Correct?

3 MR. JOHNSON: Correct.

4 COMMISSIONER GUNN: So if someone in a --
5 in a certain square foot apartment decides they want
6 to turn their water on and leave the -- the tap
7 running for hours on end while they're away or they
8 have a leak or whatever, those costs are allocated
9 among -- or they are not necessarily charged for those
10 costs, those costs may be allocated other places?

11 MR. JOHNSON: That's correct

12 COMMISSIONER GUNN: All right. Now is
13 that -- is that based on the technology of the
14 metering or is that based on it's what's easier for
15 everybody to do?

16 MR. JOHNSON: I think it's based on
17 what's easier and cheaper to do. It's easier and
18 cheaper just to have one meter for each structure
19 rather than to have a separate meter for 50 different
20 apartments within that structure.

21 COMMISSIONER GUNN: Right. Okay. Thank
22 you. I appreciate it. I don't have anything further.
23 I don't know if Commissioner Kenney does.

24 COMMISSIONER KENNEY: Just a couple. Can
25 you hear me okay?

1 MR. JOHNSON: Yes, sir.

2 COMMISSIONER KENNEY: Good morning. This
3 is an adjunct to Commissioner Gunn's question. Has
4 any state attorney general's office looked into this
5 issue more broadly? And not necessarily whether
6 they've been granted authority under their consumer
7 protection powers, but has any state AG's office just
8 looked into the issue of National Water and Power
9 contracting with the apartment complex to do its
10 billing?

11 MR. JOHNSON: I'm not sure that any state
12 has looked into that specific relationship and
13 investigated it. I have no knowledge of that. I
14 guess it's possible, but I just don't know.

15 COMMISSIONER KENNEY: Okay. And I was
16 not clear. The \$3 a month charge that you were
17 discussing earlier, what is that for?

18 MR. JOHNSON: That is for NWP's services
19 in calculating the tenant's bill and sending it to
20 them.

21 COMMISSIONER KENNEY: And that is a
22 charge that's contractually set forth between you and
23 your customer, Aspen Woods; is that right?

24 MR. JOHNSON: Well, there's definitely a
25 contract between Aspen Woods and NWP. I think the

1 source of the contract that authorizes that charge
2 also includes the lease agreement between Aspen Woods
3 and the tenant. In other words, the tenant agrees to
4 pay the bills or the charges that NWP sends the
5 tenant.

6 COMMISSIONER KENNEY: But you don't have
7 a contractual relationship with the tenant. I mean
8 your customer is Aspen Woods?

9 MR. JOHNSON: I believe that's correct,
10 yes, your Honor.

11 COMMISSIONER KENNEY: And so is the \$3 a
12 month charge for sending the bill to the customer, is
13 that contractually set forth in the agreement that NWP
14 has with Aspen Woods?

15 MR. JOHNSON: I believe it is. I'd have
16 to reread the agreement to see for sure. I know we
17 produce several of those --

18 COMMISSIONER KENNEY: I guess -- go
19 ahead. I'm sorry.

20 MR. JOHNSON: I just said we've produced
21 the agreements for several different complexes in
22 Missouri. I just -- standing here, I can't remember
23 whether there's a specific promise in there for the
24 3 bucks or if it's fixed forever or if it's something
25 that can change. I'm just not certain.

1 COMMISSIONER KENNEY: But it's your
2 understanding though that Aspen Woods' lease agreement
3 with its tenants provides that the tenant will pay
4 that charge?

5 MR. JOHNSON: Yes.

6 COMMISSIONER KENNEY: So if I -- if we
7 were to examine NWP's contract with Aspen Woods and
8 then the lease agreement between Aspen Woods and its
9 tenants, that figure should match up dollar for
10 dollar?

11 MR. JOHNSON: If the figure is
12 specifically mentioned in both agreements, yes, sir,
13 it should.

14 COMMISSIONER KENNEY: Okay. And does the
15 attorney for Aspen Woods have anything to add to that?

16 MR. PEARSON: No. I believe that's
17 accurate.

18 COMMISSIONER KENNEY: Are you aware of
19 any consumer -- any tenant in any of the states in
20 which you operate confusing National Water and Power
21 for a public utility?

22 MR. JOHNSON: I'm not.

23 COMMISSIONER KENNEY: Has that allegation
24 ever been made in any type of formal proceeding or
25 informal proceeding?

1 MR. JOHNSON: I'm not specifically aware
2 of any proceeding in which that allegation was made.
3 It wouldn't surprise me if it's happened, but I'm just
4 not aware of any.

5 COMMISSIONER KENNEY: Does the attorney
6 for Aspen Woods have anything to add to that?

7 MR. PEARSON: I have nothing to add.

8 COMMISSIONER KENNEY: You're not aware of
9 any such confusion?

10 MR. PEARSON: No, I'm not.

11 COMMISSIONER KENNEY: Okay. Okay. I
12 don't have any other questions. Thanks.

13 CHAIRMAN CLAYTON: Before we let
14 Mr. Johnson off the hook, National Water and Power is
15 your client.

16 MR. JOHNSON: Yes.

17 CHAIRMAN CLAYTON: I want to be clear
18 about that. They send the bill. Is there a consumer
19 services phone number on the bill? Is there just a
20 phone number on the bill?

21 MR. JOHNSON: Well, I know that they
22 direct them to contact NWP in case they have a
23 question or want to dispute the bill. I assume
24 there's contact information included on the bill, but
25 I can't sit here and tell you I've seen it and I know

1 what it is.

2 CHAIRMAN CLAYTON: So let's say a tenant
3 receives a bill, the bill's higher than what they
4 think it ought to be and they call up NWP and say, I
5 got a problem with this bill. What does NWP do? Do
6 they say, Let's work through this? Do they have the
7 authority to adjust it? Do they not? Do they even
8 take the call? Do they route them somewhere else? Do
9 they refer them to Aspen Woods? Do you know?

10 MR. JOHNSON: You know, I really don't
11 know, Commissioner. I would imagine they say, Who are
12 you, give me your account number, let me make sure
13 you're somebody that's got standing to ask this
14 question. And now that I've confirmed who you are,
15 tell me what your problem is and we'll see if we can
16 work our way through it, but --

17 CHAIRMAN CLAYTON: What does NWP do if
18 you get a tenant that calls up and says, I ain't
19 paying it, I'm not paying the bill? And so you have,
20 say, two or three months where they don't pay the
21 bill, they're otherwise current with their obligations
22 under the lease. What does NWP do?

23 MR. JOHNSON: I don't know.

24 CHAIRMAN CLAYTON: Does it call Aspen
25 Woods? Does Aspe-- well, I'll ask Aspen Woods, but

1 from your -- do you make a referral to Aspen Woods?

2 MR. JOHNSON: From my perspective, their
3 sole remedy would be go to Aspen Woods and say, This
4 guy's not paying, he's violating the lease, you need
5 to take care of this. Whether that's ejectment or
6 something, I don't know.

7 CHAIRMAN CLAYTON: Okay. And I think
8 this question was asked. If somebody said, My water
9 smells, and they call the number on the phone -- on
10 the -- on the bill, NWP, what does NWP do with that?
11 water isn't any good. What do you do with that?

12 MR. JOHNSON: I don't know, but I would
13 assume they call Aspen Woods and they check to see if
14 the problem is on their side or the facility or the
15 meter with Missouri American or maybe they call
16 Missouri American and they chase down the problem
17 together. I just don't know.

18 CHAIRMAN CLAYTON: What happens if they
19 call up and they say, I've looked at your algorithm
20 and I think it's broken and I think your allocation
21 factor is wrong, what are you going to do about it?
22 What does NWP do? Does it rerun the figures?

23 MR. JOHNSON: I would hope that every
24 month NWP does a reconciliation where they look at the
25 aggregation of the bills they're sending out and

1 making sure it meets the net after the common usage is
 2 subtracted out of the bill, but, you know, I've never
 3 called NWP and asked any of these questions. They
 4 might have lots of different responses I haven't
 5 thought about.

6 CHAIRMAN CLAYTON: I understand.

7 MR. JOHNSON: If you're asking me is
 8 there possible consumer protection issues associated
 9 with this relationship, I'm not going to sit here and
 10 say no. The question before us today isn't whether
 11 there may or may not be some need for consumer
 12 protections. The question today is whether the Public
 13 Service Commission has jurisdiction, and I'm saying
 14 you don't.

15 CHAIRMAN CLAYTON: Well, I think if you
 16 have a bill from a company that says National Water --
 17 National -- what is it? NWP.

18 MR. JOHNSON: National Water and Power.

19 CHAIRMAN CLAYTON: National water and
 20 Power. So you got a company that kind of looks like a
 21 utility, you get a bill that looks like a utility
 22 bill. It reflects a public service that we generally
 23 regulate around here. Comes in, there's a consumer
 24 hotline on it. Where is a consumer -- what does a
 25 consumer think? Are they thinking that they're

1 dealing with a utility company or they think they're
2 just dealing with a bill administrator, which is what
3 NWP kind of sounds like? And so what expectations
4 does the consumer have and what is NWP holding itself
5 out to be?

6 And so what I'm trying to get at is the
7 relationship that if there is a problem, how does NWP
8 respond? And that's where you're struggling with
9 answering because you're not taking the hotline calls.
10 Maybe you ought to get the hotline calls for a week
11 and then we could reconvene the hearing.

12 MR. JOHNSON: Well, I appreciate that. I
13 do think there was a hotline call that instigated this
14 case or I wouldn't be in front of you today. But to
15 me, the correct answer to all those questions is,
16 you've agreed to this because you signed a lease
17 saying that you were going to agree to this manner of
18 taking care of utility bills. If you didn't do that,
19 we weren't going to -- we're not going to give you
20 occupancy.

21 CHAIRMAN CLAYTON: That water allocation
22 factor is unlimited. You agree to pay whatever that
23 bill is even if it is a \$500 a month water bill? They
24 have an obligation to pay that under the lease?

25 MR. JOHNSON: I don't know if the lease

1 says you pay whatever bill they send you or you will
2 pay your share -- your fair share of the bill. I
3 don't know which it says.

4 CHAIRMAN CLAYTON: Okay. Okay. Thank
5 you very much.

6 JUDGE STEARLEY: Commissioner Gunn, I
7 believe you have another question for Mr. Johnson?

8 COMMISSIONER GUNN: Yeah, I just had a
9 couple questions because I think you brought up an
10 interesting point about jurisdiction. So we have
11 jurisdiction over Missouri American Water. Now, do
12 you think that we would be able to tell Missouri
13 American Water that they could not contract with
14 customer -- customers the way that you have the
15 contract with Aspen Woods and NWP?

16 MR. JOHNSON: Yes. I think you would
17 have the jurisdiction to do that, but there would have
18 to be some sort of a proceeding initiated, a
19 conclusion reached by you saying we're going to change
20 it and you're going to have to make them change their
21 tariffs.

22 COMMISSIONER GUNN: So in the next rate
23 case we could come up and say, You know what, we think
24 that this is -- we don't think there are any consumer
25 protections so we want you to individually meter

1 certain apartments? We could -- you think that we
2 have jurisdiction to do that?

3 MR. JOHNSON: Yes. There might be a
4 rate-base issue, but yes, you would have the
5 jurisdiction to do that.

6 COMMISSIONER GUNN: But you don't have
7 any contractual obligation to Missouri American Water.
8 It's only to Aspen Woods. Right?

9 MR. JOHNSON: Yes.

10 COMMISSIONER GUNN: Now, what if your
11 contract with Aspen Woods is in -- is in direct
12 contradiction to a tariff provision between Missouri
13 American and Aspen Woods or -- or for Missouri
14 American's tariff? Which -- under a jurisdictional or
15 a -- which -- which would prevail?

16 MR. JOHNSON: In that situation, the
17 dispute would be between Aspen Woods and Missouri
18 American Water. And the fact that Aspen Woods had
19 contracted with NWP in a manner inconsistent with
20 Missouri American's tariff would not be NWP's problem.
21 It would be Aspen Woods' problem. They're the
22 customer.

23 COMMISSIONER GUNN: Would you -- would
24 you be able to recover on a contract claim, in your
25 opinion -- obviously this is all a hypothetical --

1 against Aspen Woods for entering into a contract with
2 you that may be invalid based on a tariff provision?

3 MR. JOHNSON: It would depend entirely
4 upon what the contract says, what limitations or
5 remedies there are. But it's my understanding as a
6 basic fundamental of contract law that if we entered
7 into a contract based on a unilateral mistake on Aspen
8 Woods's part as to whether the contract was legal, we
9 could still enforce our contract with Aspen Woods.

10 If there's a mutual mistake, then I think
11 Aspen Woods could have the contract rescinded or
12 changed to reflect -- to correct that mutual mistake.
13 In this situation, the mistake would go to the essence
14 of the contract so I think it would be rescinded.

15 COMMISSIONER GUNN: I'd like you to stay
16 there for a second, but I have a question for
17 Mr. Pearson. Mr. Pearson, is the tenant submitting to
18 this arrangement between NWP and Aspen Woods a
19 condition of occupancy?

20 MR. PEARSON: It's in the lease. You
21 know, the lease is a preprinted form. I cannot say
22 that I have knowledge whether that lease has ever been
23 amended by negotiation, but I would doubt it.

24 COMMISSIONER GUNN: So if I'm a tenant
25 and I get your preprinted lease and I just happen

1 let's say be Mr. Johnson and I decide that I don't
2 want to deal with that arrangement and I cross out
3 that lease -- that provision of the lease and initial
4 it and sign it and I'm allowed to move in or would
5 I -- do you think I would be allowed to do that?

6 MR. PEARSON: It would just be a guess on
7 my part. I have no knowledge as to whether that's
8 ever happened or not.

9 COMMISSIONER GUNN: I'm asking for a
10 guess. It's okay. It's a hypothetical. I'm not
11 asking for real world stuff here. What I'm trying to
12 figure out is, is this -- acceptance of this
13 arrangement forced on your tenants or not? Are they
14 being forced to submit to a contract between NWP and
15 Aspen Woods as a condition of the con-- as a condition
16 to their contract between the tenant and Aspen Woods?

17 MR. PEARSON: Well, let me answer it this
18 way: Given the competition in the apartment complex
19 world, I don't think anybody's forced to rent an
20 apartment at Aspen Woods because they can go across
21 the street.

22 But I -- my educated guess would be that
23 Aspen Woods is insistent upon this water relationship
24 existing because it would be so difficult for them to
25 administer one water system for 400 com-- apartments

1 within the complex and a different one for one
2 apartment within the complex. I think common sense
3 would dictate that.

4 COMMISSIONER GUNN: All right. I don't
5 think I have any further questions, but I appreciate
6 it.

7 JUDGE STEARLEY: Commissioner Jarrett?

8 COMMISSIONER JARRETT: Yes, I did have a
9 question on the jurisdictional issue, when you were
10 talking about that if we do have jurisdiction, that we
11 should institute a rulemaking.

12 It's been my experience on the Commission
13 it's not uncommon for us to discover utilities out
14 there doing business without a certificate. Some
15 developer builds a 15-home development, runs it --
16 builds a little water and sewer system to serve it,
17 runs it for years, never comes to this Commission, we
18 know nothing about it, it's way out in rural Missouri
19 somewhere, you know, we don't know anything about it.
20 Twenty years later, you know, the water system's
21 falling apart, somebody calls our hotline.

22 MR. JOHNSON: DNR says you need a new
23 permit.

24 COMMISSIONER JARRETT: Right. And all of
25 a sudden we find out about it and we assert

1 jurisdiction because we have jurisdiction over them.
2 How would that be any different here if we discover --
3 if our staff discovers through a complaint that
4 there's a company out there that we have jurisdiction
5 over, why do we need to have a rule making to assert
6 jurisdiction over a company we should be regulating
7 and probably should have been regulating for years and
8 we just found out about it?

9 MR. JOHNSON: I don't disagree with your
10 analysis. I get those calls from time to time
11 where -- but the law is so intricate here. If in your
12 example the developer is only serving people that are
13 a member of an association, they don't need a
14 certificate. If they're going to serve people who are
15 not members of an association, then they do need a
16 certificate. So it's not always as simple as you
17 would like to see it.

18 And what I've seen in the case law that I
19 reviewed is that typically what happens is staff finds
20 out that somebody is operating and sh-- or they think
21 they should have a certificate, they file a complaint.
22 And then it's my experience in looking at these
23 things, that typically they will sell or consent to
24 jurisdiction or in the one -- the mobile home
25 situation, the trailer park situation, they went under

1 the wing of the City of Columbia and had some rate
2 protection for the consumers that way.

3 what's different about this situation in
4 my mind is, is that we don't think there's any
5 argument that this is anything more than a matter of
6 how we contract to lease private property. We're not
7 in the business of selling water or sewer. We're in
8 the business of selling apartments and space and this
9 is an incidental thing.

10 And we haven't devoted our pipes -- I
11 don't know what piece of property you want to look at
12 to make the evaluation of public use here, but we
13 definitely haven't devoted the whole parking lots and
14 the structures strictly to a utility type of service.
15 They're devoted to occupation -- to occupancy.

16 The only thing that's our property that
17 could arguably be within -- trigger the jurisdiction
18 is the water pipes, the sewer pipes, that sort of
19 thing. And since it's incidental and since it's not a
20 situation where we offer indiscriminately to anybody
21 who wants to step up to the plate and get service from
22 us, we just don't feel like we've devoted our property
23 to public use and we're not subject to the
24 Commission's jurisdiction.

25 But I see nothing wrong with the

1 Commission asserting jurisdiction by complaint, but if
2 you know there's an industry like this out there that
3 you've never regulated before, you've got no
4 assessment stuff for it, it's not in your budget to do
5 it, you don't have a department to do it, if you're
6 going to start to do it, wouldn't it be smarter and
7 wiser and fairer to do it for everybody rather than
8 just wait for Staff to finger somebody to drag them in
9 for the next complaint proceeding?

10 COMMISSIONER JARRETT: Thank you,
11 Mr. Johnson. Appreciate it.

12 JUDGE STEARLEY: Any other questions for
13 Mr. Johnson? I see none. Thank you, Mr. Johnson.

14 Mr. Pearson, if you would like to add to
15 Mr. Johnson's opening and I know the Commissioners had
16 some questions for you as well.

17 MR. PEARSON: Thank you very much. I'll
18 be brief because I pretty much endorse everything
19 that Mr. Johnson said, but I would like to emphasize a
20 couple of points as they relate to my client.

21 what I'd like to do is actually start
22 with the last question from Commissioner Jarrett and
23 step back for a moment. It's one thing for the
24 Commission to find -- or for the Staff to find an
25 entity within a regulated environment and file a

1 complaint and seek jurisdiction. Certainly we
2 understand that.

3 But here we're talking about not one
4 entity within a universe of known regulated entities.
5 We're talking about a categorical difference. And
6 we're talking about a categorical difference that has
7 never been the law.

8 If you go back to 1918, the original
9 Danciger case that developed the public use
10 requirement -- and bear with me while I read you a
11 quote. It's a little bit long, but I think it's
12 important. The Missouri Supreme Court was quoting a
13 Supreme Court of Wisconsin case and it said, The State
14 claims that by furnishing heat, light and power to the
15 tenants of their own building, the plaintiffs became a
16 public utility; that the furnishing of such
17 commodities to anyone else than to one's self is
18 furnishing it to the public within the meaning of the
19 statute.

20 It is obvious that such a construction is
21 too narrow, for it would constitute the owner of every
22 building furnishing heat or light to tenants as well
23 as every householder who rents a heated or lighted
24 room a public utility. The legislature never
25 contemplated such a construction to be given the words

1 "public utility."

2 specific reference in the original case
3 that forms the body of laws here to a tenant -- a
4 landlord/tenant relationship not creating a public
5 utility.

6 There's another case that essentially
7 says the same thing, the Cirese case from 1944 that's
8 quoted in our moving papers. Here the Court of
9 Appeals said that the entity is not, however, a public
10 utility insofar as their facilities and activities are
11 confined to the manufacture, distribution and sale of
12 electrical energy to themselves and to their own
13 buildings and tenants thereof.

14 so the public use requirement which by --
15 which is an essential requirement of court -- of
16 Commission jurisdiction, the Danciger case was clear
17 on that, has never been extended to a landlord/tenant
18 relationship.

19 Now, the questions that have been asked
20 here I think are interesting ones and good ones. But
21 they do not convert -- they do not -- those questions,
22 legitimate as they may be, do not give the Commission
23 jurisdiction in a complaint investigation. And I'll
24 talk a little bit about Aspen Woods' view on
25 regulation here in a moment.

1 But I think it's -- it's very important
2 for the Commission to understand that my client, who
3 has a landlord/tenant relationship, has never been on
4 notice that that might be subject to a complaint
5 investigation. And that's very different from a
6 developer who runs a water system who -- who can have
7 fair knowledge that there may well be jurisdiction and
8 that there are hundreds of water systems that are
9 subject to regulation. So I think that's the
10 difference between this case and a developer at the
11 lake or somewhere else.

12 Just a couple of other legal points that
13 I'd like to emphasize that Mr. Johnson alluded to and
14 then I'd like to talk for a moment about my client.
15 Case law suggests that the very basis for court -- for
16 Commission jurisdiction is the existence of a national
17 monopoly. That's the Laclede Gas case, 1980.

18 The court said, while it is correct that
19 utilities operate within our free enterprise system,
20 the courts remain mindful that these same utilities
21 are, in fact, by their nature, monopolies.

22 We submit that there's no evidence in the
23 record that would support a monopoly situation here.
24 The barriers to movement in the rental -- in the
25 leasing and rental of both office space and living

1 space are low. It is not comparable to a utility who
2 has made the kind of investment in a large
3 infrastructure that creates the rationale for
4 regulation. So the -- the -- the very policy basis
5 for regulation that -- the existence of a national
6 monopoly does not exist here.

7 Turning for a moment to my client though,
8 we operate a 400-unit apartment complex in St. Louis.
9 The report filed by the National Apartment Association
10 on Friday suggests that there may be 42,000 apartment
11 units in the state that are similarly situated. We
12 honestly don't know. I mean we -- we operate a
13 400-unit complex. We have some anecdotal evidence as
14 to what our -- our competitors do.

15 There is a management relationship
16 between Aspen Woods and two other entities in the
17 state that were identified in some of the earlier
18 pleadings in the case. Those two entities operate
19 much the same way Aspen Woods does. But beyond that,
20 we don't have knowledge.

21 But these legitimate questions about
22 consumer protection and contract-- contracting as a
23 way to perhaps -- not meaning to put words in the
24 mouth of any of the Commissioners, but to evade a
25 tariff or to sidestep a tariff are not inappropriate.

