

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter: Of the Formal Complaint) **Transcript of**
and Request for Agency Action of Bear) **Hearing**
Hollow Restoration, LLC against Leon H.)
Saunders; Landmark Plaza Associates;) Docket No:
Parley's Creek, Ltd.; Parley's Lane,) 09-015-01
Ltd.; Parley's Park; Stuart A. Knowles;)
Trilogy Limited, L.P.; Trilogy Asset)
Management, Inc.; Land and Water)
Resources, Inc.; Lawrence R. Knowles)
Irrevocable Trust; Leon H. Saunders,)
Stuart A. Knowles and Trilogy Limited,)
L.P. d/b/a SK Resources, a Utah General)
Partnership and/or Joint Venture; Summit)
Water Distribution Company, a Utah)
Corporation)

Tuesday, December 8, 2009 - 2:00 p.m.

Location: PUBLIC SERVICE COMMISSION
160 East 300 South
Fourth Floor, Room 451

Before: Ruben H. Arredondo
Administrative Law Judge

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PROCEEDINGS

JUDGE ARREDONDO: This is docket No. 09-015-01, Bear Hollow Restoration vs. Leon Saunders and others. And this is the time the commission has set for oral argument in this motion to dismiss. And with that, let's take appearances, please, beginning with Mr. Flitton.

MR. FLITTON: Yes. John Flitton, and Lara Swensen's with me, on behalf of Summit Water Distribution Company.

JUDGE ARREDONDO: Okay.

MR. HATCH: Your Honor, Brent Hatch and Mitchell Stephens on behalf of all the other individual defendants.

JUDGE ARREDONDO: Thank you. And on this side?

MR. SMITH: Craig Smith, Dan McDonald, and Kathryn Steffey on behalf of Bear Hollow Restoration.

JUDGE ARREDONDO: Okay. Thank you. And who is going to argue the motions on this? Mr. Flitton, are you going to --

MR. HATCH: Well, we have -- we have a motion to dismiss, Your Honor. I think Summit Water has one as well. I think --

JUDGE ARREDONDO: I mean, I guess of the two --

MR. FLITTON: Yes, I'll argue and Mr. Hatch will argue.

JUDGE ARREDONDO: Okay. And then on this side?

13:55:45 1 MR. SMITH: I'm going to respond to the SWDC motion,
13:55:49 2 and Mr. McDonald is going to respond to the other respondents'
13:55:53 3 motion.

13:55:54 4 JUDGE ARREDONDO: Okay. So I've already reviewed
13:55:55 5 the moving and responding papers, and I know the commissioners
13:55:59 6 have reviewed them as well. So if you'd like to quickly
13:56:02 7 summarize and then hit your major points, that would be great.
13:56:06 8 You can stay seated if you'd like, or if you'd like you can come
13:56:10 9 to the podium here, whichever. Typically people stay seated.
13:56:13 10 Just make sure your microphone is on.

13:56:16 11 Let's begin with Mr. Flitton then.

13:56:18 12 MR. FLITTON: Thank you, Your Honor. I'm assuming
13:56:22 13 since we had some of the same discussions a few weeks ago, I
13:56:26 14 won't go into too much detail on some of it. But I think it's
13:56:30 15 important to sort of set the stage for the proceeding that's
13:56:33 16 before the commission today.

13:56:34 17 This complaint which was brought by Bear Hollow is a
13:56:37 18 complaint that is really focused on trying to get the PSC to
13:56:42 19 assert jurisdiction over Summit Water Redistribution Company and
13:56:47 20 several of its shareholders. And I think it's important to note
13:56:50 21 that this -- this complaint was filed after -- after numerous
13:56:54 22 investigations that Summit has been through with the Division of
13:56:59 23 Public Utilities. And I spoke with Mr. Powlick last week on a
13:57:03 24 related matter, and he indicated that the Division of Public
13:57:08 25 Utilities was not taking a position at this point in time.

13:57:11 1 And I think that that reflects the decisions that
13:57:13 2 have come in the past, and particularly with respect to the
13:57:17 3 admissions in those decisions that unless there's a change in
13:57:21 4 circumstances, unless there are facts that give rise to the PSC
13:57:26 5 reassessing its jurisdiction, that -- that really, you know, we
13:57:32 6 keep being brought back in here over and over again. And -- and
13:57:35 7 as we will show, there are -- there are no allegations in the
13:57:37 8 complaint that really give rise to jurisdiction. And
13:57:40 9 furthermore, they -- all of the issues that have been raised in
13:57:43 10 the plaintiff's complaint have been addressed in detail by the
13:57:48 11 Public Service Commission.

13:57:50 12 Let me just give you a little bit of background of
13:57:53 13 Summit Water and -- and how it was started and how it operates
13:57:57 14 as far as a corporate matter. Summit Water Distribution Company
13:58:02 15 serves generally the unincorporated area of the Snyderville
13:58:07 16 Basin, which is just the Salt Lake City side of Park City. And
13:58:09 17 the company was founded in 1979. And at that time there were a
13:58:13 18 number of property owners who had acquired properties throughout
13:58:17 19 the Snyderville Basin, ranging from properties near Parley's
13:58:24 20 Summit all the way -- including Jeremy Ranch, and all the way up
13:58:26 21 to near the Park City limits. And those property owners that
13:58:30 22 had purchased those properties had also acquired water rights
13:58:34 23 that were appurtenant to the land that they had acquired. This
13:58:38 24 area was settled back in the 1860s, and many of the water rights
13:58:43 25 were still intact when -- when these property owners acquired

13:58:47 1 their land.

13:58:48 2 And as they looked to be able to develop their land
13:58:50 3 and to -- and to make use of the property that they owned, they
13:58:52 4 realized in short fashion that there was not a culinary water
13:58:57 5 system or -- or really adequate sources of culinary water
13:59:01 6 supply. And after going to Summit County and requesting that
13:59:04 7 the county take action to develop a public water system, it
13:59:08 8 became clear that the county really didn't have the funds or the
13:59:13 9 interest in developing such a water system.

13:59:15 10 So Summit Water Redistribution Company was born out
13:59:20 11 of the cooperative efforts of many of these property owners to
13:59:21 12 band together and to develop a culinary source of supply and a
13:59:25 13 distribution system that would be able to deliver the water to
13:59:32 14 the various properties that were spread out across the basin.
13:59:34 15 So Summit Water Distribution Company was incorporated in March
13:59:35 16 of 1979 as a nonprofit corporation, and it filed its corporate
13:59:39 17 documents with -- with the state, and has operated as a
13:59:43 18 nonprofit mutual water company since that time.

13:59:45 19 And the basic structure of the company is that the
13:59:52 20 shareholders own all of the assets and they own all of the water
14:00:04 21 rights. And like most mutual irrigation companies, the shares
14:00:04 22 of stock in Summit Water Distribution Company are created when a
14:00:05 23 water right owner conveys water rights into the company and --
14:00:10 24 and develops source capacity from which to be able to use those
14:00:14 25 water rights through the distribution system.

14:00:16 1 And there are two primary classes of stock in Summit
14:00:19 2 Water; there's the Class A development stock and there is Class
14:00:22 3 B use stock. Those shares and -- and the nature of Summit's
14:00:27 4 corporate structure has not changed, and has been reviewed by
14:00:31 5 the Public Service Commission and the Division of Public
14:00:35 6 Utilities on numerous investigations and occasions.

14:00:41 7 One of the things that the company was founded to do
14:00:44 8 was to -- was to set up a system where there was a reliable
14:00:48 9 water supply. And the company, in its 30-year history, has --
14:00:56 10 has an unblemished history of delivering culinary water to its
14:00:58 11 shareholders at the lowest prices in the Snyderville Basin, and
14:01:03 12 frankly, low prices considered anywhere. And they have never
14:01:07 13 failed to meet delivery obligations under their shares. There
14:01:10 14 has never been an occasion when the company has not fully met
14:01:15 15 all of the delivery obligations to its shareholders.

14:01:18 16 One of the issues that -- that is at the heart of
14:01:21 17 Bear Hollow's complaint is the appurtenancy requirements that
14:01:25 18 the company has on its shares of stock. And those appurtenancy
14:01:30 19 requirements are contained in the bylaws and also in a
14:01:33 20 development agreement that every new developer who seeks to join
14:01:37 21 the Summit Water System and -- and developer-acquired shares is
14:01:41 22 required to sign.

14:01:42 23 And the purpose for the appurtenancy requirement is
14:01:45 24 to ensure that there is always water that is associated with the
14:01:49 25 facilities that come to depend on that water supply. And so

14:01:52 1 under the corporate documents and under the bylaws, shares of
14:01:55 2 stock in Summit Water become appurtenant to particular projects
14:01:59 3 at the time that they are converted to Class B shares.

14:02:04 4 There is also an appurtenancy requirement that goes
14:02:08 5 along with developments at the time they enter in development
14:02:10 6 agreements, and that's to make sure that Summit shareholders
14:02:13 7 are -- are adequately protected, that -- that source of supply
14:02:16 8 is not moved to a location where the company doesn't have the
14:02:19 9 ability to deliver the water according to the shareholder
14:02:22 10 agreement, or that water is moved away from people that are
14:02:27 11 expecting to have water in their area.

14:02:29 12 So with that general background, let's -- I think
14:02:33 13 that -- that reading through plaintiff's response to our motion
14:02:38 14 to dismiss, I think that there is little disagreement about the
14:02:43 15 basic statutory framework and legal framework governing the
14:02:47 16 question of whether or not the PSC should assert jurisdiction.
14:02:51 17 And I think that the point of that agreement is that Garkane and
14:02:56 18 Nelson and the cases that have been cited by the supreme court
14:02:59 19 are controlling on the issue.

14:03:02 20 As -- as you're aware, the basis for Public Service
14:03:09 21 Commission jurisdiction is predicated on a finding that an
14:03:14 22 entity acts as a public utility. And the cases that have dealt
14:03:19 23 with this question have -- have come down to the basic principle
14:03:24 24 that in order to have jurisdiction over a -- over a public
14:03:27 25 utility, the finding has to be made that that entity serves the

14:03:32 1 public generally. And in Nelson, what the court found was that,
14:03:40 2 "If a business or concern is not public service, where the
14:03:43 3 public has not a legal right to the use of it, where the
14:03:48 4 business or operation is not open to an indefinite public, it is
14:03:51 5 not subject to the jurisdiction or regulation of the
14:03:55 6 commission."

14:03:56 7 Plaintiff's complaint does not raise any issues that
14:04:02 8 would counter the holdings of the supreme court in the past or
14:04:06 9 the recent holding of the Public Service Commission in the
14:04:10 10 Deepwater case with respect to this -- this threshold issue of
14:04:13 11 jurisdiction. And in fact, in Nelson the court went on to say,
14:04:16 12 "It is only by the presence of such fact or element," which is
14:04:19 13 public service, "that the commission has power or authority to
14:04:23 14 regulate or control such business. Eliminating it, its power
14:04:29 15 and jurisdiction are gone."

14:04:30 16 In Garkane the court held: So long as a cooperative
14:04:34 17 serves only its owner-members and so long as it has the right to
14:04:36 18 select those members, those who become members, ordinarily it
14:04:39 19 matters not that five or 1,000 people are members or that few or
14:04:42 20 all of the people in a given area are accorded membership.

14:04:46 21 And then in the PSC's recent decision in Deepwater,
14:04:51 22 the commission held that, "Even before considering the factors
14:04:54 23 stated by the Division and those in Rule 746-331-1.C, the
14:05:02 24 Commission must determine whether the service being provided by
14:05:03 25 the Company is being provided" by the -- "to the public."

14:05:05 1 So the issue that is before the Public Service
14:05:08 2 Commission with respect to jurisdiction is whether or not Summit
14:05:12 3 Water Distribution Company acts as a nonprofit corporation and
14:05:14 4 delivers water only to its members, or whether it serves the
14:05:29 5 public generally.

14:05:29 6 Turning to the factual basis set forth in
14:05:29 7 plaintiff's complaint and in the briefing accompanying this
14:05:30 8 motion, there -- there are really three arguments that -- that
14:05:37 9 Bear Hollow makes to try to overcome this legal standard that
14:05:41 10 is -- that is clearly established by the Utah Supreme Court.
14:05:44 11 The first of those is that the sale of homes, that the transfer
14:05:52 12 of the shares and the appurtenancy requirement that goes along
14:05:56 13 with the sale of homes somehow makes Summit Water Distribution
14:06:01 14 Company subject to jurisdiction as serving the public generally.
14:06:04 15 The second argument is that Summit Water Distribution Company
14:06:07 16 markets its water to the public generally. And the third is
14:06:11 17 that the public uses facilities in which water from -- from --
14:06:18 18 delivered by Summit Water Distribution Company is used. And
14:06:21 19 what I mean by that is used in public restrooms or public
14:06:25 20 restaurants or in -- in private homes. Let me -- let me just
14:06:28 21 address each of those issues individually and -- and dispel the
14:06:33 22 notion that somehow those give rise to jurisdiction.

14:06:37 23 The first issue that was -- that was raised by Bear
14:06:40 24 Hollow, the sale of homes. That -- that issue I think is one
14:06:45 25 that in the briefing was frankly conceded by the plaintiffs.

14:06:51 1 Every -- every person that receives water delivery from Summit
14:06:56 2 Water Distribution Company is a shareholder in the corporation.
14:06:59 3 Summit does not and never has served members of the public who
14:07:03 4 are not shareholders of Summit Water Distribution Company stock.
14:07:08 5 In fact, the company only serves those who meet its membership
14:07:13 6 requirements. And -- and as I said before, those membership
14:07:18 7 requirements require first either creating or acquiring a share
14:07:22 8 through the dedication of water rights, and those water rights
14:07:25 9 are represented by that share of stock. Secondly, the
14:07:31 10 corporation ensures that its membership requirements are
14:07:35 11 complied with and has a process whereby membership and share
14:07:41 12 certificates are transferred and accepted by the board of
14:07:43 13 directors of the corporation.

14:07:45 14 The second argument that has been raised by
14:07:48 15 plaintiffs in its complaint is that somehow Summit Water
14:07:51 16 Distribution Company actively markets shares of stock to the
14:07:55 17 corporation. And they gave -- they gave one example in which
14:07:58 18 they misquoted correspondence between Summit Water Distribution
14:08:03 19 Company and a potential shareholder regarding the requirements
14:08:07 20 that Summit Water Distribution Company would place on
14:08:10 21 acquisition of the shares and service to that project. That
14:08:13 22 certainly is not an effort by Summit Water Distribution Company
14:08:17 23 to market the shares.

