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PUBLIC SERVICE COMMISSION

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TRANSCRIPT OF PROCEEDINGS

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Proposed Rulemaking Hearing

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Jefferson City, Missouri

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In the Matter of a Proposed )

Rulemaking Regarding Ex Parte and ) Case No. AX-2010-0128

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Extra-Record Communications )

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MORRIS L. WOODRUFF, Presiding,  
CHIEF REGULATORY LAW JUDGE.

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ROBERT M. CLAYTON III, Chairman,

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JEFF DAVIS,  
COMMISSIONER.

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REPORTED BY:

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KELLENE K. FEDDERSEN, CSR, RPR, CCR

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MIDWEST LITIGATION SERVICES

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

2 JUDGE WOODRUFF: Good morning, everyone.

3 Welcome to the rulemaking hearing concerning the  
4 Commission's proposal to rescind and create a new rule for  
5 4 CSR 240-4.020, which concerns ex parte and extra-record  
6 communications.

7 This is a rulemaking hearing, so it's a  
8 little bit unusual procedure that we don't have to -- I  
9 don't know that we have to take entries of appearance at  
10 this point, but we're here to take comments from people  
11 who are interested in this -- in this rulemaking.

12 Chairman Robert Clayton's here by  
13 telephone. Can you hear us, Commissioner?

14 CHAIRMAN CLAYTON: I'm here.

15 JUDGE WOODRUFF: Okay. And we are  
16 webcasting. When we call witnesses, I'll ask you to come  
17 on up to the podium up here to speak. And we've had  
18 written comments filed by several parties. I'll go  
19 through them first, and then, of course, you don't have to  
20 have filed written comments to participate today. So if  
21 there's anyone else who wants to offer oral comments at  
22 the hearing, we'll get to you also.

23 Let's start off with Staff -- or actually  
24 the Secretary of the Commission filed some comments.  
25 Mr. Reed, if you want to come forward.

1                   MR. REED: Yes. Thank you, Judge. Judge,  
2 I filed comments in the EFIS system under the public  
3 comments link that you'll see in this case. I brought  
4 copies of those with me that I can mark as an exhibit,  
5 Judge. I can pass out as many as I have to those parties  
6 who are here, just in case you haven't seen them.

7                   JUDGE WOODRUFF: Mr. Reed, before you  
8 testify, I need to swear you in.

9                   (Steve Reed was sworn.)

10                  JUDGE WOODRUFF: Thank you. Proceed.

11                  MR. REED: All right. These public  
12 comments that I filed in this case have to do with some  
13 amendments that I proposed to the rule as currently exists  
14 in the case. There are four comments.

15                  The first is that under the proposed  
16 4.020(4)(D), I believe the Commission's authority is  
17 greater than that which -- the investigatory authority of  
18 the Commission is greater than that which is in the  
19 proposed rule.

20                  So my change would be to the effect of  
21 changing the language to reflect and say the  
22 investigate -- the investigative powers as established  
23 under Missouri law, to be sure and capture all those  
24 investigative powers that the Commission may have under  
25 statute.

1                   In particular, in the current proposal  
2     there's no mention of Chapter 392, which deals with  
3     telecommunications, and there's no mention of the  
4     Commission's investigative power under Chapter 394, and  
5     specifically I was thinking of 394.160 that relates to  
6     electric coops.

7                   The next comment I had has to do with  
8     primarily the rescission of the current 4.020, in  
9     particular 4.020(4). It's improper for any person  
10    interested in a case before the Commission to attempt to  
11    sway the judgment of the Commission, et cetera. That's an  
12    important rule that the Commission has been dealing with  
13    even in a current case before the Commission, and I  
14    believe that this -- this provision should be promulgated  
15    under the current proposal for 4.020. I suggested that it  
16    be paragraph 12.

17                  Next is my comments regarding the  
18    rescission of 4.020(3) that has to do with a commissioner  
19    or employee of the commission appearing before the  
20    commission in a case that that person had worked on  
21    previously after termination with the commission.

22                  It would be consistent with the proposed  
23    rule's intent to discourage improper communications and  
24    conflicts of interest to promulgate that rule as a  
25    paragraph 13, rather than abandoning that provision of the

1 current rule.

2                   And finally, in the definitions in the  
3 proposed rule, it appears appropriate that we define  
4 commission staff. I've attempted a definition here. It  
5 might need some work. But in order to distinguish the  
6 commission staff from the technical advisory staff, it  
7 seems appropriate that we try to define commission staff  
8 in some way.

9                   Now, I think what you'll see is that my  
10 proposal varies a little bit from the current definition  
11 of staff or commission staff that you see in Chapter 2 of  
12 the Commission's rules. Now, I think the Commission has  
13 in mind at some point in the near future making some  
14 changes to the current Chapter 2 rules. So I think  
15 whatever we adopt as a definition of commission staff in  
16 this Rule 4 would be carried back into Chapter 2 when we  
17 finally make revisions to Chapter 2 rules.

18                   I think that's all I have, Judge.

19                   JUDGE WOODRUFF: Thank you. Chairman  
20 Clayton, do you have any questions for Mr. Reed?

21                   CHAIRMAN CLAYTON: No questions. Thank  
22 you.

23                   JUDGE WOODRUFF: Commissioner Davis, did  
24 you have any questions for Mr. Reed?

25                   COMMISSIONER DAVIS: No.

1 JUDGE WOODRUFF: All right. Thank you,  
2 Mr. Reed.

3 In no particular order, then, I'm going to  
4 go through the parties who have filed written comments,  
5 starting with AT&T.

6 (Leo Bub was sworn in.)

7 JUDGE WOODRUFF: Thank you. Tell us your  
8 name first and who you represent.

9 MR. BUB: Leo Bub for AT&T Missouri.

10 JUDGE WOODRUFF: Thank you.

11 MR. BUB: Good morning. As the Commission  
12 is aware, we filed brief comments yesterday, and we raised  
13 essentially one substantive point, and that has to do with  
14 how the proposed rule conforms with Section 386.210 of the  
15 Missouri statutes.

16 Our basic point was that the rule needs to  
17 be consistent with the statute, and we lined the two up  
18 together, and we thought that the drafters did a pretty  
19 good job of catching and lining up the proposed rule with  
20 the statute with one exception, and that has to do with  
21 types of contacts that the Commission may make with  
22 members of the public, utilities and other commissions.

23 And there are situations where those  
24 contacts are specifically permitted by the statute, and  
25 the purpose, we believe, that the Legislature meant to

1 make available to the Commission in different contexts  
2 information that would be helpful to them in doing their  
3 job and carrying out their duties, and one particular  
4 area, and it's set out in Section 386.210 subparagraph  
5 3.3, and what that section of the statute sets out is  
6 contacts that can be made during -- that address  
7 substantive and procedural matters that are the subject of  
8 a pending filing or case but where no commission hearing,  
9 an evidentiary hearing has been scheduled.

10 I think the intent of this is to follow the  
11 procedures that the FCC has where before a hearing has  
12 been scheduled, there are permitted ex parte contacts, but  
13 with the safeguards that those need to be disclosed in the  
14 course of that case, but once a hearing has been  
15 scheduled, then there's a blackout and nobody can have  
16 ex parte contacts.

17 And our Missouri statutes I think were  
18 designed to be similar to that. Our Missouri statute in  
19 that situation identifies three areas where a contact  
20 would be permitted. One is a public agenda meeting,  
21 second is at a public forum, and then third, contacts that  
22 are made outside such agenda meetings or forum if they're  
23 subsequently disclosed. And the statute sets out two  
24 different methods if the contact is a written  
25 communication or an oral communication.

1                   We think that the proposed rule does a real  
2   good job of capturing the first two situations, the first  
3   when a contact is made during a public agenda meeting,  
4   second, when a contact is made in a context of a public  
5   forum. But it's that third situation where the contact is  
6   made outside an agenda meeting or forum that's omitted  
7   from the statute.

8                   Our basic point is that that needs to be  
9   included in the rule because it's something that's  
10   specifically permitted by the statute and that's what the  
11   Legislature wanted to be available to the Commission.  
12   That was our first point.

13                  The second point was more just a situation  
14   where we weren't exactly sure what was required of us as a  
15   public utility in a situation where there is a contact  
16   made, and the context there is where in the course of some  
17   hearing before the Public Service Commission, it could be  
18   a tariff, could be a complaint case, but during the course  
19   of that proceeding, completely unrelated to that case,  
20   something happens. It may be some outside contractor  
21   digging up one of our cables and causing a service outage.

22                  In that situation, if it's a major outage,  
23   we would normally want to make sure that the Public  
24   Service Commission was aware of it because they're going  
25   to get calls. And we're clear that when we initiate that



1 contact, that we need to make an ex parte filing within  
2 the context of the case to let other parties know that we  
3 made that contact with the Commission, and that's covered  
4 by the rules very well.

5                   It's a situation where we may get a call  
6 from a commissioner or the -- maybe a judge or the  
7 advisory staff wanting to know about that unrelated  
8 matter. In that situation, we weren't real sure who was  
9 required to make that contact because under the rules it's  
10 the person initiating the contact with the disclosure  
11 requirement.

12                   We weren't sure whether that would apply to  
13 us as a utility or whether the Commission would make the  
14 filing or whether no filing is necessary. We ordinarily  
15 wouldn't make any type of a filing because it was  
16 completely unrelated to the case. We didn't see it was  
17 necessary. We just didn't know from the rule as written  
18 what was required. So that was more of a clarification.

19                   The final point I'd like to go through is  
20 just to address a disagreement that we have with Public  
21 Counsel in the statutory interpretation of  
22 Section 386.210. And paragraph 1 we have a disagreement  
23 with Public Counsel on the meaning of that first sentence,  
24 which is where the Legislature said the commission may  
25 confer -- I'm paraphrasing here -- the commission may

1 confer with members of the public, any public utility or  
2 similar commission of this or other states and the United  
3 States of America, et cetera.

4                   Public Counsel took issue with our view  
5 that public utilities were one of the enumerated entities  
6 that could make these contacts conferring with the  
7 commission. Personally, I think that it really doesn't  
8 matter because even if Public Counsel's correct, we still  
9 would fall under the category of a member of the public.

10                   We think the proper reading is that that  
11 phrase "or similar commission" was meant to modify the  
12 first reference to commission because that sentence starts  
13 out, the commission may confer with members of the public,  
14 any public utility or similar commission. We think that  
15 "or similar commission" is a reference to that first  
16 statement of the commission.

17                   We think that's a natural reading because  
18 it's our commission that regulates public utilities in  
19 this state. But as I pointed out, we don't think it  
20 really matters because, in any event, we would fall under  
21 members of the public.

22                   Other than that, in closing, I'd just like  
23 to say that we thought that the drafters did a lot of  
24 work. I'd like to recognize and commend them for that.  
25 I'd also express our appreciation to the Commission for

1 allowing us to express our comments.