1 But they're -- but they are unanswerable as this -- as
2 this case exhibits. They are unanswerable in the
3 context of a single complaint investigation, in my
4 judgment.

5 So with that, I will close my remarks,
6 but I will -- in doing so, I'll ask the Commission to
7 grant the motion for summary determination on the
8 basis that there's no public use and pledge that were
9 the Commission to look at this further, our client
10 would provide whatever information would be helpful as
11 the Commission looks at this issue in a more -- in a
12 more broad, we believe more fair, and also a more
13 appropriate manner. So thank you for your time. I'll
14 take any questions.

15 JUDGE STEARLEY: Questions for
16 Mr. Pearson?

17 CHAIRMAN CLAYTON: Thank you, Judge.
18 welcome, Mr. Pearson. We're glad that you're here.

19 MR. PEARSON: Thank you.

20 CHAIRMAN CLAYTON: Hey, this is exciting
21 stuff for us. This is cutting edge discussion at the
22 Public Service Commission. I appreciate you being
23 part of the discussion.

24 MR. PEARSON: Thank you, sir.

25 CHAIRMAN CLAYTON: I wanted to ask you

1 just a few questions. You represent the apartment
2 complex at issue here --

3 MR. PEARSON: Yes, sir.

4 CHAIRMAN CLAYTON: -- correct? So -- and
5 this has been asked, but I think I'm going to ask it
6 in a different way. Does a tenant have an alternative
7 to water service other than sign -- if they want to
8 become a tenant in this apartment complex, do they
9 have an alternative to water service or not? Is it
10 NWP and -- and the deal or nothing or do they have an
11 option?

12 MR. PEARSON: They probably don't have an
13 option.

14 CHAIRMAN CLAYTON: Okay. Okay. So
15 basically it's one alternative and they can take it or
16 leave it, move onto another competitive apartment
17 complex?

18 MR. PEARSON: I believe so.

19 CHAIRMAN CLAYTON: Okay. Under the
20 Danciger analysis, if you had a circumstance where --
21 I don't want to say this about Aspen Woods. I'm not
22 asserting that this is the case. But if you had in a
23 competitive environment with an apartment complex, say
24 you reduced your rent for a certain apartment by half.
25 And then without the disclosure of what a water bill

1 will be, the agreement is signed, the lease is signed
2 and that the difference in the value in terms of
3 revenue is made up in a water bill.

4 Take a situation where we say we're going
5 to put \$100 a month surcharge on your water bill, call
6 it a connectivity fee, call it -- call it whatever you
7 want. And you put that on and include that as part of
8 the costs that -- or the dollars that will come back
9 to the apartment complex. Under that circumstance,
10 does that change the Danciger analysis in any way in
11 your mind?

12 MR. PEARSON: In your hypothetical is
13 that disclosed to the tenant?

14 CHAIRMAN CLAYTON: No. They sign up --
15 there's a sign out front that says, Rent Now \$200 a
16 Month and the fair market value is actually \$300 a
17 month. And so that there is a \$100 utility
18 connectivity fee. And as I understand it, your lease
19 right now does not identify a dollar amount or
20 identify what the fees are going to be on that utility
21 bill right now. It's whatever your deal is with NWP
22 is going to be passed through. Correct?

23 MR. PEARSON: There is -- I'm not going
24 to say that there's perfect disclosure. Some of the
25 fees are -- I think the record evidence is that --

1 this wasn't -- this isn't in the record on this
2 motion. I'll -- I'll be clear on that, but --

3 CHAIRMAN CLAYTON: That's all right.
4 We're an administrative agency. Say what you want.

5 MR. PEARSON: I understand. I believe
6 that the disclosure is not complete, but it is not
7 nonexistent. It's somewhere in the middle. And I
8 just honestly can't remember exactly what's disclosed
9 and not. What isn't is pretty small.

10 CHAIRMAN CLAYTON: Would -- would your
11 client have the ability though to tack on some fees?
12 In the competitive marketplace, everybody's fighting
13 for that lowest cost unit. Everyone wants the
14 cheapest unit out there. It's a tenant's market and
15 so you got to get that out there but you make up your
16 revenue in another way. Do you -- does your client
17 have the ability to do that right now?

18 MR. PEARSON: Under the -- under the
19 Public Service Commission law or under the consumer
20 protection statute?

21 CHAIRMAN CLAYTON: Just today. I guess
22 under this analysis, does -- do you believe that that
23 is a lawful or appropriate -- I guess start with
24 lawful and do you think it's appropriate, but I know
25 what you're going to say on that piece.

1 MR. PEARSON: Well, I don't think it's
2 appropriate at all. And I don't think it's lawful.
3 But I think the reason it's not lawful is found in
4 Chapter 407, which is the consumer protection
5 statutes. I don't think that that sort of scenario
6 you laid out changes the Danciger analysis because
7 Danciger is clear that there must be a public use.

8 And the -- that relationship as
9 inappropriate as you suggest, Danciger doesn't depend
10 on the nature of the contract. Danciger doesn't say
11 that a public use exists where one side has a superior
12 bargaining un-- position. Danciger doesn't even say
13 that if someone fails to properly disclose, that
14 converts it to a public use.

15 So that's a bad result, it's bad law. But
16 my position is there's this whole set of remedies to
17 resolve that other than the public use doctrine.

18 CHAIRMAN CLAYTON: Let me give you
19 another hypothetical. As I understand it right now,
20 Aspen Woods gets a bill from Missouri American --

21 MR. PEARSON: Yes, sir.

22 CHAIRMAN CLAYTON: -- on a monthly basis.
23 It has a certain number of gallons, it's got the
24 commercial fixed monthly charge and then it's got a
25 total dollar amount due. And then that is the

1 starting point where you all will run the algorithm or
2 the formula and then you will distribute -- you'll
3 divvy it out to all the different tenants. Is that
4 correct?

5 MR. PEARSON: Pretty much, yeah.

6 CHAIRMAN CLAYTON: So is there anything
7 that prevents Aspen Woods from saying, we're going to
8 add 15 percent to that -- that monthly bill and then
9 we're going to start with that figure before we put it
10 into the formula? Is there anything that prevents you
11 today from doing that?

12 MR. PEARSON: I think the lease would
13 prevent -- would prevent Aspen Woods from doing that.

14 CHAIRMAN CLAYTON: What language in the
15 lease? What does the lease say that would prevent
16 that?

17 MR. PEARSON: I'd have to look at it. I
18 can't -- I can't give you that off the top of my head.

19 CHAIRMAN CLAYTON: Let's say you added a
20 provision to the lease that says that the landlord has
21 the ability to assert or add its own administrative or
22 handling charges associated with water bills. Just
23 vague language that would suggest the possibility of
24 it. Do you believe Aspen Woods or any apartment
25 complex could do that today?

1 MR. PEARSON: Oh, you get into a debate
2 about whether that's a sufficient disclosure under the
3 consumer protection laws, but and -- you know, there's
4 a line drawing issue there, but if there's reasonable
5 disclosure, yes, they can do that.

6 CHAIRMAN CLAYTON: Does -- and I'm not
7 familiar with the owners of Aspen Woods or the
8 operating company or do you all operate in any other
9 states other than Missouri?

10 MR. PEARSON: Depends on what you mean by
11 "you." And I hate to dodge that question. Let me
12 answer a little more fully. The owner of Aspen Woods
13 operates just the one complex. It has common
14 ownership and some common contractual relationships
15 with entities like Aspen Woods who operate apartment
16 complexes in -- in other states.

17 CHAIRMAN CLAYTON: In those other states
18 do you have suggested statutory framework or
19 regulatory framework that allows for the practice to
20 continue but provides a certain degree of consumer
21 protection or a certain amount of redress other than
22 going to a circuit court over \$100 discrepancy on a
23 utility bill that's in another state in which you may
24 operate?

25 MR. PEARSON: I'm trying to think here.

1 Not that I know of. But let me give you -- if I may,
2 if you'll bear with me a sentence or two, let me give
3 you a broader sense. Our client's not against that
4 type of regulation and it's not against increased
5 consumer protection, frankly.

6 And I think this case has perhaps served
7 as a knowledge base for that. Their problem is being
8 the only one subjected to it when their competitors
9 are not.

10 CHAIRMAN CLAYTON: We're all about good
11 government here, I promise you.

12 MR. PEARSON: We appreciate that.

13 CHAIRMAN CLAYTON: What do you think
14 about the concept if we were to write a regulation
15 that attempted to work off existing case law that
16 defined what is -- what is not a public utility and
17 that as long as an entity is operating in a certain
18 way -- and I'm throwing it out as a suggestion -- that
19 basically it's a dollar for dollar pass-through of the
20 commodity costs, that you don't have -- that you don't
21 have your own markup with their markup, that perhaps
22 they're acting as an administrator rather than having
23 an unlimited markup on their own or that there's -- if
24 you set out some rules of the game that said if you
25 meet these criteria, you are not acting as a utility,

1 not subject to regulation? Does that provide your
2 client with comfort?

3 MR. PEARSON: Yes. I would endorse that,
4 frankly. Because my client isn't -- I know that your
5 various scenarios are not directed at us, but my
6 client is not interested in competing with other
7 apartment complexes who do the kind of manipulation
8 that you suggested, because they don't think they do
9 that. They want a fair playing field and a level
10 playing field.

11 The kind of rulemaking or other global
12 solution that you're suggesting, I think this case
13 reveals is probably a good idea and is an appropriate
14 thing for the Commission to take a look at.

15 Because I think -- and I can't remember
16 who raised the point, it may have been you or it may
17 have been Commissioner Gunn, the idea that there might
18 be an ability to manipulate the contractual
19 relationships to essentially eliminate some of the
20 effectiveness of the tariff is a legitimate -- is a
21 very legitimate problem that I can understand why the
22 Commission would be concerned about.

23 CHAIRMAN CLAYTON: Thank you very much.

24 MR. PEARSON: I would like to say one
25 thing that -- that segues from that and I'm speaking

1 outside the record here, but you had sort of invited
2 that. I received some information on Thursday that
3 tells me this: Aspen Woods actually loses money on
4 water service. And the reason it -- and by loses
5 money I mean this: That gap that we've talked about
6 the common areas is actually larger than the amount
7 that -- well, plus their fees that they pay to NWP is
8 actually larger than they recover from their tenants.
9 Now that's not in the record. I'm just saying that
10 because you invited --

11 CHAIRMAN CLAYTON: So you're saying that
12 Aspen Woods doesn't reallocate through a different
13 formula a percentage of the common area expense back
14 to tenants?

15 MR. PEARSON: That's in the rent.

16 CHAIRMAN CLAYTON: That would just be
17 built into rent. So the common areas don't go back to
18 the tenants on a separate basis. That's included in
19 the underlying rent charge?

20 MR. PEARSON: Correct. Yes, sir.

21 CHAIRMAN CLAYTON: That's interesting.
22 Thank you.

23 JUDGE STEARLEY: Commissioner Jarrett?

24 COMMISSIONER JARRETT: Yes. Mr. Pearson,
25 I'm confused now. Is it your client's position that

1 we don't have jurisdiction?

2 MR. PEARSON: Yes.

3 COMMISSIONER JARRETT: So if we don't
4 have jurisdiction, we don't have jurisdiction, period,
5 to do anything, make a rulemaking -- I mean we'd have
6 to have some sort of jurisdiction to make a
7 rulemaking.

8 MR. PEARSON: Well, I agree. I was asked
9 the question what would be my opinion on addressing
10 these issues. I don't think that it would be a bad
11 thing for that to occur, but I -- if I conceded -- if
12 I led you to believe that I was conceding
13 jurisdiction, I -- for a rulemaking proceeding, you
14 know, I didn't mean to convey that. That -- you know,
15 that would be an issue for another day, I would -- I
16 would assume.

17 COMMISSIONER JARRETT: All right. That's
18 all I wanted. Thanks.

19 MR. PEARSON: Thank you.

20 JUDGE STEARLEY: Commissioner Gunn,
21 Commissioner Kenney?

22 COMMISSIONER GUNN: I just have a couple
23 questions. And this is a little bit of a follow-up to
24 Chairman Clayton's question. So you believe that
25 if -- let's say -- and, again, these are all

1 hypotheticals. And I appreciate very much the fact
2 that this is not Aspen Woods, that this is a much
3 larger problem, that whatever solution we come up here
4 is going to have to be implemented on an industry
5 basis and consistently across all -- all apartment
6 complexes if we decide to do anything or if we decide
7 we have jurisdiction. So I concede that and I agree
8 with that point.

9 But -- so what you're saying though in
10 response to Chairman Clayton is that if Aspen Woods
11 decided or any apartment complex decided to put a big
12 retaining pond outside of their apartment, put a meter
13 on one side of that retaining pond, buy water from
14 Missouri American water, they pay that bill, they
15 could essentially resell that water either through a
16 surcharge or whatever to the tenants at whatever price
17 they chose?

18 MR. PEARSON: Under the Commission --
19 well, if the Commission doesn't have jurisdiction,
20 yes. I think the solution to that problem is
21 disclosure and is Chapter 407, consumer protection
22 statutes.

23 COMMISSIONER GUNN: So even though you
24 are now selling water essentially to your tenants at a
25 markup, you don't believe that falls under PSC

1 jurisdiction?

2 MR. PEARSON: Well, I suppose it would
3 depend on the exact relationship and the contractual
4 terms. I mean let me -- let me see if I can refine
5 this.

6 COMMISSIONER GUNN: Wait. We're not --
7 we're outside of contracts here because we're --
8 because the tenants don't have a choice as to where
9 they get their water if they're living in there -- in
10 the building. It's a similar situation, they have
11 Missouri American Water. You can't -- Aspen Woods
12 can't get their water from anywhere else.

13 But you are -- the only -- the only
14 difference here is that you're putting it in the lake
15 before you give it to the -- before you give it to the
16 tenants, but you're still giving it to them at a
17 markup and they can't go anywhere else. So it's not a
18 consumer issue. You essentially may be becoming a
19 reseller of water.

20 MR. PEARSON: Maybe. I mean, I'm not
21 sure in the hypothetical what the purpose of the
22 retaining pond is and how that would necessarily
23 change the analysis.

24 COMMISSIONER GUNN: Well, that's what I'm
25 asking. You're saying that there is no difference

1 between what I -- the retaining pond and what you're
2 doing is that once you -- once Aspen Woods takes in
3 that water from Missouri American Water, you can pass
4 whatever cost you want, whatever price you want on to
5 your tenants with no regulation and no controls
6 whatsoever?

7 MR. PEARSON: I think that's the law.

8 COMMISSIONER GUNN: As long as -- you're
9 saying as long as it's disclosed?

10 MR. PEARSON: Right.

11 COMMISSIONER GUNN: So if it's not
12 disclosed or if it's not a portion of the lease, then
13 you run afoul of consumer protection, but you have
14 no -- but there are no issues with becoming a utility
15 or under PSC jurisdiction?

16 MR. PEARSON: I don't think under the
17 existing law that converts Aspen Woods into a
18 regulated utility, no, sir.

19 COMMISSIONER GUNN: And that -- and that
20 would be the same under what is currently happening as
21 well as the hypothetical I just gave you?

22 MR. PEARSON: I'm not seeing a difference
23 between the current situation and the hypothetical.
24 Maybe I'm missing something, but in my judgment,
25 they're not different.

1 COMMISSIONER GUNN: Well, in one -- in
2 one it's Missouri American pipes, it's coming
3 directly -- I mean it's -- there's no interruptible
4 point in which the water is then kind of resold.
5 You're doing it through fees on a -- on a bill through
6 a third-party billing entity rather than actually
7 directly -- or claiming you're selling water. So that
8 would be the difference between the two hypotheticals
9 or between the two instances.

10 MR. PEARSON: There certainly is a
11 suggestion in some of the case law that reselling I
12 suppose is an indicator of utility status. I'm not
13 sure that that one factor standing alone would make
14 the difference, but I would agree that your
15 hypothetical feels like the entity is acting more like
16 a utility than in the case before the Commission now.
17 But I honestly can't cite a case or cite a definition
18 of a utility that would support that feeling.

19 COMMISSIONER GUNN: Let me ask you a
20 jurisdictional question because you brought up -- you
21 brought up the request that we dismiss the petition.
22 If we were to undertake a rulemaking, do you think we
23 would have the ability to hold a decision in abeyance
24 until we went through at least a stakeholder process
25 to determine how or if we should deal with this?

1 would that be acceptable where we say,
2 Look, we're not going to rule on this right now
3 because we don't know the answer to the question and
4 rather than make a bad decision, either saying we
5 don't have jurisdiction or asserting jurisdiction,
6 we're going to hold off on making any determination
7 until we go through a process that helps us get a
8 better answer?

9 MR. PEARSON: My client would be happier
10 with a different solution. I think you could do that.
11 I mean staying the case and holding it in abeyance
12 does have the benefit to my client of letting them
13 stop paying me and they would be happy -- happy with
14 that outcome.

15 But the concern that they would have is
16 what happens if the Commission at the end of that
17 proceeding decides that it does have jurisdiction over
18 some universe of apartment complexes? Because my
19 client is now sitting there with the one active
20 pending complaint case, it would be reasonable to
21 expect the Staff at that point to push this case
22 forward. And I'm going to assume in my answer that
23 the outcome of that -- of that process that the
24 Commission would engage in would not be that my client
25 is the only entity in the state who is subject to

1 jurisdiction.

2 So that's a long-winded answer to say
3 that partly solves the problem. We would be happier
4 with that than where we are now, to be sure, but we
5 wouldn't be entirely happy with that.

6 COMMISSIONER GUNN: And it would give you
7 more comfort if we said, Look, we're -- if any order
8 we would say if we were to do a stay order or hold an
9 abeyance order, that we made it clear that this was --
10 we were not going to proceed merely on a one apartment
11 complex basis? That would give you a little bit --

12 MR. PEARSON: That would --

13 COMMISSIONER GUNN: -- more comfort?

14 MR. PEARSON: Yes. I apologize for
15 interrupting. That would give us more comfort, yes,
16 sir.

17 COMMISSIONER GUNN: All right. Thank
18 you. I appreciate it.

19 MR. PEARSON: Yes, sir.

20 COMMISSIONER GUNN: I don't have anything
21 further.

22 JUDGE STEARLEY: Commissioner Kenney?

23 COMMISSIONER KENNEY: I have a few
24 questions.

25 MR. PEARSON: Yes, sir.

1 COMMISSIONER KENNEY: I do. Thank you.
2 I want to make sure I understand the application of
3 the Danciger case to these particular facts. Is it
4 Aspen Woods' contention that its property isn't
5 indiscriminately offered to the public by virtue of
6 the fact that you engage in a screening process and
7 you do a credit check and all that other stuff?

8 MR. PEARSON: Yes. That's part of our
9 position, yes, sir.

10 COMMISSIONER KENNEY: But prior to
11 screening applicants for credit worthiness, et cetera,
12 Aspen Woods does, in fact, hold itself out to accept
13 tenants from the general public. Correct?

14 MR. PEARSON: Yes, sir.

15 COMMISSIONER KENNEY: So if we're going
16 to apply Danciger and your analysis, it's a matter of
17 the point at which Aspen Woods does the screening,
18 correct, that makes it not property for public use?

19 MR. PEARSON: Yes. I think that's right.
20 I mean to amplify just for a moment, I mean Danciger
21 and the other cases don't really say what this holding
22 one's self out indiscriminately means. I mean --

23 COMMISSIONER KENNEY: Right.

24 MR. PEARSON: -- there's certainly an
25 argument that your questions might be alluding to that

1 if it is -- if everyone within the geographical area
2 can or must use the water service, that that
3 constitutes indiscriminate offering. There's no case
4 that exactly says that as blu-- as squarely as I just
5 did. We believe that the ambiguity in the case law
6 invites the argument that we've made that
7 indiscriminate use implies some rejection of some --
8 of some persons.

9 And there's a legal basis for that
10 position which is actually best found -- if I can just
11 refer to my notes for a moment -- in the Osage Water
12 case which is 950 S.W. 2d 569 where the court talked
13 about one of the factors that led to the determination
14 that there was a public use is the absence of evidence
15 that anyone had ever rejected. So picking up on that
16 language is why we believe our view of the
17 indiscriminate usage test is a -- is a legitimate one,
18 but, you know, I'll concede the law's not clear.

19 COMMISSIONER KENNEY: Has anybody ever
20 been -- has anybody ever been rejected from coming in
21 and filling out an application at Aspen Woods?

22 MR. PEARSON: I can't --

23 COMMISSIONER KENNEY: I mean, we're
24 really talking about the point at which the rejection
25 would occur. I mean if you --

1 MR. PEARSON: No.

2 COMMISSIONER KENNEY: If nobody's ever
3 been rejected from coming in and actually filling out
4 the application or going through the credit check
5 process, the argument could be made that you are, in
6 fact, holding yourself out for public use.

7 MR. PEARSON: Yes. The argument could be
8 made, I -- I agree.

9 COMMISSIONER KENNEY: Persuasively.

10 MR. PEARSON: And I don't know whether
11 anybody's been rejected at that point. I mean I'll
12 exclude reasons like there are no available apartments
13 and so on.

14 COMMISSIONER KENNEY: Right.

15 MR. PEARSON: I'll be honest. I'm not an
16 expert on the Fair Housing Act, but I would be
17 surprised if there are many rejections when someone
18 walks in the door. That -- that would be a very --
19 that would be a very risky posture for other reasons.

20 COMMISSIONER KENNEY: So the Danciger
21 analysis is at least distinguishable based upon that
22 colorable argument. Yes?

23 MR. PEARSON: Yes, sir.

24 COMMISSIONER KENNEY: All right. My next
25 question then is, is Danciger also distinguishable in

1 that we aren't really talking solely about Aspen
2 woods' relationship with its tenants but we've
3 interjected into the equation a third-party billing
4 agent, National Water and Power. In Danciger you just
5 had the landlord/tenant relationship exclusively.
6 There wasn't the injection of a third party agent into
7 the equation. Correct?

8 MR. PEARSON: Yes, sir. That's correct.

9 COMMISSIONER KENNEY: And does that
10 distinguish this even further if not from the public
11 use standpoint but from potentially converting what
12 Aspen Woods is doing into a retail sale of elec-- of
13 water?

14 MR. PEARSON: I don't see how it would.
15 I mean the relationship between NWP and Aspen Woods
16 standing alone, I don't see that that would be a
17 factor. Assuming that --

18 COMMISSIONER KENNEY: Okay.

19 MR. PEARSON: -- assuming that what --
20 that Aspen Woods could do what NWP is doing by hiring
21 its own employee to engage in all the same tasks, I
22 don't see how hiring an independent contractor to
23 perform those task in any way changes the Danciger
24 analysis.