14:08:19 24 And in fact, that is an issue that was dealt with by
14:08:21 25 the supreme court in Garkane and in San Miguel. In those cases

14:08:28 1 the court held that -- that serving the members of a community
14:08:37 2 and enlarging the number of shareholders that are served by the
14:08:40 3 corporation does not confer jurisdiction and does not change the
14:08:44 4 nature of the corporation, and that the corporation still
14:08:47 5 remains a member-owned, member-served entity. And I think that
14:08:51 6 that's the case here.

14:08:52 7 The other issue on that point is that the plaintiffs
14:08:59 8 attached a screen shot in their complaint of a Web site that
14:09:06 9 really is unrelated to Summit Water Distribution Company.
14:09:10 10 That -- that screen shot is from a Web site that is
14:09:17 11 summitcountywater.com, and does nothing more than give contact
14:09:20 12 information for a Trilogy Asset Management, which is -- which is
14:09:24 13 a shareholder in Summit Water Distribution Company. But there
14:09:28 14 is no relationship between this Web site and Summit Water
14:09:31 15 Distribution Company's Web site. And in any event, there's
14:09:35 16 nothing on the Web site that indicates that -- the shares of
14:09:38 17 stock or that Summit Water is marketing its water generally to
14:09:41 18 the public.

14:09:41 19 And finally, the third issue is one in which they
14:09:46 20 claim the public use of shareholder facilities constitutes a
14:09:51 21 service to the public generally. I'm not sure that that is all
14:09:54 22 that different than -- than the arguments that were raised in
14:09:57 23 Garkane and some of these other cases. And I'm thinking in
14:10:01 24 particular of the arguments that were made in Garkane that
14:10:05 25 somehow public -- there was a public nature to the service

14:10:08 1 because Garkane used right of ways for erecting some of its
14:10:14 2 facilities. Summit Water Distribution Company still delivers
14:10:18 3 water to its shareholders. The contractual obligations run
14:10:22 4 between the shareholder and the company, and they do not run to
14:10:25 5 any individual that may be using those facilities or that --
14:10:29 6 that may be drinking water from someone's home.

14:10:35 7 There are another subset of factual allegations that
14:10:41 8 are -- that are contained in the complaint, and I'd just like to
14:10:45 9 briefly address those as well. And these issues primarily go to
14:10:48 10 the point that there are no new facts here, that all of the --
14:10:52 11 all of the issues that the Division of Public Utilities and the
14:10:56 12 Public Service Commission reviewed in prior investigations
14:10:59 13 are -- are still the same. The company still operates in
14:11:03 14 exactly the same way, and that there is no change in corporate
14:11:07 15 structure. Summit Water has not amended its articles and
14:11:10 16 bylaws. It has not changed the manner in which it conducts
14:11:14 17 business since -- since any of the prior investigations.

14:11:22 18 Just running through the gamut of issues, the
14:11:31 19 first -- the first issue is whether or not there has been a
14:11:31 20 change in the corporate structure. In 19 -- in 2002, when the
14:11:36 21 Division of Public Utilities conducted its last investigation,
14:11:40 22 it went to great lengths to scrutinize the operation of the
14:11:44 23 company. I was involved in that investigation. And the
14:11:47 24 Division of Public Utilities' staff attended shareholder
14:11:51 25 meetings, they looked through the corporate documents in detail,

14:11:55 1 they looked through the shareholder records in detail. They --
14:11:59 2 they really scrutinized how the company operates. And the
14:12:03 3 conclusion that -- that the division made in his recommendation
14:12:06 4 to the Public Service Commission was that there was no basis for
14:12:10 5 asserting jurisdiction. And as we sit here today, that -- that
14:12:16 6 story still holds true. The company has operated for over 30
14:12:20 7 years, and there has never been an occasion which -- in which it
14:12:25 8 has failed in its responsibilities to its shareholders.

14:12:32 9 There is no allegation that -- that Summit Water
14:12:35 10 Distribution Company charges extraordinary amounts for its
14:12:38 11 service. Summit Water Distribution Company's rates are the
14:12:41 12 lowest of any of the major water providers in the Snyderville
14:12:47 13 Basin, and on a statewide basis they're -- they're competitive
14:12:51 14 or lower than -- than any other water provider. And in fact,
14:12:53 15 Summit Water Distribution Company has not had any complaints
14:12:57 16 before the Public Service Commission or the DPU that its rates
14:13:01 17 are unreasonable.

14:13:02 18 There -- Summit has a history of safe and adequate
14:13:05 19 water -- culinary water supply, and there is no allegation to
14:13:08 20 the contrary that is contained in the complaint.

14:13:11 21 The one issue that -- that seems to be important to
14:13:13 22 plaintiffs is that they focus on a change in voting rights. And
14:13:18 23 the basis for that change is a trans -- or an issuance of
14:13:23 24 additional shares that were made around the time that -- just
14:13:28 25 shortly after DPU made its recommendation and prior to the time

14:13:32 1 that the Public Service Commission reviewed that recommendation
14:13:35 2 and decided not to -- to move further.

14:13:38 3 But one of the things that the Division of Public
14:13:43 4 Utilities has always been concerned with in investigating Summit
14:13:47 5 Water in the past is -- is looking at how the corporate
14:13:51 6 structure is maintained. And one of the recognitions that has
14:13:54 7 been present in each of the investigations is the shares of
14:13:57 8 stock in the company change hands on a regular basis. And over
14:14:02 9 the years, from its inception with very few shareholders to the
14:14:08 10 state of the company today, which there are many diversified
14:14:13 11 shareholders, those changes in shares of stock occur frequently,
14:14:17 12 and in fact on a monthly basis there -- there are numerous
14:14:20 13 shares that change hands because of change of ownerships or
14:14:25 14 individuals that transfer their shares to others.

14:14:28 15 And if you -- if you were to look at the snapshot
14:14:32 16 that is presented by plaintiffs in the complaint, you know,
14:14:37 17 that -- that only represents one short window of time in view of
14:14:42 18 this company. Fortunately, the Division of Public Utilities has
14:14:46 19 had a much longer view of how this company operates in
14:14:49 20 investigations that date back to 1989 and continued through
14:14:54 21 2003. And in -- over that period of time, the shareholder
14:14:59 22 structure of Summit Water Distribution Company has not changed.
14:15:03 23 And as the company exists today, there is no material change in
14:15:07 24 shareholder distribution or the number of shares. There's been
14:15:10 25 significant share transfers that have occurred between the

14:15:14 1 period of 2002 and present, and yet those shareholder transfers
14:15:18 2 are in the ordinary course of business and consistent with the
14:15:21 3 corporate structure that has been approved by the Public Service
14:15:27 4 Commission through the DPU investigations.

14:15:29 5 Summit Water Distribution Company has a requirement
14:15:31 6 to issue shares, and -- and yet within that requirement the
14:15:35 7 shareholder must meet certain criteria. And as we discussed
14:15:40 8 before, they have to -- they have to convey into the company
14:15:42 9 water rights and they have to develop source capacity and they
14:15:45 10 have to develop distribution capacity. And over the period of
14:15:49 11 Summit Water's history there's been a number of entities that
14:15:52 12 have done that. And just to name a few, there's Knight
14:15:57 13 Brothers, the LDS Church, the Canyons Ski Resort and its parent
14:16:04 14 company, Lynn Nielsen, White Pine Ranches, Jeremy Ranch
14:16:09 15 Development and Double M. And in fact, when Bear Hollow
14:16:11 16 acquired shares of stock, a portion of that acquisition was
14:16:16 17 through the transfer of decreed water rights that were
14:16:19 18 appurtenant to the property upon which the Bear Hollow
14:16:23 19 development sits.

14:16:37 20 Just in conclusion, Summit Water Distribution
14:16:41 21 Company has an unblemished record and has a corporate structure
14:16:47 22 that protects the interests of all of its shareholders. And
14:16:50 23 primary in its mission is to deliver water at competitive,
14:16:57 24 affordable rates, and at the high -- and water that is of the
14:17:02 25 highest quality to its shareholders. And there is no allegation

14:17:05 1 in the complaint that that hasn't been met.

14:17:08 2 The complaint also does not raise any jurisdictional
14:17:19 3 issues with respect to the company. There are no allegations
14:17:19 4 other than -- than the three allegations that I addressed
14:17:19 5 earlier and that are easily dismissed, that Summit serves the
14:17:22 6 public generally. Summit delivers -- every drop of water that
14:17:25 7 Summit delivers is delivered under shares of stock in the
14:17:29 8 corporation and in accordance with the corporate documents of
14:17:32 9 the corporation, meaning the rules and regulations, bylaws and
14:17:36 10 articles of the corporation.

14:17:37 11 And the company -- one of the issues that they raise
14:17:39 12 is ownership of the facilities. The company owns all of the
14:17:43 13 water rights and the company owns all of the facilities that are
14:17:49 14 used to deliver water to the shareholders. There is no
14:17:53 15 individual ownership. And Mr. Hatch will address some of these
14:17:56 16 issues, I'm sure. But there is no individual shareholder
14:18:00 17 ownership of any of the facilities. Everybody who is a member
14:18:04 18 of Summit Water and has shares of stock is governed and
14:18:07 19 regulated by the corporate documents of Summit Water
14:18:10 20 Distribution Company. And as such, there is -- there is no
14:18:14 21 jurisdiction based on the legal standards that have been set
14:18:18 22 forth in Garkane, Nelson, and others.

14:18:23 23 One last point is that this is a -- this is a
14:18:27 24 time-consuming and costly process for Summit Water Distribution
14:18:32 25 Company, and there -- there are significant concerns. And these

14:18:36 1 are concerns that -- that have been expressed previously by
14:18:40 2 Judge Pratt in his dissenting opinion in Mulcahy vs. Public
14:18:48 3 Service Commission. Because each time that Summit Water
14:18:51 4 Distribution Company is required to appear before the commission
14:18:55 5 and present the information with respect to how it operates its
14:18:58 6 company, the odds are that, over time, you know, there's a war
14:19:02 7 of attrition, and -- and Summit has been through this process
14:19:05 8 many times.

14:19:05 9 And let me just quote what Mr. Pratt said in his
14:19:08 10 opinion. He said: "Of what use to a protestant is a rehearing,
14:19:12 11 or a favorable decision on appeal, if the applicant may file a
14:19:16 12 new application covering the same set of circumstances and
14:19:19 13 obtain what the commission originally denied him? How many
14:19:22 14 times may the applicant force the protestant through useless red
14:19:28 15 tape? Common sense tells us that the decisions of the
14:19:31 16 Commission, once they become final, should not be changed but
14:19:34 17 upon a showing of a change of circumstances."

14:19:36 18 There is no change of circumstance here. The
14:19:38 19 company is operating exactly the same way that it did when it
14:19:41 20 was founded in 1979. And this complaint is really just an
14:19:48 21 attempt by these shareholders to get relief that -- that they
14:19:51 22 otherwise would be denied, and that is that the ultimate goal of
14:19:56 23 the plaintiffs in this case is to force regulation by Summit
14:20:01 24 Water Distribution Company and change the nature and the
14:20:04 25 structure of the corporation, to remove the appurtenancy

14:20:08 1 requirements that are so important to the shareholders, and is
14:20:11 2 nothing more. And for these reasons, Summit prays that the
14:20:14 3 commission deny -- dismiss the motion of the complainant in this
14:20:21 4 case.

14:20:21 5 JUDGE ARREDONDO: Thank you, Mr. Flitton.
14:20:23 6 Mr. Smith?

14:20:23 7 MR. SMITH: Thank you. If it's okay, I'd like to
14:20:25 8 stand up.

14:20:26 9 JUDGE ARREDONDO: That's fine.

14:20:26 10 MR. SMITH: Do you want me to move my microphone up
14:20:29 11 here or just speak loud or --

14:20:32 12 JUDGE ARREDONDO: As long as the reporter can hear
14:20:34 13 you.

14:20:35 14 MR. SMITH: I doubt that will be a problem.

14:20:40 15 Providing water is a lot like providing natural gas
14:20:44 16 or electricity. Those are probably the more garden variety
14:20:49 17 things the commission regulates. We know that when utilities
14:20:52 18 are created they tend to create a monopoly, and water is no
14:20:56 19 different. In fact, water, I would argue to this commission, is
14:20:58 20 even more important than electricity or natural gas; you can't
14:21:02 21 live without water.

14:21:04 22 And the commission -- why do we have a commission?
14:21:07 23 The commission exists to regulate monopoly utilities like
14:21:13 24 Questar and Rocky Mountain Power. As pointed out in the Garkane
14:21:16 25 decision -- and we'll talk a lot about the Garkane decision --

14:21:16 1 the differing interests of the provider and the customer, that a
14:21:19 2 customer who does not own and operate the utility can create
14:21:22 3 rates that are either too low or too high. And in Garkane they
14:21:26 4 found either one was -- was bad.

14:21:28 5 Like Questar and Rocky Mountain Power, Summit Water
14:21:32 6 Distribution Company is a for-profit utility, operated by two
14:21:36 7 individuals who make their money selling its shares. But we
14:21:39 8 don't have to decide that today. I don't have to prove that
14:21:42 9 today. Today all we need to think about and all we need to look
14:21:45 10 at today is the complaint and the allegations made there. Now,
14:21:47 11 that's been recognized I think by everybody; there's no question
14:21:50 12 about that.

14:21:51 13 In fact, let me read from SWDC's memo at Roman
14:21:57 14 numeral five, before they get to the number of pages:
14:21:59 15 Accordingly, the PSC must determine whether there is
14:22:00 16 jurisdiction based on Bear Hollow's complaint and request for
14:22:04 17 agency action alone, accepting the factual allegations therein
14:22:04 18 as true.

14:22:10 19 Now, they understand that's the standard, we
14:22:12 20 understand the standard. We're happy to stand on what is
14:22:15 21 alleged in our complaint and our -- that we have filed with the
14:22:18 22 commission. However, although the -- although Summit Water
14:22:21 23 recognizes the standard, we spend most of the time hearing their
14:22:25 24 arguments of different facts that aren't in the complaint, they
14:22:39 25 claim are facts. They're allegations that have no basis other

14:22:40 1 than their counsel happens to either write them down or say them
14:22:40 2 to you, and that's what we spend all of our time listening to.
14:22:40 3 Those are completely irrelevant, and I would ask the commission
14:22:42 4 to disregard all of those comments about what they are, who they
14:22:45 5 are, how they serve. We have to look at the complaint and the
14:22:48 6 things that are in the complaint.