2 JUDGE WOODRUFF: Thank you, Mr. Bub.

3 Chairman Clayton, did you have any questions for Mr. Bub?

4 CHAIRMAN CLAYTON: No questions. Thank  
5 you.

6 JUDGE WOODRUFF: Commissioner Davis?

7 COMMISSIONER DAVIS: No questions. Thank  
8 you, Mr. Bub.

9 JUDGE WOODRUFF: Thank you.

10 MR. BUB: Thank you.

11 JUDGE WOODRUFF: Let's go then to MEDA. If  
12 you'd please raise your right hand, I'll swear you in.

13 (Paul Boudreau was sworn in.)

14 JUDGE WOODRUFF: If you'll tell us who you  
15 are and who you represent.

16 MR. BOUDREAU: Thank you. My name is Paul  
17 Boudreau, B-o-u-d-r-e-a-u, with the law firm of Brydon,  
18 Swearngen & England, here in Jefferson City. I'm  
19 representing -- here to offer some comments on behalf of  
20 the Missouri Energy Development Association, or as I'll  
21 refer to it throughout my hopefully short comments will be  
22 MEDA.

23 I want to thank the Commission for this  
24 opportunity to once again address it on this important  
25 topic of communications as between the regulated community

1 and the Commission and other interested parties. As the  
2 Commission is well aware, this has been a process that's  
3 been ongoing for some time and discussed in a number of  
4 dockets, most recently a workshop docket.

5 But in any event, MEDA has been consistent  
6 throughout this process as indicating that any rulemaking  
7 that is enacted in this -- in this docket in particular  
8 should follow three guiding principles, those being, one,  
9 any revisions must preserve the concept that a vigorous  
10 and robust exchange of ideas and information is critical  
11 to the formulation of sound public policy. The second  
12 point is that any revisions must be equally applicable to  
13 all parties, and the third point has been any revisions  
14 must make a meaningful distinction between adjudicative  
15 and legislative roles of the Commission.

16 I'm pleased to say that MEDA believes that  
17 the principles 2 and 3 are basically followed fairly  
18 closely by the proposed rule, and I think with just some  
19 targeted but important changes to the rules as proposed  
20 Principle No. 1 can be addressed adequately as well, and  
21 that being preserving the concept of a robust exchange of  
22 ideas and information.

23 MEDA has filed prefiled comments in this  
24 case. I did not bring extra copies. I didn't know,  
25 Mr. Woodruff, if you wanted to reserve an exhibit

1 reference.

2 JUDGE WOODRUFF: That's not necessary.

3 MR. BOUDREAU: In any event, I'm not going  
4 to repeat those comments at length, other than to refer  
5 the Commission to them for MEDA's current thinking of the  
6 proposed rule and the recommendations, the specific  
7 recommendations for language changes that it thinks is  
8 necessary to comport the rule that the Commission is  
9 considering with the statutory recommendations.

10 I'll try to summarize those comments,  
11 however. MEDA believes that the rule as proposed will  
12 provide needed clarity and practical guidance to all  
13 parties participating in proceedings before the  
14 Commission, but only if modified in several targeted ways  
15 to conform it with the Commission's enabling legislation  
16 which can be found in Section 386.210, Revised Statutes of  
17 Missouri, and to address the troubling rescission of some  
18 important existing language restricting unauthorized  
19 commentary by parties and counsel.

20 I was gratified to hear that the  
21 Commission's general counsel, Mr. Reed, has identified one  
22 of those items as the second comment in the public comment  
23 report that he's caused to be filed, and in particular  
24 that deals with subsection 4 of the existing rule that  
25 deals with commentary by interested parties in cases

1 before the Commission.

2                   We think that that language or language  
3 very similar to it needs to be retained in the rule, and  
4 that proposal is contained in MEDA's written comments that  
5 were filed yesterday.

6                   The proposed rule would also -- would  
7 restrict a category of communications that is specifically  
8 authorized by law, although subject to certain disclosure  
9 requirements, and that being communications addressing  
10 substantive or procedural matters that are the subject of  
11 a pending filing in which no evidentiary hearing has been  
12 scheduled and made other than in a commission agenda  
13 meeting or other permitted forum.

14                   This topic was addressed very thoroughly  
15 and appropriately by Mr. Bub on behalf of AT&T, and MEDA  
16 concurs in his -- in his stated views. I'm not going to  
17 repeat those, other than to say that that's a category of  
18 communications specifically authorized by law, and the  
19 rule would, by not addressing them or not permitting them,  
20 would presumably prohibit them. We think that the rule  
21 needs to be modified to accommodate that category of  
22 communication.

23                   The third topic is the safe harbor  
24 categories that have been addressed. There's a number of  
25 them that have been included by the Commission in

1 subsection 4 of the proposed rule. The safe -- what I'll  
2 call safe harbor categories, categories which are  
3 permitted communications, MEDA believes are too narrow and  
4 unreasonably inhibiting. They're not broad enough to  
5 permit the Commission to be fully and timely informed of  
6 matters affecting the industry or particular utilities,  
7 and the mandatory disclosure requirement frankly goes  
8 beyond what the law requires and is likely to have a  
9 chilling effect on the regulator/regulated communications  
10 that the law contemplates.

11               And I would draw the Commission's attention  
12 to the policy statement in subsection 4 of the statute  
13 386.210 which talks about how that nothing in this section  
14 or any other provision of law shall be construed as  
15 imposing any limitation on the free exchange of ideas,  
16 views and information. And our concern with that -- where  
17 that category's concerned is that the safe harbor  
18 categories are too narrow.

19               There were a number of additional  
20 categories that were addressed and proposed by MEDA in the  
21 last docket. Those categories have been laid out in the  
22 written comments that have been filed in this docket, and  
23 we think that those would be appropriate categories to  
24 deal with the day-to-day matters that frankly ought to be  
25 easily communicated to the Commission and not chilled,

1 frankly, by disclosure filing requirements.

2                   The final topic is the rescission -- I've  
3 already touched on it, but the rescission of the existing  
4 code -- the existing conduct during proceedings rule has  
5 the practical effect of watering down restrictions on  
6 attorney commentary and eliminating restrictions on party  
7 commentary.

8                   Staff has addressed and Mr. Reed has  
9 addressed the rescission of the concept of restrictions on  
10 party commentary. I would suggest that subsection 1 of  
11 the existing rule that sets forth restrictions on attorney  
12 commentary has been watered down as well. There's a  
13 provision of the existing rule that just basically  
14 attempts to piggyback on the Code of Professional Conduct  
15 limitations, which frankly don't dovetail all that well.

16                   If you take a look at the -- I've got no  
17 problem with attorneys following the Code of Professional  
18 Conduct, but in the sense of the provision that's directly  
19 applicable to the topic, which is -- I think it's  
20 communications at trial, just simply don't overlap that  
21 well. And I think that the Commission ought to -- it's  
22 civil rule 4-3.6. I would encourage the Commission to  
23 compare that rule to the existing subsection under the  
24 code -- or the conduct during proceedings rule that the  
25 Commission has, which I think are more directly targeted



1 on and more appropriate for, frankly, proceedings before  
2 the Commission.

3 I think if you rely just on the Code of  
4 Professional Conduct rules, that that will basically water  
5 down the limitations on attorney conduct, and I'm not sure  
6 that that's necessarily a good thing. I would encourage  
7 the Commission to take a look at that.

8 I also want to address -- well, a couple of  
9 things about the comments that were filed by Public  
10 Counsel in this case. I want to echo and concur in  
11 Mr. Bub's comments about Public Counsel's statutory  
12 interpretation of 386.210. I think his observations are  
13 exactly right, that it's not -- it's not -- the statute  
14 isn't meant to exclude communications from the regulated  
15 community.

16 Also, Public Counsel's comments touched on  
17 the case background that led up to this, and I would just  
18 remind the Commission that they already took a look at the  
19 allegations of inappropriate conduct in the Great Plains  
20 acquisition of Aquila some time back and basically  
21 dismissed the allegations of inappropriate conduct rather  
22 decisively.

23 In an order in that case it says that, it  
24 would appear that OPC has taken the depositions, exhibits  
25 and testimony in this matter, cut them into small pieces

1 and woven the words of its choosing together with the  
2 magic thread of innuendo in order to conclude that  
3 something clandestine and prejudicial must have occurred.

4                   And we're getting a little bit more of that  
5 even in the comments that have been filed by Public  
6 Counsel in this case. If you take a look at page 3 of the  
7 comments, it's a strange -- it strangely echoes the  
8 genesis of this whole thing in the first place in page 3,  
9 paragraph 3, in references about AmerenUE in the context  
10 of the current rate case that they have, ER-2010-0036, and  
11 again, the suggestion that something untoward is going on  
12 or might be going on or might be thought to be going on.

13                   And it's the same sort of supposition and  
14 innuendo, frankly, that polluted the whole process in the  
15 first place. I would just urge the Commission to keep  
16 these comments in context, that frankly what you need to  
17 take a look at, it's pretty easy, take a look at the  
18 enabling legislation, 386.210, which lays out the  
19 framework of the communications between utilities, the  
20 Commission and other interested parties in cases before  
21 the Commission. And the framework is there, and the  
22 public policy is stated.

23                   I think something else to consider, in  
24 taking a look at Public Counsel's comments that were  
25 filed, in approximately seven pages of commentary, very

1 little is said about the enabling legislation. That's the  
2 point that I think you need to keep in mind as point  
3 central in this discussion is what is -- what has the  
4 General Assembly told the Commission, what does the law  
5 say? The rule ought to comport with what the law says,  
6 and I think the guidance is fairly clear.

7 And with that I'll conclude my comments.  
8 If the Commission has any questions to put to me about the  
9 comments that have been filed by MEDA or the comments that  
10 I've made here this morning, I'm pleased to answer those.

11 JUDGE WOODRUFF: Chairman Clayton, do you  
12 have any questions?

13 CHAIRMAN CLAYTON: No questions, Judge.

14 JUDGE WOODRUFF: Commissioner Davis?

15 COMMISSIONER DAVIS: I do have a question  
16 for Mr. Boudreau. Okay. Mr. Boudreau, looking on page 5  
17 of your comments.

18 MR. BOUDREAU: Yes.

19 COMMISSIONER DAVIS: Looking at that, is  
20 that Roman numeral IV, is that -- very top of page 5?

21 MR. BOUDREAU: At the very top of the page,  
22 yes.

23 COMMISSIONER DAVIS: Talks about  
24 information regarding Federal Energy Regulatory Commission  
25 matters, including Regional Transmission Organization

1 related matters or Regional Reliability Organization  
2 related matters.

3 MR. BOUDREAU: Yes.

4 COMMISSIONER DAVIS: So, for instance, if  
5 it's not -- if it's not in one of these enumerated  
6 paragraphs, then is it out?

7 MR. BOUDREAU: I think the enumerated  
8 paragraphs, I called them safe harbor paragraphs, and  
9 they're proposed to the Commission as categories of  
10 communications with regard to or with respect to which a  
11 utility or representative of the utility can contact the  
12 Commission or individual Commissioners to advise them  
13 about circumstances or developments about which they ought  
14 to be made aware. So basically, they're excluded from the  
15 category of ex parte communications.