25 COMMISSIONER KENNEY: Okay. Fair enough.

1 what if, however -- and I guess I'm not clear about
 2 this. I still want to go back to this \$3
 3 administration fee. Let's assume -- this is a
 4 hypothetical. Let's assume the contractual
 5 relationship between NWP and Aspen Woods says that
 6 they will charge \$3 per unit for its -- its
 7 calculation and billing services. Okay?

8 MR. PEARSON: Yes, sir.

9 COMMISSIONER KENNEY: And then let's say
 10 that Aspen Woods' lease with its tenant says that you
 11 will pay \$3.50 for NWP -- NWP's third-party billing
 12 services. Does that extra 50 cents, does that
 13 convert -- does that change the analysis at all?

14 MR. PEARSON: I don't see how. I mean
 15 I'd be troubled with the fact that it is not a -- it
 16 is not a perfectly accurate representation. It's -- I
 17 think under the consumer protection statutes if Aspen
 18 Woods says to its tenant, You have to pay a \$3.50
 19 charge which we give to NWP and we -- we only give NWP
 20 \$3, there would be an issue there. But I don't see
 21 how that's an issue that in any way cuts for or
 22 against Commission jurisdiction or for or against the
 23 public use.

24 COMMISSIONER KENNEY: So your argument is
 25 that it's a 407 issue but not a 386 or 393 issue?

1 MR. PEARSON: It may be a -- yes, that
2 is. And it may be a -- you know, it may be a
3 landlord/tenant issue too. I can't say I'm an expert
4 on landlord/tenant law, but it would be an issue for
5 other forums.

6 COMMISSIONER KENNEY: And let's take my
7 hypothetical even further and say that Aspen Woods
8 actually spells out in the lease that it's a
9 50 percent -- I mean it's a 50 cents margin and you
10 fully disclose that you're passing only \$3 on to NWP
11 and keeping 50 cents. That would take care of the 407
12 analysis I guess and still wouldn't implicate Chapters
13 386 or 393?

14 MR. PEARSON: That's my position, yes,
15 sir. I don't see how that standing alone would
16 implicate the Commission's jurisdictional statutes. I
17 don't think that would constitute a resale and I also
18 don't think it would have any impact on the public use
19 analysis that's really the crux of our motion today.

20 COMMISSIONER KENNEY: And then my final
21 question is the public use analysis isn't the sole
22 basis upon which you're arguing for dismissal though.
23 Right?

24 MR. PEARSON: Well, that rea-- no, I --
25 Mis-- Mr. Johnson is the architect of our motion so I

1 might defer to him. But I think our motion is really
2 based just on the public use issue. We --

3 COMMISSIONER KENNEY: Okay.

4 MR. PEARSON: -- we recognize that there
5 may be issues down the road and many of the questions
6 that have been presented today kind of go to what the
7 evidence might be in a hearing on the merits or the
8 evidence in a broader, more global proceeding, but our
9 motion today, as I understand it, is based on the
10 narrower ground that there is -- that we have
11 established through the affidavit of Mister -- the two
12 affidavits of Mr. Mathes, we've established that there
13 is -- there's no public use on this record. And
14 that's --

15 COMMISSIONER KENNEY: All right. Well,
16 let me -- no, go ahead. I'm sorry.

17 MR. PEARSON: Well, I think that's
18 important. And, frankly, I wish I'd thought of that
19 15 minutes ago when I was responding to Commissioner
20 Jarrett's question because -- but since it did pop
21 into my head, I apologize. I'd like to -- I would
22 like to give a better answer.

23 I mean, what we -- what the Commission
24 has here is a narrow record on a motion for summary
25 determination. We filed an affidavit. The Staff did

1 not controvert that affidavit with any evidence. And
2 while the -- the affidavit of Mr. Merciel has been
3 admitted today without objection from us, that doesn't
4 change the analysis either.

5 So the task -- it is entirely possible
6 that the Commission could say based on the evidence
7 before us on this motion, we do not have jurisdiction
8 over this case on this motion and we are going to
9 dismiss it.

10 And the court and the Commission could
11 very equally decide that this may be an issue worthy
12 of consideration because there may be other
13 circumstances where the Commission does have
14 jurisdiction. And that is the proper venue for a
15 rulemaking proceeding has been our position and that
16 that's the proper way for the court to determine its
17 global jurisdiction over this question. Thank you
18 for giving me the moment to digress.

19 COMMISSIONER KENNEY: No, not at all.
20 Because I think it's an important digression and I
21 want to be clear. You're saying that the affidavit
22 that you -- that your clients filed establishes that
23 Aspen Woods doesn't engage in the indiscriminate
24 offering of its property for public use?

25 MR. PEARSON: Yes. I'm saying that in

1 part, but I'm saying more than that too. But, yes, I
2 am saying that.

3 COMMISSIONER KENNEY: I know. But you're
4 saying that the narrow basis for our determination
5 today for summary determination is the pub-- is the
6 application of the public use doctrine. And I --
7 well, let me ask a different way. Isn't that a
8 question of fact whether or not -- whether or not
9 Aspen Woods engages in the indiscriminate offering of
10 its property for public use based upon our earlier
11 discussion?

12 MR. PEARSON: I don't think so. Not -- I
13 mean it's not -- there are no facts in dispute. If
14 you look at the moving papers, we've established
15 certain facts that have not been properly disputed by
16 staff so everything in our affidavit for purposes of
17 this motion in this case must be taken as true. On
18 those facts, we believe the staff has failed to
19 establish a public use.

20 There may be -- many of the questions
21 that have been explored today, like I say, are
22 interesting and legitimate, but they're -- they are
23 not specifically germane to the ruling on our motion.

24 COMMISSIONER KENNEY: well, I think my
25 question is about the point at which you determine

1 indiscriminate offering of property. If it's at the
2 point at which any tenant off the street is -- or any
3 potential tenant off the street is allowed to come in
4 and fill out an application, then arguably Aspen Woods
5 does engage in the indiscriminate offering of its
6 property for public use.

7 If, however, we say that the point at
8 which you determine whether your offering is
9 indiscriminate or not is the point at which they fill
10 out the credit application or whatever, you've
11 established those facts. So -- but I'm not sure that
12 we've established the point at which we should make
13 that determination. Does that make sense?

14 MR. PEARSON: Yeah. I would essentially
15 agree with you. If the Commission were to conclude
16 that as a matter of law, the point at which the
17 analysis of indiscriminate offering is made is at the
18 entry point, then I suppose the Commission could deny
19 the motion for summary determination on the basis that
20 we have not established the facts on that -- on that
21 issue.

22 If that were the case, frankly, we'd like
23 an opportunity to do that before a hearing on the
24 merits because we doubt that there would be facts in
25 dispute, but that's for down the road.

1 COMMISSIONER KENNEY: All right. Well,
2 I'm finished with my questions. Thank you.

3 MR. PEARSON: Thank you.

4 JUDGE STEARLEY: Additional questions?

5 COMMISSIONER JARRETT: Yeah. Just a
6 couple more, Mr. Pearson. The first one I think
7 Chairman Clayton asked Mr. Johnson and he didn't know
8 and so I'll ask you.

9 Let's say a tenant of Aspen Woods tells
10 NWP, I'm not saying paying this bill, I'm just not
11 going to pay it, I don't think I owe it. And NWP
12 calls your client and says, They're not paying their
13 bill, they haven't paid their water bill for three
14 months and they've said they're refusing to pay. What
15 would Aspen Woods do?

16 MR. PEARSON: Their remedies would be
17 under the lease. If it remained unpaid, they would
18 probably at some point, following the landlord/tenant
19 law and all that, have the right to evict.

20 COMMISSIONER JARRETT: Okay. My second
21 question is obviously Aspen Woods and National Water
22 and Power are two different entities.

23 MR. PEARSON: Yes, sir.

24 COMMISSIONER JARRETT: And really I know
25 that they're an independent contractor and that

1 they're doing work for Aspen Woods. But could we find
2 that we have jurisdiction over National Water and
3 Power and not jurisdiction over Aspen Woods Apartments
4 and vice-versa? Could we find the other way?

5 MR. PEARSON: Well, we'd prefer the
6 former.

7 COMMISSIONER JARRETT: I understand. And
8 I'll give you a chance to respond to that,
9 Mr. Johnson, but --

10 MR. PEARSON: Give me a moment.

11 COMMISSIONER JARRETT: You know, I mean
12 performing different functions here -- I mean are you
13 two inex-- inex-- are you two tied together without
14 severance? I can't say inextricably.

15 CHAIRMAN CLAYTON: At least it's on the
16 record.

17 MR. PEARSON: I haven't thought about
18 this, but let me give you my best answer. I think for
19 purposes of this motion, yes, we are. I don't think
20 there's any -- any distinction there.

21 And maybe for -- even for purposes of
22 this case because this is -- the complaint looks
23 backward in time and says this operation -- using the
24 term to encompass both entities -- violates the law.

25 But Aspen Woods can provide water service

1 in a lot of different ways and it doesn't have to do
 2 that with NWP so there are practical reasons that
 3 we're not bound. You know, we have a contractual
 4 relationship just like we do with a lot of vendors.
 5 But I would say legally for purposes of this motion
 6 and probably for purposes of this case, it seems like
 7 we probably are.

8 COMMISSIONER JARRETT: And I guess the
 9 reason I ask that is Commissioner Kenney's question
 10 prompted that. Because he was asking you about the
 11 Danciger case and whether we had a third party in here
 12 somehow change -- changed the analysis.

13 You know, for example, I see ads in the
 14 paper all the time, you know, rent this house, rent
 15 this apartment, 500 bucks, all utilities included, you
 16 know, in the rent price. And I've never thought that
 17 we might have jurisdiction over some arrangement like
 18 that.

19 But when you have a third party that's
 20 sending out bills specifically for the water, it's
 21 not -- you know, if I'm paying 500 bucks a month, all
 22 utilities included, I don't get a bill for any of the
 23 utilities.

24 MR. PEARSON: Correct.

25 COMMISSIONER JARRETT: But here they're

1 getting a bill for water and it fluctuates month to
2 month, I assume. So -- or quarter to quarter or
3 whenever. So is what -- that's -- that's what's
4 prompted my question. They seem to be doing something
5 different than Aspen Woods. So to the extent that
6 they are, might we have jurisdiction over the services
7 that they're providing versus what Aspen Woods is
8 doing?

9 MR. PEARSON: I think the legal -- this
10 is maybe a better answer than I just gave you because
11 it just popped into my head. There is a -- there is
12 some language in the case law that might suggest that
13 what you described is accurate. And that comes from
14 really from the WATS case -- the hotel/motel case that
15 was not a Court of Appeals opinion but a Commission
16 order.

17 And there the Commission said the hotel
18 that was adding a fee for long-distance telephone
19 service was not a regulated utility because what it
20 did was incidental to its basic function, which is
21 renting rooms. And we -- in our moving papers we've
22 referenced that case because it seems analogous to the
23 situation here. What Aspen Woods does is rent
24 apartments. Its -- water service is an incident to
25 its main business, which is the rental of apartment

1 units.

2 So I think the WATS case would give --
3 give some authority for the idea that Aspen Woods is
4 not subject to jurisdiction because it is -- water
5 service is incidental to its main function. I
6 honestly don't know enough about NWP's operations to
7 conclude that it -- it's different, but that analysis
8 would -- could be invited by the WATS decision.

9 COMMISSIONER JARRETT: All right. Well,
10 I've give you a chance to respond, Mr. Johnson. You
11 know, I'm using the old divide and conquer ploy here.

12 MR. JOHNSON: Well, thank you. What I
13 think we failed to distinguish in -- in -- all the
14 discussions we've had this morning is what property is
15 it we're talking about being, quote, devoted. And I
16 think most utilities, they have property that goes in
17 the rate-base that is property that's germane to the
18 distribution of the utility service.

19 Sometimes -- for Commissioner Kenney's
20 purposes, he wants to assume the property we're
21 talking about is the entire apartment or apartment
22 complex or apartment room.

23 In my mind, what we should be talking
24 about is the property that's specifically involved in
25 delivering the utility service; pipes, meters. I

1 don't know why we're talking about the apartment
2 complex.

3 And so I think that distinction lends
4 itself to the incidental language that the Commission
5 enunciated in the WATS resale case and it also makes
6 sense when you look at the precedent that we're
7 talking about.

8 So I might depart a little bit from
9 Mr. Pearson that if the only reason you have to look
10 at somebody to regulate here is because they own some
11 facilities that are used to distribute utility
12 services, you're only looking at Aspen Woods. NWP
13 doesn't own that. They're strictly a billing agent or
14 a vendor.

15 And there's lots of regulated utilities
16 that use unregulated billing vendors because the
17 Commission, when it has jurisdiction over the rates,
18 it determines what those billing vendors can bill
19 whether they're subject to the Commission's
20 jurisdiction or not.

21 So I think I would disagree a little bit
22 that it's necessary in my mind for you to have
23 jurisdiction for somebody that you regulate to have an
24 ownership interest or management rights of the
25 property that's being used to distribute utility

1 services.

2 COMMISSIONER JARRETT: Okay. Thank you.

3 I don't have any further questions.

4 JUDGE STEARLEY: Commissioner Gunn?

5 COMMISSIONER GUNN: Yeah, I have a
6 question for Mr. Johnson about that. So could --
7 AmerenUE has set up a separate transmission company.
8 Could Missouri American Water set up a separate
9 billing company and call themselves a third-party
10 biller and charge whatever rates they wanted to on
11 the -- on those billing to supplement the regulated
12 income as a non-regulated entity?

13 MR. JOHNSON: No. I think whatever
14 billing vendor that Missouri American uses, they've
15 got to bill the Missouri American rates.

16 COMMISSIONER GUNN: Well, but that
17 independent company could -- could contract with Aspen
18 Woods to charge whatever they wanted to charge under
19 the theories that are being put forward today.

20 MR. JOHNSON: I'm not sure I'm totally
21 tracking with you, Commissioner, but as I
22 understand --

23 COMMISSIONER GUNN: So Missouri American
24 Water sets up Missouri American Water billing, okay,
25 owned by American Water. That company contracts with

1 Aspen Woods to do third-party billing services
2 separate and apart from the water that they're
3 providing to Aspen Woods.

4 MR. JOHNSON: Who's providing water --

5 COMMISSIONER GUNN: According to -- I'm
6 sorry?

7 MR. JOHNSON: Who's providing the water
8 to Aspen Woods? Missouri American or the entity they
9 just set up?

10 COMMISSIONER GUNN: Missouri American
11 water. So under the -- under the theories that have
12 been put forth today, that billing entity which is a
13 stand-alone company even though it may be owned by the
14 same parent company, could charge any price for the --
15 for their services in addition to the commodity price
16 of the water.

17 MR. JOHNSON: Well --

18 COMMISSIONER GUNN: Just want to make
19 sure everybody's consistent, that you agree that
20 that --

21 MR. JOHNSON: I think I disagree. If
22 Missouri American water -- we're talking about the
23 bill they send to Aspen Woods, the complex, as the
24 customer of Missouri American. The only thing that
25 Missouri American or its hired billing vendor can bill

1 are the rates this Commission has approved. If --

2 COMMISSIONER GUNN: That's not -- that's
3 not what I'm asking.

4 MR. JOHNSON: If the person that supplies
5 the water is supplying the water to Aspen Woods but it
6 doesn't -- it's not doing that pursuant to
7 certificate, then it's illegally engaged in the
8 business of supplying water. If we're talking about
9 that entity supplying water to the tenants, then -- I
10 mean I think it's important to keep all these
11 relationships straight and that's why I'm getting
12 confused by your question because I didn't understand
13 what you were --

14 COMMISSIONER GUNN: So let me try to
15 clarify. Your argument is that a third-party vendor
16 has no obligation to any -- or has no -- is under no
17 authority by the -- to be regulated by this -- there's
18 no authority to regulate those third-party vendors by
19 the Commission?

20 MR. JOHNSON: Yes.

21 COMMISSIONER GUNN: And that they can
22 charge surcharges or fees in whatever amount that they
23 can contract with Aspen Woods or any apartment complex
24 that they see fit?

25 MR. JOHNSON: No.

1 COMMISSIONER GUNN: Why not?

2 MR. JOHNSON: In this situation, Missouri
3 American is the utility and the customer --

4 COMMISSIONER GUNN: Let's forget -- let's
5 forget about that for a second. So if NWP decides to
6 contract with Aspen Woods and instead of charging \$3,
7 they want to charge \$30, there's nothing that this
8 Commission can do to prevent that?

9 MR. JOHNSON: That's correct.

10 COMMISSIONER GUNN: All right. So what
11 I'm asking is, is what prevents -- and I'll come to a
12 question for Mr. Pearson in a second, but what
13 prevents our regulated utilities from setting up
14 non-regulated affiliates owned by the same parent
15 company from charging as much as they want for a
16 third-party billing relationship and not for the
17 service -- the provision of water service? And under
18 what you're saying, nothing.

19 MR. JOHNSON: Well, but regulated
20 utilities, in particular the telecommunications
21 business, they use third-party billing vendors today.
22 The Commission does not have jurisdiction over the
23 vendors, but they have jurisdiction over the billing
24 relationship between the utility and the utility's
25 customers.

1 And they can -- and this Commission can
2 prevent a utility from using a third-party vendor from
3 sidestepping the rates in the -- in the relationship
4 and billing the utility's customers something other
5 than the approved rates in the tariffs.

6 COMMISSIONER GUNN: Is NWP --

7 MR. JOHNSON: The question here is
8 whether Aspen Woods is a utility or not.

9 COMMISSIONER GUNN: Is NWP a publicly
10 traded company?

11 MR. JOHNSON: I believe that it is, but
12 I'm not positive about that.

13 COMMISSIONER GUNN: Could a utility
14 buy -- could a utility buy a majority ownership stake
15 in NWP and have this relationship still be not
16 regulated by the utility?

17 MR. JOHNSON: Yes.

18 COMMISSIONER GUNN: So you could have
19 majority ownership of a third-party billing vendor by
20 a regulated utility and yet we would still not have
21 jurisdiction over that third-party billing vendor?

22 MR. JOHNSON: That's correct.

23 COMMISSIONER GUNN: Okay. Mr. Pearson?

24 MR. PEARSON: Yes, sir.

25 COMMISSIONER GUNN: If -- if -- if Aspen

1 woods through their contract with NWP decides that
2 they want to charge, similar to Commissioner Clayton's
3 \$200 a month or \$250 a month for their water bills and
4 that equals or exceeds the rental income, would that
5 still be incidental service?

6 MR. PEARSON: Maybe not.

7 COMMISSIONER GUNN: So under the -- under
8 the Danciger analysis there may be a limit as to what
9 someone could charge?

10 MR. PEARSON: Well, the -- the incidental
11 service issue is one part of the Danciger analysis.
12 So without turning that into the entire test, I would
13 say as to that one component, yes. I mean the --
14 by -- almost by definition, the incidental services
15 language in the -- in the WATS case is a line drawing
16 analysis. I mean there has to be some definition of
17 what is incidental, so sure.

18 COMMISSIONER GUNN: All right. I don't
19 think I have anything further. Thank you.

20 COMMISSIONER KENNEY: I do. And I hate
21 to belabor this, but Mr. Johnson's discussion
22 regarding which portion of Aspen Woods' property is --
23 is the -- is what we should be looking at. And I
24 think that that's -- it confused me because my reading
25 of your motion of Aspen Woods' pleading was that Aspen

1 woods is not a public utility because it doesn't hold
2 itself out for the indiscriminate offering of its
3 private property to the public use and there wasn't
4 any distinguishing as to which portion of its private
5 property was being held out for public use.

6 But I think I heard Mr. Johnson say that
7 that's -- that we need to look at what portion of its
8 private property is being held out for public use. So
9 I'm confused as to this analysis. Did I hear you
10 correctly, Mr. Johnson, and is that actually the
11 argument that Aspen Woods is making?

12 MR. JOHNSON: Well, you did hear me --
13 the words that I said. I'm not sure you took it in
14 the context that I intended it. Obviously --

15 COMMISSIONER KENNEY: All right.
16 Well, clarify it for me.

17 MR. JOHNSON: Okay. In traditional
18 regulation when you look at a utility's property
19 that's being devoted to public service, you look at
20 the property that's used and useful with respect to
21 providing the utility service.

22 And all I'm suggesting here is that we've
23 had an inability to -- on one hand, we talk about who
24 all they accept as tenants. And then I was suggesting
25 that in reality here if we were looking at them as a

1 regulated utility, we would only be regulating that
2 part of the property that's devoted to utility
3 service. But it's sort of a heart -- a horse and cart
4 question because obviously they're not going to be
5 devoting their pipes to anybody that's not renting the
6 property.

7 COMMISSIONER KENNEY: Right. Right.

8 MR. JOHNSON: So -- but on the other
9 hand, you were -- you were couching your when do we do
10 the analysis at the stage of when somebody's either
11 coming in to ask about a lease or submitting a written
12 application for it.

13 And what I intended to do is just suggest
14 that that's all well and good for purposes of
15 evaluating when they reject somebody or when they
16 enter into a private contract, but it sort of misses
17 the point as to what property we're really talking
18 about being devoted to the public use. And I was just
19 kind of suggesting that I don't think anybody's here
20 saying the Commission would assume jurisdiction over
21 the entire apartment complex including the rent.
22 we're just talking about --

23 COMMISSIONER KENNEY: well, right. No,
24 we wouldn't exercise jurisdiction over -- well, but I
25 guess the argument was that what distinguishes Aspen

1 woods in terms of offering its property for public use
2 or not is the fact that you turn people away from
3 using your property. And it's the point at which
4 they -- and the -- and the mechanism by which you do
5 that is through filling out an application or a credit
6 check request or something like that. Right?

7 MR. JOHNSON: Yes.

8 COMMISSIONER KENNEY: That that's the --
9 that's the method by which Aspen Woods discriminates?

10 MR. JOHNSON: It was our method --

11 COMMISSIONER KENNEY: And I don't mean
12 that in any -- go ahead. I'm sorry.

13 MR. JOHNSON: And I understand. And that
14 was just our method of trying to meet the public use
15 or devotion to public use versus indiscriminate
16 offerings to the public test. We were basically
17 putting that information in there to show you that we
18 don't offer our service indiscriminately, only -- we
19 only offer whatever service that we offer to people we
20 accept to meet our --

21 COMMISSIONER KENNEY: The service you
22 offer is the provision of apartments.

23 MR. JOHNSON: Well --

24 COMMISSIONER KENNEY: So are you saying
25 that the service that you offer is something other

1 than the provision of an apartment?