14:22:50 7 Now, without the commission, Bear Hollow, as a
14:22:56 8 minority shareholder, we're powerless. We can't even get a list
14:23:00 9 of the other shareholders. So when they start talking about
14:23:02 10 this shareholder and that shareholder, that's news to us. We
14:23:06 11 don't even know who the shareholders are. We have asked them
14:23:07 12 for a list of shareholders. They have refused to provide it to
14:23:09 13 us. There's no question who's controlling Summit Water and why
14:23:13 14 they're controlling it. We can't even find out that much, and
14:23:16 15 that's why we need to do discovery in this case.

14:23:18 16 Now, despite what you've read in the respondent's
14:23:20 17 memos and what you've heard today, this is really the very first
14:23:22 18 time that SWDC and its insiders have been before the commission
14:23:26 19 in a hearing matter.

14:23:27 20 First of all, we've got to -- I think we've got to
14:23:29 21 segregate, which seems to be -- there seems to be a lot of
14:23:33 22 confusion about the Division of Public Utilities and Public
14:23:37 23 Service Commission. I'm sure it's not in the commission's mind.
14:23:37 24 I'm sure you are well aware the Division of Public Utilities'
14:23:42 25 recommendation, like the one in 2002 and the other three that

14:23:44 1 they talk about, are not commission orders. They don't carry
14:23:47 2 the weight of a commission order. Even though Summit Water says
14:23:52 3 the Public Service Commission has examined Summit Water's status
14:23:56 4 as an exempt, nonprofit mutual water company four times.

14:24:00 5 Now, we try to find every record of every kind of
14:24:06 6 examination, so-called examination, of all these times that
14:24:06 7 they've been through this, and what do we find? Really nothing.
14:24:09 8 There's nothing from the 1989 proceeding. All we know is that's
14:24:09 9 when they were given an exemption. The commission has done
14:24:13 10 nothing since, not order -- not entered an order since. And I
14:24:15 11 would dare say that this is the first time there's ever been a
14:24:18 12 hearing even discussing this issue before the commission.
14:24:22 13 Again, we can't rely on -- if you want to rely on DPU's
14:24:27 14 recommendations, there would be no reason for the commission to
14:24:30 15 even act, because the recommendation would be -- would be the
14:24:32 16 law. That's just not the case.

14:24:35 17 So even if there had been this -- you know, these
14:24:41 18 four previous proceedings as SWDC argues -- and again, we can't
14:24:46 19 even find the letter in 1989, that was 20 years ago, in the
14:24:49 20 commission files that even says they were given an exemption; if
14:24:52 21 they weren't, how they came about that. But let's assume --
14:24:55 22 just for a few minutes let's assume that there had been these
14:24:58 23 four determinations. Can -- can the commission look at this now
14:25:02 24 and should it look at this now. That's a -- that's the question
14:25:04 25 that's been raised. And they, relying on one minor quote from

14:25:12 1 Rule 746-331-1(c), talk about the issuance of the findings shall
14:25:12 2 not preclude another commission inquiry at a later time --

14:25:19 3 REPORTER: Could you slow that down just a little?

14:25:19 4 MR. SMITH: I'm sorry. I tend to always talk fast.

14:25:21 5 If changed circumstances or later discovered facts

14:25:24 6 warrant another inquiry. Now, they want you to disregard the

14:25:28 7 rest of this rule, because they say this rule doesn't apply

14:25:31 8 because they -- and we'll talk about this in a few minutes.

14:25:34 9 This rule -- the rest of this rule, where it talks about

14:25:37 10 commonality of interest, where it talks about having sufficient

14:25:40 11 assets to provide for the -- those things, they don't count, but

14:25:43 12 this thing does.

14:25:44 13 Well, let's look at some of the other governing law.

14:25:46 14 First of all, I don't think we've heard anything about Utah Code

14:25:54 15 Annotated 54-7-14.5(1). And let me read that to the commission,

14:25:54 16 one of the key statutes governing the commission's activities.

14:25:57 17 It says, "The commission may, at any time after providing an

14:26:02 18 affected utility notice and an opportunity to be heard, rescind,

14:26:08 19 alter, or amend any order or decision made by the commission."

14:26:08 20 At any time.

14:26:10 21 Let's look at the case that was quoted for, the

14:26:13 22 dissent from Justice Pratt, the Mulcahy case. Let's take a look

14:26:17 23 at that case, what does that case say. Well, what that case

14:26:22 24 says, in that case it says any decision -- and in that case it

14:26:25 25 was a denial or a certificate of -- a certificate of convenience

14:26:27 1 and necessity, which is not an exercise of their judicial
14:26:31 2 function, or one that does not purport to settle and conclude a
14:26:34 3 legal controversy, is not res judicata of the rights and issues
14:26:38 4 therein involved or thereby decided. That's a supreme court
14:26:42 5 case, you can look at that. No question that you could look at
14:26:44 6 this again. And there have been plenty of changed circumstances
14:26:48 7 that we'll talk about, since 1989, which was the last time this
14:26:53 8 was really looked at.

14:26:55 9 And let's talk about a few of those changed
14:26:57 10 circumstances. Nothing in the prior proceedings show that
14:27:00 11 Summit Water is owned and operated by two individuals who have
14:27:02 12 made millions of dollars through their control. Millions of
14:27:05 13 dollars, I might add.

14:27:07 14 Now, when we -- we hear about rates, we have to
14:27:09 15 remember something about rates when we hear about rates. I
14:27:09 16 think we heard it three or four times: Summit Water has the
14:27:12 17 lowest rates. Well, it's going to take a long time, even at
14:27:17 18 double or triple their rates, to make up for the 20,000 bucks
14:27:21 19 that everybody that bought into Summit Water was forced to pay.
14:27:22 20 They're making their money at the front end, at the buy end.
14:27:26 21 That's why they wanted -- that's why they issued more shares to
14:27:36 22 themselves, that's why they wanted to control the shares,
14:27:36 23 because that's where the money is being made by the insiders.
14:27:36 24 And like I say, whether your rate's 30 or 60 bucks a month, it's
14:27:36 25 going to take a long time to make a difference between 20,000

14:27:37 1 and, you know, a couple of thousand to hook up your -- hook up
14:27:39 2 to that system. And that is borne by the ratepayers. Because
14:27:43 3 if I buy a house there, if I buy a house in Jeremy Ranch, that
14:27:47 4 cost has to be built into my -- into my home. And so this idea
14:27:49 5 about the lowest rates -- which they may even be too low, and
14:27:53 6 that could be a problem -- that's really a red herring and
14:27:57 7 should not be part of the consideration. Not even a fact before
14:28:00 8 the commission, but it shouldn't even be a consideration of
14:28:01 9 this.

14:28:02 10 Okay, let's -- let's talk about a couple of other
14:28:03 11 things. Never before, I don't think in any other proceeding,
14:28:06 12 there was the -- you know, it was shortly after the last
14:28:07 13 recommendation by the Division of Public Utilities that we had
14:28:12 14 the issuance of a whole bunch of new shares. Yeah, Mr. Saunders
14:28:16 15 and Mr. Knowles were getting worried they couldn't control the
14:28:20 16 company. Well, they were making lots of money, but that's not
14:28:23 17 good enough; they wanted to also keep their control. They
14:28:26 18 issued themselves a whole bunch of new shares. No information
14:28:29 19 about that has ever been looked at by the commission, or even by
14:28:31 20 the Division of Public Utilities.

14:28:33 21 I would like to provide more current information
14:28:36 22 than the information we've provided with the complaint, but,
14:28:38 23 again, we've been stonewalled. We can't even get a list of the
14:28:42 24 shareholders, let alone the information of how this company
14:28:45 25 runs. That's why we need discovery. We could control a lot

14:28:45 1 more facts of how Summit -- what Summit's done, and the
14:28:49 2 insiders, how they've done it, if we could have this discovery.
14:28:50 3 And that's what this is all about.

14:28:52 4 These other cases that we've talked about, the
14:28:55 5 Garkane case and other cases, they came after a full commission
14:28:58 6 hearing on the merits, not at a motion to dismiss stage.

14:29:02 7 Okay. Now, let's -- we talked about some of the
14:29:05 8 change of circumstances and some of the new facts. Let's -- let
14:29:10 9 me -- and we continue to find new facts today. If I could
14:29:13 10 approach, I'd like to give the commission a copy of an affidavit
14:29:17 11 by Mr. Saunders and talk a little bit about what's in that
14:29:24 12 affidavit.

14:29:29 13 MR. FLITTON: Your Honor, as this is a -- this is
14:29:31 14 not an evidentiary hearing, I'd object to the use of an
14:29:35 15 affidavit.

14:29:35 16 JUDGE ARREDONDO: Was this included with you -- with
14:29:37 17 your response?

14:29:38 18 MR. SMITH: No, we didn't have it, Your Honor, we
14:29:39 19 didn't have it then. We just recently got this. Let me just
14:29:43 20 point out two things on the affidavit --

14:29:43 21 JUDGE ARREDONDO: Well --

14:29:44 22 MR. SMITH: -- and I think I have a right to argue
14:29:46 23 those. I'm not asking for any admission of the affidavit, I'm
14:29:49 24 just submitting the affidavit. And...

14:29:51 25 MR. FLITTON: Your Honor, this is a -- this is a

14:29:53 1 motion to dismiss. And as Mr. Smith correctly notes, it is
14:29:56 2 based on the allegations contained in the complaint.

14:29:59 3 MR. SMITH: Well, we tried --

14:30:02 4 MR. FLITTON: -- this affidavit is --

14:30:02 5 JUDGE ARREDONDO: I'm going to sustain the
14:30:05 6 objection. I'm not going to allow the affidavit. And I will
14:30:08 7 say that I understand that the -- Mr. Flitton submitted a lot of
14:30:13 8 facts that probably aren't in evidence. And just so you know,
14:30:16 9 the commission is going to rely on what's in the pleadings and
14:30:20 10 the attachments to make their decision.

14:30:22 11 MR. SMITH: Okay. I'll just read -- I'll just tell
14:30:24 12 you what's in the affidavit. I think I have the right to do
14:30:26 13 that as part of my argument.

14:30:28 14 JUDGE ARREDONDO: No.

14:30:35 15 MR. SMITH: Okay. Also, which is a part of what
14:30:40 16 we've submitted, is the ongoing antitrust lawsuit. It's
14:30:44 17 interesting how different Summit Water is charactering the
14:30:47 18 antitrust lawsuit than it is there. In that lawsuit in the
14:30:51 19 Third District Court, just like in this affidavit that I can't
14:30:54 20 read from, they've characterized themselves as a very different
14:30:57 21 entity than what they're characterizing themselves today.
14:30:59 22 They're characterizing themselves as a competitor, a water
14:31:03 23 marketer. They're in the business to do this. They're suing
14:31:05 24 because they can't -- the markets -- they think the market's
14:31:08 25 been improperly taken away from them by Mountain Regional in

14:31:08 1 Summit County. They're a marketer and a competitor in that.
14:31:12 2 They're not talking about serving their -- just their
14:31:15 3 shareholders.

14:31:17 4 Finally, we've never been party to any prior
14:31:19 5 proceeding. Nothing -- we have never been -- no order has
14:31:24 6 governed us as far as Bear Hollow Restoration. This is our
14:31:27 7 first complaint. This -- we believe we have a right to have our
14:31:31 8 complaint heard, and heard in full.

14:31:33 9 Now, let's talk a little bit -- let's shift over and
14:31:34 10 talk about the Garkane case a little bit. Okay, we go to the
14:31:41 11 1940 Garkane decision, and that's -- that's the last time I
14:31:46 12 would argue to this commission that the supreme court has
14:31:49 13 carefully looked at the definition of a public utility. Talked
14:31:55 14 about it a little bit toward 1925, but that's really the case
14:31:56 15 that I think everybody's keying on.

14:31:59 16 Now, let me read you what the holding -- you read
14:31:59 17 something that said it was the holding of the Garkane case. I
14:32:03 18 would have to respectfully tell this commission that that is not
14:32:04 19 the holding of the Garkane case. The Garkane case contains a
14:32:07 20 holding. And the holding in Garkane -- and I will read it --
14:32:10 21 it's exactly -- wasn't what you were told. The holding states,
14:32:12 22 says, Garkane, and I'll just -- I'll quote, "as a nonprofit
14:32:16 23 electrical cooperative which serves only its members and is
14:32:21 24 completely consumer-owned, with each consumer limited to one
14:32:25 25 membership, is not a public utility within the purview of the

14:32:30 1 statute."

14:32:30 2 Now, let's compare Garkane to Summit Water. And I
14:32:34 3 would submit to the commission that Summit Water is not even
14:32:46 4 within shouting distance of this holding. Okay, Summit Water,
14:32:46 5 is it completely consumer-owned? No, what from what we have.
14:32:47 6 It's controlled by two majority shareholders who are not
14:32:50 7 consumers; they are owner-operators of it. One is the president
14:32:54 8 of the company, the other one's on the board, and one's been the
14:32:57 9 president since the company started. They have enough shares to
14:32:58 10 outvote every other stockholder that gets service from the
14:33:03 11 company. So is that completely -- is that completely consumer-
14:33:06 12 owned? I -- I would say clearly not completely consumer-owned.

14:33:09 13 Now, is each consumer limited to one share or one
14:33:13 14 membership? No. Again, Summit Water is not like Garkane. We
14:33:18 15 can have as many shares as we've bought -- that's shown that you
14:33:20 16 have, and if you have a majority you can run the company even
14:33:24 17 though you don't get any service from the company. Okay. And
14:33:27 18 so is each consumer limited to one membership? No. That's
14:33:31 19 completely different from the Garkane holding.

14:33:33 20 I would submit to the commission that Garkane is
14:33:36 21 completely different than what we have here, and that the
14:33:38 22 Garkane decision actually supports what we're doing here today
14:33:42 23 and is not the case that has been argued to you, because Summit
14:33:47 24 Water cannot meet those conditions of Garkane. And that is the
14:33:49 25 holding. That is the most important part of the case. And the

14:33:51 1 court says this is our holding -- that's at the very end of the
14:33:54 2 opinion, this is the holding that we made, and they spell that
14:33:58 3 out very clearly. That's why we have Rule 746-331-1, was to try
14:34:03 4 to put those into -- into a rule. That's talking about complete
14:34:04 5 commonality of interest. And again, there's no commonality of
14:34:09 6 interest because we have two individuals that can run and
14:34:11 7 control the company, and they have been doing that. We'll know
14:34:11 8 a lot more of how they do that when we can actually get looking
14:34:15 9 at the records and finding out what's happened, which have been
14:34:17 10 denied to us; as a shareholder we have no right to get those
14:34:20 11 things, according to Summit Water.