16 COMMISSIONER DAVIS: Okay. So my question  
17 is, would like the Nuclear Energy Regulatory Commission,  
18 would they be in one of these safe harbors?

19 MR. BOUDREAU: I don't know that they're  
20 specifically addressed in here, and perhaps they ought to  
21 be, and that's one of the -- and that's one of the  
22 problems with -- that's one of the objectives that MEDA  
23 was trying to accomplish here was to give the -- you know,  
24 to deal with matters that the Commission ought to readily  
25 have information on, and sometimes -- and often it's the

1 utilities that have the information at the upshot. It may  
2 be that these -- even these safe harbors are not broad  
3 enough to be adequate for day-to-day use.

4 COMMISSIONER DAVIS: Well, because NERC is  
5 an obvious one. One about Southwestern Power  
6 Administration, which is different than SPP, and then also  
7 like the Corps of Engineers, and --

8 MR. BOUDREAU: Those are all good thoughts.  
9 There may be other -- there may be other categories that  
10 the Commission thinks or would like to have in basically  
11 the safe harbor categories, where if there are  
12 developments that should be brought to its attention, they  
13 ought to be included in here.

14 I don't think these are offered to be  
15 necessarily limited. They're just the ones that, in  
16 discussions with the members of the association, were  
17 thought to be probably the most prominent.

18 COMMISSIONER DAVIS: All right. Thank you,  
19 Mr. Boudreau.

20 MR. BOUDREAU: I guess the point, it may be  
21 appropriate to expand that list along some of the lines  
22 that you've been discussing.

23 COMMISSIONER DAVIS: Okay.

24 JUDGE WOODRUFF: Anything else?

25 COMMISSIONER DAVIS: No.

1 JUDGE WOODRUFF: All right. Thank you,  
2 Mr. Boudreau.

3 MR. BOUDREAU: Thank you.

4 JUDGE WOODRUFF: CenturyLink also filed a  
5 comment. Is there anyone here who would like to speak for  
6 CenturyLink? Good morning.

7 MS. KILPATRICK: Good morning.  
8 (Becky Kilpatrick was sworn in.)

9 JUDGE WOODRUFF: Could you identify  
10 yourself?

11 MS. KILPATRICK: Becky Kilpatrick for  
12 CenturyLink. I don't have much to add. I just wanted to  
13 stand up and repeat that we concur in the entirety of  
14 AT&T's comments before the Commission and support them.

15 JUDGE WOODRUFF: Any questions for  
16 Ms. Kilpatrick, Mr. Chairman?

17 CHAIRMAN CLAYTON: What was that, Judge?

18 JUDGE WOODRUFF: Becky Kilpatrick, did you  
19 have any questions for her?

20 CHAIRMAN CLAYTON: Sorry. No questions.

21 JUDGE WOODRUFF: Commissioner Davis? Thank  
22 you. Public Counsel.

23 (Lewis Mills was sworn in.)

24 JUDGE WOODRUFF: Thank you. Identify  
25 yourself, please.

1                   MR. MILLS: My name is Lewis Mills. I'm  
2 Public Counsel.

3                   Thank you for the opportunity to make  
4 comments this morning. I filed written comments  
5 yesterday. I will try not to repeat them at any great  
6 length this morning, although one thing I will point out,  
7 Mr. Boudreau is quite right that I didn't discuss a lot  
8 about the enabling legislation in my comments, except for  
9 one particular aspect, because I think in large part the  
10 proposed rule complies with the enabling legislation, and  
11 so I don't think there's a whole lot of reason to get into  
12 it.

13                  One of the things that I do disagree with,  
14 and I'll talk a little bit more about the any public  
15 utility argument that some of the utilities are advancing,  
16 but before I get to that, I want to talk about the notion  
17 that MEDA has raised that somehow Section 386.210 has  
18 mandated that the Commission must confer with public  
19 utilities and that the Commission cannot carve out a  
20 period of time in which it will not.

21                  And I think that's just frankly  
22 inconsistent with the language of the statute. 386.210(1)  
23 says the Commission may confer in person with a group of  
24 different entities. It doesn't say the Commission must.  
25 So I don't think that the Commission's rule as drafted

1    which carves out a particular period before the filing of  
2    a case is in conflict with that.  It's perfectly  
3    consistent with that.  The Commission may confer means  
4    that the Commission may also determine that there are  
5    times when it does not want to confer.  The statute  
6    doesn't say must.  It says may.  And I think MEDA's  
7    reading is inconsistent with that word.

8                   This particular hearing this morning is the  
9    culmination of a fairly long, I would say arduous,  
10   circuitous process that has involved at least three other  
11   docketed cases before the Commission, docketed files,  
12   however you want to refer to those.  And just so that we  
13   have some of that information for the Commission to  
14   consider as it considers the proposed rules, I'd like to  
15   have a few exhibits marked.

16                   The first is the Motion for Proposed  
17   Rulemaking which -- that I filed along with a number of  
18   other entities to be open Case No. AX-2008-0201.  I think  
19   it's important to look at the proposed rule that was  
20   attached to that and the rationale that virtually all of  
21   the representatives of consumers and consumer groups that  
22   regularly appear before the Commission concurred in  
23   filing, because I think it's -- it's informative both to  
24   see how much of the currently proposed rule has in common  
25   with that and then how it disagrees.  I think there's, in



1 fact, more in common than there is difference.

2 JUDGE WOODRUFF: I'll go ahead and mark  
3 this as Exhibit 1, and it will be admitted into the  
4 record.

5 (EXHIBIT NO. 1 WAS MARKED AND RECEIVED INTO  
6 EVIDENCE.)

7 MR. MILLS: Just then so the record is  
8 complete, in that same case, AX-2008-0201, the same  
9 entities that filed the original rule after having had a  
10 roundtable discussion, as it were, with a number of  
11 entities and the Commission, those same entities filed a  
12 revised rule which took into account some of the issues  
13 that were raised at that roundtable.

14 And, in fact, some of those issues that  
15 were changed are to reflect two of the three guiding  
16 principles that MEDA has consistently espoused and,  
17 frankly, with which Public Counsel does not disagree.  
18 Public Counsel agrees these are three important  
19 principles, perhaps not the only three, but they are  
20 important and the rules should adhere to them.

21 The revised rules that I just handed out  
22 which I assume will be marked as Exhibit 2 --

23 JUDGE WOODRUFF: They are Exhibit 2.

24 MR. MILLS: -- took into account two of  
25 those. One, it made clear that the rule as proposed would

1 not apply to rulemakings and other legislative-type  
2 activities of the Commission; and two, that they -- that  
3 the rules would apply not just to utilities and utility  
4 representatives but to all parties before the Commission.

5 So that's the -- some of the primary  
6 differences between Exhibit 1 and Exhibit 2 in terms of  
7 the rules.

8 JUDGE WOODRUFF: Exhibit 2 will be admitted  
9 or accepted into the record.

10 (EXHIBIT NO. 2 WAS MARKED AND RECEIVED INTO  
11 EVIDENCE.)

12 COMMISSIONER DAVIS: Judge, can I just ask  
13 that we take notice of the entire record of AX-2008-0201,  
14 and then that way we're not just taking pieces of the  
15 record?

16 JUDGE WOODRUFF: Certainly. I think as a  
17 practical matter this is the entire record. Is there  
18 anything else in there, Mr. Mills?

19 MR. MILLS: No. There are -- there may be  
20 a transcript. I know there are comments of other entities  
21 that were filed later as written documents. So there is  
22 significantly more documentation than these two. These  
23 are actually two of the fairly early filings in the case,  
24 and there are another couple of rounds of comments after  
25 that.

1                   MR. BOUDREAU: I would concur in the  
2 Commissioner's idea that the Commission just take notice  
3 of the filings of all the parties in the relevant dockets,  
4 just so that everything's taken in context.

5                   JUDGE WOODRUFF: The Commission will take  
6 notice of those, that file.

7                   MR. MILLS: Judge, if I may inquire, I'm  
8 also going to be offering as exhibits the report that was  
9 the culmination of Case No. AO-2008-0192. If it would --  
10 if it would be your preference, the Commission could  
11 simply take judicial -- or official notice of the record  
12 in that case as well.

13                  JUDGE WOODRUFF: What was that case number  
14 again?

15                  MR. MILLS: AO-2008-0192, which was a  
16 review of the Missouri Public Service Commission standard  
17 of conduct rule and conflicts of interest statute that  
18 then Chairman Davis conducted culminating in a report. I  
19 was going to offer the report itself, but if you would  
20 prefer to take notice of that case and have the entire  
21 record in this case, that would be fine with me as well.

22                  JUDGE WOODRUFF: That would be acceptable.  
23 We'll take notice of that case as well.

24                  MR. MILLS: And then the third case I think  
25 that bears on how we got to where we are today is Case

1 No. AW-2009-0313, and along the same lines, I'd request  
2 that the Commission take official notice of all the  
3 filings in that case as well. That's the workshop case  
4 that immediately preceded this case.

5 JUDGE WOODRUFF: The Commission will take  
6 notice of that. If there is anything specific about that  
7 case, I don't want to have to comment on the entire --  
8 when I'm writing the rulemaking, I don't want to --

9 MR. MILLS: I understand.

10 CHAIRMAN CLAYTON: Judge, can I ask a  
11 question, Judge? Excuse me, Mr. Mills. I hate to do  
12 this. What is the process for taking notice of other  
13 cases in a rulemaking docket? Does it work -- would it  
14 work the same way as in a contested case docket?

15 MR. MILLS: I would assume so.

16 JUDGE WOODRUFF: As I see it, the documents  
17 in those files are before the Commission. As parties  
18 refer to them in comments, the Commission can make  
19 reference to those documents in writing its Final Order of  
20 Rulemaking. I think that's all it means. I don't want to  
21 have to try and in the Final Order of Rulemaking try and  
22 summarize all those earlier cases in general, and I'm not  
23 sure what response I could put to that.

24 So that's why I made the earlier comment  
25 about if you have anything specific about those cases that

1   you particularly want to bring to the Commission's  
2   attention, please do so.

3                   CHAIRMAN CLAYTON:  I understand.  I don't  
4   mean to belabor this.  I think we're going to need to get  
5   an opinion from maybe Mr. Reed, because as you establish a  
6   record in a rulemaking docket, it is different than a  
7   contested case docket where we can take administrative  
8   notice.  I just have a question that if the actual written  
9   word isn't in the record, I'm not sure whether we can  
10  contemplate that word that hasn't been turned over just by  
11  reference.  I don't know if that flies in the face of  
12  Chapter 536.

13                   That's the only question that I had, and  
14  maybe we can get some clarification and some research on  
15  that down the road.  I didn't mean to interrupt.  Excuse  
16  me.

17                   JUDGE WOODRUFF:  That's a good  
18  interruption.  I want to make sure that the record is  
19  clear also.  As I say, when I write the Final Order of  
20  Rulemaking, I want to be clear on what we're actually  
21  discussing.  Mr. Mills, any comment on that?

22                   MR. MILLS:  No.  I think there are another  
23  couple of documents that because there's some -- at least  
24  to my mind, it's unclear exactly how official notice would  
25  work, I'd like to have marked as exhibits.

