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In the Matter of a Repository)
File for the Collection and)
Distribution of Documents)Case No. AW-2009-0313
Pertaining to the Ethics)
Review at the Missouri Public)
Service Commission)

MORRIS L. WOODRUFF, Presiding,
CHIEF REGULATORY LAW JUDGE.
ROBERT M. CLAYTON III, Chairman,
JEFF DAVIS,
TERRY JARRETT,
KEVIN GUNN,
ROBERT S. KENNEY,
COMMISSIONERS.

REPORTED BY:

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

2 JUDGE WOODRUFF: Good afternoon,
3 everyone. Welcome to the ethics -- ethics review
4 public meeting, and this is Case No. -- or File
5 No. AW-2009-0313. This is going to be an informal
6 session today. I'm not going to swear anyone in, I'm
7 not going to take any formal testimony. That will
8 come later in the process. But for right now, what
9 we're looking for is feedback from the public about
10 the proposed rules that have been filed by our
11 consultant, Mr. Michael Downey. And I'm going to in
12 a moment turn this over to Mr. Downey to -- to run
13 the conversation.

14 Before Mr. Downey gets started, though,
15 I know the Commissioners want to make some comments.
16 And Chairman, if you'd like to speak.

17 CHAIRMAN CLAYTON: Thank you, Judge. I
18 just -- since we're going on the record, this is part
19 of a public meeting to receive input, I think this
20 process as we near hopefully a conclusion, this is an
21 opportunity for you to chime in on -- on the
22 different issues that have been raised in both the
23 draft submitted by Mr. Downey as well as a draft that
24 I submitted setting out several concepts that I think
25 are worthy of discussion. It is our hope that we can

1 receive this testimony here today and get some
2 guidance on how we need to move forward with our own
3 rulemaking in a more formal manner in the -- the
4 weeks and months to come, so I appreciate everyone
5 who's here today.

6 As far as my proposal that I've drafted,
7 I'm going to let my comments speak for themselves.
8 I -- I'll look forward to the discussion that comes
9 up regarding both sets of rules. So thank you very
10 much.

11 JUDGE WOODRUFF: Any other Commissioners
12 want to make an opening comment?

13 (NO RESPONSE.)

14 JUDGE WOODRUFF: All right. Then,
15 Mr. Downey, I'll turn it over to you and please
16 proceed.

17 MR. DOWNEY: Thank you. Good afternoon,
18 Commissioners, and I do apologize, I truly had this
19 calendared at two o'clock today. Welcome to the
20 members, the interested parties, regulated persons
21 and everyone else who is here.

22 As previously discussed, the objective,
23 at least as to the first tier, is to attempt to come
24 up with an ex parte rule that will provide clearer
25 guidelines for members of the Commission, the

1 presiding judges that are handling cases and also
2 other parties involved as to what can and cannot be
3 discussed with people making decisions, either the
4 presiding judge -- judge presiding over a contested
5 case or other persons. And the effort that has been
6 made is to try to come up with a rule.

7 What we have attempted to do on several
8 different levels is to provide a framework that will
9 allow people guidance as to what is permitted and not
10 permitted as well as to -- in the initial draft of
11 rules we realized there was some confusion, and we
12 attempted to try to clarify things by allowing for a
13 clearer picture of when things are going to be
14 governed or not governed by the rules.

15 So what I'm hoping to do in -- in a
16 moment, it's not working of course, is to pull up a
17 PowerPoint presentation to sort of run through. Let
18 me just -- while this is -- while my computer is
19 hopefully doing its magic -- I've actually got a copy
20 as well. But while we are hopefully pulling that up,
21 there was previously a set of rules that was
22 submitted that dealt with a number of other topics.
23 It's my understanding now that the Commission at the
24 next agenda meeting is going to consider what is
25 going to -- if there's anything in -- in that

1 additional list that deserves attention, and if so,
2 what does deserve attention.