14:34:21 12 They are -- they have an interest that's different
14:34:23 13 from the homeowner in Jeremy Ranch who gets water from Summit
14:34:27 14 Water. Their interest is different in the fact that they want
14:34:28 15 to see the price of water go as high as possible so the shares
14:34:32 16 that they sell become as valuable as possible.

14:34:36 17 And now let's talk about -- a little bit about the
14:34:37 18 Deepwater case that the commission recently issued an order. We
14:34:42 19 have obviously looked at that decision with very -- very hard,
14:34:43 20 because obviously that's a decision of the commission, and as
14:34:47 21 reluctant as I am to try to argue about what the commission
14:34:50 22 meant by something, I just have to tell what I think it meant by
14:34:54 23 this -- by the decision, and pointed out that in Deepwater, the
14:34:58 24 three individuals who were on the board were also consumers.
14:35:01 25 There may be in the future sometime when the stock is issued to

14:35:01 1 other people that aren't consumers, but that wasn't the case
14:35:01 2 right now. And that's what the commission looked at, is saying
14:35:07 3 that it was only serving -- and there was no allegation it was
14:35:09 4 serving the public, there was no allegations about anything
14:35:11 5 else, it was just saying that the commission was -- that the
14:35:13 6 Division was telling the commission, we're concerned, because in
14:35:16 7 the future there might be problems. And the commission looked
14:35:18 8 at it and said we don't think there's -- there's -- there -- you
14:35:22 9 know, that's -- looking at the future, that's not enough to give
14:35:25 10 jurisdiction and revoke the exemption.

14:35:28 11 I can tell you that in 27 years I've been practicing
14:35:30 12 water law in this state, there is nothing else like Summit Water
14:35:34 13 out there. They are a unique animal all unto themselves.
14:35:38 14 They -- they've stepped in a role that no other -- there's no
14:35:40 15 other company, private, public, other water supplier out there
14:35:44 16 that has been able to manipulate the system to make as much
14:35:48 17 money as Summit Water insiders have. And that's a whole
14:35:50 18 different animal. It's completely different than anything else
14:35:52 19 that I have ever seen, and I've seen plenty in 27 years.

14:35:55 20 Okay, let's talk about serving the general public.
14:35:59 21 Summit claims we've conceded that point, which we clearly
14:36:03 22 haven't. We believe there's many facts that show they do serve
14:36:07 23 the general public. Okay. First of all, they have an exclusive
14:36:09 24 territory. They talked about their territory. If you live in
14:36:11 25 Jeremy Ranch, that's the only water source that you have access

14:36:14 1 to, is Summit Water. If you buy a house, that's -- that's water
14:36:14 2 for your house. However you do it, there's nothing that
14:36:14 3 prevents you -- or they have no -- unlike Garkane, where they
14:36:14 4 could pick who could be the members, there's no -- no choice
14:36:27 5 about that, you just become a member of Summit Water if you fill
14:36:29 6 out the same thing that Park City or Salt Lake City would have
14:36:32 7 you fill, which is just a service agreement, just like Questar
14:36:37 8 and everybody else has, those sorts of things. You fill
14:36:37 9 those -- that out, you pay your bill, you do that.

14:36:39 10 Okay. It also serves public buildings and renters.
14:36:42 11 Now, let's talk about renters for a second, because I think
14:36:46 12 that's something that Summit would like to have us all gloss
14:36:49 13 over. There are a number of apartment complexes and rent --
14:36:50 14 other rental properties within the Summit Water service area.
14:36:53 15 In fact, in their bylaws, and I'd like to read from their
14:36:56 16 bylaws, they even in their bylaws provide for providing --
14:37:00 17 serving renters. Now, these renters aren't shareholders. Now,
14:37:04 18 a minute ago you were told they only serve their shareholders.
14:37:07 19 The renters aren't shareholders. In fact, this is what their
14:37:10 20 bylaws say. It's on page 17, No. 10 of their bylaws, and those
14:37:12 21 are attached to some of the pleadings here. It says: Landlords
14:37:14 22 or lessors -- this is the heading of Section 10. Landlords or
14:37:18 23 lessors shall be held primarily liable for all assessments.
14:37:31 24 Then it says: The legal owner of any rented property being
14:37:31 25 served by SWDC shall appear as the record owner of the share of

14:37:32 1 stock representing the water connection within SWDC and shall be
14:37:32 2 held primarily responsible to SWDC for the payment of the annual
14:37:36 3 stock assessment.

14:37:37 4 Okay, now we know what it said. Now, what doesn't
14:37:40 5 it say? Well, it doesn't say they pay the monthly charge,
14:37:43 6 because they don't pay the monthly charge; that's paid for,
14:37:45 7 obviously, by the renter. We're talking about the annual
14:37:48 8 assessment. There's lots of other charges here. This --
14:37:50 9 there's a monthly fee for the service of water, which is what
14:37:53 10 we're concerned about. What we're told is so low, that's paid
14:37:57 11 for by the renter, not by the -- by the shareholder. That
14:38:01 12 renter is not a shareholder. That renter is paying the bill.

14:38:05 13 Now, if we look at the statute and we look carefully
14:38:08 14 at what the statute says, let's read that, let's read -- they
14:38:09 15 talk about who the contract is with, is it between the
14:38:11 16 shareholder and the company. That's not what the statute
14:38:14 17 requires. Let's look at the statute for jurisdiction. And if
14:38:17 18 we look at -- it's in 54 -- let me turn to this here really
14:38:22 19 quickly, so I want to read this so I get it completely correct.
14:38:30 20 Okay, let's see. Okay, it's in 54-2-1(16). This is the
14:38:40 21 definition of a public utility. And I'll read this so I get it
14:38:43 22 right: A public utility includes every railroad corporation,
14:38:46 23 gas corporation, electrical corporation, distribution electrical
14:38:51 24 cooperative, wholesale electrical cooperative, telephone
14:38:54 25 corporation, telegraph corporation, water corporation is where

14:39:01 1 we are here, water corporation, sewerage corporation, heat
14:39:01 2 corporation, and independent energy provider not described in
14:39:05 3 section (16)(d) where the service -- now, this is the key
14:39:08 4 language -- where the service is performed for or the commodity
14:39:12 5 delivered to the public generally. It's where the commodity,
14:39:15 6 the water is delivered to, is what determines whether it's a
14:39:18 7 public utility or not. It's not who is the contract with. The
14:39:22 8 contract could be with somebody else, but it's deliver -- when
14:39:24 9 it's delivered to the public generally, that's the key part of
14:39:27 10 this. And it's delivered to these renters who aren't
14:39:30 11 shareholders. And that's the delivery of a commodity. It
14:39:37 12 doesn't matter even who pays the bill, but even that their own
14:39:39 13 bylaws anticipate that the renter pays the bill. And so this is
14:39:42 14 service to the general public because these people aren't
14:39:44 15 shareholders. It's not serving only its shareholders like they
14:39:48 16 want to tell you. It's just -- it's serving all of these other
14:39:51 17 folks.

14:39:51 18 Okay, then the -- also we have the fire plugs,
14:39:55 19 things like that, fire hydrants, get that service and that sort
14:39:58 20 of thing. And so we have this delivery of this commodity. And
14:40:08 21 under -- under Summit Water's view of the world, I could form a
14:40:12 22 water company, I could have one share that's mine that's the
14:40:15 23 only voting share, then I could give shares to everybody else
14:40:19 24 that I serve water to that has no vote at all, and because
14:40:23 25 they're my shareholders I -- I wouldn't -- I wouldn't be

14:40:28 1 regulated even though I have full say and control of the company
14:40:30 2 completely.

14:40:30 3 You have to remember something that was said in the
14:40:32 4 Garkane case, and this will be the last quote that I'll read.
14:40:36 5 But in the Garkane case, this is a quote from a case that you
14:40:38 6 haven't heard anything about. Let me read this to you, because
14:40:43 7 I think this is important. And again, I want to get it exactly
14:40:46 8 correct: The courts will always scrutinize closely to determine
14:40:51 9 whether or not a certain organization or method of conduct has
14:40:54 10 for its purpose evasion of the law, and where it finds that such
14:40:57 11 evasion will declare -- finds such evasion, will declare such
14:41:02 12 organization to be truly what it is. Truly what it is.

14:41:06 13 What is -- what is Summit Water truly? We don't
14:41:08 14 know for sure yet. We've made the allegation that it's a public
14:41:11 15 utility seeking to evade and -- and evading regulation by this
14:41:17 16 commission. Now, we don't have the facts today to prove that,
14:41:19 17 but we don't need those facts today.

14:41:22 18 As was pointed out, I couldn't even submit that
14:41:25 19 affidavit from Mr. Saunders where -- where he makes his
14:41:28 20 characterizations of the company. There's a lot of facts out
14:41:31 21 there that we have a right to look at and we have a right to
14:41:33 22 bring before this commission so this commission can make a fully
14:41:36 23 informed decision about what Summit Water really is and whether
14:41:43 24 or not it should be regulated. Thank you.

14:41:45 25 JUDGE ARREDONDO: Thank you. Mr. Flitton, any

14:41:46 1 reply?

14:41:47 2 MR. FLITTON: Yeah. Thank you, Your Honor.

14:41:47 3 JUDGE ARREDONDO: Brief reply.

14:41:50 4 MR. FLITTON: What's that? Brief --

14:41:51 5 JUDGE ARREDONDO: Brief reply.

14:41:52 6 MR. FLITTON: Yes, I'll be brief.

14:41:54 7 Let's let me begin with the question that Mr. Smith

14:41:58 8 asked at the end of his argument, and that is that -- what is

14:42:01 9 Summit Water Distribution Company. And Mr. Smith has put a lot

14:42:05 10 of personal statements in here and has -- has been pretty fast

14:42:09 11 and loose with some of the factual allegations that he's made in

14:42:14 12 his arguments. What Summit Water Distribution Company is today

14:42:17 13 is a shareholder-owned corporation that is operated with its own

14:42:22 14 governing system. And -- and unlike the example that he gave,

14:42:27 15 the Class A and Class B shareholders of the company all have a

14:42:41 16 voting right within that company.

14:42:41 17 One of the things that distinguishes a water

14:42:41 18 corporation in this context is -- and addressing the arguments

14:42:41 19 relating to the Garkane holding, and I would point out that, you

14:42:44 20 know, if you read that carefully, it is the -- the court is

14:42:47 21 dealing with the facts that were specifically before it, which

14:42:51 22 were appropriate. It was looking at the structure of Garkane,

14:42:54 23 and its holding was specific. But its analysis certainly does

14:42:58 24 not require that there's only one membership accorded or that

14:43:02 25 that's the structure. And with respect to that point, a water

14:43:07 1 corporation has to reflect the interest of those shareholders.
14:43:12 2 And the rights that were conveyed into the company are
14:43:15 3 represented by those shares of stock. And those interests
14:43:18 4 are -- are held. And frankly, that's an issue that the Division
14:43:23 5 of Public Utilities has given a lot of concentration on in its
14:43:27 6 past investigations. That was one of the major issues that was
14:43:30 7 before the Division of Public Utilities in 2002.

14:43:34 8 And I would also like to just clarify that when
14:43:40 9 Summit Water Distribution Company has gone through the Division
14:43:45 10 of Public Utilities' scrutiny, it has been at the direction of
14:43:47 11 the Public Service Commission. There is no misunderstanding on
14:43:50 12 the part of Summit Water Distribution Company as to the
14:43:53 13 procedures that apply here. And if Mr. Smith would look at the
14:43:57 14 files, he would see that the Public Service Commission directed
14:44:00 15 the DPU to conduct an investigation, and to in fact make a
14:44:03 16 recommendation back to its body as to whether or not Summit
14:44:08 17 Water Distribution Company merited an exemption and was without
14:44:12 18 the jurisdiction of the Public Service Commission.

14:44:18 19 Furthermore, if you were to take Mr. Smith's
14:44:21 20 arguments with respect to the Garkane holding, the Garkane
14:44:24 21 holding also makes clear that it applies to electrical
14:44:28 22 corporations. That could be read one of two ways. One is that
14:44:32 23 you could only get -- that exemption or that holding only
14:44:37 24 applies to electrical corporations, which we know it does not,
14:44:37 25 because San Miguel and Holmgren and Medicall and the cases that

14:44:41 1 follow it all pick up on the same language of the Garkane
14:44:44 2 analysis.

14:44:47 3 Let me just turn in my remaining time briefly back
14:44:50 4 to the issue that Mr. Smith seemed to spend a lot of time on.
14:44:54 5 And I think that the reason that it -- that that was such the
14:44:56 6 focus of the argument is because it's really the seminal
14:44:59 7 question that's before the Public Service Commission in this
14:45:05 8 case, and that is -- is whether or not the element -- the
14:45:06 9 required threshold element of serving the public generally is
14:45:11 10 present. And Mr. Smith's arguments really focus on -- on this
14:45:14 11 idea of renters and whether or not the renters would require
14:45:19 12 Summit Water Distribution Company to be regulated. As Mr. Smith
14:45:23 13 correctly read from -- from Summit's corporate documents, it is
14:45:28 14 the property owner, it is the shareholder that is primarily
14:45:31 15 responsible. And the distinction that I think is important
14:45:33 16 here, and it's been glossed over, is that the water that is
14:45:37 17 delivered by Summit Water Distribution Company is delivered
14:45:41 18 under the shares. It is not out delivering water to individuals
14:45:46 19 that don't have a tie to a shareholder interest. And in fact,
14:45:49 20 as he correctly pointed out, it is the shareholder who is
14:45:52 21 ultimately responsible to Summit Water Distribution Company for
14:45:55 22 the assessments, which are quarterly and -- and actually
14:45:58 23 annually, and not monthly. So in that respect there is nothing
14:46:03 24 about having a renter occupy a home that defeats the nature of
14:46:08 25 Summit Water Distribution Company as a cooperative, nonprofit

14:46:12 1 corporation. That same argument is akin to arguing that if you
14:46:16 2 have guests come over to your home and you serve them a glass of
14:46:20 3 water or they use your restroom facilities, that somehow you are
14:46:24 4 serving them and serving the public generally, when in fact the
14:46:30 5 water is being delivered to the shareholder, to the property
14:46:33 6 owned by that shareholder. A renter is simply occupying a piece
14:46:37 7 of property that is owned by the shareholder, and the water is
14:46:41 8 delivered under the contractual requirements of that share and
14:46:45 9 the corporate documents.