1 JUDGE WOODRUFF: I think that would be  
2 helpful.

3 MR. MILLS: And the next one that I wanted  
4 to talk about is the report that was the final report in  
5 AO-2008-0192. And just so the record is clear, this  
6 report, including the appendices, was something I think  
7 north of 160 pages. This is the text of the report itself  
8 and not all the appendices.

9 I think one of the -- one of the things  
10 that I want to highlight in that report, and it's the --  
11 the Chairman's conclusions, I believe, was the title of  
12 the section that begins on about page 55. One of the  
13 things that it recommends that is not reflected in the  
14 current rule that I think would be a beneficial addition  
15 is the notion of making Commissioners' calendars and  
16 appointments open records so that parties to cases can  
17 know who the Commissioners have been talking to and when  
18 and even the subjects that were to be talked about.

19 So I think -- I think some of the  
20 recommendations that arise, and particularly the one about  
21 more openness in terms of who Commissioners are meeting  
22 with and when, would be a beneficial addition to the  
23 currently proposed rule.

24 JUDGE WOODRUFF: All right. This report  
25 you've offered has been marked as Exhibit 3, and it will

1 be a part of the record.

2 (EXHIBIT NO. 3 WAS MARKED AND RECEIVED INTO  
3 EVIDENCE.)

4 MR. MILLS: Now, one --

5 CHAIRMAN CLAYTON: Judge, can I --

6 JUDGE WOODRUFF: Commissioner Clayton.

7 CHAIRMAN CLAYTON: I'm sorry. I had a  
8 question just on that last point. Shall I wait for the  
9 end? I didn't know what his schedule was.

10 MR. MILLS: You're welcome to ask questions  
11 as I go along. Please go ahead.

12 CHAIRMAN CLAYTON: On the calendar piece  
13 where you're requesting that the calendars be open  
14 records, are you suggesting that today they are not open  
15 records?

16 MR. MILLS: Well, I think what the  
17 Commissioner's report contemplated and what I'm talking  
18 about is not something that can be, you know, discovered  
19 through a Sunshine request, but something that is more  
20 easily accessible, I mean open in a more -- a more general  
21 sense and not in the technical sense as contemplated by  
22 the Sunshine Law. I think you may be right that under the  
23 Sunshine Law they may be open records.

24 I think what then Chairman Davis was  
25 talking about, what I'm talking about is sort of having

1    them more publicly and readily accessible, open in that  
2    sense.

3                   CHAIRMAN CLAYTON:  Can you identify the  
4    type of things that need to be on that public calendar, so  
5    to speak?

6                   MR. MILLS:  I'm sorry.  I didn't hear the  
7    question.

8                   CHAIRMAN CLAYTON:  Can you include the type  
9    of appointments that would need to be included on the  
10   public calendar?  The reason I ask, I mean, there's a lot  
11   of stuff that I have on my Outlook calendar.  Most of it  
12   is certainly related to work, but --

13                  MR. MILLS:  I understand.  Certainly I  
14   don't think the public needs to know when you go to the  
15   dentist, for example, but --

16                  CHAIRMAN CLAYTON:  That's a fine example.  
17   I just went last week and it's on there.  I don't know if  
18   I just want to have a link on the website that may have  
19   that connection or if I have a soccer game or a children's  
20   activity that I may have on there to make sure I cross  
21   reference.

22                  MR. MILLS:  No.  I think in any -- no  
23   matter what the rule says, there's always going to be some  
24   room for interpretation, and there really needs to be, and  
25   I think having -- having Commissioners have the discretion



1 to, yes, this is a work-related, this is the kind of  
2 appointment that parties that appear before us in the  
3 public should know about, and this is a dentist  
4 appointment and that doesn't fall in that category, I  
5 think -- I certainly think that the rule can be drafted to  
6 accommodate that difference.

7 CHAIRMAN CLAYTON: Do you provide language  
8 that would identify what you think needs to be included  
9 and what things do not need to be included?

10 MR. MILLS: I have not provided specific  
11 rule language at this point, no.

12 CHAIRMAN CLAYTON: Would you expect that a  
13 calendar would include appointments with Staff on  
14 administrative issues within the PSC?

15 MR. MILLS: I would assume that that would  
16 be on your calendars. I don't know that that's -- that  
17 that kind of administrative internal workings needs to be  
18 made public. I think that's the kind of thing that,  
19 depending on what you're talking about, could fall either  
20 way.

21 If you're talking about, you know, with --  
22 just to bring up an example, if you're talking with Adam  
23 McKinney about Southwest Power Pool issues, then I think  
24 that would be public. If you're talking with Connie  
25 Landolt about expense reports, then I think it doesn't.

1                   CHAIRMAN CLAYTON: First of all, I think  
2 it's all public. I think if there is something on my  
3 Outlook calendar, it is all public. I don't think there  
4 is any closed records. And if I -- if there is something  
5 that specifically references maybe a personnel issue, that  
6 would be just about it. So I would argue that our entire  
7 record is public.

8                   I'm just -- my question comes down to the  
9 ease of access of certain issues. So if you have a link  
10 or a public calendar, I'm trying to figure out what would  
11 go on the public -- what you believe should go on the  
12 public calendar, what should go on the public but just not  
13 as easily accessible calendar. May have some personal  
14 items. May have some administrative items, that sort of  
15 thing.

16                  I'm trying to find that line that would  
17 satisfy your concerns. You're saying if there's going to  
18 be some meeting with a utility, I completely follow that.  
19 I'm getting into the grayer areas, and I'm trying to get  
20 some feedback and direction on where you think the line  
21 should be drawn in those gray areas.

22                  MR. MILLS: Well, and I -- certainly we can  
23 come up with example after example, but I think the two I  
24 just gave tend to outline at least my thinking on it, you  
25 know, that if it's an administrative matter dealing with

1 the Staff, that's one thing. If it's dealing with  
2 substantive regulatory issues like the Southwest Power  
3 Pool or NERC or, you know, storm outages, anything along  
4 those lines, I would think that would be public.

5 CHAIRMAN CLAYTON: Is that -- could you  
6 think about that and supply a list or just summarize those  
7 in writing for the record?

8 JUDGE WOODRUFF: The record has to close  
9 after today, Mr. Chairman. We can't --

10 CHAIRMAN CLAYTON: Perfect timing. All  
11 right. Well, I'll stop asking questions as far as --

12 MR. MILLS: I can -- I can file something  
13 today if that's within the scope of the Commission's  
14 order. I'm not sure that it is. The written comment  
15 period closed yesterday.

16 JUDGE WOODRUFF: The comment period  
17 actually closed yesterday. We can't really take anything  
18 after the hearing today.

19 MR. MILLS: I don't think it would be that  
20 difficult to craft a rule provision that says, you know,  
21 internal administrative matters are not required to be as  
22 public as matters that deal with substantive issues having  
23 to do with the regulation of utilities.

24 CHAIRMAN CLAYTON: How about -- how about  
25 staff meetings on rulemaking issues that haven't been

1    opened yet?

2                   MR. MILLS:  Well, I mean, I think -- I  
3    don't want to -- I don't want to give you the wrong  
4    impression about what I'm talking about.  I don't know  
5    that those meetings have to be open meetings where people,  
6    you know, the public is invited, but I think it would  
7    certainly be a good idea that those be -- that the fact  
8    that those discussions are taking place be available for  
9    members of the public and utilities and Public Counsel to  
10   find out about.

11                  CHAIRMAN CLAYTON:  Well, okay.  Go ahead  
12   and -- go ahead with your comments.

13                  MR. MILLS:  One of the things that I really  
14   want to talk about is the interpretation of the rest of  
15   386.210(1) because really this flows through into  
16   386.210(3), because 386.210(3), which talks about when you  
17   can have these conferences, refers back to the ones that  
18   are referenced in 386.210(1).

19                  And there are clearly two different  
20   interpretations of what 386.210(1) says, and it has to do  
21   with the phrase any public utility or similar commission  
22   of this and other states and the United States of America.  
23   And I think I would have more -- you know, I could be  
24   convinced of Mr. Bub's position, and I think this is the  
25   one that virtually all the utilities take, not just

1 Mr. Bub, but I'll pick on him because he filed it first  
2 yesterday. If there was an additional comma after any  
3 public utility, and if the word, you know, similar public  
4 utility commission or something came in there, but I think  
5 the way you read that phrase between the commas, it's  
6 talking about any public utility or similar commission of  
7 this and any other state of the United States of America.

8 I don't think there's any way to read the  
9 similar commission as referring all the way back to the  
10 beginning of the sentence. I think if it said a public  
11 utility or any similar commission, that would be one  
12 thing, but that's not what it says. A public utility or  
13 similar commission. I don't think there's any way to read  
14 that other than to refer to any public utility meaning any  
15 public utility commission.

16 We can argue about that, but I just -- you  
17 know, I think that there really isn't any principle of  
18 statutory construction that would let you simply take that  
19 word similar, pull it out of this phrase that's set off  
20 with commas and make it refer back to a word several  
21 clauses ago back at the beginning of the sentence. It  
22 just doesn't make sense to read it that way.

23 And then I guess sort of as a fall-back  
24 argument in case that fails, the other argument is that,  
25 you know, the Legislature when it says members of the

1 public, of course, means utility representatives as well.  
2 You know, I don't -- I think that's even a bigger stretch.  
3 I think if the Legislature meant to refer to utilities in  
4 particular, it would have said utilities. It would not  
5 have said members of the public, meaning that by members  
6 of the public we mean, of course, utilities as well.

7 I think the way this is drafted makes it  
8 very clear that the Legislature was conscious that the  
9 Commission regulates utilities, but it needs to refer and  
10 confer with members of the public, and it may need to  
11 confer with its peers on other commissions in a way that  
12 it doesn't confer with utilities that it regulates simply  
13 because of the nature of the Commission's business.

14 The Commission is in many instances called  
15 upon to adjudicate matters that deal with public  
16 utilities, and I don't think that the Legislature is  
17 somehow oblivious to that fact. I think that's a given in  
18 what they're drafting, and I think to assume that the  
19 Legislature thinks that regulated utilities, oh, they're  
20 just like regular old members of the public like everybody  
21 else is absurd, frankly.

22 I think that's really all that I wanted to  
23 elaborate on beyond my written comments that I filed  
24 yesterday. I'd be happy to answer questions.

25 JUDGE WOODRUFF: Thank you. Chairman

1 Clayton, do you have any further questions for Mr. Mills?

2 CHAIRMAN CLAYTON: Let me ask just,  
3 Mr. Mills, can -- just a quick summary on exactly what  
4 you're asking for us to contemplate as we conclude this  
5 up, and I read through your comments and they're pretty  
6 lengthy. A lot of it is rehashing what has happened in  
7 the past, and that may or may not be helpful in describing  
8 where we are. I certainly know how we got to this point,  
9 and I know, I'm aware of all the dockets that have been  
10 referenced.

11 But what I wanted to ask is, summing up  
12 where you stand on the rule, first of all, you believe  
13 that the 30-day period prior to the case should be  
14 extended to 120 days. That is one of your  
15 recommendations; is that correct?