3 So people should realize the ex parte
4 rules are the focus of today. That is really the
5 focus that the Commission has asked me to take is to
6 focus on that particular aspect. That does not mean
7 that -- that nothing else will happen, that does not
8 mean that further work will not occur in the future
9 as to other topics, but I -- I think it's important
10 to -- for people to realize that at least the attempt
11 is to not take away from the initial focus which is
12 the ex parte rules.

13 With that, I'm going to go ahead and --
14 my computer continues to not talk to me. Let me go
15 ahead -- I'm actually going to -- I know the
16 PowerPoint is available. As soon as I can get it up,
17 I'm going to put it up. Let me just go ahead and
18 start on it because like I said, I don't want to hold
19 people up.

20 The overview of the project, this was a
21 three-tier project and basically we are still in the
22 second tier. The initial objective was to prepare a
23 comparative state compendium, and everyone should be
24 aware that that was prepared and then actually was
25 reposted about three weeks ago in a format that

1 people should be able to download. It is in pdf,
2 it's a massive document. I think there are somewhere
3 around 11 different segments that have been placed in
4 that printout. I know I have two sets up in my
5 office and they're about six or seven inches of text.
6 But that is available for people.

7 What we have then attempted to do using
8 that as sort of a framework, although frankly, I
9 think we ultimately decided to have -- work from an
10 original standpoint, is to pull up a ex parte rule
11 that basically divides the rule into two different
12 categories. And the two different categories that
13 are the target here, the first is to have a category
14 that deals with -- with what we call extra record
15 communications.

16 And extra record communications are
17 communications that are deemed to be less threatening
18 to the process, and those would be -- simply be
19 subject to a notice provision. I'll hand this off.
20 It's the St. Louis and it's numbered, it's the most
21 recent file.

22 And a second category of -- of
23 communications that are ex parte communications. And
24 the ex parte communications involve the substance of
25 a matter, they are the -- the conver -- the

1 communications that are really considered more of a
2 threat to the process, and those are communications
3 that are generally going to be prohibited. And in
4 fact, if parties do engage in such communications,
5 there is a risk of sanctions. So that's sort of the
6 broad framework of things.

7 And I'm going to pause here just for a
8 moment because if we pull it up, it will probably be
9 helpful to everybody. Go ahead, switch it to details
10 list and then do it by date modified. Just click it
11 the other way, date modified. And do the top one.
12 Okay. Just pull it right up. And I'm in particular
13 now on slide seven, I think is the best place to go
14 to. That's perfect. Actually, let's just pause here
15 for just a second.

16 Let me -- I think it's probably worth it
17 since this is really the focus of things. What I've
18 attempted to do, I kept joking that there was sort of
19 a diagram that I had in mind for this. The first
20 level of regulation as for what we deem as extra
21 record communication, and you'll see there, "What is
22 an extra record communication?" It's communication
23 between a Commission adjudicator -- and I just used
24 that term to include Commissioner or Commission's
25 technical advisory staff or a presiding judge and an

1 interested person. And notice that's not a party,
2 that's the biggest difference between an extra record
3 communication and ex parte communication.

4 And you'll see there it's a
5 communication regarding the substance of and -- and
6 anticipated for a pending contested case. And we'll
7 talk in a moment, but people are -- should be
8 generally aware that what we've attempted to do is to
9 provide a window at the outset that is not only
10 pending matters but matters that a party or a person
11 expects will be filed within 30 days. And I'll
12 explain the why in just a moment there.

13 You'll see there notice is required and
14 then information received in such communication
15 should not be considered when making a decision.
16 It's effectively how the regulation is set up.
17 There's a second tier at the next slide which is a
18 subset.

19 And I apologize, it's a little bit
20 darker on the screen than I wanted, but you can see
21 there in the world of extra record communications,
22 there's a subset and that subset is an ex parte
23 communication which is a communication between,
24 again, a Commission adjudicator and a party regarding
25 the substance of an anticipated or pending case. And

1 you'll see there that these communications are
2 prohibited and may result in sanctions being imposed.
3 So this is sort of the -- hopefully a helpful way to
4 look at this. This is the grand overlay of how we
5 attempted to set up the regulations.