14:47:00 10 Mr. Smith makes a point also to focus on the rules
14:47:04 11 of the -- of the Public Service Commission and this issue of new
14:47:08 12 facts. And I think a lot of effort is made to try to give the
14:47:14 13 appearance that there are facts that change circumstances. And
14:47:18 14 I think that a review of the record, and it is the -- as the
14:47:22 15 judge has correctly noted, that, you know, it's really based on
14:47:26 16 what is in the allegations of complaint. I don't think that
14:47:29 17 there's anything in the complaint.

14:47:31 18 But I just wanted to point out also that the rule
14:47:34 19 that was quoted and the citation to Mulcahy that was referenced
14:47:38 20 by Mr. Smith, it talked about an affected utility. I think that
14:47:42 21 that's important, because the issue that is before the
14:47:46 22 commission is whether or not Summit Water is a public utility,
14:47:49 23 and that question has to be answered as to whether or not Summit
14:47:52 24 serves the public generally. And I have seen no facts either in
14:47:56 25 the complaint or in the argument today that would suggest that

14:47:58 1 Summit Water Distribution Company is nothing but a shareholder
14:48:01 2 entity that delivers water to its shareholders exclusively.

14:48:13 3 Just one last thing. I've got a -- I reference
14:48:13 4 these in the argument, and if it's okay with the Court, I'd like
14:48:13 5 to just present these handouts that just kind of summarize the
14:48:18 6 cases and the arguments we've made.

14:48:21 7 JUDGE ARREDONDO: If you'd like to provide a list of
14:48:23 8 the citations, that's fine.

14:48:24 9 MR. FLITTON: Okay. Do you want me to do that
14:48:26 10 instead?

14:48:26 11 JUDGE ARREDONDO: Uh-huh.

14:48:29 12 MR. FLITTON: All right. Thank you.

14:48:29 13 JUDGE ARREDONDO: You can provide those to the court
14:48:31 14 reporter.

14:48:31 15 MR. FLITTON: Okay.

14:48:32 16 JUDGE ARREDONDO: All right. Thank you. Mr. Hatch?

14:48:38 17 MR. HATCH: Thank you, your Honor.

14:48:38 18 JUDGE ARREDONDO: Thank you. Does anybody need a
14:48:38 19 break?

14:48:38 20 MR. FLITTON: Yeah, I could use a drink of water.

14:48:40 21 JUDGE ARREDONDO: Okay. Let's take a break till
14:48:44 22 11:00, five till.

14:55:06 23 (A recess was taken, 2:48 p.m. to 2:55 p.m.)

14:55:06 24 JUDGE ARREDONDO: Back on the record. Mr. Hatch,
14:55:08 25 please.

14:55:09 1 MR. HATCH: Thank you, Your Honor.

14:55:13 2 I think it's obvious to the Court that there is a
14:55:16 3 slight bit of overlap between our two motions, in part because,
14:55:20 4 obviously, the commission is -- does not have the jurisdiction
14:55:23 5 to regulate Summit Water. The individual shareholders are once
14:55:28 6 removed from that and wouldn't be -- there would be no
14:55:33 7 jurisdiction over them either.

14:55:35 8 But without repeating what Mr. Flitton has said to
14:55:40 9 you, there are a few thing that Mr. Smith says, well, that I
14:55:43 10 found a little surprising, one of which is the nature of this
14:55:51 11 proceeding. He indicated that he thought this was really the
14:55:54 12 first opportunity that -- the commission and administrative law
14:56:01 13 judge has had the opportunity to have a real hearing and address
14:56:04 14 these kind of issues. And I found that somewhat amazing,
14:56:06 15 because that argument was based without any real citation to
14:56:10 16 record, without any facts of any kind, essentially says that the
14:56:15 17 four times in the past the commission has addressed this issue,
14:56:18 18 that they've essentially done it in an arbitrary, capricious
14:56:25 19 manner without any real facts, evidence, or in a knee-jerk
14:56:29 20 fashion. And I -- you know, I just don't think that that's the
14:56:31 21 way the commission views its own rulings or its own
14:56:37 22 responsibility in granting those exemptions, the most recent of
14:56:39 23 which was in 2002.

14:56:40 24 And if I can -- if I might, can I -- I have a couple
14:56:46 25 demonstratives that I would give Mr. -- you're arguing, right?

14:56:55 1 MR. McDONALD: Judge, I'm just going to object to
14:57:00 2 this exhibit. It's almost as if it's a demonstrative exhibit.
14:57:06 3 There's no foundation. This is not an evidentiary hearing.
14:57:10 4 None of this -- unless they can show me where in the complaint
14:57:13 5 and what paragraph these facts are contained, I think this
14:57:18 6 exceeds the scope of this hearing.

14:57:20 7 MR. HATCH: Your Honor, this is absolutely not
14:57:22 8 evidence. This is dealing with the commission's own rulings,
14:57:25 9 which are a matter of record, a matter of judicial notice, and
14:57:29 10 it is not entering into any type of factual analysis. As a
14:57:35 11 matter of fact, it's dealing with the judicial -- essentially
14:57:36 12 the judicial rulings of the past. That's like saying you can't
14:57:41 13 cite a case. And this -- this goes to the precedent that
14:57:45 14 affects this matter, and that -- I don't -- I don't think that's
14:57:47 15 with any basis at all, the objection he just made.

14:57:50 16 JUDGE ARREDONDO: What I'll do is we can refer to it
14:57:53 17 here in the hearing if you like. To me it seems -- I mean,
14:57:57 18 these are things that were brought up in the motions, the
14:58:00 19 pleadings, but --

14:58:01 20 MR. HATCH: This was, Your Honor. Because
14:58:03 21 essentially what the argument is, is they have to show something
14:58:06 22 new since the last exemption was granted. And it's very clear
14:58:10 23 from the previous proceedings that if you compare it to the
14:58:14 24 complaint -- and that's what we're supposed to look at here.
14:58:17 25 They don't want you to look at the complaint now, because it

14:58:20 1 alleges no new facts, no changed circumstances, and that's what
14:58:24 2 they're required to do under the law. And so of course I can
14:58:27 3 argue this. Because it was their -- Summit Water users or
14:58:32 4 shareholders, there's no new facts here, there's no material
14:58:35 5 change since the prior commission ruling. The corporate
14:58:37 6 structure has not changed. They haven't alleged that, there are
14:58:40 7 no facts that would support that, there's no material change.

14:58:45 8 That they're paying reasonable rates, they can't --
14:58:46 9 they didn't even argue today that the rates aren't reasonable.
14:58:50 10 In fact, you know, the evidence would be, of course -- and they
14:58:52 11 could not contradict that -- that the rates are the most
14:58:56 12 reasonable in that valley. And that -- but that was issued back
14:58:58 13 then, and there's no material change since then. And that goes
14:59:01 14 to each of these, including voting rights. So they -- they have
14:59:04 15 not met the legal standard.

14:59:07 16 Now, what's really telling about the complaint, and
14:59:09 17 this is particularly telling about the individuals, Your Honor,
14:59:13 18 is that Mr. Smith got up, and he put it that way, he said look
14:59:19 19 at what these insiders -- he calls them insiders, which is a
14:59:24 20 pejorative way of referring to the defendant individual
14:59:28 21 shareholders here. He says, look what they've done to us.
14:59:31 22 Well, let's look at what he alleges. Because what he's alleging
14:59:35 23 is not something that is a matter of PSC jurisdiction, but it
14:59:40 24 would be the matter of a lawsuit, a corporate or contractual
14:59:43 25 lawsuit in a civil court if it were true. They haven't alleged

14:59:48 1 something that goes to rate making or something that would be
14:59:51 2 under the regulatory authority of this commission.

14:59:53 3 In their introduction in their brief, and I'll read
15:00:06 4 from that, they said they exercise manipulation and control of
15:00:06 5 the company behind the scenes. Now, this kind of pejorative
15:00:06 6 language I guess gives it flavor, but there's no factual
15:00:06 7 allegation of that. Behind the scenes in a manner that allows
15:00:10 8 them to exploit the company's limited resources for their
15:00:13 9 personal gain. Well, that's a breach of fiduciary duty, that's
15:00:18 10 potentially a breach of contract claim, potentially maybe a tort
15:00:23 11 claim, I don't know, but that's not a -- that's not a PSC
15:00:26 12 matter.

15:00:26 13 And they make that even more clear as they go on in
15:00:29 14 their -- they had two sections in their brief. The first
15:00:32 15 section talked about the commission has jurisdiction over the
15:00:35 16 individual respondents because they're controlling Summit Water,
15:00:40 17 a -- Summit Water, a water system. Well, then they -- then
15:00:45 18 they -- then they say that -- the individual response is page 2
15:00:49 19 of their brief -- are subject to the commission's jurisdiction
15:00:52 20 because they operate and control Summit Water. Well, that's --
15:00:57 21 that's saying they control a corporation. That goes back to
15:01:00 22 Mr. Smith's allegations and the allegations that are in the
15:01:03 23 introduction to this brief that somehow there are individuals
15:01:07 24 who are breaching their duty of good faith and fair dealing with
15:01:10 25 the corporation. That isn't a matter that the PSC -- that's,

15:01:15 1 again, some civil lawsuit, if they can make that out, which I
15:01:20 2 don't believe they can.

15:01:20 3 And -- and more importantly, it talks about -- when
15:01:22 4 we're talking today about whether or not these individual
15:01:26 5 shareholders are controlling a water system, well, water system,
15:01:30 6 we all know from the statute, it's very clear what that is. A
15:01:34 7 water system is defined as all reservoirs, tunnels, shafts,
15:01:40 8 dams, dikes, head gates, and similar properties when used in the
15:01:45 9 public distribution of water. Well, even Mr. Smith, in the
15:01:49 10 briefs that they filed in response to our motion, made it very
15:01:53 11 clear they never once said the individual respondents control
15:01:57 12 any of those things. They say they are -- through their --
15:02:01 13 their status as shareholders that they somehow control Summit
15:02:05 14 Water. Well, that's controlling a corporation. And as we made
15:02:08 15 clear in our brief, that's something very different, because
15:02:12 16 that is -- that is a new legal argument. That is an argument
15:02:16 17 that goes well beyond the Nelson/Garkane progeny of cases. And
15:02:21 18 those cases, as Your Honor well knows, goes way back, and it
15:02:26 19 goes back to the 1940s, and they've never been overruled.

15:02:29 20 And they make it very clear that the commission at
15:02:32 21 one point, and others, tried to get the commission to exercise
15:02:36 22 jurisdiction over essentially private water -- private utility
15:02:41 23 companies, and was made very clear by the supreme court that the
15:02:45 24 statute does not allow that, and that -- and that companies that
15:02:48 25 are like Summit Water today, and Mr. Smith in their brief has

15:02:53 1 not made a single distinguishing factor from those cases, that
15:02:57 2 those cases, those entities, the court -- this commission does
15:03:01 3 not have jurisdiction over. And so as the court brings us
15:03:05 4 closer to what I think the commission has well accepted is the
15:03:09 5 extent of its jurisdiction. And the Deepwater case that
15:03:13 6 Mr. Flitton cited came out just eight days ago, accepted the
15:03:20 7 Nelson/Garkane/San Miguel line of cases.

15:03:23 8 Mr. Smith and Bear Hollow now wants to go the other
15:03:27 9 direction and not only go back and just obliterate the
15:03:32 10 Nelson/Garkane line of cases, but to go one step further and
15:03:36 11 reach back to the shareholders of those entities, where all they
15:03:40 12 alleged -- and all we have to do is look at the complaint for
15:03:43 13 that and things I just read you -- is that somehow they're
15:03:46 14 breaching their corporate fiduciary obligations to the
15:03:51 15 shareholders.

15:03:52 16 Now, they go on one -- they have one more section in
15:03:54 17 their brief, the second section, and it says the commission has
15:03:57 18 jurisdiction over the individual respondents because they are
15:04:00 19 controlling Summit Water for the public generally. It's the
15:04:03 20 same thing. And they say that through control or management of
15:04:06 21 Summit Water. And they completely ignore any obligation to show
15:04:12 22 that the individual respondents, let alone -- that the
15:04:17 23 individual respondents are control -- are operating a water
15:04:21 24 system under the definition of the statutes and under the
15:04:24 25 jurisdiction of this commission. And so they want to ignore the

15:04:29 1 niceties.

15:04:30 2 Mr. -- Mr. Smith at one point said -- and I've
15:04:34 3 always been interested in the years that I've practiced law that
15:04:38 4 when you don't have facts, you always say in the 27 years I've
15:04:42 5 practiced law I've never seen anything like this. Well, that's
15:04:46 6 not what's required in a court of law, it's -- like how many
15:04:49 7 years you've been practicing law, it's to actually to present
15:04:52 8 some cognizable fact or legal argument that would cause your
15:04:56 9 clients to win. And that doesn't do it.

15:04:59 10 And so we look at -- if we look at all of these
15:05:02 11 things put together, Summit Water is claiming -- for instance,
15:05:07 12 here he's said in his argument we can't even get a list of
15:05:11 13 shareholders. I practice corporate law. We get those kind of
15:05:17 14 lawsuits all the time, and there are means of doing that in
15:05:20 15 civil court. That's not something that causes a commission to
15:05:24 16 say that we're going to regulate individuals who control a
15:05:38 17 corporation, allegedly, through their shareholder status as
15:05:38 18 though they're a public utility providing water to people. So
15:05:38 19 he's going -- while the court has brought us over here with the
15:05:40 20 Nelson/Garkane cases, he wants to go -- he wants to go pre-1940
15:05:43 21 and start going the other direction and ignore what the supreme
15:05:47 22 court did. And I suggest to the Court that that would be an
15:05:50 23 improper course of action to go forward that way.

15:05:56 24 And I would point out, I think he said that the
15:05:58 25 Garkane case was the last time the supreme court even looked at

15:06:01 1 the issue. I think the San Miguel case is at least 16 years
15:06:06 2 after that. And so I think the cases past Garkane have come
15:06:09 3 closer to where we're at.