2 MR. JOHNSON: Well, I guess --

3 COMMISSIONER KENNEY: You're reasoning by
4 analogy. Right? So we're not saying that it's water
5 service that Aspen Woods is offering. I mean I
6 thought -- I thought if I understood your argument
7 correctly, is that you were reasoning by analogy and
8 that the service you offer is the provision of
9 apartments.

10 MR. JOHNSON: The complaint is seeking to
11 regulate our provision of water and sewer service.
12 And we're telling you we don't meet the jurisdictional
13 test because we haven't devoted our property to public
14 use which does involve the indiscriminate offering
15 concept.

16 COMMISSIONER KENNEY: And what is it that
17 Aspen -- for purposes of your argument, what is it
18 that Aspen Woods offers?

19 MR. JOHNSON: Well, for purposes of our
20 argument, I guess what I would be saying, that we do
21 not offer utility service as --

22 COMMISSIONER KENNEY: I see.

23 MR. JOHNSON: It's just an -- what we
24 offer is -- the ability to get water in and sewer out
25 is an incident to renting our apartments. But what

1 we're offering and what we're renting are apartments.
2 It's the Staff that's claimed that we are engaged in
3 providing water and sewer as -- as a utility without
4 the certificate from the Commission.

5 COMMISSIONER KENNEY: I understand
6 Staff's complaint. I'm just trying to understand
7 Aspen Woods's application of the public use
8 definition. Okay. Thank you.

9 MR. PEARSON: Could I take a stab at
10 answering that, Commissioner?

11 JUDGE STEARLEY: Go ahead, Mr. Pearson.

12 COMMISSIONER KENNEY: Sure.

13 MR. PEARSON: It's similar to what
14 Mr. Johnson said, but I'd like to just state it a
15 little differently. It's -- the way I would
16 articulate it is the service that Aspen Woods offers
17 is the rental of an apartment unit and the provision
18 of water service is a mere incident to that as
19 evidenced by the fact that you can't just buy water
20 from Aspen Woods unless you are a tenant in one of its
21 apartments.

22 COMMISSIONER KENNEY: So if you're
23 talking about indiscriminately offering or dedicating
24 private property to the public use, is it the property
25 that's offered for purposes of renting an apartment or

1 only that portion of your property that's offered for
2 the provision of utility service?

3 MR. PEARSON: I think the latter. But I
4 think -- I'm not -- well, I'll leave it at that.

5 COMMISSIONER KENNEY: No, what were you
6 going to say?

7 MR. PEARSON: Well, I'm not sure -- I was
8 going to say is that I'm not sure it makes a
9 difference, but --

10 COMMISSIONER KENNEY: Okay. All right.
11 All right. Thank you.

12 JUDGE STEARLEY: Any other questions for
13 Mr. Pearson?

14 MR. PEARSON: Could I have a brief moment
15 just to close?

16 JUDGE STEARLEY: I have one quick
17 question --

18 MR. PEARSON: Of course.

19 JUDGE STEARLEY: -- which might help add
20 a little clarity. On all the cases that have been
21 cited by the parties in case passages that are in the
22 motion in responsive pleadings where the court is
23 talking about holding out property to the public use,
24 doesn't every one of those cases, in fact, reference
25 what they're talking about is the provision of water

1 and sewer services or electrical services?

2 MR. PEARSON: I think so. I mean I'd
3 have to --

4 JUDGE STEARLEY: I've read them all and I
5 would agree with that.

6 MR. PEARSON: I'd have to run through a
7 catalog in my mind, but I believe that that's true.
8 That's probably true.

9 JUDGE STEARLEY: That's all that I had to
10 ask. And if you want to close, you may.

11 MR. PEARSON: Just briefly. I think it's
12 important that we step back and make sure we
13 understand what the legal test of this public use
14 doctrine is. And what I did in preparing is I made
15 some notes about the different factors that have been
16 discussed in the cases.

17 And I think there's no case that says how
18 all those are going to be weighed. But I think if you
19 read the case law as a whole, it's clear that no one
20 of these factors is really ever determinative. So
21 we've talked about them all, but with your indulgence,
22 I'd just like to do kind of a checklist here to close
23 as to what I've pulled out of the cases as to what the
24 courts and the commissions seem to have looked at.

25 First from Danciger is what we've just

1 been talking about which is, is there a holding out by
2 the company as ready and willing to serve the public.
3 And I won't belabor that. We've had plenty of
4 discussion of that.

5 Second, the Danciger case talks about
6 whether the entity has the right to assert eminent
7 domain power. We briefed that issue, it's not been
8 discussed at great length today, but it is a factor
9 discussed in the Danciger case. There's no evidence
10 in the record that would suggest that Aspen Woods has
11 any eminent domain power and, in fact, it does not.

12 Third from Danciger is, is the entity
13 entering into special contracts upon its own terms.
14 That's the language from Danciger. Our position is
15 that Aspen Woods is entering into special contracts;
16 in other words, the lease arrangement with its
17 tenants. Danciger case says when companies do that,
18 enter into those special contracts, such companies are
19 plainly engaged in private business, and that's the
20 end of the quote, but -- and not subject to
21 regulation.

22 The fourth factor is the question posed
23 both in Danciger and then applied by the Commission in
24 the -- in the wide Area Telephone Service case. Is
25 the sale only an incident to the business in which the

1 company is engaged. That's the question posed in
2 Danciger. We think the evidence is clear that we meet
3 that test.

4 Fifth, is the entity a natural monopoly.
5 We've discussed that. That's from the Laclede Gas
6 case. It's also referenced in the Hurricane Deck
7 Court of Appeals opinion.

8 So all those factors have to be looked
9 at. No one, in my judgment, is determinative. And
10 the ultimate question is applying all those different
11 factors that the courts have -- and the Commission has
12 relied on in its cases, has Aspen Woods devoted its
13 activities to public use. And our position is that it
14 has not and, therefore, on the record before the
15 case -- before the Commission in this case on this
16 motion, the Commission should dismiss the complaint.
17 Thank you.

18 JUDGE STEARLEY: Thank you, Mr. Pearson.

19 Mr. Boudreau, National Apartment
20 Association filed suggestions in support so --

21 MR. BOUDREAU: Indeed. I'll keep my
22 comments short because we've been at this for some
23 time and I'm sure after looking at my notes, that
24 other counsel have covered most of the topics that I
25 would have covered. I want to point out that the

1 National Apartment Association is not one of movants,
2 although it supports the motion for summary
3 determination in this case.

4 And it seems to me that the -- that the
5 points that Mr. Pearson and Mr. Johnson have brought
6 up, the questions about whether this is a natural
7 monopoly, what sort of business are they actually in?
8 They're in the business of renting apartments and I
9 would submit not -- not providing utility service.
10 These are all good questions. I'm not going to
11 re-plow that ground. I think it's been plowed pretty
12 thoroughly.

13 There's a couple of things though that I
14 think that -- that I'd like to embellish on or at
15 least point out that haven't been talked about is for
16 the Commission to consider the idea of -- of the
17 allocation of utility services as part of rent on kind
18 of a direct basis as something that -- that may have a
19 positive good associated with. In fact, I would
20 suggest it does have a positive good in terms of
21 sending good economic signals to tenants, that, you
22 know, you pay for your service, you use more of the
23 service, you pay more for it.

24 I think that's generally a good thing is
25 that -- is that people don't think they get just free

1 utility service and so that's something to consider as
2 you consider these questions, is that -- the idea
3 of -- of a tenant having a connection between I use a
4 certain amount of water or electricity or whatever it
5 may be and I get -- and I get charged for that. I
6 mean it's good for conservation, it's good for -- just
7 good energy efficiency concepts if you're talking
8 something other than water. Just a little bit broader
9 topic to consider.

10 The other thing is that the law of
11 landlord/tenant is fairly comprehensively covered in a
12 number of chapters in the Revised Statutes of
13 Missouri. So this is a field that's fairly thoroughly
14 been addressed by the General Assembly. And I would
15 suggest and National Apartment Association suggests
16 that the field is largely preemptive.

17 And it's not as if the idea of master
18 metering is unknown to the General Assembly. If you
19 look at Section 451.650, it talks about heating
20 services, but there is a statute on the books that
21 specifically talks about this master metering concept.
22 And in -- I think it's more important what it doesn't
23 say than what it says, but it doesn't address that
24 sort of concept in any way suggesting that it's --
25 it's the equivalent of a utility service that's being

1 provided by the apartment owner.

2 So it's not -- it's just a point that the
3 concept is not unknown to the General Assembly. And
4 if it were viewed as a problem, it could be addressed
5 and would have been addressed by the General Assembly.

6 And that actually kind of gets to one of
7 the questions I think -- and I don't know if I'm
8 taking the comment out of context. I think it was
9 Commissioner Gunn was talking about a much -- a much
10 larger problem. And I guess another question I would
11 pose to the Commission is how much of a problem is
12 this really?

13 And I don't -- I don't really know, but
14 it might be a good question to put to the Staff as to
15 how many complaints does the customer service
16 department of the Commission actually get about these
17 sort of circumstances? Is it really a problem?

18 I'm trying to think if there's anything
19 else before I -- before I wrap up here. I think -- I
20 do agree that Mr. Pearson, Mr. Johnson have -- I
21 generally agree with their analysis of the Danciger
22 case. I think that's the starting point for any of
23 these discussions. I think the public use concept is
24 one that -- that is again the starting point for the
25 discussion.

1 And I do think the WATS resale case was
2 pretty indicative, I mean that -- that, you know, the
3 idea that the service is just incidental to the -- to
4 the real line of business. And I think you can get
5 lost in the weeds here. You have to sort of step back
6 and say, what are these people doing? well, they're
7 renting apartments. That's what they're doing.
8 They're not providing water service, certainly not in
9 any sort of focused main line of business concept.
10 They're just providing it because they have -- it has
11 to be provided in order to provide living space for --
12 for human beings.

13 But anyway, just to wrap up, I think
14 that -- that the Commission ought to be careful about
15 what it is being asked to do here because there's a
16 lot of questions about, well, as a practical matter,
17 how would you regulate it? Mr. Johnson touched on the
18 concept are you talking about regulating rent or are
19 you talking about regulating some aspect of their
20 business? And if so, how do you determine rate-base?

21 And in the -- you know, some more
22 pragmatic questions, you know. Will the cost of
23 regulating this outstrip the -- the perceived savings
24 in the arrangement? Because presumably there would be
25 some assessments associated with the Commission's

1 allocation of resources to this task.

2 So just from a practical perspective, I
3 just encourage the Commission as they look at this, to
4 kind of think about the broader view, the
5 practicalities of what's going on.

6 Bottom line is that National Apartment
7 Association concurs with the movants that -- that the
8 circumstances that have been identified by the Staff
9 in its complaint don't rise to the provision of a
10 public service and that the Commission doesn't have
11 any jurisdiction over their operations. With that,
12 I'll conclude my remarks and if you have any
13 questions, I'd be glad to try to answer them.

14 JUDGE STEARLEY: Questions for
15 Mr. Boudreau?

16 CHAIRMAN CLAYTON: Very quickly. Thank
17 you for being here, Mr. Boudreau. You definitely
18 bring a perspective from a national scope.
19 Potentially your client has knowledge of how all
20 states are addressing these issues as they potentially
21 come up.

22 I wanted to ask you about a concept I
23 kind of threw out, that if the Commission were to
24 proceed down the path of a rulemaking where we define
25 what we do not believe we have jurisdiction over and

1 try to write it in a way that sets out some reasonable
2 standards, protections of abuse and that keeps us from
3 stepping in to provide cost of service regulation -- I
4 mean I think that -- that's problematic in and of
5 itself.

6 But if you have a situation where you
7 have an unreasonable surcharge or you have a markup,
8 you have a landlord that is making money off of a
9 deal, you have problems in billing or service, you
10 have abuses and try to define that as long as you're
11 within this reasonable framework, that -- that we
12 don't believe we are -- that you are a utility, you're
13 not holding yourself out to the public and that the
14 Commission will not step in, is that a workable
15 concept or does your client believe that's still
16 problematic?

17 MR. BOUDREAU: I listened to that back
18 and forth with some interest. And I think as a
19 technical point, if you have jurisdiction, you have
20 it; if you don't, you don't.

21 Now, having said that, I'm not sure that
22 there's anything necessarily wrong with the
23 Commission, if it wants to determine whether there is
24 a problem, what the nature of -- nature and scope of
25 the problem is, couldn't look into this and make some

1 recommendations to the General Assembly.

2 Now, this gets -- this takes me a little
3 bit beyond where I'm -- where I'm comfortable. I
4 don't know whether that -- the Commission views that
5 as being part of its portfolio of authorizations
6 from -- from its delegation from the General Assembly
7 to just investigate something and make some
8 recommendations. But I don't think it's unheard of
9 that the Commission has made recommendations to the
10 General Assembly.

11 CHAIRMAN CLAYTON: I'm talking about a
12 regulatory solution rather than a legislative.

13 MR. BOUDREAU: Yes. Yes.

14 CHAIRMAN CLAYTON: I'm talking about
15 basically making a finding that if you are within a
16 certain framework, that you are not subject to our
17 jurisdiction, which would leave open the possibility
18 that if there is a factual finding of a 15 percent
19 markup on the water usage or unreasonable fees or
20 inaccurate billing or some -- and I'm not even saying
21 this is possible.

22 MR. BOUDREAU: Uh-huh.

23 CHAIRMAN CLAYTON: Because I think it is
24 problematic. You either have jurisdiction or you
25 don't. But the Commission makes a finding this is

1 what we think we have jurisdiction over, this is what
2 we don't and basically would come back to faulty
3 service, captive customer, hold -- you know, an entity
4 holding itself out, which may or may not be the case
5 in this instance.

6 MR. BOUDREAU: Yeah. And I do understand
7 the concern. I think I'm just going to -- I'm going
8 to fall back on what I said originally. The
9 Commission either has jurisdiction over the subject
10 matter or it doesn't. And I'm not sure that a
11 regulatory rulemaking would -- would change that, no
12 matter how well intentioned.

13 CHAIRMAN CLAYTON: What a surprise that
14 you say that. Are you aware of any state public
15 service commission, public utility commission rule or
16 regulation that would be on point throughout the
17 country?

18 MR. BOUDREAU: I'm not, but I can make an
19 inquiry. And I would be glad to visit with my client
20 about that.

21 CHAIRMAN CLAYTON: Okay. Thank you.

22 MR. BOUDREAU: Thank you.

23 JUDGE STEARLEY: Commissioner Jarrett?

24 COMMISSIONER JARRETT: It's good
25 afternoon, Mr. Boudreau. We've run a little bit past

1 noon. I'm looking at your filing on -- basically we
2 issued the order asking about the number of similarly
3 situated --

4 MR. BOUDREAU: Yes

5 COMMISSIONER JARRETT: -- apartment
6 complexes. And you had indicated in that filing that
7 approximately 383,000 -- 383,000 individual apartment
8 rental homes in state of Missouri.

9 MR. BOUDREAU: Uh-huh. Yes.

10 COMMISSIONER JARRETT: And you were able
11 to identify through some of your reporting that there
12 were approximately 42,000 rental homes similarly
13 situated. And I calculated that to be about
14 11 percent. Does that sound about right?

15 MR. BOUDREAU: I think the math is
16 correct, yes.

17 COMMISSIONER JARRETT: Right. But then
18 you also go on to qualify that by saying you didn't
19 get -- you didn't get responses from some of your
20 members.

21 MR. BOUDREAU: Yes.

22 COMMISSIONER JARRETT: So it could be
23 more?

24 MR. BOUDREAU: Yes. I think that's a
25 correct characterization.

1 COMMISSIONER JARRETT: Do you know -- do
2 you have a ballpark on how much more?

3 MR. BOUDREAU: You know, I don't here
4 today, but I can get that information for you. My
5 understanding is that there was some effort of a
6 survey made by National Apartment Association where
7 the members were -- were asked about this aspect of
8 what's going on and they got a -- some responses as
9 you can imagine, and others they did not. They have
10 not quantified for me the degree of the response that
11 they got, but I could get that information.

12 COMMISSIONER JARRETT: That would be
13 good.

14 MR. BOUDREAU: Okay.

15 COMMISSIONER JARRETT: I mean it seems to
16 me 11 percent, 15 percent, 20 percent, still the vast
17 majority of apartment complexes are not similarly
18 situated.

19 MR. BOUDREAU: I will -- let me follow up
20 with --

21 COMMISSIONER JARRETT: would you --

22 MR. BOUDREAU: well, I think --

23 COMMISSIONER JARRETT: Maybe I should let
24 you --

25 MR. BOUDREAU: I think it's going to

1 depend on what sort of service you're talking about,
2 if it's water versus -- whether it's versus electric.
3 Having been a recent resident of an apartment, you
4 know, the water was kind of part of the rent, you
5 know, trash service to the extent you view that as a
6 utility service, but I paid for electric directly.

7 So it may vary in terms of what
8 categories of utility services you're talking about.
9 So -- but if we're just focused on water, I can
10 probably make that -- make that inquiry.

11 COMMISSIONER JARRETT: Well, just -- you
12 know, we've been talking a lot about this is going to
13 be a big bloat of the rental apartment industry in the
14 state if -- you know, could be quite a big
15 policy-making decision that would affect a lot. And
16 it would be good to know if it's only -- I mean
17 11 percent is still substantial, but --

18 MR. BOUDREAU: Let me see what I --

19 COMMISSIONER JARRETT: -- it's not like
20 80 percent.

21 MR. BOUDREAU: I will follow up on that.

22 COMMISSIONER JARRETT: Thank you,
23 Mr. Boudreau. That's all I have.

24 JUDGE STEARLEY: Commissioner Gunn?

25 COMMISSIONER GUNN: Just a quick

1 question. So as a practical matter, if we were to
2 determine that these types of billing arrangements we
3 didn't like, we could be looking at an install of
4 42,000 individual meters that we -- or more that we
5 have to figure out how we're going to deal with them
6 in rate-base and all those other things?

7 MR. BOUDREAU: Yeah. There's -- I think
8 there's a lot of practical issues about -- in terms of
9 the facilities if you're -- you know, how the -- the
10 physical facilities of the apartment complex are --
11 are constructed, whether it's feasible to put -- to
12 put in individual meters, whether it's desirable to do
13 so.

14 These are all I think, you know,
15 questions that are not inconsequential. But I agree
16 with your general statement. You'd have to look into
17 whether or not there would be an impact, what the
18 nature of the impact would be, whether it's even
19 feasible or practical depending on the -- the
20 construction of the facility in question.

21 COMMISSIONER GUNN: And just a follow-up,
22 when you're finding out for Commissioner Jarrett
23 the -- that 42,000 is individual units. If -- if
24 there's any way to get even a round number about how
25 many complexes there are, I mean I know there are

1 individual units in there, but, you know, for example
2 we got Attachment A which has 16 or 20 units of a
3 certain number of apartments each. So, you know, that
4 may be -- this may be a couple hundred apartments that
5 are only 20 complexes.

6 So if there was any way to break down
7 that number into kind of complexes rather than
8 individual units, that might be helpful -- helpful as
9 well.

10 MR. BOUDREAU: I will certainly --

11 COMMISSIONER GUNN: And I think it's to
12 your point about how big of a problem this is that if
13 the 42,000 encompasses only a certain limited number
14 of complexes, then that may reduce that problem even
15 to a smaller amount. So I'd like -- or it may not. I
16 just would like to see if there's any way we could get
17 some -- a little bit more detail in that 42,000, if
18 it's possible.

19 MR. BOUDREAU: I will circle back with my
20 client and see if they have -- if that information is
21 available in a more broken down form for you.

22 COMMISSIONER GUNN: Thank you. I
23 appreciate it. I don't have anything else.

24 JUDGE STEARLEY: Commissioner Kenney?

25 COMMISSIONER KENNEY: No, thank you. No

1 questions. Thanks, Mr. Boudreau.

2 MR. BOUDREAU: Thank you.

3 JUDGE STEARLEY: Thank you, Mr. Boudreau.

4 MR. BOUDREAU: That's all I have unless
5 you have further questions.

6 JUDGE STEARLEY: At this time we've been
7 going for about two hours. I was planning on taking a
8 break, giving our court reporter a break. I wanted to
9 inquire, Staff and Public Counsel obviously want to
10 put on counter-arguments at this point. And I'm not
11 sure the length of time of those arguments and how
12 many questions there will be for you. So do the
13 parties want to just take a ten-minute break at this
14 time or do you all want to break for lunch and come
15 back after lunch?

16 CHAIRMAN CLAYTON: Are you asking us too?

17 JUDGE STEARLEY: I'm trying to be
18 courteous to our parties. No, of course, I'm asking
19 you to, Mr. Chair.

20 CHAIRMAN CLAYTON: Well, I have delayed
21 some lunch plans so I'm -- not that that would
22 persuade the parties, but I'm going to have questions
23 for Public Counsel and Staff and I either need to
24 cancel or not.

25 COMMISSIONER KENNEY: why don't we break

1 for lunch and come back after lunch.

2 JUDGE STEARLEY: We can break and
3 reconvene at -- what do you think? About two o'clock?

4 CHAIRMAN CLAYTON: Is that problematic
5 for anybody or is anybody traveling? Thank you all
6 very much. Thank you, Judge. Thanks for asking.

7 JUDGE STEARLEY: We'll go ahead and take
8 an intermission at this time. We'll reconvene at
9 two o'clock.

10 (A recess was taken.)

11 JUDGE STEARLEY: All right. We are back
12 on the record in WC-2010-0227 and we are ready to take
13 counter-arguments on motion for summary determination
14 from staff and the office of the Public Counsel. Do
15 you have a reference of which of you wishes to go
16 first?

17 MS. HERNANDEZ: I can. It doesn't
18 matter.

19 MS. BAKER: They're the moving. I can
20 go.

21 CHAIRMAN CLAYTON: Step up.

22 MS. HERNANDEZ: Okay. Good afternoon.
23 May it please the Commission. I think from the
24 discussions this morning, I'm going to focus our
25 response in two parts and hopefully address all the

1 questions that you asked this morning as well in some
2 of the response.

3 The two parts would be why Staff asserts
4 that summary determination is not proper at this
5 point, it's not ripe for summary determination, and
6 also arguendo, if you were to decide summary
7 determination is appropriate at this point in time,
8 why the respondents are providing service to the
9 public.

10 First, looking to the Commission's rules,
11 if you would indulge me just for a moment, the rule
12 says -- 4 CSR 240-2.117(1)(e), which is when summary
13 determination may be granted, provides that the
14 Commission may grant a motion for summary
15 determination if the pleadings, testimony, discovery,
16 affidavits and memoranda on file show that there is no
17 genuine issue as to any material fact, that any party
18 is entitled to relief as a matter of law as to all or
19 any part of the case, and the Commission determines
20 that the granting of summary determination is in the
21 public interest.