16 MR. MILLS: That is correct.

17 CHAIRMAN CLAYTON: The second change would  
18 be implementation of some sort of easily accessible public  
19 calendar, is that -- does that accurately summarize what  
20 you're recommending?

21 MR. MILLS: That's also correct.

22 CHAIRMAN CLAYTON: Okay. And what else?

23 MR. MILLS: The other -- I'm sorry. I  
24 didn't hear that.

25 CHAIRMAN CLAYTON: I was just saying, what

1 other specific recommendations to this language that we  
2 have before us today?

3 MR. MILLS: Okay. Specific recommendations  
4 of the language that you have before you, in addition to  
5 those, is that in -- I'm sorry. I've got -- I've just  
6 noticed a typo. No, I didn't.

7 In 4 CSR 240-020(6)(B), which is one of the  
8 reporting requirements, it allows recording or  
9 transcription as an alternative to a summary made by the  
10 person who initiates the extra-record discussion. And my  
11 proposed change is that a recording or transcription ought  
12 to be the default way of reporting such a discussion, and  
13 that the only time that a description would be allowed is  
14 if there is a valid reason, explanation why recording or  
15 transcription could not take place.

16 So that all of -- all of the things that  
17 are required to be reported by (6)(B) would be required to  
18 be reported or transcribed rather than simply summarized  
19 unless there is some reason why they can't be recorded or  
20 transcribed. Say, for example, if a conversation took  
21 place in the hallway at NARUC and nobody had a tape  
22 recorder, then you would simply say, you know, I talked to  
23 commissioner so and so yesterday, here's what we talked  
24 about, and that's the best documentation you can have.

25 On the other hand, if there's a scheduled



1 meeting set up at the Commission's offices, if somebody  
2 comes to a Commissioner's office, there's no really valid  
3 reason why that couldn't be recorded or transcribed  
4 without a whole lot of trouble. So I think that should be  
5 the default when it's available.

6 And those are really the only specific  
7 changes that I'm proposing to the -- for the proposed  
8 rule.

9 CHAIRMAN CLAYTON: So --

10 MR. MILLS: Let me add one more. There is  
11 a provision in, I believe it's section 9 that calls for --  
12 calls for sanctions, and really the sanctions are there, I  
13 think, to spur the person who initiates an extra-record  
14 discussion to file either the recording or the summary of  
15 it. And I think that's probably a good provision, but I'm  
16 not sure that it's entirely adequate.

17 I think there are situations where the  
18 threat of sanctions may not be all that meaningful. So I  
19 think there ought to also be an obligation on the part of  
20 commissioners, presiding officers and advisory staff to  
21 file in the event that the initiating party doesn't file.

22 CHAIRMAN CLAYTON: If the other party  
23 doesn't file?

24 MR. MILLS: Right.

25 CHAIRMAN CLAYTON: Is that how you ended



1     that's different from walking around with a tape recorder.

2                     CHAIRMAN CLAYTON:   Okay.   Well, and I don't  
3     mean to be flippant.   I just -- let me ask the question  
4     this way.   Maybe I misunderstand your recommendation.   The  
5     recommendation is only for transcription of conversations  
6     with employees of the utility as opposed to any potential  
7     stakeholder; is that correct?

8                     MR. MILLS:   Let me see if I can answer  
9     that.

10                    CHAIRMAN CLAYTON:   I guess, for example, I  
11     would suggest that if -- let's assume that we don't have  
12     the slew of rate cases that we have right now.   Now is a  
13     terrible time to be talking to anybody because everybody  
14     is in.   We've got people from all over the state that are  
15     involved.

16                    Assume no rate cases are filed right at  
17     this time, but still potentially these conversations would  
18     include any attorney that would practice before us  
19     potentially, anyone from your staff, anyone from our own  
20     staff, anyone from any stakeholder group or business group  
21     or anything like that, there would be a potential for  
22     discussion of something that would touch on some case.

23                    I'm trying to get a handle on what type of  
24     recording beyond just filing a notice of disclosure on  
25     something that's already been filed.

1                   MR. MILLS: This -- and if you have the  
2 rule in front of you, what I'm talking about is provision  
3 (6)(B), which is already somewhat narrow, and really all  
4 I'm suggesting is to flip and -- because (6)(B) already  
5 talks about making a recording or transcription, and what  
6 I'm talking about is simply making that the preferred  
7 method of preserving these conversations rather than  
8 simply an alternative to a summary.

9                   CHAIRMAN CLAYTON: Okay. So that would  
10 be -- would that be only for the regulated utility, then?

11                  MR. MILLS: I'm sorry. I didn't hear the  
12 question.

13                  CHAIRMAN CLAYTON: That would only be with  
14 conversations with the regulated utility, then?

15                  MR. MILLS: No. This is with -- this is  
16 with anyone, any person who initiates an extra-record  
17 communication regarding a pending case.

18                  CHAIRMAN CLAYTON: Okay. All right. Thank  
19 you. I'm sorry to interrupt.

20                  JUDGE WOODRUFF: Anything else, Chairman  
21 Clayton? Chairman Clayton, did you have any other  
22 questions?

23                  CHAIRMAN CLAYTON: I'm sorry. I keep  
24 putting it on mute, then you keep asking me a question.  
25 The answer is no.

1 JUDGE WOODRUFF: All right. Thank you.

2 Commissioner Davis?

3 COMMISSIONER DAVIS: Okay. Mr. Mills, let  
4 me go back to page 2, numbered paragraph 3 of your filing.  
5 You make the statement that there is not even any  
6 indication that the Commission complied with Section  
7 536.041, RSMo. 2000, which required the Commission to  
8 furnish a copy thereof to the Joint Committee on  
9 Administrative Rules and to the Commissioner of  
10 Administration together with the action, if any, taken or  
11 contemplated by the agency as a result of such petition  
12 request and the agency's request therefor.

13 Did you ever -- first of all, do you know  
14 Cindy Kadlek?

15 MR. MILLS: I know the name. No, I don't  
16 know her.

17 COMMISSIONER DAVIS: Okay. So did you ever  
18 contact Cindy Kadlek, the executive director in the Joint  
19 Committee of Administrative Rules, to see if we filed  
20 anything?

21 MR. MILLS: No. But in other cases the  
22 Commission has filed that in the docket system. You did  
23 not in this case.

24 COMMISSIONER DAVIS: All right. In your  
25 filing you listed a couple of hypothetical situations. I

1 want to ask you about a third hypothetical situation.

2 MR. MILLS: Okay.

3 COMMISSIONER DAVIS: Okay. Can you pretend  
4 to be Steve Kidwell? Can you just pretend?

5 MR. MILLS: Yeah. I'm not sure that I've  
6 had enough coffee that I can really capture that level of  
7 animation, but I'll do my best.

8 COMMISSIONER DAVIS: All right. If you  
9 would indulge me here and pretend to be Steve Kidwell. So  
10 let's say Ameren was filing a rate case on the 3rd of  
11 July, and we were having a Commission meeting on the 3rd  
12 of July, and someone comes in and says, I need to make a  
13 presentation to the Commission. And they make the case  
14 that their electric rates are too high compared to what  
15 everyone else pays, and it's clearly information designed  
16 to sway the opinion of the Commissioners, but it's not  
17 filed in the case, but it's being done, you know, under  
18 the premise of, well, it's an agenda meeting, everyone  
19 knows. And do you think that's appropriate?

20 MR. MILLS: I don't think that's  
21 appropriate, but I think that's a different kind of  
22 communication than the one that is not on the record and  
23 is not -- I mean, on the record, by on the record I mean  
24 on the record in the case but recorded and publicly  
25 accessible. So no, I don't think that's appropriate, but

1 I think the fact that UE can watch, can be present at the  
2 presentation, can see the DVD from the agenda later, I  
3 think that gives them the opportunity to respond to it.

4 I think the biggest concern that a lot of  
5 these rules are trying to address is meetings that aren't  
6 publicly accessible.

7 COMMISSIONER DAVIS: Okay. But what if it  
8 never gets put into evidence in the case, then how does  
9 the utility address it?

10 MR. MILLS: I mean, if they're getting  
11 ready to file a case, they can -- well, I think under your  
12 scenario they would probably have been filing the  
13 testimony that same day, but, you know, they can tailor  
14 their testimony to respond to those things.

15 The issue is if, you know, that  
16 communication was made in private and the utility doesn't  
17 even know that it happened, Commissioners may -- it may in  
18 some way, subtle or unsubtle, influence the Commissioners  
19 in ways that the utility doesn't even know about. It's  
20 unfair going either way. If I were to go meet with  
21 Commissioners, you know, a week before a rate case knowing  
22 it was going to happen and try to suddenly plant seeds  
23 about, you know, utility's overearnings, that would be  
24 just as bad as the utility coming in trying to plant seeds  
25 in a different way.

1                   COMMISSIONER DAVIS: So if one of the  
2 consumer advocates -- first of all, are you here speaking  
3 on behalf of Public Counsel today or are you speaking on  
4 behalf of the coalition that filed the Motion for Proposed  
5 Rulemaking back, I'm not even sure what the date on this  
6 was, but -- oh, December 19th, 2007?

7                   MR. MILLS: I am speaking only on behalf of  
8 Public Counsel.

9                   COMMISSIONER DAVIS: Okay. So if one of  
10 the signatories to that motion were here in the Commission  
11 offices up on the 9th floor last week lobbying for who  
12 knows what, then it's your position that they should --  
13 should be filing a statement, too, saying that, hey, this  
14 is what I was up here for and this is what I was doing?

15                  MR. MILLS: Yes.

16                  COMMISSIONER DAVIS: Okay.

17                  MR. MILLS: And just to further elaborate  
18 on that, one of the other points that MEDA has raised, and  
19 which I agree, is that the rules or Commission practices  
20 should not stymie the, I think, vigorous and robust  
21 exchange of information, and I agree with that. But I  
22 also think that that information ought to be more readily  
23 accessible and that other parties ought to know what kind  
24 of information is flowing around.

25                  COMMISSIONER DAVIS: Okay.



1                   MR. MILLS: I don't want to stop it. I  
2 just want to know about it.

3                   COMMISSIONER DAVIS: Right. A little  
4 earlier in, I believe, some of the questions from Chairman  
5 Clayton you talked about impartiality. Do you agree that  
6 the obligation of impartiality extends to all Commission  
7 employees? It's in our rules.

8                   MR. MILLS: I'm not sure exactly what you  
9 mean by the obligation of impartiality. I think that  
10 it's -- you know, in terms of a requirement on the  
11 decision-maker, a decision-maker is required to be  
12 impartial. I think in many instances the Commission Staff  
13 acts as an advocate, and almost by definition an advocate  
14 is not impartial. I certainly don't -- I'm an advocate.  
15 I don't consider myself to be impartial.

16                  COMMISSIONER DAVIS: I understand. But the  
17 Commission Staff has different duties than the Office of  
18 Public Counsel.