15:06:10 4 Now, a couple of things that they have to show, as
15:06:13 5 I've stated, is that the statute requires control of the water
15:06:16 6 system, not a company. Now, that sometimes sounds -- may sound
15:06:21 7 to some as though that's a technical distinction, but it's very
15:06:25 8 important, because without that distinction, the shareholders
15:06:28 9 and others in a corporation would always be subject to the
15:06:33 10 commission's control. And that would mean every board member of
15:06:36 11 Questar, PacifiCorp, every major shareholder -- and we said in
15:06:41 12 our brief, for instance, Warren Buffet even would be -- would be
15:06:44 13 regulated by this commission as though they were a public
15:06:47 14 utility. And I don't think Bear Hollow can cite to a single
15:06:53 15 precedent, legal or otherwise, that would cause even a policy
15:06:57 16 reason for why that should happen, and yet that's what they're
15:07:01 17 asking for here.

15:07:03 18 Summit Water is its own unique entity. It has its
15:07:06 19 own liabilities, duties, debts, assets and other things. And
15:07:11 20 the board members -- even board members are limited in their
15:07:14 21 corporate duty and their duty to act in good faith and their
15:07:19 22 fiduciary duty to the corporation. They can't just, as alleged
15:07:24 23 in the brief, just do anything they want to do; they're limited.
15:07:28 24 It isn't -- they can't act in their personal interests; they act
15:07:31 25 in their -- in their position as fiduciaries to the corporation.

15:07:38 1 And as such, there is no -- there's not the type of distinction
15:07:40 2 that's being made here.

15:07:42 3 Now, the second point that we've made is that the
15:07:47 4 commission lacks jurisdiction of Summit Water, but certainly the
15:07:51 5 independent shareholders if they do not serve the public
15:07:54 6 generally. Now, it was very interesting to me because the
15:07:59 7 Nelson/Garkane line of cases make it very clear that as long as
15:08:04 8 you are -- you have to be a member to be served, that that's
15:08:08 9 enough. And they said in numerous instances it doesn't matter
15:08:12 10 if there are five or a thousand members, that's immaterial.
15:08:16 11 They don't -- whether there's a number -- the number of people
15:08:20 12 in an area that subscribe to the service, that's immaterial.

15:08:24 13 I think Mr. Smith argued that, well, we serve
15:08:27 14 everybody -- he said everybody at Jeremy Ranch. Well, whether
15:08:31 15 that's true or not is not a matter of evidence here today. But
15:08:36 16 let's assume that that were true. It's very clear if you look
15:08:40 17 at... let's see. Hold on. Here we go, I got it. Yeah, that's
15:08:57 18 true, he was citing the Garkane case when he was talking about
15:09:00 19 that. And I found that kind of interesting because he said,
15:09:02 20 well, that means you're serving the public generally because you
15:09:06 21 serve every member in Jeremy Ranch. Well, that's not what
15:09:11 22 Garkane says. How could he cite Garkane for that? Garkane
15:09:14 23 said, "So long as a cooperative serves only its owner-members
15:09:19 24 and so long as it has the right to select those who become
15:09:24 25 members, ordinarily it matters not that 5 or 1000 people are

15:09:27 1 members or" -- and this is the part that wasn't read to you --
15:09:30 2 "that a few or all of the people in a given area are accorded
15:09:35 3 membership..." And so the Garkane case, the supreme court is
15:09:44 4 pretty clear on this point.

15:09:46 5 And the arguments that have been made here are
15:09:49 6 really starting to kind of border on the frivolous. Mr. Smith
15:09:55 7 stood up and he basically said, well -- and I think he used it
15:09:58 8 as kind of an ad hominem attack on our clients. He said, well,
15:10:04 9 they -- you know, they got to pay \$20,000 to get in and, yeah,
15:10:06 10 their rates may be low, but it takes a long time to pay back
15:10:11 11 that \$20,000. Well, what was one of the requirements by the
15:10:14 12 supreme court is the fact that someone had to pay -- one of
15:10:17 13 them, in Garkane I believe it was, it made it -- they were
15:10:22 14 trying to argue that it was too low by being \$5 in Garkane. And
15:10:28 15 now they're arguing, oh, this is really unfair because you got
15:10:32 16 to pay to be a member. Well, what they essentially did by
15:10:35 17 representing that to Your Honor is they made it very clear that,
15:10:38 18 yes, you've got to be a member. That goes directly to the fact
15:10:41 19 that they're not serving members of the public, because you got
15:10:44 20 to pay \$20,000 to be a member. And so he -- Mr. Smith proved
15:10:48 21 our point by making that. He's trying to use it to try and kind
15:10:52 22 of smear Summit Water, and I guess through Summit Water, the
15:10:56 23 individual respondents by saying it's expensive to be a member,
15:11:10 24 even though they have the lowest rates in the valley. But what
15:11:10 25 he essentially proved is exactly what the supreme court says:

15:11:10 1 They're not serving the public generally. And that's why, you
15:11:10 2 know, I say their briefs start to border on the frivolous.

15:11:13 3 And so they can't dispute, and they haven't
15:11:15 4 disputed, and they can't allege in their complaint that approval
15:11:20 5 was required before you can become a shareholder, that the
15:11:22 6 service is limited to members just as required in the Garkane
15:11:26 7 cases. And that's the whole reason Bear Hollow purchased these
15:11:30 8 in the first place, is so that they could become a member and
15:11:33 9 they could receive water. And so they then fall back into what
15:11:38 10 I call really quite disingenuous arguments, because they -- they
15:11:43 11 are trying to find some way to say that we are serving the
15:11:48 12 general public.

15:11:50 13 And some of these they said in brief in opposition
15:11:53 14 to my motion to dismiss, some in response to Summit Water's
15:11:59 15 motion to dismiss, but they made arguments like if you use the
15:12:02 16 facilities at the post office, since the post office is open to
15:12:06 17 the general public, then therefore you're -- you're providing
15:12:08 18 water to the public in general. I don't see any authority in
15:12:12 19 the law for that. And it really is quite a specious argument
15:12:16 20 that just because you use a public toilet, that somehow we're
15:12:20 21 providing -- that we, particularly the individual respondents --
15:12:23 22 are providing a public water system and public utilities.

15:12:30 23 I assume that they would put in their brief some of
15:12:32 24 their strongest evidence, and they -- so they attach as Exhibit
15:12:37 25 Q -- and I know Your Honor has this, but if you could just -- so

15:12:40 1 we could have it easily, this is Exhibit Q to their brief. Oh,
15:12:49 2 you do have it.

15:12:51 3 MR. McDONALD: Your Honor, this is not Exhibit Q to
15:12:54 4 our brief.

15:12:55 5 JUDGE ARREDONDO: That's Exhibit Q here.

15:12:58 6 MR. McDONALD: Well, this was provided in their
15:13:01 7 brief. It was --

15:13:02 8 MR. HATCH: Your Honor, I misspoke, I misspoke, it's
15:13:06 9 Exhibit Q to their complaint.

15:13:06 10 JUDGE ARREDONDO: Okay.

15:13:08 11 MR. HATCH: Did you submit it to them or not?

15:13:12 12 MR. SMITH: What is that?

15:13:16 13 MR. HATCH: That makes it even more relevant,
15:13:19 14 because it's part of the complaint, Your Honor. They -- they
15:13:21 15 represented this to you as showing that the -- that the --
15:13:24 16 either Summit Water -- particularly -- particularly the
15:13:26 17 individuals, because they attribute this to Mr. Knowles, one of
15:13:29 18 the individual respondents, he's -- he's offering water to the
15:13:32 19 public. And this is it. It says, "Trilogy Asset Management,
15:13:38 20 Inc. Welcome to the home page for Trilogy Asset Management, Inc.
15:13:43 21 For further information, please go to About Us. For complete
15:13:47 22 contact information, go to Contact Us." That's all they give.
15:13:50 23 That's the -- that's the only thing that's in the complaint;
15:13:54 24 that's what we consider.

15:13:55 25 The next page gives -- is the Contact Us you can go

15:13:58 1 to. And it says, "For general inquiries, e-mail:
15:14:00 2 Info@trilogyasset.com." And it gives Stuart A. Knowles and
15:14:04 3 Marianne Cleveland, their addresses, telephone, fax numbers, and
15:14:08 4 their e-mails.

15:14:11 5 And this is why, you know, I say that, you know,
15:14:14 6 trying to bring individuals in here, there isn't even a good
15:14:19 7 faith basis for it. There's not a mention of water there, let
15:14:23 8 alone water for sale. There's nothing there. And this is --
15:14:27 9 this is evidence that they put not only in their complaint, but
15:14:30 10 again in their briefs, they argue that that is offering water to
15:14:36 11 the public generally. It just doesn't -- it just doesn't pan
15:14:40 12 out.

15:14:55 13 So if we look -- if we look at the standards, the
15:14:58 14 only other -- the only other point I would mention is that I am
15:15:01 15 involved in the antitrust lawsuit, Your Honor, and talked --
15:15:05 16 several cites were made to the antitrust lawsuit. But what
15:15:08 17 isn't talked about there is an antitrust lawsuit is a very
15:15:12 18 different animal, and there you're suing for -- to be able to
15:15:15 19 get recompense for damaged property rights and economic rights.
15:15:22 20 And so those types of -- even though those -- the allegations in
15:15:24 21 the complaint go clear back and they're -- they involve other
15:15:27 22 individuals. So they're taken out of context to the extent that
15:15:31 23 they're taken -- they're not put in the full context of that
15:15:34 24 antitrust lawsuit and the types of allegations, the laws that
15:15:37 25 are being applied, the damages that are being sought.

15:15:39 1 So, Your Honor, I would put to you that not only
15:15:43 2 should Summit Water be dismissed, but certainly in any instance
15:15:48 3 the individuals should be dismissed, as not a water corporation
15:15:54 4 or an individual or entity that is controlling and operating a
15:15:59 5 water system for public service. Thank you.

15:16:01 6 JUDGE ARREDONDO: Thank you, Mr. Hatch.
15:16:03 7 Mr. McDonald, please.

15:16:05 8 MR. McDONALD: Thank you, Judge Arredondo. I want
15:16:07 9 to start out by reminding everybody in this room as to the basis
15:16:15 10 for why we're here. We're here on a Rule 12(b)(1) and a Rule
15:16:20 11 12(b)(2), motions to dismiss for lack of jurisdiction over the
15:16:25 12 person and over the subject matter. That's it. We're not here
15:16:29 13 for a trial, we're not here for an evidentiary hearing, we're
15:16:34 14 here on a motion to dismiss for lack of jurisdiction.
15:16:37 15 Consequently, as all the lawyers in this room have agreed and
15:16:41 16 conceded, the proper standard for the commission to review is to
15:16:46 17 assume that every single allegation in the complaint is true,
15:16:57 18 irrefutable, factual, and established for purposes of this
15:16:57 19 motion. And we've spent a lot of time today on sideshows and
15:17:02 20 personal attacks and things that aren't in the complaint. And I
15:17:08 21 would urge Judge Arredondo and the commission to carefully
15:17:12 22 review the allegations of the complaint.

15:17:14 23 The motion that I'm addressing makes two points. On
15:17:19 24 page 4 of the individual non-consumer majority shareholders'
15:17:25 25 opening brief they state, "There are no allegations nor is there

15:17:29 1 any support for the proposition that the individual shareholders
15:17:32 2 own or control a water system." On page 6 of their opening
15:17:37 3 brief they said, "Even if each of the individual shareholders
15:17:40 4 did independently own and operate a water system, there is
15:17:43 5 absolutely no allegation or support for the proposition that the
15:17:47 6 individual shareholders do so for the public generally."

15:17:51 7 So really the two issues framed in the briefs is,
15:17:55 8 number one, are there any allegations in the complaint that
15:17:58 9 support the idea that the non-consumer majority shareholders own
15:18:04 10 or control a water system. And second, even if they did, do
15:18:09 11 they do so for the public generally. Those are the two issues
15:18:13 12 I'd like to address today.

15:18:15 13 To do that, I want to highlight some allegations of
15:18:18 14 the complaint. I don't know how counsel gets around these, but
15:18:23 15 let me just highlight a few of these for the record. Paragraph
15:18:27 16 16 of the complaint: Respondents each independently and
15:18:32 17 collectively constitute a public utility and/or a water
15:18:36 18 corporation as those terms are defined in Utah Annotated Section
15:18:40 19 54-2-1(16)(a), 29. Paragraph 18: Jurisdiction over this action
15:18:48 20 is properly held by the Public Service Commission. Paragraph
15:18:52 21 21: Since its inception, SWDC has provided or attempted to
15:18:57 22 provide and fulfill the essential public use and purpose of
15:19:02 23 providing water and water service for culinary, domestic,
15:19:07 24 residential, commercial, and recreational uses in western Summit
15:19:11 25 County, Utah. The culinary water distribution system owned and

15:19:15 1 operated by SWDC and controlled by the respondents is a "water
15:19:20 2 system" as defined in Utah Code Section 54-2-1(30) (a).
15:19:28 3 Paragraph 22, "SWDC and respondents are operating a public
15:19:33 4 utility as defined in Utah Code Section 54-2-1(16) (a) and are
15:19:39 5 engaged in the development, establishment, operation, and
15:19:42 6 maintenance of public water service facilities in western Summit
15:19:47 7 County, Utah, including water rights, source, storage, treatment
15:19:51 8 and distribution systems, facilities, and equipment." That's
15:19:55 9 just a few of the allegations that you have to assume are true
15:19:59 10 and established for purposes of this motion. I don't know how
15:20:04 11 counsel can say that there are no allegations in the complaint
15:20:07 12 that support jurisdiction.

15:20:10 13 However, I don't want the commission to just view
15:20:13 14 those allegations in isolation, I want the commission to also
15:20:17 15 view the other allegations of the complaint. I would call your
15:20:22 16 attention particularly to paragraph 39, paragraph 40, paragraph
15:20:30 17 41, which address Exhibit Q that we've just talked about. We
15:20:34 18 don't hang our hats on that exhibit. If that's all that we had,
15:20:38 19 yeah, we'd be in trouble. That's just one of many examples.
15:20:43 20 It's not the linchpin, it's not the litmus test for our case.
15:20:48 21 We have a very detailed complaint with paragraph after paragraph
15:20:52 22 of allegations.