22 My reading of that makes me believe that
23 all three things have to be there for summary
24 determination to be granted.

25 Now, this morning the Commission granted

1 Staff's motion to put Mr. Merciel's affidavit into the
2 record. That affidavit shows that there are some
3 material facts that are still in dispute at this point
4 in time. Most importantly, whether the tenants agree
5 to all charges for utility service within the lease
6 that a tenant signs; whether Aspen Woods is removing
7 all water and wastewater common usage amounts before
8 allocating the remaining amount to the tenants to pay
9 by bill; and then also, whether Aspen Woods and NWP
10 allocate only the tenant's share of water and
11 wastewater usage to each respective tenant, so their
12 proportionate share.

13 In terms of the -- also for summary
14 determination that -- why it's important that the --
15 that there be facts not in dispute is that the
16 Commission has to put facts in its order for summary
17 determination. So you have to base any order that's
18 written on some material facts that are no longer in
19 dispute.

20 In terms of public use, if you look at
21 the Commission's statute of authority over water or
22 sewer corporations, it says that the Commission has
23 jurisdiction over every corporation, company,
24 association, partnership and there are some other
25 entities' names that are in that statutory definition.

1 That's a very broad definition, if -- if you will, of
2 who can be a water or a sewer corporation and, thus, a
3 public utility.

4 The respondents want you to move the
5 focus from their behavior to what type of structure or
6 what type of entity they are. That's not an
7 appropriate factor to consider and it is irrelevant to
8 the Commission's decision in this matter.

9 what the Staff is concerned with is
10 regulating behavior. That's why we brought this
11 complaint. Whoever that may be. Whether it's a
12 landlord, whether it's not a landlord, whether it's a
13 subdivision, a mobile home park, the structure doesn't
14 matter.

15 This complaint began through a consumer
16 contact. The Staff investigated the consumer's
17 concerns and found it necessary to bring this
18 complaint; that Aspen and NWP, the respondents, are
19 operating as public utilities.

20 The respondents want to focus on the fact
21 that those subjected to this case are landlords and
22 tenants. And the Staff was not out in search of
23 landlords to regulate, which sometimes sounds like
24 that's the argument that's being made, but to stop the
25 behavior that is within the Commission's jurisdiction

1 to regulate.

2 what is important for this decision is
3 that the tenants are receiving service from the
4 respondents and subject to their charges, rules and
5 regulations without any oversight ability. Once
6 you're in their service area, the apartment complex,
7 you are subject to the monopoly provider for billing,
8 account information, customer service and disputes.
9 This could even result in eviction if you don't pay
10 your utility bill. All of that can be found in
11 Staff's complaint of the attachments that Staff --
12 that is part of Staff's complaint.

13 I believe from some questioning this
14 morning, some Commissioners had noted that not all
15 charges are put in the lease. There's actually a
16 blank on the utility addendum that specifically refers
17 to late fees. Also attached to the Staff's complaint
18 is a letter that a tenant receives from NWP after you
19 become a tenant in Aspen apartment complex, which also
20 states specifically some additional charges that are
21 not part of the lease.

22 And also if you look at the utility
23 addendum, paragraph 2 -- I can just read that language
24 to you, If allowed by state law, we, at our sole
25 discretion, may change the above method of determining

1 your allocated share of the utility service by written
2 notice to you.

3 So that indicates to me at least that any
4 time that NWP or Aspen wants to change this -- the
5 charges that are being put on your bill, they may do
6 so. The tenants are not willing or able having full
7 disclosure to know all the charges up front before
8 they enter into the lease.

9 You should also look -- and there was
10 some discussion about this this morning, about moving
11 from the public offering of the apartment to where --
12 a public offering of the water service or the sewer
13 service, the two different points in time. Think
14 about when you move, you need to call the utility
15 providers to set up your service. Once you get into
16 your house, you're not automatically set up with
17 your -- all your utility services. You need to call
18 and set up that service.

19 If you move that focus, you look at the
20 public offering at the point of the water -- once
21 you're a tenant, the water and sewer service, the --
22 the applicable case in this instance is Hurricane
23 Deck, which interesting was not mentioned in the long
24 line of summaries that was given by the respondents
25 before we took our lunch break.

1 That is the most recent decision from a
2 reviewing court, the Western District Court of Appeals
3 which looks at the Commission's decisions. It's the
4 most recent in time. And they also -- the court had
5 the ability to -- it knew all the past cases which
6 were cited earlier this morning and also in the
7 staff's brief. And I don't need to name all those
8 names, but they had all that before them when they
9 issued that Hurricane Deck decision.

10 And I will, if I may, just take some
11 important points from that Hurricane Deck opinion that
12 talks about what public use is. And these are all
13 from the Staff's filing -- Staff's response.

14 The key fact in that by sending out bills
15 to the residents, Hurricane Deck Holding Company
16 offered service to all residents of the given
17 subdivisions. It is not purporting to merely offer
18 services to only a few friends. By offering water and
19 sewer utility services to the public, even if that
20 public is confined to the residents of a few
21 subdivisions, Hurricane Deck Holding Company has made
22 itself subject to regulation as a public utility.

23 And the court also, with those previous
24 opinions before it, explained that under Osage Water
25 and Cirese, Hurricane Deck could constitute a public

1 utility even though its services were limited to two
2 subdivisions in which its water and sewer systems were
3 located where it offered service indiscriminately to
4 all persons located within that service area. And
5 that's -- and they also conclude that that's what the
6 Commission found in its underlying order -- Report and
7 order.

8 There's an idea that once a tenant enters
9 into a private contract, that that's outside the
10 Commission's jurisdiction to review. There's a very
11 clear case law, May Department Store case which is
12 cited in the Staff's reply, that states that the mere
13 signing of a contract does not remove those charges
14 from the Commission's review.

15 The tenants are not agreeing in the lease
16 to all charges incurred by them, which I just
17 mentioned a little bit earlier. In fact, NWP and
18 Aspen can change those charges at any time to --
19 apparently there's no limitation on what that amount
20 could be.

21 In terms of a rulemaking, I think there
22 was some -- there was a lot of mention this morning
23 about whether that's the appropriate thing to do at
24 this point. In my opinion, the rulemaking -- there
25 would have to be a decision of jurisdiction first.

1 Because if we went through a rulemaking without some
2 guidance by the Commission, either that would hinder
3 the rulemaking workshop or there could be a challenge
4 to the rule once we submitted it for publication on
5 whether the Commission actually has jurisdiction over
6 these types of entities.

7 Also, when looking at whether someone is
8 functioning as a utility, it's a very fact-specific
9 analysis. A rulemaking, putting something down on
10 paper that says, when you do this, you're a utility
11 and when you -- if you don't do this, you're not a
12 utility, it appears would be very difficult, if not an
13 arbitrary set of numbers, descriptions, that could
14 ultimately be challenged and may not be of much
15 service to anyone involved.

16 I -- if -- if this matter goes to
17 evidentiary hearing, the Staff has tenants involved in
18 these matters willing to testify to provide more
19 information about what exactly is occurring with their
20 service, who they have to contact, what type of
21 customer issues they're having problems with, who
22 handles billing disputes.

23 And on that point, I also forgot to
24 mention that as part of the -- the bill that you
25 receive from NWP, on the back of the bill there is

1 customer notification about who to call. You call NWP
2 if you have a problem with your bill, you're disputing
3 your bill. You have to provide within 45 days your
4 written dispute as to why you're disputing your bill.
5 NWP is the sole investigator. They're the sole
6 decision maker, there's no appeal process that's
7 allowed.

8 Important to note that it does have some
9 other states, Miami, Florida, Maryland, Washington,
10 that if you are having problems, there's some consumer
11 advocates that you can call thereafter. I think that
12 was a topic of discussion this morning about who --
13 what other options the customer has in terms if you
14 have a problem.

15 I think at this point -- I don't want to
16 go through all of the cases just for the time. And
17 like was said this morning, the Commission's very
18 capable of reading and understanding the responses
19 that were supplied to you, but if you have any
20 specific questions that we could answer for you.

21 JUDGE STEARLEY: Questions for Staff?

22 CHAIRMAN CLAYTON: I do. In the
23 Hurricane Deck case, who actually produced the
24 commodity, the water?

25 MS. HERNANDEZ: It was a subdivision so I

1 believe they had their own wells.

2 CHAIRMAN CLAYTON: And so what was
3 Hurricane -- and I should remember this but it's been
4 a few years. What role was Hurricane Deck actually
5 playing?

6 MS. HERNANDEZ: They were -- they had the
7 wells so they were producing the water.

8 CHAIRMAN CLAYTON: So Hurricane Deck --

9 MS. HERNANDEZ: But they also were doing
10 the billing, the same --

11 CHAIRMAN CLAYTON: Hurricane Deck was
12 producing the water and then turning around and
13 selling the water?

14 MS. HERNANDEZ: Correct.

15 CHAIRMAN CLAYTON: Okay. And that would
16 be different in this circumstance because NWP never
17 owns the water, do they?

18 MS. HERNANDEZ: They don't -- NWP --
19 you're correct that NWP and Aspen do not produce the
20 water themselves. They don't have their own well on
21 site. But if you look at it in terms of them being a
22 wholesale provider, Aspen or N-- I guess you would
23 call Aspen Associates is the customer of Missouri
24 American or MSD. They deliver the product to their
25 property, but the respondents are responsible

1 thereafter.

2 CHAIRMAN CLAYTON: It is my
3 understanding, I think, Missouri American -- does it
4 have a tariff that addresses wholesale water issues?
5 Aren't wholesale rates tariffed?

6 MS. HERNANDEZ: Yes.

7 CHAIRMAN CLAYTON: As opposed to
8 electricity. Electricity is just out on the market.
9 But water is actually a tariffed rate on the wholesale
10 level. Correct?

11 MS. HERNANDEZ: Correct.

12 CHAIRMAN CLAYTON: So does Aspen purchase
13 at a wholesale rate for Missouri American or do they
14 purchase under the commercial operator tariff?

15 MS. HERNANDEZ: I believe they're under
16 commercial.

17 CHAIRMAN CLAYTON: So they're not acting
18 as a wholesaler -- or at least they haven't accessed
19 the product at the lower rate to turn around and sell
20 it?

21 MS. HERNANDEZ: Right. That's -- in
22 terms of billing, that is correct. But if you look at
23 it in terms of what their actions are, you could
24 compare them to a wholesaler.

25 CHAIRMAN CLAYTON: So by actions you mean

1 they are providing the bill?

2 MS. HERNANDEZ: Correct.

3 CHAIRMAN CLAYTON: Are they setting a
4 rate? Are they setting a rate at which --

5 MS. HERNANDEZ: In some respects, yes,
6 because they're using the ratio. So they're using the
7 square footage, the --

8 CHAIRMAN CLAYTON: Does NWP do that or
9 does Aspen do that?

10 MS. HERNANDEZ: That is negotiated. It's
11 stated in the contract between Aspen and NWP that
12 that's the way the bill will be established and then
13 it's in the lease as well.

14 CHAIRMAN CLAYTON: Is it Staff's
15 contention that Aspen is receiving in revenue more
16 than the charge to -- that they -- more than the bill
17 that they receive for Missouri American?

18 MS. HERNANDEZ: Yes. We actually asked
19 for some interrogatories on that fact. We were not
20 provided with an audit from NWP to see what at the end
21 of the year they'd collected. We also asked on that
22 point about some consumer protections, if they had any
23 policies in place to -- what to do if a customer
24 calls, is having billing issues, what not and they
25 said that there was no written policy in place.

1 CHAIRMAN CLAYTON: Let me get back to are
2 they receiving more. It sounds like you don't know.
3 Do you know whether or not Aspen is receiving more
4 than what they're being charged through these billings
5 than what they're being charged from Missouri American
6 water?

7 MS. HERNANDEZ: Aspen, maybe not.

8 CHAIRMAN CLAYTON: Do you know?

9 MS. HERNANDEZ: No, we don't know. In
10 terms of the allocation, we don't -- there's a generic
11 allocation -- or I'm -- excuse me, a common amount
12 that's removed. They're calling it -- NWP on their --
13 on their billing analysis says they remove 5 percent
14 for their common usage. Whether that's the accurate
15 amount from the MSD bill or Missouri American, we
16 don't know.

17 CHAIRMAN CLAYTON: Okay. Would it make
18 any difference to Staff if the underlying water
19 provider was, say, City of St. Louis Water? Would it
20 make any difference in -- would Staff still proceed
21 under the same theory or would it -- would it matter?

22 MS. HERNANDEZ: I think it wouldn't
23 matter who the water was coming from. What Staff is
24 worried about is the behavior; someone acting as a
25 utility, sending out a bill, setting up account

1 numbers, setting up random fees that are not all
2 agreed to, being the arbitrator in customer disputes,
3 setting deadlines for when your bill is due, so on, so
4 forth.

5 CHAIRMAN CLAYTON: Okay. If -- if the
6 Commission finds that it has jurisdiction, that the
7 company's either apart or together operating as a
8 water corporation under the statute, does the
9 Commission have a choice in what it does? Can we
10 decline to assert that jurisdiction or do we have to
11 assert that jurisdiction?

12 MS. HERNANDEZ: Well, I would -- from
13 the -- from looking at the scope of the issue on --
14 it's my belief that that should not be considered
15 about the number of -- of potential apartment
16 complexes that we will regulate. The scope of the
17 problem, there's no indication by the statute that we
18 can decline jurisdiction --

19 CHAIRMAN CLAYTON: I understand.

20 MS. HERNANDEZ: -- based on the size of
21 the problem.

22 CHAIRMAN CLAYTON: Do we have -- but do
23 we have the ability to say, yeah, I think they meet
24 the definition, but we're not going -- we're not going
25 to move forward with this case or we're --

1 MS. HERNANDEZ: Uh-huh.

2 CHAIRMAN CLAYTON: -- that we don't want
3 to move forward and having it defined as a water
4 corporation? Do we have that ability?

5 MS. HERNANDEZ: I think in the only
6 instance you could have that ability was if you were
7 to find the Rocky Ridge requirements met in this case
8 where there is some tenant oversight in the charges,
9 that they all get to vote, that there's some other
10 regul-- regulatory body, if you will, that has a say
11 in how much they're charged in the regulation of the
12 charges. You can't find that in this case so I would
13 argue that there is no -- there is no out or other
14 decision.

15 CHAIRMAN CLAYTON: What if you had an
16 instance where the provider of water is a municipal
17 utility and the municipality has an ordinance on how
18 NWP should function? Would that be a piece of
19 evidence or a criteria that would permit the -- or not
20 permit, that would remove jurisdiction from the
21 Commission or give us the option of not asserting
22 jurisdiction?

23 MS. HERNANDEZ: Well, I think that's what
24 happened in the Blue Acres case. Hopefully I'm giving
25 you right citation for that where the City of Columbia

1 established some ordinances to -- to regulate the
2 mobile home park's sale of water. whether St. Louis
3 County or someone would do that in this instance, I
4 don't know, but --

5 CHAIRMAN CLAYTON: Would we have the
6 ability -- even if that is in place, would the Com--
7 could we still step in if we -- if we wanted to assert
8 jurisdiction over the Blue Acres circumstance
9 regardless of what the City of Columbia did?

10 MS. HERNANDEZ: I would -- I think you
11 would have to look to see what exactly the ordinance
12 is. If it's only regarding the sale of the commodity
13 and what you can charge for the commodity, if there's
14 no indication as to additional fees, customer service,
15 that type of thing. If -- if Blue Acres is performing
16 those activities, or any other respondent, then I
17 would say that -- that's necessary to look at for the
18 decision.

19 CHAIRMAN CLAYTON: So it would be a
20 factor on whether the Commission could or could not
21 assert jurisdiction?

22 MS. HERNANDEZ: Based on what the
23 ordinance says, I think it would be.

24 CHAIRMAN CLAYTON: Well, we're not bound
25 by the municipal ordinance. We're a creature of state

1 law. So we wouldn't be subject to the municipal law,
2 would we?

3 MS. HERNANDEZ: well, municipal systems,
4 co-ops sometimes fall outside the Commission's
5 jurisdiction so that's what was making me think, well,
6 if there's a municipal ordinance, maybe there might be
7 some lines there, but --

8 CHAIRMAN CLAYTON: If the -- if we were
9 to proceed to evidentiary hearing and the evidence
10 produced demonstrated that Aspen Woods received either
11 identical or nearly identical, the same amount of
12 revenue from these billings as the actual charges for
13 Missouri American, if that's what the evidence
14 demonstrated, would staff still believe that Aspen is
15 acting as a utility?

16 MS. HERNANDEZ: Yes.

17 CHAIRMAN CLAYTON: As a water
18 corporation?

19 MS. HERNANDEZ: Yes. Because according
20 to the Osage water case, for gain is not -- does not
21 mean profit. It just means the receipt of money for a
22 service. So even if they're not recovering --

23 CHAIRMAN CLAYTON: well, what service are
24 they actually providing? I mean there's a utility
25 that's providing the actual water, the pipes, the

1 commodity.

2 MS. HERNANDEZ: Uh-huh.

3 CHAIRMAN CLAYTON: What service are they
4 providing and what gain are they receiving if it's
5 just 100 percent pass-through and there's no markup?

6 MS. HERNANDEZ: If there's -- okay. I'm
7 sorry. Maybe I wasn't understanding your question.

8 CHAIRMAN CLAYTON: No. I think you did.
9 I think you did. You're answering away from the
10 perspective that you want to answer, but I'm -- is
11 there a difference if Aspen were adding on 15 percent
12 to maybe make up for lower occupancy? Recession has
13 hit them hard. Is that -- does that matter in this
14 analysis?

15 MS. HERNANDEZ: It -- that does matter in
16 terms of the -- the costs that are associated with
17 doing business. That's -- that's on the landlord.

18 CHAIRMAN CLAYTON: Sure. But if it's
19 100 percent pass-through and there's no markup, are
20 they really acting as a utility?

21 MS. HERNANDEZ: Well, if there's just the
22 charge for the commodity, you get them a bill from
23 Missouri American that says X, you charge X, just
24 divide it equally amongst the number of tenants, then
25 that's what we would call a pass-through and there

1 would be no utility action on that part. Anything --
2 those actions plus something else is where you get
3 into the utility ground.

4 CHAIRMAN CLAYTON: All right. Does Staff
5 have any idea how many types of companies are
6 operating like this?

7 MS. HERNANDEZ: In the state of Missouri?

8 CHAIRMAN CLAYTON: Yes.

9 MS. HERNANDEZ: Not -- we're not certain.

10 CHAIRMAN CLAYTON: You're not certain.

11 MS. HERNANDEZ: We believe just from the
12 documents received from NWP there are about
13 20 different apartment complexes in the state that are
14 similar to the respondent's activities.

15 CHAIRMAN CLAYTON: So is Staff prepared
16 to name each of them as a water corporation, assess
17 them pursuant to our funding mechanism and then apply
18 cost of service rate of return regulation?

19 MS. HERNANDEZ: Well, like we stated in
20 our filing, we haven't investigated all those
21 activities of those other individuals so we would need
22 to do that first. In terms of assessing them, going
23 through a cost of service general small company rate
24 case, I don't -- in terms of the customers, some of
25 them might even be large rate cases, but the -- the

1 rate-base in those instances, while I'm not certain,
 2 may be similar to that of a developer where they --
 3 they contribute all the property so there's no
 4 rate-base. That may be the case in this situation as
 5 well some of these apartment complexes.

6 CHAIRMAN CLAYTON: Does the Commission
 7 have the ability to discriminate in how it applies
 8 regulation among different types of actors? If say
 9 you have -- I don't want -- I don't know any other
 10 companies. NWP One is doing a pass-through and
 11 applying a \$3 a month charge versus an NWP Example Two
 12 that is applying 20 percent on top of the bill as
 13 their fee, could we apply different regulatory
 14 mechanisms on the two different entities if we find
 15 that there's jurisdiction or do we have to apply
 16 identical regulation on both?

17 MS. HERNANDEZ: I think you would have to
 18 apply identical governance to all the utilities that
 19 you find are under your jurisdiction, because you
 20 would need the competent and substantial evidence
 21 to -- to establish that what action is making the
 22 entity a utility so that such decision would be
 23 supported by a court's review.

24 CHAIRMAN CLAYTON: Does Staff believe
 25 that Aspen is acting as a utility and that NWP is

1 acting as a utility?

2 MS. HERNANDEZ: The Staff's complaint has
3 alleged that either jointly or separately.

4 CHAIRMAN CLAYTON: Jointly or separately.

5 MS. HERNANDEZ: And part of that
6 reasoning is that NWP has asserted in different forums
7 that they are acting as solely an agent, so they're
8 trying to push the -- the complaint one way where
9 Aspen's trying to, you know, put it on the shoulders
10 of someone else. But there's clear agency law that
11 the agent can't do what the owner cannot do legally.

12 CHAIRMAN CLAYTON: Does the Commission
13 have the ability on a forward-looking basis of setting
14 criteria or setting out the threshold where the
15 Commission would step in for regulation, or is it
16 Staff's position that all entities that provide this
17 type of administrative service must be regulated as a
18 traditional water corporation?

19 MS. HERNANDEZ: I don't -- I'm -- do you
20 just want me to answer or do you want to ask Staff
21 their opinion?

22 CHAIRMAN CLAYTON: Who do you represent?

23 MS. HERNANDEZ: I represent the Staff.

24 CHAIRMAN CLAYTON: Whoever. I mean, I'm
25 not trying to trick you or anybody.

1 MS. HERNANDEZ: I know.

2 CHAIRMAN CLAYTON: If Mr. Merciel --

3 MS. HERNANDEZ: Just because of the
4 technical nature, he may have more information than I
5 do. But once again, looking on the legal side of it,
6 you would have to have some standard that could be
7 supported upon review.

8 I don't know if you set -- like you were
9 saying someone charges \$3 and someone else charges
10 3.25, what's the difference of the quarter? Does that
11 make you a utility or not? It's not the charge in
12 itself that's making you the utility, but the act.
13 Not the amount.

14 CHAIRMAN CLAYTON: Well, for an entity
15 like NWP, they don't own any infrastructure so they
16 have no -- it would be zero rate-base and you'd have
17 basically a billing and collection operating expense.
18 And so that they would only be entitled to their
19 expense with no profit. Correct? With no rate of
20 return built in. Why would they ever do that?