19                  MR. MILLS: They do, but in a lot of roles  
20 they're -- you know, I'm not a Staff member, and I can't  
21 really put words in their mouth, but in a lot of  
22 situations they are required to advocate for a position.

23                  COMMISSIONER DAVIS: Okay. But shouldn't  
24 they be advocating for what they view to be the impartial  
25 position, or are they supposed to be consumer advocates,

1 too?

2 MR. MILLS: I don't think they're supposed  
3 to be consumer advocates, but in some situations they're  
4 advocating for positions that are contrary to what the  
5 utility advocates, and --

6 COMMISSIONER DAVIS: Right. But obviously  
7 the utility position is not going to be an impartial one  
8 either.

9 MR. MILLS: Right. I think that's just a  
10 feature of the advocacy system that prevails in contested  
11 cases.

12 COMMISSIONER DAVIS: Do you agree that  
13 Staff has a lot of influence in contested cases?

14 MR. MILLS: Staff is in almost every case  
15 the most well equipped, most involved party other than the  
16 utility, and I think, yes, that gives them a lot of  
17 influence.

18 COMMISSIONER DAVIS: Okay. So let's say  
19 you're Mr. Pendergast now.

20 MR. MILLS: Okay. Never give up. Never  
21 say die.

22 COMMISSIONER DAVIS: This will be  
23 hypothetical -- this will be hypothetical No. 4.

24 MR. MILLS: Okay.

25 COMMISSIONER DAVIS: I think you had two

1   hypotheticals.  I gave you one.  Now I'm going to give you  
2   a second one.  And let's say that you're litigating a case  
3   here in front of the Commission, and you've got the  
4   executive director of the Commission, you've got the head  
5   of the finance division, you've got your deputy general  
6   counsel, and they are eating lunch at Mortimer Kegley's  
7   every day with one of the attorneys that you are  
8   litigating a case against.  Do you think -- doesn't  
9   that -- would that give you cause for concern at all?

10                   MR. MILLS:  Who's there?  The finance --

11                   COMMISSIONER DAVIS:  Let's say you've got  
12   Wes Henderson, let's say you've got Bob Schallenberg,  
13   let's say you've got Nathan Williams, and let's say you've  
14   got Mr. Coffman, and they're eating their lunch every day  
15   during the pendency of your rate case.

16                   MR. MILLS:  The only part of that that  
17   gives me pause is I don't really know that I fully  
18   understand Wes Henderson's role as it pertains to the  
19   Commission and the Staff.  Certainly if you took that out  
20   of the picture, if it was just the other three, I don't  
21   see how the utility could have a reason to complain about  
22   that.

23                   I mean, none of those people have any sort  
24   of an adjudicatory role in the pending case, except as I  
25   said, I don't know exactly how Mr. Henderson relates to

1 the Commissioners themselves as opposed to the Staff.

2 COMMISSIONER DAVIS: Okay. Last question,  
3 Mr. Mills. What about attorneys filing knowingly false  
4 statements with the Commission? If an attorney does that,  
5 do you think there are other rules in place that already  
6 cover that, or do you think we need to do something about  
7 that?

8 MR. MILLS: Well, certainly if there aren't  
9 rules against that, there ought to be. Whether that ought  
10 to be part of a rule regarding ex parte and extra-record  
11 communications, I don't know. But it certainly ought to  
12 be prevented by the Commission's rules if it's not already  
13 prevented by the rules of judicial conduct -- I mean  
14 professional conduct.

15 COMMISSIONER DAVIS: All right. Thank you,  
16 Mr. Mills.

17 JUDGE WOODRUFF: Mr. Mills, I have a  
18 question for you, too. MEDA proposed that the Commission  
19 reinstitute part of the rule that we're rescinding dealing  
20 with conduct outside of the hearing by parties. Does  
21 Public Counsel have a position on that?

22 MR. MILLS: I certainly think that there  
23 ought to be -- and I haven't gone through and compared  
24 word for word what was taken out and what is proposed in  
25 there now to find out exactly what the differences are. I

1 don't have a problem with there being a requirement that  
2 attorneys -- and again, like I just said to Commissioner  
3 Davis, I don't know that it necessarily needs to be in the  
4 ex parte and extra-record communications rule, but I  
5 certainly don't have a problem, in fact, I think it's  
6 probably a good idea that the Commission's rules state  
7 that attorneys need to comply with the Code of  
8 Professional Conduct.

9 I think what Mr. Boudreau was suggesting,  
10 if I'm not mistaken, is that the Commission adopt  
11 requirements in a previous version of the Code of  
12 Professional Conduct rather than the current version. And  
13 like I said, I haven't gone through and compared line for  
14 line, word for word how they differ. I don't know that I  
15 necessarily have a problem with it.

16 JUDGE WOODRUFF: Okay. Thank you. That  
17 was all the parties that filed written comments. Is there  
18 anyone else here who would like to make oral comments?  
19 Mr. Coffman.

20 MR. COFFMAN: Yes. I'll be very brief.

21 JUDGE WOODRUFF: Please raise your right  
22 hand.

23 (John Coffman was sworn in.)

24 MR. COFFMAN: I simply wanted to go on  
25 record on behalf of two of my clients, AARP and the

1 Consumers Council of Missouri. We're in complete  
2 agreement with the Office of Public Counsel's comments and  
3 recommendations in this matter. I won't go over them.

4 But I would state that I'm also in general  
5 agreement with the principles stated by Mr. Boudreau  
6 regarding the fact the rules should apply equally to all  
7 parties and should be -- should promote vigorous and  
8 robust communication and make those distinctions between  
9 contested cases and legislative matters and other matters  
10 for which there aren't the same restrictions.

11 I would also concur on the last point just  
12 made that the Commission with regard to lawyer conduct  
13 during proceedings should be consistent with the current  
14 Code of Professional Conduct. I think that the extent  
15 that it is inconsistent could create some difficulties,  
16 and this would be an opportunity to make sure that the  
17 Commission's rules are consistent with what the Supreme  
18 Court has set down, the Missouri Supreme Court, for  
19 Missouri attorneys, and as well as other free speech cases  
20 that relate to the conduct of parties and their attorneys.

21 But I want to make sure that I do mention  
22 specifically the conundrum that was the main issue that  
23 led to these arduous workshops and discussions, and that  
24 is the issue of an anticipated case or reasonably foreseen  
25 matters, and I think the Commission has done a very good

1 job in its rule, although we do believe, as does the  
2 Public Counsel, that a closer to a three or four month  
3 period would be more appropriate than the 30 days that the  
4 Commission has proposed in this rule to be the definition  
5 of an anticipated case.

6 That certainly is an important matter to  
7 us, just as it is in normal civil court, that a judge not  
8 be communicated with about something that is clearly  
9 coming up, and the approach of a certain number of days is  
10 an appropriate way to do that. We believe the Commission  
11 should go further than 30 days on that.

12 But the rule overall, the vast majority of  
13 it is definitely an improvement over what we have and  
14 certainly I think worth the arduous process that we've  
15 gone through.

16 JUDGE WOODRUFF: Thank you, Mr. Coffman.  
17 Chairman Clayton, do you have any questions for  
18 Mr. Coffman?

19 CHAIRMAN CLAYTON: I don't believe I have  
20 any questions. He didn't file written comments, did he?

21 JUDGE WOODRUFF: That is correct.

22 CHAIRMAN CLAYTON: I don't think I have any  
23 questions. Thanks.

24 JUDGE WOODRUFF: Commissioner Davis?

25 COMMISSIONER DAVIS: Thank you,

1 Mr. Coffman.

2 JUDGE WOODRUFF: Thank you. Additional  
3 oral comments? Mr. Kidwell.

4 MR. MITTEN: Judge, AmerenUE did not file  
5 written comments, but Mr. Kidwell has a written statement.  
6 His testimony today likely will deviate slightly from  
7 that. I'll be happy to provide copies to you, to the  
8 Commission and any of the other parties here just for  
9 convenience.

10 JUDGE WOODRUFF: We'll have the transcript.  
11 Let's just go with that. Please raise your right hand.

12 (Stephen Kidwell was sworn.)

13 JUDGE WOODRUFF: Identify yourself.

14 MR. KIDWELL: Sure. Steve Kidwell, Vice  
15 President of Regulatory & Legislative Affairs for  
16 AmerenUE.

17 If it pleases the Commission, I'd like to  
18 give you a little bit of a thought from a business  
19 perspective. We, the Commissioners, Judge Woodruff, Lewis  
20 Mills have seen a lot of each other the last few days, and  
21 I hope that my personal appearance here gives a little bit  
22 of an idea of how important, how serious we take this  
23 rulemaking and what comes out of it.

24 I'm appearing at this hearing to express  
25 AmerenUE's support for comments that have been submitted



1 by MEDA in both the current rulemaking case as well as the  
2 workshop docket that preceded it. I also want to urge the  
3 Commission to adopt the alternative ex parte and  
4 extra-record communications rule language that MEDA  
5 proposed in the workshop docket, Case No. AW-2009-0313,  
6 especially those provisions that create safe harbors for  
7 certain types of communications in lieu of the rule  
8 currently under consideration.

9                   For your convenience, I've attached a copy  
10 of MEDA's proposed alternative language to my written  
11 statement. With the Commission's permission, I would like  
12 to read my statement -- I promise to be brief here -- into  
13 the record. After the conclusion of my statement, I'll be  
14 happy to answer questions from the Commissioners regarding  
15 my statement or the alternate rule proposed by MEDA.

16                   Let me begin by stating that AmerenUE  
17 understands and appreciates the circumstances that  
18 prompted the Commission and the Office of Public Counsel  
19 to review the current rule governing ex parte and  
20 extra-record communications. As a regular participant in  
21 contested cases and other adversarial proceedings before  
22 the Commission, AmerenUE has a vested interest in ensuring  
23 that Commission hearings are conducted in a fair and  
24 impartial manner, that Commission orders reflect sound  
25 regulatory policy and are based on competent and

1 substantial evidence, and that the due process rights of  
2 all parties in contested matters are recognized and  
3 protected.

4 I just want to say that I want -- I  
5 appreciate the comments that Mr. Mills has made today in  
6 terms of trying to protect the rights of all parties. I  
7 think we're on the same page with that.

8 AmerenUE understands that the Commission's  
9 actions, especially in contested matters, must also appear  
10 to be fair and impartial to those who are not directly  
11 involved, because if there is a perception that cases are  
12 not being decided fairly and impartially, the public will  
13 lose faith in the Commission and the decisions it makes,  
14 even if there is no actual impropriety.

15 But AmerenUE believes that the Commission's  
16 proposed rule goes well beyond what is necessary to ensure  
17 that the due process rights of parties to contested  
18 proceedings are protected and that the public's confidence  
19 in the Commission, itself, and in the integrity of its  
20 processes and decisions is preserved.

21 AmerenUE believes that the proposed rule  
22 destroys the balance between the Commission's need to  
23 protect legitimate due process rights on the one hand and  
24 the need to obtain information necessary to fulfill its  
25 regulatory authority outside contested matters on the

1 other. Regular and frank communication between the  
2 Commission, the public utilities it regulates and other  
3 stakeholders who are interested in or affected by the  
4 regulatory process is essential to a healthy and  
5 productive state regulatory environment.