15:20:54 23 Paragraph 44, last sentence, last phrase, "Saunders
15:20:58 24 and Knowles and/or the Saunders and Knowles entities manipulate
15:21:02 25 and dominate SWDC." Essentially what we're saying there is that

15:21:08 1 they're an alter ego; they manipulate, dominate, and control the
15:21:11 2 company to the extent that there's no distinction between the
15:21:14 3 non-consumer majority shareholders and the company itself.
15:21:19 4 That's basic corporate law, and that's a theory that's never
15:21:24 5 been alleged, I don't think, in this forum. That is an
15:21:30 6 allegation that gives plenty of basis for conducting as least an
15:21:34 7 investigation, at least allowing us to have some discovery.

15:21:37 8 I realize they don't like the allegations, I realize
15:21:39 9 that they're offensive to them. However, the law is the law;
15:21:44 10 they have to be accepted as true. And if they want to dispute
15:21:48 11 them, let's have discovery, let's have an evidentiary hearing,
15:21:52 12 let's have a summary judgment hearing, but let's not get into a
15:21:57 13 shouting match here in this proceeding about what is true and
15:21:59 14 what isn't.

15:22:01 15 Seventy-six, paragraph 76 of the complaint: Class A
15:22:04 16 development shares are issued to developers upon conveyance to
15:22:08 17 SWDC of sufficient water rights and source site. Upon the sale
15:22:13 18 of a lot from a developer to a customer, a Class A development
15:22:26 19 share is convertible to a Class B use share appurtenant to and
15:22:26 20 inseparable from the lot. That's critical to understand. These
15:22:27 21 shares are supposedly appurtenant to and inseparable to the lot.
15:22:32 22 What that means is that they don't get to choose who the members
15:22:37 23 are of SWDC. They have no more control over who's going to move
15:22:42 24 into Jeremy Ranch than Questar or PacifiCorp does. They can't
15:22:47 25 control that. And later on I'll show you where they admit in

15:22:51 1 the antitrust litigation that very thing.

15:22:54 2 I call the Court's attention to paragraphs 78, 79,
15:22:59 3 81, 82, 83, 86, 87, and 88, which I won't address here. Those
15:23:06 4 address the domination and control and the manipulation of the
15:23:10 5 company by the non-consumer shareholders. And I keep saying
15:23:15 6 non-consumer majority shareholders because that's an important
15:23:19 7 concept to understand. Non-majority -- excuse me, non-consumer
15:23:25 8 majority shareholders control and dominate this company.

15:23:29 9 Paragraph 93: Because of their minority shareholder
15:23:32 10 status, Class B use shareholders which are SWDC's rate-paying
15:23:37 11 consumer members do not have it in their power to elect other
15:23:41 12 directors, which are elected by a simple majority vote, and
15:23:46 13 demand necessary changes or control in the rate-making process.
15:23:51 14 Paragraph 99: It cannot be said of SWDC that the owner is both
15:23:51 15 the seller and buyer, because Class A development shareholders,
15:24:00 16 although owners, do not and cannot buy or receive water service.
15:24:04 17 Paragraphs 100, 103, 104 all go to the elements of Garkane and
15:24:11 18 all go to the elements of jurisdiction. Paragraph 105: The
15:24:15 19 conflict of interest between owner-vendor and consumer-vendee
15:24:19 20 inherit in public utility companies is not lacking in SWDC, nor
15:24:23 21 are their consumer and producer interests one and the same.

15:24:27 22 Now, the relief that we request against the
15:24:29 23 individual non-consumer majority shareholders is spelled out in
15:24:35 24 paragraph 134. This is -- this is what we're asking: Bear
15:24:40 25 Hollow respectfully requests that the commission commence a

15:24:42 1 commission inquiry as to whether all of the other respondents,
15:24:45 2 including but not limited to Saunders, Knowles, the Saunders and
15:24:49 3 Knowles entities, and SK Resources should be regulated as a
15:24:53 4 public utility or qualify for exemption. We ask the same thing
15:24:57 5 in paragraph 135.

15:24:59 6 No one has told you today -- and this is because
15:25:02 7 it's true -- that the non-consumer majority shareholders have
15:25:07 8 ever been investigated by the DPU or by the commission. They
15:25:11 9 never have. To my knowledge, no one has ever filed a complaint
15:25:15 10 against the individual non-consumer majority shareholders.
15:25:20 11 We're not plowing old ground, we're plowing new ground.

15:25:27 12 Let me just refer to the antitrust complaint which I
15:25:32 13 think we've taken judicial notice of. It's a public record, and
15:25:35 14 I don't think there's any dispute that it's been filed. And let
15:25:40 15 me put that in context of the broad definitions of the statute,
15:25:44 16 because the statute enacted by the Utah legislature is really
15:25:48 17 what controls here. Garkane controlled, but Garkane was partly
15:25:52 18 overruled by some legislative action subsequent to its holding.

15:25:59 19 The critical issue I think that you need to
15:26:01 20 understand is what is the definition of a water system. Counsel
15:26:04 21 has suggested that a water system is the distribution mechanism,
15:26:07 22 the dams, the canals, the ditches, the pipes, the diversion
15:26:12 23 works. That's true. That's part of it. But the definition
15:26:15 24 that the legislature imposes upon us is much, much broader than
15:26:20 25 that. Referring to Utah Code Annotated Section 54-2-1(30), and

15:26:26 1 I'm going to quote the pertinent parts: Water system includes
15:26:30 2 all other real estate, fixtures, and personal property owned,
15:26:36 3 controlled, operated, or managed in connection with or to
15:26:43 4 facilitate the development of water. All you have to do is own,
15:26:47 5 control, or manipulate personal property in connection with or
15:26:51 6 to -- even just to facilitate the development of water. There's
15:26:55 7 no requirement in the statute that you actually have to be
15:27:01 8 titled owner to a dam or a ditch or a pipe or a diversion
15:27:05 9 facility. That's -- that's superimposing upon the statute
15:27:08 10 requirements that just aren't there that the legislature never
15:27:11 11 intended.

15:27:12 12 Let me give you some examples though of how these
15:27:17 13 statutory definitions are satisfied and established in the
15:27:19 14 antitrust case. Let's take the issue of providing water to the
15:27:22 15 public generally. That's been a big issue, that is a big issue,
15:27:26 16 that's an important issue. Paragraph 38 of the antitrust
15:27:29 17 complaint states with regard to Class B shares, "The water
15:27:43 18 rights represented by the Class B share become part of the real
15:27:43 19 property owned by the homeowner and are transferred with the
15:27:43 20 land upon subsequent sale of the home." So if I buy a home in
15:27:46 21 Jeremy Ranch, I have no choice but to get my water from Summit,
15:27:50 22 and they have no choice but to deliver it to me because it runs
15:27:53 23 with the land. That's their own words: It runs with the land.
15:27:58 24 So they have no more authority, no more knowledge of who's going
15:28:01 25 to be the next owner or the next member than Questar does or

15:28:06 1 PacifiCorp does. It runs with the land.

15:28:09 2 In our antitrust complaint they say they compete
15:28:13 3 with other people. Paragraph 53, they say: As of January 2000
15:28:19 4 there were 11 water companies serving the Snyderville Basin,
15:28:23 5 comprised of a mix of mutual water companies such as Summit
15:28:28 6 Water, private water companies subject to regulation by the
15:28:28 7 Public Service Commission and special service districts
15:28:32 8 established by Summit County. So who do they compete with?
15:28:35 9 Well, they compete with public water providers like Summit
15:28:38 10 County and private water companies regulated by the PSC. How
15:28:43 11 can the respondents compete with public water providers and
15:28:47 12 PSC-regulated entities if they don't provide water to the public
15:28:52 13 generally? That doesn't make sense to me. That's like Utah
15:28:56 14 saying it competes with BYU every November at Rice-Eccles or
15:28:56 15 Lavell Edwards Stadium, but then claiming, no, we're not playing
15:28:56 16 football. That's like them wearing red helmets, shoulder pads
15:29:10 17 and chin straps and admitting there's 11 of us out there on the
15:29:12 18 field, we block and we tackle our competitors, but no, we're not
15:29:16 19 playing football. That's as preposterous as the respondents
15:29:20 20 saying they compete with public water providers and PCS-
15:29:25 21 regulated water companies, but they don't intend to provide
15:29:26 22 water to the public generally.

15:29:28 23 As a matter of fact, with -- with regard to whether
15:29:31 24 they control a water system, they explain how they control a
15:29:35 25 water system in their antitrust complaint. In paragraph 34 they

15:29:38 1 talk about the Class A shareholders who are non-users, non-
15:29:42 2 consumers, but voting members. What they do is "contribute
15:29:48 3 capital, infrastructure and/or source water in exchange for
15:29:51 4 shares." Paragraph 37 of the antitrust complaint, they say,
15:29:55 5 "The right to wet water that these shares represent may be sold
15:29:59 6 to new or existing Class A shareholders. This is the means by
15:30:04 7 which the investor shareholders recover their costs and a
15:30:06 8 reasonable return on their investment in obtaining and
15:30:10 9 developing the water rights and water sources and providing the
15:30:13 10 capital to construct" -- now they're talking about the Class A
15:30:18 11 shareholders here, the non-member Class A shareholders that are
15:30:20 12 parties to the antitrust litigation as we've named in this
15:30:20 13 complaint -- "to construct the storage, distribution, and
15:30:24 14 delivery systems they have contributed at no cost to Summit
15:30:29 15 Water." It's the Class A shareholders that are constructing the
15:30:33 16 delivery systems. They then contribute them to Summit Water.
15:30:36 17 So I ask you, how can you contribute a distribution and delivery
15:30:40 18 system if you don't operate it or control it to begin with? Of
15:30:45 19 course, the non-consumer majority shareholders own and operate
15:30:48 20 and control the water system. You cannot contribute a water
15:30:51 21 distribution and delivery system on the one hand, and then claim
15:30:55 22 that you don't own or operate or control a water system on the
15:30:57 23 other.

15:30:58 24 We've talked about the \$20,000 per share that the
15:31:01 25 Class A non-user majority shareholders charge. Those wholesale

15:31:07 1 rates they charge consumers are completely controlled and
15:31:10 2 dominated by them because they're the only ones that have
15:31:14 3 fungible shares. We allege that in the complaint, we discuss
15:31:18 4 that.

15:31:18 5 Again, a water system under 54-2-1(30) includes all
15:31:23 6 other real estate, fixtures and personal property owned,
15:31:26 7 controlled, operated or managed in connection with or to
15:31:29 8 facilitate the development of water. That's what they do.
15:31:35 9 That's what they do. They dominate, control, and manipulate
15:31:39 10 Summit Water to the extent that they're one and the same; we
15:31:41 11 allege that, and that's one theory. That's the only theory that
15:31:45 12 they've addressed in their motion. But in the complaint we also
15:31:48 13 explain these other -- these other -- how they operate, the
15:31:52 14 factor. And they're really two sides of the same coin, because
15:31:55 15 if they're one and the same, they're developing and distributing
15:31:59 16 the water.

15:32:00 17 So how could Summit Water function without the
15:32:03 18 foundational contribution of a distribution and delivery system
15:32:07 19 they admit the non-consumer majority shareholders provide? How
15:32:11 20 could the company function without the contribution of their
15:32:13 21 water system? Do they just get Class A shares because the board
15:32:19 22 of directors is nice and likes them? No. They admit they
15:32:23 23 contribute a water system. They should be regulated.

15:32:27 24 Let me just quickly address the Warren Buffet and
15:32:42 25 the Walt Disney analogy, because I think these are -- are

15:32:42 1 interesting examples. Cinderella's castle, I like that example
15:32:42 2 because it persuasively demonstrates my point. Do you really
15:32:45 3 think that if Walt Disney himself were alive he couldn't storm
15:32:50 4 Cinderella's castle? Do we really think that Walt Disney
15:32:54 5 himself, as a majority shareholder in the Disney Corp., couldn't
15:32:58 6 arbitrarily raise the price of admission or arbitrarily exclude
15:33:02 7 anybody he wanted from Cinderella's castle? Is it realistic to
15:33:06 8 think that an officer and employee of Disneyland would say to
15:33:10 9 Mr. Disney, "I'm sorry, sir, you're just a majority
15:33:14 10 shareholder?" No, that's not going to happen. And as fun as
15:33:18 11 Disneyland obviously is, there's obviously a different value
15:33:22 12 that society places on tickets to Disneyland and Cinderella's
15:33:26 13 castle and water.

15:33:27 14 It's been proven that human beings can live without
15:33:30 15 gas and, although my teenage kids would disagree, humans can
15:33:33 16 also live without electricity. Humans can actually live without
15:33:38 17 public transportation. But doggone it, they can't live without
15:33:42 18 water. So why wouldn't the Public Service Commission take a
15:33:46 19 very good look at this, an entity that claims they're the
15:33:50 20 largest and most efficient and powerful water-distribution
15:33:54 21 company in all of Snyderville Basin? If they screw up, we're
15:33:57 22 talking about a commodity essential to human life, not tickets
15:34:00 23 to Disneyland.

15:34:01 24 Warren Buffet, first problem with their Warren
15:34:03 25 Buffet analogy is that PacifiCorp is in fact a regulated entity.

15:34:06 1 And if Summit Water was in fact a regulated entity, maybe there
15:34:11 2 would be less need to regulate its non-consumer majority
15:34:15 3 shareholders. Unlike the non-consumer majority shareholders in
15:34:17 4 this case, Warren Buffet himself's not out there personally
15:34:20 5 bringing antitrust lawsuits in his own name against PacifiCorp's
15:34:20 6 public utility competitors. Unlike the non-consumer majority
15:34:20 7 shareholders in this case, Warren Buffet isn't out there
15:34:30 8 personally building pipelines, creating distribution or delivery
15:34:34 9 mechanisms to sell to consumers on the wholesale market or
15:34:39 10 donate to PacifiCorp. Whenever this position is taken to its
15:34:40 11 logical extreme, the Warren Buffet analogy means that no
15:34:44 12 majority shareholders can ever be regulated regardless of how
15:34:51 13 much they manipulate, dominate, or control the company and its
15:34:52 14 assets and no matter what is actually going on in the company.

15:34:54 15 And that's what Garkane says that you ought to look
15:34:57 16 at. Don't -- don't put form over substance. Just because their
15:35:02 17 articles of organization or their bylaws say something, don't
15:35:04 18 assume that that's exactly what reality is. If that was the
15:35:08 19 case, you could evade jurisdiction of the Public Service
15:35:12 20 Commission just through carefully crafted bylaws. You have to
15:35:14 21 look at what's actually going on. That analogy ignores the
15:35:19 22 facts of this case.