21 MS. HERNANDEZ: What do you mean? Why
22 would they subject to a tariff?

23 CHAIRMAN CLAYTON: If we were to do -- if
24 we were to apply traditional rate of return
25 regulation. Why would they ever engage in that type

1 of business?

2 MS. HERNANDEZ: In terms of a profit, I
3 don't -- I don't know. I mean you could -- there's an
4 argument that they're managing or controlling certain
5 infrastructure on the property.

6 CHAIRMAN CLAYTON: If I make the
7 statement that isn't NWP just basically a billing
8 administrator here, how do you refute that?

9 MS. HERNANDEZ: That they are not just
10 simply taking the bill from Missouri American, which
11 then goes through Aspen's delivery hands, to NWP.
12 They're not looking at that -- the commodity bill from
13 Missouri American or MSD and saying, okay, the bill
14 this month is \$1,000. We have, you know, so many
15 people at this apartment complex so we're going to cut
16 the costs by this and then we're going to charge for
17 our billing services the cost of that service to the
18 landlord because the landlord doesn't have to worry
19 about that. That should be a cost of business to him
20 or her. That would be an okay situation. That would
21 be when they're just a billing entity.

22 Right now they're stepping outside that
23 ground and moving to where they -- they do the
24 activities that we've mentioned so many times today;
25 the additional fees, they're representing customer

1 service, billing dispute matters, they're the
2 arbitrator, there's no other protections for the
3 customers in this matter.

4 CHAIRMAN CLAYTON: Okay. Thank you.

5 JUDGE STEARLEY: Commissioner Jarrett?

6 COMMISSIONER JARRETT: Thank you, Judge.

7 Good afternoon, Ms. Hernandez. The Hurricane Deck
8 Holding Company case, that involved subdivisions; is
9 that correct?

10 MS. HERNANDEZ: Yes.

11 COMMISSIONER JARRETT: So they were
12 homeowners -- the customers -- the end customers were
13 homeowners?

14 MS. HERNANDEZ: Correct.

15 COMMISSIONER JARRETT: They weren't
16 tenants of Hurricane Deck Holding Company?

17 MS. HERNANDEZ: Right. That's correct.

18 COMMISSIONER JARRETT: Same thing with
19 Osage water. Those were homeowners --

20 MS. HERNANDEZ: Those were homeowners as
21 well.

22 COMMISSIONER JARRETT: -- in
23 subdivisions, they weren't tenants?

24 MS. HERNANDEZ: Correct.

25 COMMISSIONER JARRETT: Is there any

1 dispute in this case that the customers are tenants of
2 Aspen Woods?

3 MS. HERNANDEZ: Is there any dispute that
4 the tenants are customers of Aspen Woods?

5 COMMISSIONER JARRETT: Yeah. The
6 customers of the water service are tenants of Aspen
7 Woods?

8 MS. HERNANDEZ: From our perspective,
9 that's a true fact. I don't --

10 MR. MERCIEL: They're not of NWP.

11 MS. HERNANDEZ: Well, that's -- that's
12 true. They're not tenants of NWP and NWP is just the
13 billing entity.

14 COMMISSIONER JARRETT: Right. But they
15 are tenants of Aspen Woods?

16 MS. HERNANDEZ: Yes. I'm just -- I'm
17 trying to remember what facts the respondents put in
18 their -- their pleadings so I don't want to say it's
19 disputed when I'm not for sure what they said.

20 COMMISSIONER JARRETT: Well, I guess my
21 question is then why doesn't the Danciger and the
22 Cirese cases control where the courts said that if a
23 company is supplying manufacturing, distributing and
24 selling any type of utility service to their tenants,
25 then they are not acting as a public utility?

1 MS. HERNANDEZ: That --

2 COMMISSIONER JARRETT: Is there any case
3 in Missouri where a court has held that a company that
4 supplies those services to tenants is a public
5 utility?

6 MS. HERNANDEZ: I don't believe there's
7 any court case that's deal specifically with the
8 structure of -- whether it's a subdivision or an
9 apartment complex. But in those -- the cases that you
10 mentioned when the producer is -- is selling -- I
11 don't know in that instance if there was additional
12 fees or additional activities on the part of those
13 entities in those cases that would make them into a
14 public utility, whether they were just providing the
15 service to their subdivision based on the cost and not
16 asking for late fees and that type of activity.

17 COMMISSIONER JARRETT: And I understand
18 that. But I'm trying to -- I'm trying to determine
19 here -- these cases talk about tenants. If you're
20 providing to a tenant, then you're not a public
21 utility. That's what Danciger says, that's what
22 Cirese says. And I just want to know, are there any
23 cases in Missouri that say someone that is selling to
24 a tenant is a public utility?

25 MS. HERNANDEZ: Well, as mentioned

1 earlier, in the Hurricane Deck, the Western District
 2 looked at the Cirese and Danciger cases. And they --
 3 page 791 of their opinion, which is in Staff's
 4 response, they stated, In arriving at the foregoing
 5 conclusion, we have not overlooked appellant's
 6 contention that they sold service only on private
 7 contract -- so based on comparative of a tenant --
 8 landlord/tenant situation.

9 we think the evidence is sufficient to
 10 support a finding to the effect that they -- that they
 11 held themselves out as willing to sell to all comers
 12 who desired service in the immediate vicinity of their
 13 plant, a district consisting of several blocks, and
 14 that they did sell to all such customers.

15 COMMISSIONER JARRETT: Okay. So you
 16 don't see any distinction between tenants and
 17 homeowners as far as the case law is concerned?

18 MS. HERNANDEZ: As far as the case law,
 19 no.

20 COMMISSIONER JARRETT: Are you aware of
 21 any other cases in other states where a Public Service
 22 Commission has asserted jurisdiction over a company,
 23 over a landlord who sells or provides water service to
 24 its tenants?

25 MS. HERNANDEZ: In terms of a particular

1 utility, no. From my review of some of the states
2 that have some -- some lingering statutes, I believe
3 Florida, Texas and Pennsylvania do have statutes that
4 deal more specifically with this. But in that
5 respect, if you were to try to compare what those
6 states have done with Missouri, I would also say you
7 need to look at the statute and see what exactly their
8 statute allows jurisdiction on.

9 COMMISSIONER JARRETT: Statutes are
10 different, yeah. Okay. Thank you, Ms. Hernandez. I
11 don't have any further questions, Judge.

12 MS. HERNANDEZ: You're welcome.

13 JUDGE STEARLEY: Commissioner Gunn, any
14 questions?

15 COMMISSIONER GUNN: Yes. Thank you very
16 much. Can you just clarify what -- you said a couple
17 times that we're trying to regulate the behavior. Are
18 we talking about -- and just to be clear, are we
19 talking about illegal or fraudulent behavior or -- and
20 by that I mean violative of consumer protection laws,
21 or are we talking about simply non-certificated
22 behavior? So put another -- in another direction, if
23 these guys held a public utility certificate, would
24 they be doing everything correctly?

25 MS. HERNANDEZ: I haven't looked at their

1 behavior just because we don't have the jurisdiction
2 to compare it to other statutes for consumer
3 protection analyses, but I would -- my -- Staff's
4 contention is they're operating without a certificate
5 and that's what's unlawful.

6 COMMISSIONER GUNN: So are they --

7 MS. HERNANDEZ: I'm sorry.

8 COMMISSIONER GUNN: But that's the only
9 part. We're not making any allegations that -- that
10 the extra fees or something are -- are somehow
11 fraudulent or that they're usurious or anything like
12 that at this point in time?

13 MS. HERNANDEZ: At this point in time,
14 no. Certainly the charges are what we assert above
15 and beyond what the cost of the commodity is, but
16 there's no allegations of fraud or any -- anything to
17 that effect.

18 COMMISSIONER GUNN: Now, this case was
19 initiated through -- or as mentioned before, that they
20 thought that this was initiated through a hotline call
21 or consumer complaint. Have there been -- is it just
22 based on one complaint plus the Staff investigation or
23 have there been multiple complaints about -- about
24 this or other apartment complexes?

25 MS. HERNANDEZ: We've received, to my

1 knowledge, more than the complaint which initiated the
2 Staff's current complaint. We received some
3 information from the Seven Trails facility as well as
4 the Aspen Woods apartment complex.

5 COMMISSIONER GUNN: Okay. Now, with --
6 with other apartment complexes, because we think that
7 this only affects this -- this clearly -- and even
8 under the NAA data, that there are other complex --
9 apartment complexes that are doing this.

10 Now, how do they do it? Are they -- are
11 they just allowing their tenants to be directly billed
12 or are they -- are they just paying the water bill
13 themselves and they include it in rent or how -- how
14 is it being done right in some of these other places,
15 in Staff's opinion?

16 MS. HERNANDEZ: I think it could be done
17 either way you stated. And also a third, where they
18 take the bill and they divide it amongst all of the
19 tenants -- by the number of tenants that are in the
20 apartment complex.

21 Right now there are apartments that just
22 do straight pass-through. They get the bill from
23 Missouri American or whatever the provider is, they
24 divide it by the number of customers. There are some
25 if the producer's tariff allows sub-metering and the

1 setup within the structure for that, they pay the bill
2 directly.

3 COMMISSIONER GUNN: And so the Staff's
4 okay with you get a bill for \$2,000 a month, you've
5 got 20 tenants, everybody pays 100 bucks for water
6 regardless of use -- regardless of usage?

7 MS. HERNANDEZ: Yes. Because you're not
8 exhibiting any utility behavior at that point.

9 COMMISSIONER GUNN: Okay. So one of the
10 things that we brought up before was a practical
11 problem where we may be dealing with, you know, 40,000
12 individual meters or other kind of rate-base issues or
13 things like that and you've talked a little bit about
14 it. But do we really, as a Commission from a policy
15 standpoint, want to be regulating a apartment
16 complexes as utilities? I mean is that really where
17 we want to be headed?

18 MS. HERNANDEZ: Well, I would argue that
19 the policy considerations where -- I know that they're
20 weighing on everyone's mind and we shouldn't pretend
21 that they're not. That's a separate determination
22 from whether you have jurisdiction and your authority
23 that's given to you by the legislature. There's two
24 different questions there, in my mind.

25 In terms of whether that's good policy or

1 not or whether we should assert jurisdiction, these
2 customers that -- or let me back up. The Commission
3 is given authority to not only regulate utilities, but
4 to ensure that customers receive just and reasonable
5 rates for any utility service that is provided.

6 You know, that's something that's
7 certainly of the public interest if not to all the
8 customers but those that are affected. Just alone in
9 the Aspen Woods complex, there's 450-plus customers
10 that are affected by these charges which can be
11 changed at any point in time.

12 From a policy standpoint, I don't think
13 it's a good idea to -- to avoid asserting your
14 jurisdiction, if you do find it in this matter, to
15 regulate the utilities that the legislature gave you
16 the authority to do.

17 COMMISSIONER GUNN: So let me -- that's
18 an excellent point and I think that that's -- that
19 there are two questions here; one, whether we have
20 jurisdiction, and how we assert it. This kind of goes
21 back to the Chairman's question.

22 But is there a third way? Can we say we
23 have jurisdiction and then only regulate those
24 activities that we find troublesome, like -- like
25 capping the fees or making sure there's a procedure in

1 place for billing disputes or making sure that --
 2 that -- that complaints are dealt with or that they
 3 have a certain level of consumer service done
 4 without -- without dealing with any of the other
 5 issues surrounding typical regulation of utilities?
 6 Is that something that you believe that this
 7 Commission would have the authority to do?

8 MS. HERNANDEZ: well, all of those
 9 charges would be similar to the regulated utilities
 10 now. Just because we have Missouri American on our
 11 minds, say Missouri American's tariff that talks about
 12 the -- what can you can charge for late fees, service
 13 fees, bad check fees, whatever the fee may be.

14 If there -- there may not be any harm,
 15 say, with NWP just having a tariff and them coming
 16 before the Commission if they would want to raise
 17 their rates from 3.25 to whatever the appropriate
 18 billing or customer monthly charge would be at that
 19 time.

20 For them just to have a tariff with their
 21 charges, NWP in -- going back to the Commissioner's --
 22 Chairman's question about their profit, NWP is making
 23 a profit off of these extra fees. They're -- it's my
 24 understanding that once Aspen receives the bill, the
 25 5 percent is taken out and then the 5 -- that

1 5 percent for common usage is not returned so there's
2 a small window where NWP is making a profit off of --
3 off of those fees.

4 So in terms of them making a profit off
5 of infrastructure, you're correct that there's not
6 going to be a any rate-base unless they put in meters
7 or something to that effect. But I -- I'm -- in
8 thinking, I think the company could come before the
9 Commission just -- and have a tariff in place for
10 customer service, billing disputes, the -- the fees
11 they want to charge and have that in place so that
12 they could act within our jurisdiction.

13 COMMISSIONER GUNN: Because that -- a lot
14 of what we're talking about would be almost solely
15 controlled by the Missouri American Water tariff.
16 Correct?

17 MS. HERNANDEZ: What the appropriate
18 charges are? Is that what you're asking?

19 COMMISSIONER GUNN: Well, not even
20 necessarily -- not even necessarily what those
21 particulars are, but you would -- you wouldn't have to
22 deal with depreciation, for example, you wouldn't have
23 to deal with other issues. Those things would be --
24 would naturally flow from the Missouri American Water
25 tariff. And what we would be concerned about were

1 solely those provisions in a tariff that dealt with
2 customer service and -- and late fees and those --
3 those particular things. So it would be a truncated
4 tariff at best.

5 MS. HERNANDEZ: Yeah, I think that's
6 correct. And that goes back to your question this
7 morning about these other billing entities and your
8 question about Missouri American, what if they have a
9 billing entity. They, in fact, do and they just
10 function off of Missouri American's tariff.

11 COMMISSIONER GUNN: So they would
12 essentially adopt -- well, I'm just trying to -- I
13 mean from a policy perspective -- and I think you're
14 right, we have two questions about whether we assert
15 jurisdiction and then the second question is in the
16 manner we do that, but I think they're interrelated.

17 Because if -- if all we're concerned
18 about are some of the issues regarding -- like the
19 consumer services and capping the fees and things like
20 that, then why -- isn't this really the province of
21 the attorney general's office that determines whether
22 this company is taking advantage of consumers in
23 violation of a consumer protection statute?

24 Because much of what we traditionally
25 would regulate in rate of return regulation would be

1 based upon a full rate case or the current Missouri
2 American tariff. And the -- and the parts that
3 would -- would be impacted really would be consumer
4 protection aspects of this.

5 MS. HERNANDEZ: Well, I believe you're
6 correct in terms of the general large rate cases.
7 You're looking more at the cost of service from
8 infrastructure point of view, the investment, the
9 return on the investment.

10 But the Commission was given
11 responsibility to oversee utilities and utility
12 actions. I think that's what removes it from, say, a
13 general consumer protection agency such as the
14 attorney general's office to a more specific, this is
15 a utility action, you're functioning as a utility.
16 That authority has been given to this Commission.

17 COMMISSIONER GUNN: And this would be
18 exactly the same that if, say, a homeowners
19 association hired a third-party billing clerk to send
20 out bills to the homeowners. If you had a developer,
21 the developer bills the homeowners association for
22 water, then the homeowners association hires a third
23 party billing -- billing outfit to -- to process the
24 bills for each individual homeowner. You believe that
25 would be -- it would be a similar circumstance?

1 MS. HERNANDEZ: Just based on the -- the
2 entity -- the underlying entity being a homeowners
3 association, I would say that would be outside our
4 jurisdiction if they meet the Rocky Ridge criteria.
5 Because if the homeowners are wanting to -- and they
6 vote to hire a billing company, they have oversight of
7 that billing company. So it --

8 COMMISSIONER GUNN: But what I'm talking
9 about is if a developer still owns the -- if in this
10 hypothetical the developer still owns the water system
11 and is a certificated entity, all right, but instead
12 of him deciding he wants to -- he doesn't want to bill
13 all the homeowners separately because he just owns one
14 subdivision, he sends one big bill to the homeowners
15 association, then the homeowners association goes out
16 and says, you know, we can't hire this so we're going
17 to pay -- we're going to pay Fred's Accountant Agency
18 to distribute bills and collect bills from all the
19 homeowners to pay that one big water bill.

20 would you -- so where the homeowners
21 association was not the owner of the system, a
22 separate developer is, would you think that situation
23 would be similar?

24 MS. HERNANDEZ: well, can I ask you a
25 question in response? would the developer be getting

1 just the cost that's -- that he or she sees in
2 developing the commodity and then also --

3 COMMISSIONER GUNN: Sure. The
4 developer -- the developer is a certificated entity so
5 yes, they would be getting the cost. But in addition
6 to paying the water bill, the homeowners association
7 says, You know what? Fred's Accounting Agency charges
8 us 20 bucks a month to do this so we're going to --
9 and there are 20 homes in the subdivision so everybody
10 pays an extra dollar so -- in order to -- you know, to
11 get the bills. And it's disclosed and everybody's
12 fine with it. Would that Fred's Accounting Agency
13 then become a utility?

14 MS. HERNANDEZ: I'm trying to think -- I
15 don't know how to answer your question in terms of --
16 in terms of the homeowners association, they have
17 oversight on that charge. If they vote to approve it
18 and they meet the Rocky Ridge requirements for
19 homeowners association, there's no problem with them
20 in terms of -- if it costs -- if they're just
21 paying --

22 COMMISSIONER GUNN: If the bill says --

23 MS. HERNANDEZ: Right. If they're just
24 paying the \$20 --

25 COMMISSIONER GUNN: -- if you've got a

1 problem, call Fred -- sorry. Go ahead.

2 MS. HERNANDEZ: No. If the bill says if
3 you have a problem with this bill, call Fred, that's
4 kind of customer service, that's approaching utility
5 behavior. If -- if you're just -- if you're just
6 paying Fred the invoice that says \$20 for me to bill
7 everyone, then that would be -- I guess that would --
8 that would be okay because the homeowners are saying
9 that's -- they are the ones that are saying that
10 charge is okay. They're not incurring anything
11 without their oversight. But yet the -- the billing
12 company I guess would fall outside the jurisdiction
13 too as long as they're just charging the \$20.

14 COMMISSIONER GUNN: Right. But what if
15 I'm -- what if they charge an extra charge to cover
16 the -- what if they charge them an extra dollar in
17 order to cover -- each homeowner an extra dollar to
18 cover the cost? So they're making money off of it.
19 It seems to mean -- they've agreed -- and in many
20 cases these tenants have signed leases of contractual
21 agreements with Aspen Woods that say they agree to
22 these fees even though they're not necessarily named.
23 So I don't know why it would be any different.

24 I mean -- and to your point earlier, it
25 may be a difference in scale, but in practice, I'm not

1 sure that there's a difference. And if we're not
 2 supposed to take a look at scale and take a look at
 3 some of these practical effects of it during that,
 4 that would mean that you could theoretically have a
 5 one-person shop that's sending out bills for
 6 homeowners association that we would consider then a
 7 certificated utility. And does that really fulfill
 8 the intent of the statute or what our regulatory
 9 authority should be?

10 MS. HERNANDEZ: I think you've had
 11 instances before this Commission where there has been
 12 a one-person shop sending out bills and then they've
 13 either submitted to jurisdiction -- but even in those
 14 instances, the Commission issues a Report and Order
 15 and finds that they have jurisdiction over the
 16 one-person shop.

17 COMMISSIONER GUNN: Were those
 18 third-party vendors or were they -- were they owners
 19 and operators of systems?

20 MS. HERNANDEZ: Those were owners and
 21 operators. I hate -- I'm not trying to dodge your
 22 question. I'm just trying to -- I'm having difficulty
 23 forming an answer to it, so I apologize.

24 COMMISSIONER GUNN: It's all right. I
 25 understand. This is not easy stuff. I mean this

1 is -- we're kind of trying to figure our way through
 2 this. And that's part of the reason I think that
 3 Mr. Pearson even brought it up that we've got to
 4 develop a rule that is consistent across the board and
 5 solve some of these very legitimate questions we're
 6 asking here. So I don't fault you at all for what's
 7 going on. I don't think I have anything further. I
 8 appreciate it. Thank you.

9 MS. HERNANDEZ: You're welcome.

10 JUDGE STEARLEY: Commissioner Kenney, any
 11 questions?

12 COMMISSIONER KENNEY: Just a couple I
 13 think hopefully relatively narrow. Thank you,
 14 Ms. Hernandez. For purposes of summary determination,
 15 Staff submitted Mr. Merciel's affidavit; is that
 16 correct?

17 MS. HERNANDEZ: That's correct.

18 COMMISSIONER KENNEY: To -- okay. Just
 19 what are the -- what are the factual disputes that
 20 Mr. Merciel's affidavit creates?

21 MS. HERNANDEZ: Sure. Well, as mentioned
 22 earlier, one of them is whether the tenants agree to
 23 all charges for utility service within any lease that
 24 is signed. That's what Aspen and NWP's witness filed
 25 within their affidavit. And so that's now a disputed

1 facts -- fact.

2 whether the common usage is truly being
3 removed from any bill allocated to the tenants.
4 That's a disputed fact just because of that 5 percent
5 amount. whether the tenant is actually paying their
6 appropriate share of the water or sewer bill, that's
7 in dispute. who owns the sewer meters or meters that
8 are used to determine the wastewater usage, that's in
9 dispute. Let's see. There are also --

10 COMMISSIONER KENNEY: what was number
11 three after the common usage being billed? what was
12 the third element or the third fact?

13 MS. HERNANDEZ: whether the tenant
14 receives their appropriate share of the overall bill.

15 COMMISSIONER KENNEY: Okay.

16 MS. HERNANDEZ: And there's some --
17 there's some other facts that are in dispute in terms
18 of who's receiving the bill from Missouri American.
19 That has changed from our discovery over the past
20 couple of months. There was -- it appeared some other
21 entities were named on the customer record on some
22 records for the 38 meters that Missouri American has
23 onsite. The customer of record has changed at least
24 twice since we've --

25 COMMISSIONER KENNEY: From Aspen Woods to

1 something else?

2 MS. HERNANDEZ: Some of them had Aspen
3 Woods or Madison and Aspen Woods' name on it. Some of
4 them had -- I'm not for sure if I can -- if that would
5 be confidential information, but there were other --

6 COMMISSIONER KENNEY: Yes, it --

7 MS. HERNANDEZ: There was another name on
8 the account a couple months ago besides Madison and
9 Aspen Woods. And then just recently there's been
10 another name besides Madison and Aspen Woods. Some of
11 them still have Madison and Aspen Woods, some of them
12 have this other entity on them.

13 COMMISSIONER KENNEY: Does Staff dispute
14 Aspen Woods' analysis that this is ripe for summary
15 determination with respect to the -- whether Aspen
16 Woods holds its property out for public use?