6 AmerenUE believes that one reason the  
7 proposed rule destroys the balance I just mentioned is  
8 that, as MEDA has pointed out in its written comments, the  
9 proposed rule originates from an assumption that open  
10 lines of communication should be discouraged, especially  
11 communications with regulated utilities, and should be  
12 allowed only in exceptional circumstances.

13 Proceeding from this assumption, the  
14 Commission proposed rule governing ex parte and  
15 extra-record communication significantly restricts the  
16 freedom the Commission has enjoyed in the past to freely  
17 communicate with public utilities and others outside  
18 contested cases and to gain from those communications both  
19 information and perspectives that are necessary to  
20 formulate and implement regulatory policies that benefit  
21 all Missourians.

22 Ultimately, these restrictions will only  
23 serve to isolate the Commission and its members from  
24 viewpoints and information from a broad range of  
25 interested parties that would be helpful to the Commission

1 in both identifying important policy issues and in  
2 formulating responses to those issues.

3           Although, as I mentioned a moment ago, the  
4 restrictions affect a broad range of interested parties,  
5 they are disproportionately -- they disproportionately  
6 disadvantage regulated utilities. And unless changes are  
7 made, AmerenUE believes the restrictions included in the  
8 proposed rule will significantly impede the Commission's  
9 ability to meet the broad range of regulatory  
10 responsibilities that exist outside the context of a  
11 contested case and to do so in an informed and  
12 knowledgeable manner.

13           The development of a state energy policy is  
14 one example of an area where unnecessary restrictions on  
15 communications could seriously impede the Commission's  
16 ability to act in a manner that is informed and that  
17 benefits all citizens of the state.

18           While any party to a currently contested  
19 case should avoid discussion of specific issues in that  
20 case, many issues of state energy policy are long term in  
21 nature and would not currently be issues in contested  
22 cases. Examples today from my company include the issues  
23 of climate change, the potential for renewable resource  
24 development in the state, and policies for encouraging  
25 transmission investment.

1                   In grappling with these types of issues, it  
2   seems obvious that the Commission and its members would  
3   greatly benefit from input from a wide range of interested  
4   parties. But the proposed rule erects barriers that  
5   likely will discourage interested parties from  
6   communicating with the Commission, thereby depriving the  
7   Commission of potentially useful information.

8                   It seems obvious that in making decisions  
9   critical to the formulation of a rational state energy  
10   policy, the Commission would benefit from regular  
11   communications with parties interested in issues related  
12   to that policy. In addition to public utilities, the list  
13   of such interested parties includes political leaders,  
14   alternate energy providers, residential and industrial  
15   customers, labor unions, environmental groups, and the  
16   public in general, among others.

17                  Certainly the Commission should be  
18   congratulated on its recent use of workshops to gain  
19   information from interested parties regarding issues that  
20   likely will be the subject of future ratemaking. But  
21   workshops alone are no substitute for the types of frank  
22   exchanges that can only take place if utilities and others  
23   feel free to meet in private with the Commission or its  
24   individual members.

25                  If the Commission unnecessarily restricts

1 its ability to freely communicate with any or all of these  
2 constituencies, it will miss the opportunity to gain  
3 important information and insights that these groups can  
4 provide, as well as the opportunity for early alignment of  
5 utility activities with state energy policies as they are  
6 formulated and adopted.

7 I'd submit to you that right now that  
8 that's where we are today. I -- I have had my job for two  
9 years, and I've had very few, I can count on one hand the  
10 times that I've talked with Commissioners about issues  
11 that I think are important to the state.

12 And while I understand that those contacts  
13 need to be above board, it's my perception that because of  
14 what happened right before I came into my job,  
15 Commission -- the communication environment has just  
16 frozen up, and I find that frustrating. I'd like to see  
17 that everyone has equal access. I think that Lewis made  
18 some good comments about that earlier.

19 Missouri law, specifically Section 386.210  
20 of the Missouri Revised Statutes, already prescribes  
21 standards that govern what types of communications are  
22 appropriate between the Commission, the utilities it  
23 regulates and other interested parties, both within the  
24 context of a contested matter and otherwise.

25 That statute in one form or another has

1    been in effect since 1939, and if the General Assembly  
2    believes the communication standards set out there need to  
3    be supplemented or changed, it can do so by amending the  
4    statute, as it did most recently in 2003. But unless and  
5    until the General Assembly takes such action, the  
6    Commission should not adopt a rule that is more  
7    restrictive than the governing statute.

8                   Again, Missouri law already has established  
9    the proper balance between those communications that are  
10   lawful and those that are not, and a Commission rule that  
11   is more restrictive than the law requires will upset that  
12   balance to the detriment of the Commission and all who are  
13   subject to or affected by its regulatory policies and  
14   decisions.

15                   The revisions to the ex parte and extra-  
16   record communications rule that have been proposed by MEDA  
17   maintain much of the balance I referred to a moment ago.  
18   In particular, section 3 of MEDA's proposal, entitled  
19   Exclusions from Ex Parte and Extra-Record Communications,  
20   establishes some robust and much needed safe harbors for  
21   certain specified types of communications. These types of  
22   communications include the following:

23                   Communications with government officials as  
24   allowed under subsection 5 of Section 386.210.

25                   Communications regarding actual or

1 anticipated service outages or other operational problems  
2 or damages to utility facilities.

3 Updates regarding service restoration  
4 efforts or repairs to damaged facilities.

5 Communications regarding service  
6 reliability or security issues.

7 Information regarding FERC matters or  
8 matters related to regional transmission organizations. I  
9 recognize the discussion that we had earlier, and that  
10 list may need to be added to.

11 Communications regarding labor relations  
12 matters, including threatened or impending strikes or work  
13 stoppages.

14 General information regarding utility  
15 operations, including the status of utility programs,  
16 billing issues, information related to the issuance of  
17 securities, and publicly available financial information.

18 Communications in a contested matter that  
19 deal with purely procedural issues.

20 And communications related to the  
21 Commission's investigative powers.

22 Each of these categories fits within either  
23 the letter or the spirit of existing law governing the  
24 types of communications the Commission is able to engage  
25 in without obligating any party to file or otherwise



1 provide notice of the communication and its contents.

2                   However, under the Commission's proposed  
3 rule, some sort of disclosure would be required for each  
4 of the aforementioned types of communication, especially  
5 if they involve one or more parties or anticipated parties  
6 to a pending or anticipated contested case.

7                   The disclosure required under Section 6 of  
8 the Commission's proposed rule requires parties to file a  
9 copy of any written communication or, if the communication  
10 is not written, to prepare and file a written memorandum  
11 that includes the names of all participants in the  
12 communication, the date, time and location of the  
13 communication, the means by which the communication took  
14 place, and a summary of the substance of each  
15 communication.

16                  The burden imposed by Section 6 of the  
17 Commission's proposed rule, especially as it relates to  
18 unwritten communications, is so onerous that it easily  
19 could dissuade a Commissioner or a party with information  
20 that is material to one of the Commission's regulatory  
21 responsibilities from initiating a necessary or useful  
22 conversation. A couple of recent examples might  
23 illustrate my point.

24                  Shortly after ice storms destroyed large  
25 portions of AmerenUE's transmission and distribution

1 system resulting in service outages for thousands of my  
2 customers, one of the members of this Commission made a  
3 field tour of some of the affected areas to assess both  
4 the extent of the damage and AmerenUE's repair efforts.  
5 During the course of that tour, the Commissioner talked to  
6 numerous officials and employees of our company, gaining  
7 information that was critical to the fulfillment of his  
8 duties as a regulator.

9 I believe that, at least in part, he  
10 believed he was able to undertake his fact-finding trip  
11 because he was not obligated to prepare lengthy memoranda  
12 detailing his activities.

13 However, because AmerenUE had a general  
14 rate case pending at the time of the ice storm, which did  
15 not include any issue related to that storm, it is likely  
16 that the proposed rule would have precluded the  
17 fact-finding field trip altogether or, alternatively,  
18 would have imposed on both AmerenUE and the commissioner  
19 who made the trip the obligation to prepare memoranda  
20 detailing each conversation with an AmerenUE employee that  
21 took place during that trip.

22 One can only speculate as to whether the  
23 commissioner would have made the same fact-finding field  
24 visit if the prohibitions in Sections 2 and 3 and the  
25 disclosure obligations in Section 6 of the Commission's

1 proposed rule were in place at the time of that storm.

2 No similar speculation is required,  
3 however, regarding whether the fact-finding trip was a  
4 value to that commissioner in the fulfillment of his  
5 regulatory responsibilities toward AmerenUE and its  
6 customers.

7 Another example concerns the various  
8 rulemaking proceedings, including this one, that are  
9 pending before the Commission. Currently, communications  
10 with the Commission or its members regarding matters that  
11 are the subject of a rulemaking proceeding are not  
12 considered to be prohibited ex parte communications.

13 That changes under the proposed rule. If  
14 one of the parties to the communication is a party to a  
15 pending contested case, Section 2 of the proposed rule  
16 prohibits any communication regarding a substantive issue.  
17 But even if the communication is not prohibited  
18 altogether, the onerous reporting requirements of  
19 Section 6 of the proposed rule, which I discussed earlier,  
20 would apply.

21 Thus, the proposed rule likely would deny  
22 the Commission the opportunity to obtain information and  
23 viewpoints from a range of interested parties, and given  
24 the important regulatory policy issues that are the  
25 subject of pending rulemaking proceedings, which include

1 integrated resource planning, the current ex parte rule,  
2 the implementation of renewable resources referendum, and  
3 the coming discussions of energy efficiency policy in  
4 implementing SB 376, AmerenUE believes that making it  
5 impossible or very difficult for the Commission to obtain  
6 and benefit from diverse information and viewpoints is not  
7 in the public interest.

8                   It is not difficult to imagine that members  
9 of the Commission will elect to forego other types of  
10 potentially beneficial communication if the proposed rule  
11 is adopted. For example, if AmerenUE has one or more  
12 cases pending before the Commission, will individual  
13 commissioners refuse or be reluctant to converse with or  
14 receive communications from the company's executives and  
15 experts regarding matters of regulatory policy such as  
16 energy policy even though the opportunity for such  
17 communications is available to parties who either do not  
18 have a pending case or are not subject to the Commission's  
19 regulatory authority?

20                   Will individual commissioners refuse or be  
21 reluctant to make field visits that allow them to gain  
22 information that the utility -- about the utilities they  
23 regulate simply because the utility is a party to a  
24 pending case and will be a party to an anticipated  
25 contested case?

1                   If under the proposed rule the answer to  
2 either of these questions is yes, then the Commission  
3 should stop and consider whether the rule goes too far and  
4 does, in fact, impede the Commission and its members from  
5 doing what is necessary or helpful to meet their  
6 responsibilities as regulators.

7                   Before I conclude my statement, I would  
8 like to make one additional point. The existing rule that  
9 will be replaced by the Commission's proposed 4 CSR -- and  
10 then it goes on. I won't read this in, but I will echo  
11 what Paul Boudreau said, and I'm appreciative that Steven  
12 Reed has identified the rescission of these rules as being  
13 a problem.