15:35:20 23 In conclusion, the motions to dismiss should be
15:35:23 24 denied because the allegations of the complaint, when viewed in
15:35:26 25 a light most favorable to Bear Hollow, with all reasonable

15:35:31 1 inferences being drawn in Bear Hollow's favor, that establishes
15:35:34 2 that the respondents own, control, and operate a public utility,
15:35:39 3 they control -- control a water system. We've alleged that
15:35:43 4 they're a public utility. That ends the inquiry for now. If
15:35:48 5 they want to dispute that, fine; we'll have discovery, we'll
15:35:51 6 have an evidentiary hearing. Quite frankly, given the confusion
15:35:55 7 and the finger pointing and everything else that's going on
15:35:58 8 today, I think we need to have an evidentiary hearing. If our
15:36:03 9 claims are truly "frivolous," "disingenuous," "specious," "with
15:36:08 10 no good-faith basis," then let's have it, let's find out. Well,
15:36:14 11 we can't find out based on allegations made by a consumer that
15:36:19 12 has been stonewalled and doesn't even have a current shareholder
15:36:23 13 list because they refuse to give it to us.

15:36:28 14 Let this proceed to where it ought to proceed and
15:36:30 15 let's do the right thing and look at this carefully and not just
15:36:33 16 dismiss this complaint out of hand.

15:36:35 17 Thank you.

15:36:35 18 JUDGE ARREDONDO: Thank you, Mr. McDonald.

15:36:39 19 Mr. Hatch, a brief reply?

15:36:41 20 MR. HATCH: Sure. Thank you, Your Honor.

15:36:43 21 A lot of things were alleged there, but I think
15:36:45 22 Mr. McDonald was right in the sense that, you know, what we're
15:36:48 23 looking at is this complaint. And I'm happy to address anything
15:36:52 24 in the antitrust complaint, because I think they've taken it out
15:36:55 25 of context. I do think that's not alleged. None of the

15:36:59 1 antitrust complaint issues are alleged in their complaint, and
15:37:03 2 it's truly outside of the scope of this proceeding. I didn't
15:37:06 3 object because I'm happy to answer any of those because I think
15:37:10 4 they're totally irrelevant.

15:37:12 5 But the point -- Mr. McDonald went through several
15:37:15 6 sections in the complaint, and, you know, that's fine, but what
15:37:18 7 the problem is, is the standard is even if we accept these
15:37:21 8 things as true, are they still legally sufficient to proceed on.
15:37:26 9 And Mr. McDonald's taken the position that just because they say
15:37:31 10 something, we have to ignore the law, we have to ignore all
15:37:42 11 reality, and -- and the issue is over, and we go to an
15:37:42 12 evidentiary hearing.

15:37:42 13 If that were truly the case, Your Honor, there would
15:37:42 14 never be a motion to dismiss in federal court, state court, or
15:37:46 15 before this commission. Because every -- every case that I
15:37:50 16 think any lawyer's ever been involved with where a motion to
15:37:54 17 dismiss has been brought, it's been brought largely because,
15:38:00 18 given the allegations that are made, there isn't a legal basis
15:38:00 19 to move forward.

15:38:02 20 Now, let me point out a few -- I'll just -- I don't
15:38:02 21 have time to go through every one of those. I will if Your
15:38:06 22 Honor wants to give me the time. But he cited, for instance,
15:38:08 23 that you have to take as true and move forward Section 8 --
15:38:16 24 Section 8, paragraph 18 of the complaint. Well, here's what
15:38:18 25 that says. It says: Jurisdiction over this action is properly

15:38:24 1 held before the Public Service Commission pursuant to, and then
15:38:25 2 he cites code cites. Well, that's not -- by saying you have to
15:38:28 3 accept the allegations are true, he's essentially saying, well,
15:38:32 4 since we say you have jurisdiction, you cannot determine
15:38:35 5 jurisdiction for yourself. That's certainly not the case. And
15:38:39 6 there's certainly no authority for any such of a wild assertion
15:38:43 7 as that.

15:38:44 8 And that's why you have a motion to dismiss, because
15:38:46 9 you look at these things and you determine is there really
15:38:49 10 jurisdiction, are there grounds for it, not just did they allege
15:38:53 11 it in their complaint. We're not just trying to determine
15:38:56 12 whether the form is proper, but whether the substance that's
15:38:59 13 contained in this document is proper.

15:39:01 14 So we go through it. And if you go through it, they
15:39:04 15 make a lot of allegations. In 22, with -- one of the very next
15:39:10 16 sections, he -- paragraphs that he cited to, he says Summit
15:39:13 17 Water and respondents -- he throws those in, my clients -- are
15:39:16 18 operating a public utility as defined in Utah Code. Well,
15:39:20 19 that's a conclusory statement. Just them saying that doesn't
15:39:24 20 mean that they're -- they're -- that they've made the
15:39:27 21 allegations necessary and that this commission doesn't look to
15:39:30 22 see whether or not there are allegations in this complaint that
15:39:33 23 meet the standard that would grant jurisdiction over my clients
15:39:39 24 and over Mr. Flitton's clients to proceed further.

15:39:43 25 And virtually all of these, if you look at the

15:39:45 1 sections he talks about, he's talking about things that are
15:39:48 2 totally unrelated or conclusory statements, things that in our
15:39:53 3 briefs and the -- and the arguments that I made earlier, we
15:39:55 4 addressed every one of the points and showed how they are
15:39:58 5 legally insufficient.

15:40:00 6 A perfect example is paragraph 40. He says, for
15:40:04 7 example: On information and belief, Trilogy Asset Management,
15:40:07 8 Inc., a for-profit corporation here owns the domain name
15:40:15 9 summitcountywater.com and appears to be advertising water for
15:40:18 10 sale over the Internet; see Exhibit Q. Well, they attached
15:40:23 11 Exhibit Q. They made a big issue that I misspoke and said it
15:40:27 12 was in the briefs, attached here as -- to Plaintiff's Exhibit Q.
15:40:31 13 And we've gone through that, Your Honor. And, you know, when
15:40:33 14 I've talked about things having really no good-faith basis, I
15:40:37 15 mean, that has to fit every one of the words I ever used,
15:40:42 16 because if you look at it yourself, they're sitting here saying
15:40:44 17 that it is an advertisement for water over the Internet, and the
15:40:47 18 word "water" isn't even used, nothing's being offered for sale.
15:40:50 19 And they want you to -- they say that, well, you have to accept
15:40:52 20 our view of that as true because we said it. Well, that's not
15:40:55 21 the standard, it's never been the legal standard. They have to
15:40:58 22 allege facts that provide a legally sufficient basis, and they
15:41:02 23 haven't done it. And they've proved it because you're allowed
15:41:05 24 to consider the exhibit to their -- to their complaint.

15:41:08 25 So you go through, and I listened very carefully,

15:41:12 1 and they do not provide any facts to show that the respondents
15:41:18 2 themselves are providing water to the public. The only
15:41:22 3 allegations in here are that Summit Water does that. And they
15:41:25 4 try to bootstrap, essentially, the individual respondents by the
15:41:32 5 fact that they own shares. Now, you know, obviously -- and one
15:41:36 6 of the things we haven't talked about that's really interesting
15:41:43 7 here too is they're a Class A shareholder, Your Honor. They
15:41:44 8 come under the same status as my clients. And yet they've never
15:41:48 9 sat here and said that they themselves ought to be regulated.
15:41:52 10 Because they don't want to be regulated.

15:41:54 11 I mean, they're here trying to pursue a corporate
15:41:57 12 lawsuit that, if it has any merit or any basis whatsoever, it
15:42:01 13 ought to be pursued in civil court. But I -- you know, and I
15:42:06 14 can only -- I can only guess as to their motivations for trying
15:42:09 15 to do that here, but what I do know is they haven't alleged a
15:42:13 16 legal basis to be here and have you do that for them. They've
15:42:17 17 never alleged that my clients run a water system, that they own
15:42:24 18 any of the things that are required in the statute, and we went
15:42:26 19 through that. Again, they've only alleged that Summit Water
15:42:30 20 owns those things, and that somehow because we're a shareholder
15:42:33 21 we ought to be there. But every time that -- they try to jump
15:42:37 22 that chasm, that legal chasm.

15:42:49 23 And that's why we talk about are their allegations
15:42:49 24 legally sufficient. They have to ignore Garkane, they have to
15:42:49 25 ignore San Miguel, they have to ignore Nelson, and they have to

15:42:50 1 try to limit those cases, and they have to take us back to prior
15:42:54 2 to the 1940s and ignore everything the supreme court has said to
15:42:57 3 jump from my client, past Summit Water, and say we're the ones
15:43:01 4 that are running the water, when we're not.

15:43:04 5 They never have alleged that -- they've never --
15:43:09 6 they've never contradicted, and in their complaint they don't,
15:43:13 7 that the only right to the water is through share ownership. As
15:43:17 8 a matter of fact, they've been here complaining that it's
15:43:19 9 expensive to -- you have to own a piece of property and you have
15:43:22 10 to pay money to become a member; if you don't do that, they
15:43:26 11 don't let you become a member. And -- and so they've exactly --
15:43:29 12 they've absolutely argued the opposite of what they would need
15:43:34 13 to show to get outside of Garkane and outside of San Miguel and
15:43:39 14 outside of Nelson. What they've argued is -- is exactly what
15:43:43 15 those cases require, is if you're only a member, it's not being
15:43:46 16 offered to the public.

15:43:47 17 And their bigger complaint is essentially that we're
15:43:51 18 a member. We don't like being a member, I guess. But
15:43:54 19 they've -- every allegation is that we're a member and we
15:43:57 20 wouldn't have any right to water otherwise. That falls directly
15:44:00 21 inside the supreme court's test. And they have never disputed,
15:44:04 22 in a complaint or otherwise, that approval is required. As a
15:44:08 23 matter of fact, you heard their arguments today that they
15:44:11 24 complained about approval being required.

15:44:13 25 And so we hear, you know, kind of these broad,

15:44:16 1 general arguments as we go through the complaint that somehow
15:44:20 2 some conclusory statements that largely go to what -- the
15:44:24 3 provision of water by Summit Water, which isn't even -- their
15:44:28 4 allegations aren't even legally sufficient to provide
15:44:30 5 jurisdiction over Summit Water, that somehow you can jump the
15:44:34 6 chasm and get to us. And to do that we would have to ignore
15:44:38 7 years and years of supreme court precedent.

15:44:44 8 Mr. McDonald said, you know, we're plowing new
15:44:46 9 ground here, and I would agree that they are asking you to plow
15:44:51 10 new ground here. They're asking you to plow new ground that has
15:44:54 11 no basis of being plowed.

15:44:54 12 They say that the reason -- well, Warren Buffet's
15:44:59 13 never been -- that you ought to investigate my clients because
15:45:02 14 we've never been investigated. Well, neither has Warren Buffet.
15:45:06 15 I mean, are they saying that you -- you and the Public Service
15:45:09 16 Commission should be personally investigating every member,
15:45:11 17 every shareholder, every board member of every -- every
15:45:17 18 corporation that has anything to do with water? If we take
15:45:21 19 their arguments, you know, you'd have to be checking out the
15:45:23 20 guys at Smith's Food Store because they've got a public water
15:45:27 21 fountain. And in the examples they gave you, that's the
15:45:30 22 provision of water to the public. So we ought to call in the
15:45:33 23 board members of Smith's. I mean, that's the kind of reductio
15:45:38 24 ad absurdum arguments that are being kind of crafted, and talk
15:45:42 25 with each other to try to -- try to come up with a case out of

15:45:45 1 whole cloth that just doesn't exist.

15:45:58 2 The last point I -- and I'm happy to answer any
15:46:01 3 questions Your Honor has, too -- is the -- their argument
15:46:06 4 from -- I think it was paragraph 53. I was writing these down
15:46:09 5 as fast as I could. He talked about, you know, that -- that
15:46:17 6 Summit Water is competing, you know, with public -- this is
15:46:20 7 where he cites the antitrust case and thinks -- and apparently
15:46:24 8 finds somewhat persuasive the fact that because Summit Water --
15:46:28 9 and I'll note that this argument goes to Summit Water, not
15:46:32 10 really my clients -- but he notes -- he notes that in the
15:46:34 11 antitrust complaint it's alleged that Summit Water is competing
15:46:38 12 with public water providers, and that somehow -- and to be true
15:46:42 13 to the statement in the antitrust case, it says competes with
15:46:47 14 public and private water suppliers. But I guess -- I gather the
15:46:50 15 argument they're trying to make now is because we compete in
15:46:53 16 some instances with public water suppliers, that therefore we're
15:46:57 17 a public water supplier. And there's really something missing
15:47:00 18 from the logic of that if you graph that out. And we could do
15:47:05 19 that logically to show it doesn't make any sense whatsoever.

15:47:08 20 But I think as far as we need to go is the fact that
15:47:11 21 that's exactly the facts of the San Miguel case, you know,
15:47:14 22 because they were -- they also in that instance indicated that
15:47:17 23 one of the people they competed with was public systems. But
15:47:21 24 the court didn't look to that. It's not a factor, it's
15:47:25 25 immaterial, it's irrelevant. The important factors are -- are

15:47:28 1 do you require membership, and do you -- do you -- and are you
15:47:34 2 not holding yourself out to the public, you have to only be a
15:47:37 3 shareholder or a member to receive water. That's the test
15:47:41 4 that's been established. And certainly my client -- Summit
15:47:45 5 Water requires that, and certainly my clients don't even provide
15:47:49 6 water.

15:47:49 7 And so I would ask Your Honor to dismiss this matter
15:47:54 8 as being legally insufficient to be able to bring against
15:47:59 9 individuals such as my client, and if they have real, honest-
15:48:10 10 to-goodness disputes, to go air them in the proper jurisdiction,
15:48:10 11 which, if they have claims, would not be here.

15:48:11 12 Thank you, Your Honor.

15:48:12 13 JUDGE ARREDONDO: Thank you. Thank you, all of you.
15:48:14 14 And we'll go ahead and take this matter under advisement and
15:48:18 15 make a recommendation to the commissioners. Thank you.

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(Proceedings concluded, 3:48 p.m.)

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C E R T I F I C A T E

I, Lisa Collman, Certified Shorthand Reporter within and for the State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth, and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision.

That the foregoing 74 pages contain a true and correct transcription of my shorthand notes so taken.

In witness thereof, I have hereunto transcribed my name this 30th day of December, 2009.

Lisa Collman, CSR
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