17 MS. HERNANDEZ: I -- there is factual
18 dispute about whether it -- they're holding themselves
19 out for public use through the point in time you
20 consider where the public use is, whether it's back
21 when they're renting apartments or whether it's when
22 they're -- the tenant is in his or her apartment and
23 has a one-year lease and now they're not being
24 subjected to these costs for water and sewer service.

25 All of these facts that we've outlined I

1 think go to whether -- the actions that the
2 respondents are allegedly engaged in, whether that
3 puts them out for a public use.

4 COMMISSIONER KENNEY: And do you know if
5 there are any complaints to the attorney general's
6 office about the billing practices or any other issues
7 related to Aspen Woods and its tenants?

8 MS. HERNANDEZ: I'm not certain of what
9 has been reported to the attorney general's office. I
10 just know that we've received at least two different
11 customers from different complexes that have provided
12 us with information and also have complained about
13 service issues and billing issues and not having
14 anyone to air their concerns to besides the person
15 that's billing them.

16 COMMISSIONER KENNEY: And I don't know if
17 this -- if this -- if you answered this question
18 already, but forgive me if you did. How many other
19 apartment complexes statewide would we potentially
20 have to regulate if we found that we had jurisdiction
21 and that this was a practice we could -- we could
22 regulate? Do you know approximately how many other
23 apartment complexes in the state would be affected by
24 that determination?

25 MS. HERNANDEZ: All I can say at this

1 point is possibly 20 just based on the documents we
2 have received from NWP and some independent review.
3 And those -- all that information is attached as
4 Staff's Attachment A to the informative filing.

5 COMMISSIONER KENNEY: And this is
6 statewide?

7 MS. HERNANDEZ: Yes. I mean there may be
8 others out there. We just -- the complaint process
9 for the Staff, at least in my short time here, has
10 always been you find -- or someone complains of
11 something, you -- the Staff goes through an analysis,
12 determines that it's violating some statute or rule
13 and then you bring a complaint. There's not a general
14 survey of what people are doing out there and then
15 trying to file complaints based on those actions.

16 So there may be others. There's
17 certainly other landlords that are just passing
18 straight through. We've had instances where tenants
19 have called the consumer services hotline and
20 mentioned that the landlord is trying to shut off my
21 water service or trying to charge me this and we've
22 worked with them informally to resolve the issue to
23 where the landlord is just passing through the charges
24 that he or she received from the provider.

25 In this instance we did try some informal

1 settlement, but here we are in the complaint room.

2 COMMISSIONER KENNEY: Have we had
3 complaints from any of these other apartment complexes
4 on this list?

5 MS. HERNANDEZ: To my knowledge, no.
6 Besides the Seven Trails.

7 COMMISSIONER KENNEY: Okay. Thank you.

8 MS. HERNANDEZ: You're welcome.

9 COMMISSIONER KENNEY: I don't have any
10 other questions.

11 JUDGE STEARLEY: Any other questions,
12 Commissioner Clayton, Commissioner Jarrett?

13 I've got a few questions. Aspen Woods
14 and National Water and Power filed their report at the
15 same time you did and Staff did. Do you recall what
16 number of apartment complexes they estimated were
17 similarly situated to Aspen Woods?

18 MS. HERNANDEZ: I can look. I have that
19 pleading here. Did you say Aspen and NWP?

20 JUDGE STEARLEY: They filed a joint
21 report. I just believe they had one estimate in
22 their --

23 MS. HERNANDEZ: Oh, that they just had
24 knowledge of their -- joint report. Okay. It says,
25 Aspen Woods has no information upon which to estimate

1 the number of similarly situated apartment complexes.
2 And then paragraph 4 of their pleading says, NWP has
3 some knowledge to the extent of services.

4 JUDGE STEARLEY: And then it gave a rough
5 estimate.

6 MS. HERNANDEZ: A rough estimate that
7 there are probably 500 or more.

8 JUDGE STEARLEY: 500 or more apartment
9 complexes. Okay. Does Staff have a way of following
10 up with them to verify that information?

11 MS. HERNANDEZ: We can certainly ask
12 another interrogatory based on that fact, but when we
13 did our first round of interrogatories, we asked for
14 all Missouri properties where these activities were --
15 the alleged activities were occurring and received
16 just the list that we did. So certainly we can try
17 getting that information again.

18 JUDGE STEARLEY: I would like to focus a
19 couple questions back to the motion that's before the
20 Commission.

21 MS. HERNANDEZ: Okay.

22 JUDGE STEARLEY: And I don't believe
23 anybody's arguing the Commission must have subject
24 matter jurisdiction to go forward with this complaint.
25 And the Commission's subject matter jurisdiction is

1 certainly present for public utilities as defined in
2 Chapter 386. And under our definition sections, that
3 would capture sewer corporations and water
4 corporations.

5 But the motion that's before the
6 Commission for summary determination doesn't involve
7 any of those definitions, does it? It actually
8 involves extra judicial requirements the courts have
9 imposed which we've been referring to as the public
10 use test; isn't that correct?

11 MS. HERNANDEZ: The Danciger case does
12 talk about the public use and that's what the
13 respondents say that their joint motion is limited to.

14 JUDGE STEARLEY: Right. And that public
15 use test has been further delineated with subsequent
16 cases like Osage Water and Hurricane Deck and Cirese
17 as well, hasn't it?

18 MS. HERNANDEZ: That's correct.

19 JUDGE STEARLEY: So their motion focuses
20 on the public use test. And their argument is if they
21 don't satisfy that test, we don't get to the statutory
22 definitions of a public utility or a water corporation
23 or sewer corporation. Is that the way you understand
24 their motion?

25 MS. HERNANDEZ: That's the way I

1 understand their motion, yes. You have to look at
2 some facts to determine whether their activity --

3 JUDGE STEARLEY: Certainly.

4 MS. HERNANDEZ: -- is public use.

5 JUDGE STEARLEY: Right. Would you agree
6 that the public use test must be satisfied for the
7 Commission to have subject matter jurisdiction?

8 MS. HERNANDEZ: The Supreme Court of the
9 state has said that that's part of the statutory
10 definition not explicitly, but implicitly.

11 JUDGE STEARLEY: So it has to be
12 satisfied?

13 MS. HERNANDEZ: Correct.

14 JUDGE STEARLEY: And in summary and in
15 putting these cases together, that test is basically
16 been defined as indiscriminately offering utility
17 service to the general public. And the general public
18 is defined as all persons within the area that that
19 entity or utility is capable of serving. Correct?

20 MS. HERNANDEZ: Correct. In this
21 instance it would be -- general public would be those
22 that are in the apartment complex.

23 JUDGE STEARLEY: So the public use test
24 has several elements. There is an element of whether
25 or not there's discrimination. There's an element of

1 whether or not they offer utility service and there's
2 an element as to whether or not that service is
3 offered to all persons they are capable of serving.
4 Is that a fair summary of what's embodied in that
5 test?

6 MS. HERNANDEZ: I believe so, yes.

7 JUDGE STEARLEY: So doesn't the
8 Commission need a definition of utility service to
9 make a decision with whether or not an entity
10 satisfies the public use test?

11 MS. HERNANDEZ: It would need to consider
12 certain facts like you're saying, what a utility
13 service is, whether the respondents, their activities
14 are meeting the utility service definition.

15 JUDGE STEARLEY: Okay. And in this
16 instance the complaint alleges that Aspen Woods and/or
17 jointly with National Water and Power is providing
18 water and sewer service without a certificate; is that
19 correct?

20 MS. HERNANDEZ: That's correct.

21 JUDGE STEARLEY: Okay. And the
22 Commission has a definition of sewer service in its
23 regulations; two different parts of its regulations.
24 Can you tell me what the definition of a sewer service
25 is?

1 MS. HERNANDEZ: Sure.

2 JUDGE STEARLEY: Not statutory definition
3 of a service because there is no statutory definition
4 of sewer service.

5 MS. HERNANDEZ: Of general service?

6 JUDGE STEARLEY: There's a general
7 service definition. I've got a copy of the
8 regulations right here if you'd like to come forward
9 to take these.

10 MS. HERNANDEZ: Oh, okay. Do you have it
11 marked?

12 JUDGE STEARLEY: And I have it marked.
13 Two different places the Commission has an explicit
14 definition of what sewer service constitutes. They're
15 located at 4 CSR 240-3.300(3) and 4 CSR
16 240-60.010(3)(m). Would you mind reading -- it's the
17 same definition in both sections. Would you mind
18 reading that into the record?

19 MS. HERNANDEZ: Sure. 4 CSR 240-3.300,
20 paragraph 3, Sewer service means the removal and
21 treatment of sewage.

22 And then at 4 CSR 240-60.010, paragraph
23 3M, Sewer service, removal and treatment of sewage.

24 JUDGE STEARLEY: All right. So public
25 use test would require the respondents to be

1 indiscriminately, for the purpose of sewer services
2 anyway, removing and treating sewage to all the
3 persons it's capable of providing that service to in
4 their service area. Is that what Staff is alleging in
5 its complaint?

6 COMMISSIONER GUNN: Judge, can I ask you
7 a question about that question, please?

8 JUDGE STEARLEY: Certainly.

9 COMMISSIONER GUNN: Are you asking
10 Ms. Hernandez's opinion as to whether that is the case
11 or are you making a conclusionary question?

12 JUDGE STEARLEY: No. I asked her what
13 Staff was alleging. She's stated that she agrees the
14 public use test applies and that that would require
15 the Commission to consider what constitutes utility
16 services as to being provided to the general public.

17 So I've just asked if that is what she's
18 alleging, is that by the Commission's regulations,
19 either of these entities is providing sewer service to
20 all the persons within its area that it's capable of
21 serving. So I'm just trying to clarify for purposes
22 of their complaint what Staff is alleging.

23 MS. HERNANDEZ: well, according to our --

24 COMMISSIONER GUNN: Okay.

25 MS. HERNANDEZ: Oh, I'm sorry. According

1 to our first complaint, I only brought that one along
2 since the second -- amended complaint hasn't received
3 full answers yet, but paragraph 20 says, Pursuant to
4 Section 386.020.48, service includes -- and then we
5 listed that statutory definition for service.

6 JUDGE STEARLEY: Correct. And a
7 statutory definition is a general definition for
8 service, but the Commission has its own specific
9 definition for sewer service which is why I inquired
10 about that.

11 MS. HERNANDEZ: Well, we -- if you're
12 wanting some legal analysis, I can certainly provide
13 that for you, but I -- in terms of the complaint, we
14 didn't cite that -- the -- that rule in our complaint.

15 JUDGE STEARLEY: All right. Well, you
16 said earlier when I asked about the elements of the
17 public use test, that the entity in your complaint
18 would have to be offering some type of public utility
19 service.

20 MS. HERNANDEZ: Correct.

21 JUDGE STEARLEY: And you're relying
22 solely on the general definition 386.020(48) for
23 service for that then?

24 MS. HERNANDEZ: I believe so, yes.

25 JUDGE STEARLEY: All right. Now assuming

1 these entities are indiscriminately offering that
2 service -- that alleged service to all persons within
3 their service area, those are the three elements of
4 the public use test. Mr. Merciel's affidavit doesn't
5 allege any facts that have anything to do with that
6 test, does it?

7 MS. HERNANDEZ: Let's see. Whether
8 they're discriminating, I don't believe so. Whether
9 they're providing utility service -- utility service,
10 at least what we've put in our complaint, is not only
11 the use and accommodations afforded consumers or
12 patrons, but any product or commodity furnished by any
13 corporation, person or public utility in the plant.
14 Property and facilities employed by -- corporation,
15 person, public utility performing any service or in
16 furnishing any product or commodity, and to the use
17 and accommodation of consumers or patrons.

18 So I would say that his affidavit does
19 talk about service where they're talking about NWP's
20 billing resembling utility billing, those -- that --
21 I'm looking at -- there may be others, but paragraph
22 16 and 17, 18. So there are some facts that talk
23 about what the respondents are doing in terms of
24 service.

25 JUDGE STEARLEY: Okay. I'm just trying

1 to clarify how you're tying this all together with
2 your complaint. Assuming for the sake of argument
3 that you're correct and that they meet the public use
4 test, as a practical matter, would they be able to
5 thwart the Commission's jurisdiction if they simply
6 had Missouri American meter one of those single units?

7 MS. HERNANDEZ: If they had them meter
8 only one of the apartment complexes?

9 JUDGE STEARLEY: Uh-huh. Then they
10 wouldn't be offering utility services to every person
11 within their service area any longer.

12 MS. HERNANDEZ: They would have -- my
13 first thought is that the respondents would have to
14 agree to allow Missouri American to go in and do that,
15 so --

16 JUDGE STEARLEY: So if they were all
17 separately metered units and half of the residents
18 chose Missouri American and half chose to go through
19 the landlord --

20 MS. HERNANDEZ: Uh-huh. Then that would
21 be the customer's choice of which service area to be
22 in.

23 JUDGE STEARLEY: And the Commission
24 wouldn't have jurisdiction in that instance?

25 MS. HERNANDEZ: Well, in terms of service

1 territory, we do.

2 JUDGE STEARLEY: Under the public use
3 test?

4 MS. HERNANDEZ: No. In general what
5 service territory a utility can service -- provide
6 service to, territorial agreements. I mean the
7 Commission reviews those.

8 JUDGE STEARLEY: Okay. That's presuming
9 they fell under the definition of a public utility.
10 And I'm just looking solely at the public use test.
11 And I'm just trying to get this clarified because the
12 actual motion before the Commission, it focuses on
13 this one test. And as I understand the pleadings, the
14 parties still dispute the other statutory definitions.
15 But we haven't even gotten to that hurdle --

16 MS. HERNANDEZ: Right.

17 JUDGE STEARLEY: -- at this point. We're
18 looking at a separate jurisdictional issue.

19 MS. HERNANDEZ: So you're just asking
20 whether they discriminate what utility service is and
21 then do they provide all persons capable --

22 JUDGE STEARLEY: Under that
23 hypothetical --

24 MS. HERNANDEZ: And if the one person
25 decided I wanted to go with someone else --

1 JUDGE STEARLEY: Right. Under that
2 hypothetical, if people had a choice and Aspen Woods
3 and NWP were not providing or offering service or --
4 to every single person, every one of their tenants,
5 wouldn't they fall out of that test?

6 MS. HERNANDEZ: I don't believe they
7 would fall out of it. That's the customer's choice to
8 go with a different provider. They can still provide
9 service to that person within their service territory.

10 JUDGE STEARLEY: So if they lock the
11 doors on one of the apartment complexes and just
12 didn't rent that facility, then they wouldn't be
13 providing utility service to all people that was in
14 their area that they're capable to provide service
15 for. Would that knock them out of the Commission's
16 jurisdiction?

17 MS. HERNANDEZ: Well, if they locked the
18 doors and wouldn't let anyone in, there wouldn't be
19 anyone living there so there wouldn't be any people to
20 service.

21 JUDGE STEARLEY: If they are not at full
22 capacity because they simply don't have enough
23 renters, do they suddenly fall out of the Commission's
24 jurisdiction then? They're offering utility service
25 to all these units but there aren't people there to

1 receive them.

2 MS. HERNANDEZ: No. I think you could --
3 to my knowledge, you think about a subdivision that
4 doesn't have all the homes sold in it. Even if the
5 developer is selling to one or two homes, they're
6 still considered a public utility.

7 JUDGE STEARLEY: In the subdivision cases
8 that was talked about earlier, they were
9 distinguishable because in those cases the entity
10 providing the service actually owned the means of
11 production and all of the means of distribution.
12 Correct? Or in other words, Aspen Woods doesn't have
13 a well and they're not pumping water.

14 MS. HERNANDEZ: That's correct. They
15 have their own service lines, because --

16 JUDGE STEARLEY: So that is a distinction
17 between those prior cases.

18 MS. HERNANDEZ: By the type of plant,
19 yes.

20 JUDGE STEARLEY: Okay. Were there any
21 cases where the courts found an entity that didn't own
22 the actual property that was producing the commodity
23 was a public utility?

24 MS. HERNANDEZ: I don't believe so, but
25 there has been a Commission case such as the mobile

1 home park. Off the top of my head, I don't remember
2 the -- the complete CCN name of that park, but I
3 believe that the -- there's another provider of the --
4 or another producer of the water product. I want to
5 say it's Missouri American, but I'm not --

6 MR. MERCIEL: It's a water district.

7 MS. HERNANDEZ: It's a water district
8 that produces the water, but then they have a
9 certificate to do these additional charges. So there
10 has been a case similar to the complaint case here
11 where the Commission has issued a certificate.

12 JUDGE STEARLEY: Okay. Was that just a
13 Commission case? Was that -- was there a Court of
14 Appeals case on that?

15 MS. HERNANDEZ: That's -- to my
16 knowledge, that's just a Commission case.

17 JUDGE STEARLEY: Okay. And do you recall
18 the name on that case or the case number?

19 MS. HERNANDEZ: I know it's Seges Mobile
20 Home Park. I certainly can look it up.

21 MR. MERCIEL: I don't have the case
22 number with it.

23 MS. HERNANDEZ: I would say it's been the
24 last year and a half.

25 JUDGE STEARLEY: Okay. would you file

1 that information for the Commission?

2 MS. HERNANDEZ: Sure. You just want the
3 case number or what would you like?

4 JUDGE STEARLEY: Yeah, the name of the
5 case and the case number so the Commission can
6 reference it.

7 MS. HERNANDEZ: Okay.

8 JUDGE STEARLEY: And that's all the
9 questions I had. Thank you.

10 MS. HERNANDEZ: You're welcome.

11 JUDGE STEARLEY: Any other questions from
12 the Bench?

13 Okay. Seeing none, thank you,
14 Ms. Hernandez.

15 MS. HERNANDEZ: May I approach to give
16 you back your regulations?

17 JUDGE STEARLEY: Yes. Certainly. Thank
18 you for humoring me there.

19 MS. HERNANDEZ: I'm sorry. Can I
20 interrupt you?

21 MS. BAKER: Go right ahead.

22 MS. HERNANDEZ: I don't have the complete
23 name, but the case number is WA-2001 --

24 MR. MERCIEL: 2008.

25 MS. HERNANDEZ: 2008? Yeah. 2008-0281.

1 okay. I can still file that complete name if you
2 would like.

3 JUDGE STEARLEY: That would be
4 appreciated. Thank you very much.

5 MS. HERNANDEZ: I'm sorry.

6 JUDGE STEARLEY: Okay. Ms. Baker, you
7 may proceed.

8 MS. BAKER: As has been said several
9 times today, basically what we're here for is a
10 determination on the motion for summary determination,
11 which is based on respondent's statement that they
12 are -- that they do not offer their services out to
13 the public and, therefore, the Commission has no
14 jurisdiction.

15 As a party to the case, Public Counsel
16 filed a response to the respondent's motion basically
17 bringing to the Commission's attention that, yes,
18 there are issues of material fact that are at play
19 about whether the respondents are a -- have offered
20 out to the public or not.

21 In their motion basically the -- the
22 respondent stated that, yes, there are material facts
23 that are at play that would say whether they are a
24 public utility, whether they are a water utility. All
25 of those they said were at play, but what they focused

1 their motion on was that they did not offer their
2 services out to the public.

3 And for -- and as evidence of that, they
4 pointed to the fact this they did not offer out
5 apartments to everyone. They -- they focused on the
6 issue that they had service agreements with the people
7 who are tenants, they had background checks, they had
8 credit report checks and that somehow they thought
9 made their -- their offering not be to the public.

10 In our filing, the Office of the Public
11 Counsel pointed out that those -- those things of
12 having a service agreement, background checks, credit
13 checks, those are all things that are common within a
14 regulated utility's tariff. Missouri American itself
15 has those requirements.

16 And so the ability for the service to be
17 given out to the public does not hinge on the fact of
18 whether it -- they have a service agreement. All
19 utilities tend to have service agreements. If a
20 person cannot pay their bills, then they are not --
21 they are not given service -- utility service.

22 And so the thought that just because they
23 did these background checks and they have an
24 agreement, that somehow transforms the fact that they
25 are providing bills to the -- to the tenants, they are

1 adding on service fees, they are adding late fees,
2 they are basically stating that if you do not pay your
3 utility bill, then you are evicted from your home
4 concerns Public Counsel greatly because these are
5 utility customers, they receive the utility benefit of
6 the water.

7 And, quite frankly, if you'll look at the
8 agreement that the -- the tenants are allowed to sign,
9 this can also affect their electric, their gas, their
10 sewer as well as their water. And so this goes beyond
11 just the water issues in the -- in the complaint case.

12 Public Counsel's extremely concerned
13 that -- that there is a whole host of customers
14 throughout Missouri that are being afflicted by these
15 fees that are not looked at, they are not regulated,
16 they are not looked to see if they are just and
17 reasonable, they can change at any time. And all of
18 this just because a person wants to live in an
19 apartment.

20 There are -- there are duplexes out
21 within Missouri American's territory where just
22 because there happen to be two meters, there ends up
23 being two customers. But in a major apartment complex
24 where there is the choice to just put one meter,
25 somehow these customers are transformed into something

1 that respondents say are not under the jurisdiction of
2 the Commission.

3 And this is -- this is something that
4 Public Counsel disagrees with and we believe that the
5 facts show that -- that the respondents are wrong in
6 that regard. And so, therefore, we would -- we would
7 ask that you deny the motion for summary determination
8 and I'm here for questions.

9 I have some -- some comments about some
10 of the things that have been -- that have been stated
11 today. One incidentally I guess it also goes with the
12 public -- public issue is respondent stating that
13 their water was -- was incidental to their apartment
14 complex business.

15 well, it's apparently not quite so
16 incidental that they had to make sure that they had a
17 special provision in the lease, they have special fees
18 for it, they have a special company that they hire for
19 it. So water is not quite -- and all the other
20 utilities are not quite as incidental as -- as
21 respondents tend to make it out to be.

22 JUDGE STEARLEY: Questions?

23 CHAIRMAN CLAYTON: Thank you, Judge.

24 Ms. Baker, thanks for your patience here today.

25 You've been waiting a long time to get a piece of the

1 action here.

2 MS. BAKER: I've been very quiet.

3 CHAIRMAN CLAYTON: Okay. If from Public
4 Counsel's perspective you have an apartment complex
5 that basically offers a tenancy that includes
6 utilities, so they're charging 500 bucks a month, all
7 water, sewer is included --

8 MS. BAKER: Uh-huh.

9 CHAIRMAN CLAYTON: -- and basically you
10 don't get a separate building. You compare it to a
11 building of similar size next door. Maybe the rent
12 over there is 400, 450 dollars. It's hard to identify
13 that but for this hypothetical.