14                  So in conclusion, let me reiterate  
15 AmerenUE's continued support for the comments and  
16 suggestions that have been made by MEDA, especially the  
17 alternative verbiage that MEDA has proposed to govern ex  
18 parte and extra-record communications.

19                  For the reasons I've stated, AmerenUE  
20 believes MEDA's alternative language is superior to the  
21 obstructive provisions included in the Commission's  
22 proposed rule. Accordingly, if the Commission believes  
23 changes should be made to the current rule, the changes  
24 proposed by MEDA are the ones that should be adopted.

25                  Thank you for your attention and your

1 consideration of my comments, and I will be happy to  
2 answer any questions.

3 JUDGE WOODRUFF: Thank you. Chairman  
4 Clayton, did you have any questions for Mr. Kidwell?

5 CHAIRMAN CLAYTON: I have no questions.  
6 Thank you, Judge.

7 JUDGE WOODRUFF: Commissioner Davis?

8 COMMISSIONER DAVIS: No questions.

9 MR. KIDWELL: Judge, if I might add one  
10 point, and that is Lewis Mills identified the calendar  
11 idea. I want to just say that my company supports that  
12 idea, and I think the concept that Lewis laid out in his  
13 verbal comments today is the right one.

14 The only thing that I'd say is, in terms of  
15 administrative matters before the Commission in terms of  
16 dealing with staff, I'd say purely administrative matters  
17 should be excluded from the public calendar, but if  
18 there's some gray area as to whether it's purely  
19 administrative or crosses into some substantive issues  
20 before the Commission, I think it should be included.

21 JUDGE WOODRUFF: Mr. Kidwell, I do have one  
22 question.

23 MR. KIDWELL: Yes.

24 JUDGE WOODRUFF: Toward the end of your  
25 comments you referenced that you were not going to read

1 your entire statement in.

2 MR. KIDWELL: Uh-huh.

3 JUDGE WOODRUFF: Because you were -- I want  
4 to make sure you're not referencing a document that's not  
5 in the record.

6 MR. KIDWELL: No. I think what I was  
7 referencing was, first of all, Steven Reed's comments this  
8 morning in terms of the rescission. Let me make sure I  
9 have it absolutely right, and Paul, if I'm making a  
10 mistake, please let me know. It was 4 CSR 240-4.020  
11 governing the contact of attorneys. I think -- I think  
12 Mr. -- that Steven Reed gave some comments there. I think  
13 Paul Boudreau seconded those, and that's what I was going  
14 to discuss. I think the record's clear.

15 JUDGE WOODRUFF: I just wanted to make sure  
16 that you're not trying to reference a document that was  
17 not put into the record.

18 MR. KIDWELL: No. It references really  
19 directly back to Steven Reed's comments.

20 JUDGE WOODRUFF: All right. Thank you.  
21 That's all.

22 MR. KIDWELL: Great. Yes.

23 JUDGE WOODRUFF: Thank you.

24 COMMISSIONER DAVIS: Judge, I have one more  
25 question.

1 JUDGE WOODRUFF: Go ahead.

2 COMMISSIONER DAVIS: Let me go back and ask  
3 this of Mr. Mills. All right. Mr. Mills, hypothetically  
4 speaking -- hypothetically speaking, Plum Point is about  
5 45 miles from my parents' house, and so I might be taking  
6 my children home to see my parents for Easter. I might  
7 like to go over and see Plum Point because it's about to  
8 come online, or maybe -- maybe I don't do it at Easter.  
9 Maybe I wait until Thanksgiving or whenever.

10 So what advice do you -- I mean, what  
11 procedures should I follow if I want to go take a look at  
12 Plum Point? I'm just interested in it because I know one  
13 of our Missouri utilities has an interest in it. The  
14 municipals in this state also have an interest in it.  
15 It's not a super-critical plant. So I'm kind of  
16 interested in comparing the fact that it's not super-  
17 critical to super-critical and what that all means.

18 So what procedures should I follow going  
19 forward if I want to go look at Plum Point either in the  
20 next two months or in the next year?

21 MR. MILLS: Well, there may be a difference  
22 depending on when you want to go visit it. Right now,  
23 it's shaping up to be a major issue in a pending rate  
24 case. So I think you would want to be fairly careful  
25 about who you talk to and what you talk about while you're





1 rules or the proposed rules would prevent you from going  
2 there and finding out about the construction. I think if  
3 you talk to employees about what's going on, you need  
4 to -- under the proposed rules, you would have to file or  
5 they would have to file a statement about what you talked  
6 about.

7                   And, you know, at the risk of disagreeing  
8 with some of the other parties, I don't think that's a  
9 hugely insurmountable burden for somebody to write -- you  
10 know, this is one of those kind of situations where  
11 obviously you're not going to have a court reporter  
12 tagging after you with the stenography machine on wheels,  
13 and it wouldn't be feasible really to carry a tape  
14 recorder with you and tape record everything you say as  
15 you tour a power plant.

16                   But I think if you're talking about this  
17 power plant which is going to be an issue in the pending  
18 rate case, I don't think it's too much to ask that the  
19 people you talk to make a statement about what you talked  
20 about. So I think that's how it would be covered under  
21 the current rules, and I think that's adequate. I don't  
22 think -- I mean, that's how it would be covered under the  
23 proposed rules, and I think that's adequate.

24                   I think it allows you to go look at the  
25 plant if you think as a Commissioner that's important to

1 do while the case is under way, but it allows the parties  
2 to the case to know who you talked to, what you talked  
3 about.

4 COMMISSIONER DAVIS: All right. I think  
5 that's fine. Now, let me just add to that question.  
6 Okay. Obviously power plants' expenses are going to be  
7 significant issues in probably more than one upcoming  
8 case.

9 Do you think that we should -- you know, if  
10 people are going to be in here arguing over expenses, do  
11 you think it would be a good idea for this Commission to,  
12 like, go out and take a tour of the facilities and see  
13 what's actually being paid for?

14 MR. MILLS: In terms of power plants?

15 COMMISSIONER DAVIS: Uh-huh.

16 MR. MILLS: You know, I think -- I think  
17 it's probably helpful for Commissioners to tour power  
18 plants just to get an idea of what the turbine looks like,  
19 what the economizer looks like, how all the parts fit  
20 together, because particularly when you're talking about  
21 reflecting a plant in rate base, some of those issues come  
22 up.

23 And I think it's, you know, just as it's  
24 important for utilities, it's important from my side of  
25 things that the Commissioners understand what we're

1 talking about when we're debating issues in front of them.  
2 It does nobody any good to try to keep commissioners in  
3 the dark. None of the things that I'm suggesting are  
4 trying to keep commissioners from information, because the  
5 better informed the Commissioners are, the more  
6 knowledgeable they are, I think the better the decisions  
7 will be.

8 COMMISSIONER DAVIS: Sometimes in tort  
9 cases and even criminal cases they do go out and actually  
10 take the jurors out to look at the scene and everything.

11 MR. MILLS: Yeah.

12 COMMISSIONER DAVIS: Thank you, Mr. Mills.

13 MR. MILLS: You're welcome.

14 JUDGE WOODRUFF: Thank you, Mr. Mills. Was  
15 there anyone else in the audience who wished to make a  
16 statement? Mr. Pendergast. Good morning.

17 MR. PENDERGAST: Good morning.

18 (Michael Pendergast was sworn in.)

19 JUDGE WOODRUFF: Could you identify  
20 yourself, please.

21 MR. PENDERGAST: Michael Pendergast, and  
22 I'm here on behalf of Laclede Gas Company. I also want to  
23 express support for the comments that have been provided  
24 by MEDA. And in the interest of never giving up, I just  
25 wanted to go ahead and make a general comment.

1                   We had a Supreme Court decision issued the  
2 other day that basically struck down a decade's worth of  
3 restrictions on the right of corporations, labor unions  
4 and others to engage in political speech, and in that  
5 decision the Court kind of returned to first principles  
6 and said, we have a Constitution in this country. That  
7 Constitution gives folks the right to go ahead and speak  
8 freely, particularly on fundamental political issues, and  
9 the restrictions that impair the right of even  
10 corporations, nonprofit, profit, labor unions to do that  
11 cannot withstand scrutiny.

12                   Corporations and others also have the right  
13 to petition the government, and I'm not suggesting that  
14 there can't be reasonable restrictions on how you go about  
15 doing that, but that right recognizes that when the  
16 government has profound power to control the fate and  
17 direction of a particular enterprise or particular  
18 financial consequences for consumers, that it has to be an  
19 outlet where those affected can contact and have some role  
20 to play on how the government goes about doing that.

21                   And I'm not here today to suggest that  
22 there are specific restrictions that absolutely run afoul  
23 of that, but to the extent that those restrictions become  
24 so onerous that you preclude parties from having  
25 meaningful input on policies that can profoundly influence



1 yesterday.

2 COMMISSIONER DAVIS: It's in all the  
3 newspapers, Judge.

4 JUDGE WOODRUFF: I've been rather busy the  
5 last couple days.

6 (Laughter.)

7 JUDGE WOODRUFF: All right. Thank you,  
8 sir.

9 Anyone else in the audience who wishes to  
10 make an oral statement?

11 (No response.)

12 JUDGE WOODRUFF: I don't see anyone else.  
13 I wanted to go back to one thing. Back at the very  
14 beginning, Mr. Reed, you referenced an exhibit that you  
15 handed out to the other parties. I never got a copy of it  
16 and I didn't mark it as an exhibit. Did we need to  
17 actually mark it as an exhibit?

18 MR. REED: Well, It's filed in the EFIS  
19 system, Judge. I brought it here for purposes of  
20 convenience in case everybody hadn't seen it. So as long  
21 as those comments that are in EFIS are cognizable as part  
22 of the official record, I think I'm fine.

23 JUDGE WOODRUFF: All right. I believe they  
24 are. Just wanted to be clear on the record as to what we  
25 were doing. All right. I won't mark it as an exhibit

1     then.

2                     Okay.  I believe that's everything.

3     Anything final from Commissioners?

4                     (No response.)

5                     JUDGE WOODRUFF:  Then we are adjourned.

6                     WHEREUPON, the public hearing in this case  
7     was concluded.

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## 1 C E R T I F I C A T E

2 STATE OF MISSOURI )  
3 ) ss.  
4 COUNTY OF COLE )

5 I, Kellene K. Feddersen, Certified  
6 Shorthand Reporter with the firm of Midwest Litigation  
7 Services, do hereby certify that I was personally present  
8 at the proceedings had in the above-entitled cause at the  
9 time and place set forth in the caption sheet thereof;  
10 that I then and there took down in Stenotype the  
11 proceedings had; and that the foregoing is a full, true  
12 and correct transcript of such Stenotype notes so made at  
13 such time and place.

14 Given at my office in the City of  
15 Jefferson, County of Cole, State of Missouri.

16 \_\_\_\_\_  
17 Kellene K. Feddersen, RPR, CSR, CCR  
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