14 In that instance, Public Counsel doesn't
15 believe that the apartment complex is holding itself
16 as a utility, do they?

17 MS. BAKER: We do not.

18 CHAIRMAN CLAYTON: You do not.

19 MS. BAKER: If it is passed through in
20 the rental agreement which is looked at by the tenant,
21 then that's correct. It is only when there are extra
22 fees and extra charges that are attached specifically
23 to the -- to the -- to the utility service that --

24 CHAIRMAN CLAYTON: So if you have a
25 situation where a tenant goes in, has all water

1 included, includes water in the common areas, in the
2 pool, if you're lucky you got a hot tub -- I don't
3 believe I said that on the record.

4 MS. BAKER: No comment.

5 CHAIRMAN CLAYTON: You have water for
6 your facilities or for your own apartment and it
7 doesn't delineate any of that. But if it's included
8 in the rent and it's not set out by separate fees,
9 that does not make the apartment complex a water
10 corporation under the statute?

11 MS. BAKER: I would agree to that, yes.

12 CHAIRMAN CLAYTON: Okay. So in this
13 instance -- and I know the evidence would have to bear
14 this out. It appears that you have a landlord that is
15 trying to set up some methodology that allocates the
16 water charges among the various tenants in the common
17 areas and then hires an administrator to set that out
18 at a fee. And -- and by doing that, that converts
19 that landlord into a water corporation. Is that your
20 position?

21 MS. BAKER: Basically the position is
22 yes, that there is some unknown formula out there that
23 divides it out amongst the tenants and -- and that
24 formula can change at any moment.

25 CHAIRMAN CLAYTON: But there could be a

1 formula under the other way, you just don't have any
2 idea of what it is --

3 MS. BAKER: That's correct.

4 CHAIRMAN CLAYTON: -- under that
5 circumstance?

6 MS. BAKER: That's correct. But there is
7 also not attached service fees that are -- that are
8 blatant, there are not separate bills that are
9 blatant, there are things like that. And the ability
10 whenever the charges are sitting in the -- in the
11 monthly rent, the customers or the tenants are -- they
12 know what they're paying for; whereas, if it is a
13 side, then their monthly rent, it adjusts because of
14 water alone. And so there is -- there is a market
15 benefit to those who divide out theirs. And so the --

16 CHAIRMAN CLAYTON: Wait a minute.
17 There's a market benefit for this model by Aspen or a
18 benefit by just an all you can eat, included in your
19 rent with no surcharge type of model? Which is it?

20 MS. BAKER: There would be a market
21 benefit for -- for an Aspen-type of a model because
22 they could offer out their rent at a lower price.
23 Their published rent would be lower, but you would
24 also pay these fees on the side which is for your
25 utility, but their market rent would be less than the

1 one down the road.

2 CHAIRMAN CLAYTON: If the bill that is
3 issued by NWP goes to the tenants of this building,
4 doesn't include a surcharge, doesn't have the \$3 --
5 what 3.05, 3.50, something like that?

6 MS. BAKER: There's several different
7 ones, yes.

8 CHAIRPERSON CLAYTON: Basically if it
9 didn't have any fees on it and it was just a water
10 charge, would we still be here today from the
11 standpoint of Public Counsel?

12 MS. BAKER: If it was divided equally
13 amongst the tenants and there was no specific extra
14 charges attached to it, then -- then probably not, no.

15 CHAIRMAN CLAYTON: But there's no way of
16 knowing that without going through discovery and
17 asking a lot of questions?

18 MS. BAKER: That's true.

19 CHAIRMAN CLAYTON: Okay. Does Public
20 Counsel accept as a fair methodology allocating costs
21 by square footage of the apartments? Is that an
22 appropriate method of allocating water costs?

23 MS. BAKER: That is one -- one method of
24 doing so. That does not take into account how many
25 people live in the apartment and how many gallons of

1 water is used per apartment. So it is not a very
2 accurate basis of actual usage, but it is one
3 possibility.

4 CHAIRMAN CLAYTON: I could see where
5 there would be an opportunity for a consumer being
6 treated unfairly or inappropriately under both this
7 model or under a model where a landlord just
8 charges -- I'm going to charge you \$800 a month, you
9 can use all the water you want and at the end maybe
10 that water allocated is only \$20. I mean, there would
11 be room for abuse there. Would you agree there's room
12 for abuse under either model?

13 MS. BAKER: I could see that there's room
14 for abuse under either model. But the one where you
15 are using this to lower your base rent, the market
16 will -- will bring that to an equilibrium because
17 you're not going to add on too much more to your -- to
18 your base rent when one down the street has a lower
19 rent than you. So the market helps with that.

20 The market cannot help with these extra
21 fees that are attached for a water service because
22 they are beyond the market.

23 CHAIRMAN CLAYTON: So is this -- could
24 this be addressed by advanced disclosure on the lease?
25 That if you know you're going in and you're going to

1 have a \$100 a month water bill going in, be the same
2 thing as having certainty that you know that you're
3 rent is an extra \$100 a month under the all-inclusive?

4 MS. BAKER: If you could say for
5 certainty what -- what the water usage would be, which
6 is impossible to do because it fluctuates even for the
7 apartment complex every month. So I don't think that
8 that would -- even if they put down a typical water
9 bill is \$60, I don't think that that would be very
10 good disclosure because that would not tell them what
11 would happen within each apartment.

12 CHAIRMAN CLAYTON: Is Public Counsel
13 seeking that the Commission require a certificate for
14 each, both or either of these two entities? Both or
15 either?

16 MS. BAKER: I think what Public Counsel
17 is seeking at this point is the evidentiary hearing
18 on -- on the issue. What we're seeking is to not have
19 the case -- or the complaint be dismissed at this
20 point and that we go forward into -- into the
21 evidentiary hearing. And then at that point I would
22 put together a position statement.

23 But right now what's before us is a
24 complete dismissal of the case and that is what Public
25 Counsel is fighting.

1 CHAIRMAN CLAYTON: I understand. But if
2 the Commission decides that one or the other or both
3 are acting as a water corporation, looking forward are
4 we seeing what -- is Public Counsel going to advocate
5 that these entities be regulated as a cost of service
6 rate of return regulated entity like -- like Missouri
7 American would be?

8 MS. BAKER: If they are public utilities,
9 then yes, they would have the same treatment as -- as
10 any other public utility.

11 CHAIRMAN CLAYTON: If we find them as --
12 if we find that they meet the definition of a water
13 corporation, do we have the ability to regulate them
14 in a different way than a typical water utility?

15 MS. BAKER: I think that --

16 CHAIRMAN CLAYTON: For example, could we
17 just say, yeah, we think they're a water corporation,
18 but it's just too difficult, it's too difficult, the
19 scope is too big, we don't have the resources and
20 we're not going to touch it? Do we have the ability
21 to just say no, we're not going to assert jurisdiction
22 over them?

23 MS. BAKER: I don't think the
24 Commission's jurisdiction is based on how much time
25 each case takes, how much money each case takes or

1 what the budget of your office or my office, for that
2 matter, is. Every customer out there who is a
3 customer of a public utility deserves the same
4 treatment within the Commission.

5 CHAIRMAN CLAYTON: Legally, lawfully do
6 we have the ability to not assert jurisdiction even if
7 we find that they're acting as a water corporation?
8 As a matter of law, do we have the ability -- do we
9 have the discretion whether to act or not act if we
10 find they're a water corporation?

11 MS. BAKER: The Commission has discretion
12 on its jurisdiction, yes.

13 CHAIRMAN CLAYTON: Okay.

14 MS. BAKER: Now whether that would hold
15 up through -- through an appeal, it would be fact
16 based.

17 CHAIRMAN CLAYTON: All right. Does
18 Public Counsel have a position as to the most
19 efficient way of addressing consumer rights in regard
20 to the relationship between a tenant/landlord and
21 potentially an administrator or a billing
22 administrator? would a rulemaking be more efficient?
23 would be going case-by-case when they start coming in,
24 proceeding to evidentiary hearing on all of them?
25 what would be the most efficient way of the Commission

1 setting a policy that would set out some sort of
2 policy on this issue?

3 MS. BAKER: I mean making sure that each
4 of them is treated the same within the facts of each
5 case. Each case that comes from the Commission is
6 extremely different from the one that comes before it.
7 And so the ability to come before the Commission and
8 bring the evidence to you for a decision needs to
9 happen in every case, I would say.

10 Now, there -- there is, of course, the
11 ability for the Commission to set guidelines
12 through -- through statute, through its rules. And
13 that is -- is always a -- a good way to go because you
14 do bring in the stakeholders and you bring in the
15 different interests and everyone tends to help to
16 create those.

17 And so while -- while -- for this
18 particular case, I don't believe that Public Counsel
19 is saying, you know, set this aside for a rulemaking,
20 Public Counsel would always actively participate in a
21 rulemaking that would help make things more
22 streamlined.

23 CHAIRMAN CLAYTON: But the implications
24 from this case, if we decide to move forward, go to
25 evidentiary hearing, take evidence, go through the

1 whole deal, it's going to have an impact on other
2 operators in the state. And they're not here, they're
3 not involved. Potentially we would be setting a
4 going-forward policy in this case. And I guess I'm
5 trying to find the most efficient and fair way if --
6 if there's a majority that wants to move forward with
7 anything, wouldn't it be through some sort of
8 rulemaking and setting out some basic criteria or is
9 the answer, look, all these guys got to come in for a
10 small water rate case? That is it. We've already got
11 a rule and that's the answer. What do you think is
12 the most efficient way?

13 MS. BAKER: At this point I think moving
14 forward with the case that we have is the most
15 efficient.

16 CHAIRMAN CLAYTON: But it excludes -- it
17 excludes anyone else. They're not able to participate
18 in this.

19 MS. BAKER: But every complaint that
20 comes before the Commission excludes other -- other
21 parties. We have plenty of times where we find new
22 subdivisions, we find new entities. They are brought
23 in front of the Commission without having to bring in
24 every other person in -- in Missouri who is likely
25 situated. That's not required. Why in this

1 particular case would it be required for every
2 apartment complex who is similarly situated to have to
3 be brought in?

4 CHAIRMAN CLAYTON: There's a number in
5 one of these pleadings that there are potentially
6 500 instances of this happening in some way, shape or
7 form. Should we anticipate with that reasoning that
8 we're going to have 500 different complaint cases over
9 several years to adjudicate an appropriate policy if
10 the Commission were to want to set a policy on these
11 issues?

12 MS. BAKER: I mean, the Commission has
13 well over 500 regulated utilities at this point. So
14 your decision is not based on a maximum number that
15 the Commission can -- can hold.

16 CHAIRPERSON CLAYTON: I just asked what
17 is the most efficient way. Is that really the most
18 appropriate and fair mechanism to work through this,
19 500 different complaint cases? What if we were to set
20 out a rulemaking setting out some basic policy
21 guidelines, fairness in billing, fairness -- I don't
22 even know what -- I'm not even going to venture what
23 those would be. I'm just trying to get -- wouldn't
24 that be the more efficient and fair way for all
25 parties and stakeholders to participate in how that

1 policy is established?

2 MS. BAKER: I mean the issue with a
3 rulemaking is that that takes an enormous amount of
4 time and that takes an enormous amount of effort. And
5 all the meanwhile, these customers are continuing to
6 pay extra amounts that in the end, they -- they should
7 not have to pay compared to other water utilities'
8 customers.

9 CHAIRMAN CLAYTON: Okay. What is the --
10 can you give me an idea of what the average bill is by
11 these customers?

12 MS. BAKER: It is Missouri American in
13 the St. Louis area. They are around 42 -- I want to
14 say somewhere around \$40 or so.

15 CHAIRPERSON CLAYTON: So how much more is
16 a -- is one of these tenants paying above what an
17 average homeowner would be paying?

18 MS. BAKER: Well, they are certainly
19 paying an extra service charge --

20 CHAIRPERSON CLAYTON: Three bucks?

21 MS. BAKER: -- that an average is not
22 paying. They are paying an extra \$10 for setting up
23 some sort of an account. They are paying for extra
24 fees as far as --

25 CHAIRMAN CLAYTON: So extra \$15 a month

1 than the average customer, \$20 a month?

2 MS. BAKER: At least. And those are not
3 set. Those can change at any time. And so -- and
4 that is the issue is what are these customers getting
5 for that extra amount of money?

6 At least those who are -- are direct
7 customers of Missouri American, they come in for the
8 rate case. We know what the infrastructure investment
9 is. We know what the cost of service is for that
10 customer. These are beyond that. They -- they are
11 attempting to contract themselves out of regulation so
12 that these fees can be attached without any basis on
13 whether they are necessary or prudent.

14 CHAIRMAN CLAYTON: If we were to find
15 that Aspen or both NWP were water corporations, would
16 that enable them to access Missouri American's
17 wholesale tariff?

18 MS. BAKER: I would assume that that
19 would be something that they could -- they could talk
20 with Missouri American about, yes. I don't believe
21 that there is --

22 CHAIRPERSON CLAYTON: Do you know the
23 criteria of having access to the wholesale tariff?

24 MS. BAKER: I believe it is an
25 application to Missouri American and a listing of how

1 many customers that they serve and things like that.
2 But, you know, those tariffs are always open, every
3 rate case that comes in here. Lately rate cases are
4 coming about every -- every year and a half. And so
5 if that is something that the Commission is concerned
6 about, then that can be put into the next rate case
7 tariff.

8 CHAIRMAN CLAYTON: Okay. Thank you.

9 MS. BAKER: Thank you.

10 JUDGE STEARLEY: Commissioner Jarrett?

11 COMMISSIONER JARRETT: Yes, thank you,
12 Judge. Afternoon, Ms. Baker.

13 MS. BAKER: Afternoon.

14 COMMISSIONER JARRETT: I'll ask you a
15 similar question that I asked Ms. Hernandez earlier.
16 Getting back to the Danciger and the Cirese cases,
17 would you agree that those cases say -- the courts
18 there say that if the entity is providing utility
19 service, you know, their -- their activities are
20 confined to themselves, their buildings and their
21 tenants, then they're not holding themselves out to
22 public use?

23 MS. BAKER: I do not agree with that, no.

24 COMMISSIONER JARRETT: Okay. What do
25 they say then?

1 MS. BAKER: I mean, basically what
2 they're saying is, is there a mechanism where they can
3 be discriminate in the -- against those who -- who get
4 utility service. And for some of the -- well, like
5 the Hurricane Deck Holding. Basically it was saying,
6 you know, these are not just their friends that
7 they're offering it out to. This is an apartment
8 complex where anyone who comes in the door, fills out
9 an application for -- for an apartment.

10 And -- and attached to that is the
11 requirement that the water service have these extra
12 fees. It -- it is, you know -- it's set up where any
13 person who comes in off the street can do so.

14 COMMISSIONER JARRETT: Well, I'm reading
15 from State ex rel. Use of Cirese, et al. versus Public
16 Service Commission of Missouri, 178 S.W. 2d 788, and I
17 believe it is on page 790.

18 And in this case the Cireses had their
19 own power and light company and they were at first I
20 think providing services just to themselves and their
21 tenants and their own buildings and they were
22 generating their own power. And then later they
23 expanded and they decided to offer it to the public.
24 And they advertised in the newspaper, that type of
25 thing.

1 And the court found that there was
 2 ample -- and I quote, There was ample and substantial
 3 evidence to support a finding by respondent that
 4 appellants are engaged in public utility to the extent
 5 that they manufacture, distribute and sell electrical
 6 energy to members of the public. They are not,
 7 however, a public utility insofar as their facilities
 8 and activities are confined to the manufacture,
 9 distribution and sale of electrical energy to
 10 themselves and to their own buildings and tenants
 11 thereof in the manner shown in evidence.

12 It goes on to cite Danciger, the Lohman
 13 case -- the Danciger and the Lohman case. So isn't
 14 that what Cirese says? If you're just selling to your
 15 tenants, then you're not selling to the public.

16 MS. BAKER: I mean I think that goes back
 17 to the point of if it goes within the rent of your
 18 tenants, that's one thing, but --

19 COMMISSIONER JARRETT: It doesn't say
 20 that.

21 MS. BAKER: -- whenever you are adding on
 22 extra fees that go beyond just the water service that
 23 you are given, then -- then I believe it moves beyond
 24 that case.

25 COMMISSIONER JARRETT: So you think the

1 Cirese case says that as long as you just pass on --
2 you just pass on the charges, then you're not holding
3 yourself out to the public?

4 MS. BAKER: And I think that's been the
5 argument of most of us here today.

6 COMMISSIONER JARRETT: I know that's what
7 the argument is, but I'm asking you what Cirese says.
8 Is that what you believe Cirese says?

9 MS. BAKER: I believe so, yes.

10 COMMISSIONER JARRETT: Okay. Thanks,
11 Ms. Baker. I appreciate it.

12 JUDGE STEARLEY: Commissioner Gunn?

13 COMMISSIONER GUNN: Yeah. I just have a
14 quick question. You seem to -- you made an
15 interesting point about water -- the water service not
16 being incidental. So are you essentially saying
17 that -- just for clarification sake, that because
18 water -- you know, hot, cold water or portable water
19 is essential for them to be able to allow -- to be
20 able to rent the apartment, that it's not incidental?
21 That as a package, the apartment could not be rented
22 without the water service and, therefore, we're --
23 you're saying that since water is essential, it's not
24 incidental?

25 MS. BAKER: Yes. That is true. Because

1 the water is essential and it is required that the --
2 the -- that every apartment have water service, it's
3 not incidental to the -- the apartment itself.

4 I'm also saying the fact that the rental
5 agreement specifically divides out public utility
6 service and specifically makes statements about who
7 will provide sub-metering of those utility services,
8 that the apartment complex itself is dividing that out
9 as something beyond what a normal rental agreement
10 would be and is putting special focus on that as being
11 something more that the -- that the tenant is having
12 to agree to than just simply an apartment complex --
13 apartment.

14 COMMISSIONER GUNN: I apologize. I do
15 not have the rental agreement in front of me, but does
16 the rental agreement make reference to the provision
17 of -- other than the public utility section under a
18 warrant of habitability or anything like that speak to
19 the provision of water, either hot water or -- other
20 than the public utility section?

21 MS. BAKER: In Staff's Exhibit C, what
22 they have is the rental agreement. There is a
23 specific utility addendum for water, sewer, gas, trash
24 and electric service that is -- is required to be
25 signed by the -- the prospective tenant. And so

1 there -- there is a specific addendum that's attached.

2 Is that the question that you had?

3 COMMISSIONER GUNN: I just wondered if it
4 referenced anywhere else in the rental agreement. But
5 if you -- we don't have to go through it line by line.
6 I can pull the rental agreement and take a look at it
7 separately. So -- but other than that, I don't have
8 any other questions.

9 JUDGE STEARLEY: Commissioner Kenney, any
10 questions?

11 COMMISSIONER KENNEY: Ms. Baker, thanks.
12 How are you?

13 MS. BAKER: I'm good. How are you?

14 COMMISSIONER KENNEY: Doing well. Thank
15 you. I only have a couple of questions. And I just
16 want to be clear. You're not offering an opinion at
17 this stage about whether a rulemaking would be
18 appropriate or a case-by-case determination. You're
19 offering at this point the argument that summary
20 determination is not appropriate. Correct?

21 MS. BAKER: That's correct. That's what
22 this oral argument is for.

23 COMMISSIONER KENNEY: And as you see it,
24 what are -- what are the disputed facts that pertain
25 to the public use analysis?

1 MS. BAKER: I mean the reasons that were
2 given by the respondents in their motion for summary
3 determination for them saying that they did not hold
4 out to the public was basically because they had
5 specific rental agreements with the -- with the
6 renters, they also required background checks, they
7 required credit checks.

8 And so, therefore, the -- their argument
9 is that because they were able to turn away some
10 people that did not meet the requirements of -- of the
11 application background check, credit check, because
12 they turned those -- those people away, they were
13 somehow changing what they offered from the general
14 public to a more private arrangement.

15 And -- and Public Counsel's argument
16 against that is the fact that service agreements,
17 background checks, credit checks are all normal tariff
18 provisions, which are approved by the Commission every
19 day. And so the facts that are -- that are at issue
20 still are whether this is a public offering or not,
21 whether -- whether this is a public issue or not.

22 COMMISSIONER KENNEY: Okay. I don't have
23 any other questions. Thank you.

24 MS. BAKER: Thank you.

25 JUDGE STEARLEY: Any other questions for

1 Ms. Baker?

2 COMMISSIONER JARRETT: I don't have any,
3 Judge. Thanks, Ms. Baker.

4 JUDGE STEARLEY: All right. Thank you,
5 Ms. Baker.

6 MS. BAKER: Thank you.

7 JUDGE STEARLEY: All right. I believe
8 we've heard from all the parties today. Was anyone
9 else wanting to make any final statements before we go
10 off the record? Mr. Jarrett?

11 COMMISSIONER JARRETT: I just want to
12 thank the parties for coming in and briefing and
13 arguing this issue. A lot of interesting issues and I
14 appreciate the airing out of them today. Thanks.

15 JUDGE STEARLEY: All right.
16 Ms. Hernandez, if you could please get that full case
17 citation to us within the next couple days, say no
18 later than Friday, that would be appreciated.

19 And I think Mr. Boudreau has left, but he
20 had indicated earlier he was going to try to refine
21 the information that he was able to provide the
22 Commission. And I'd like to set a two-week deadline
23 on that, for hearing back on that. So probably get a
24 written order out so that we can do that.

25 Are there any other matters that we need

1 to take up?

2 MS. HERNANDEZ: And you also wanted from
3 staff another -- I suppose we could file it together
4 with the citation, but any other providers in this --
5 in the state? You had a request similar to that.

6 JUDGE STEARLEY: I think I had asked if
7 you could -- if you had any means of verifying the
8 information that Aspen Woods and National Water and
9 Power had filed. And I don't know if you do or not.
10 If you -- if you do have a means for doing that or can
11 indicate a time period which you could undertake that,
12 Ms. Hernandez, that would be appreciated.

13 MS. HERNANDEZ: Okay.

14 JUDGE STEARLEY: Anything else that we
15 need to take up at this time? Hearing nothing, the
16 proceeding to hear the oral argument today in Case No.
17 WC-2010-0277 is hereby adjourned.

18 (Hearing adjourned.)
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CERTIFICATE OF REPORTER

I, Tracy Thorpe Taylor, CCR No. 939, within the State of Missouri, do hereby certify that the testimony appearing in the foregoing matter was duly sworn by me; that the testimony of said witnesses was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this matter was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Tracy Thorpe Taylor, CCR

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