6 If you go ahead and slide to the next
7 one, some basic issues of structure. And this is
8 again just to explain to everyone sort of how we were
9 thinking about things. They govern all contested
10 matters. And as I mentioned, anticipated matters
11 provide a 30-day, effectively a halo.

12 The concern that we're trying to address
13 here was one that was mentioned as sometimes happened
14 in the past of a party or a -- an entity coming in, a
15 regulated entity coming in and saying to a
16 Commissioner or a group of Commissioners or
17 administrative law judge we'd like to talk about some
18 issue. And sub -- they have those conversations, it
19 could be something that appears innocuous.

20 The concern, though, is that then that
21 same group of people, that same regulated entity may
22 file a contested case a week later that deals with
23 that very issue. And we said we want to provide some
24 sort of halo there.

25 The original proposal was a 60-day

1 period. It has been cut down to 30 days. The
2 concern was that there are smaller regulated entities
3 that may not know exactly what's going on, and the
4 sense was that a 30-day window should provide some
5 protection. Obviously, if you said 180 days, you'd
6 have more protection, but we're trying to come up
7 with a balance between what can the parties really
8 do, what can they expect and also making sure that
9 there -- there is some sort of protection there.

10 And you'll see there, one of the other
11 issues that arose was there are certain types of
12 issues I understand that come before the Commission.
13 They may appear to be a noncontested matter. There's
14 a filing. Subsequently an issue may convert into a
15 contested case. And so we've attempted to address
16 that through the definitions as well.

17 These regulations apply to -- and I said
18 everyone there, although it's effectively dividing up
19 that you have the Commissioners and the technical
20 advisory staff, they're effectively the
21 decision-making body or the -- the administrative
22 judges. Everyone else, the Staff, the Public
23 Counsel, the regulated parties -- regulated entities,
24 if they are a party, they would be subject to these
25 regulations. So it's really trying to say we're

1 treating as much as we can everyone on a level
2 playing field, that if the Staff can go in and talk
3 to a Commissioner, another person, a regulated entity
4 can also go in and talk to the Commissioners about
5 that same subject. If they know that a matter's
6 going to be filed, they shouldn't be having those
7 conversations.

8 And then just to simplify things, if you
9 switch to the next slide, there's a whole series of
10 communications that are not regulated. And actually,
11 that was not the slide I was expecting. Oh, and I
12 think I added that one, that's perfect. You'll see
13 things that are not in the hearing -- things that are
14 in the hearing process do not fall subject to these
15 regulations at all. These govern communications
16 outside the hearing process.

17 Things that are not about a contested
18 case or anticipated case if they relate to other
19 matters, they're not governed by these regulations.
20 And I think -- and, frankly, some of the concerns
21 that have been raised -- raised by the Chair may, in
22 fact, be addressed by what we attempted to avoid. If
23 they are not between a Commissioner, Commission
24 decisionmaker and a party or interested person,
25 again, if they're between, for example, two

1 interested persons or Public Counsel and someone,
2 obviously those fall outside as long as you don't
3 have a Commissioner, the Commission and
4 administrative judge that's presiding over the case.

5 And finally, if they're not about the
6 merits, specific facts, evidence, claims or positions
7 that have arisen or are reasonably likely to arise.
8 And really, the goal of that language which is used
9 in both extra record and ex parte communications is
10 to capture the universe of potential substantive
11 communications.

12 And we didn't just want to use the term
13 substantive because so often that leads to a
14 discussion of what is and is not substantive. If
15 you're dealing with the facts, the merits, claims,
16 positions in a contested matter, those are
17 communications that are governed by this rule.

18 Go ahead, please. You'll see the basic
19 reporting requirements for an extra record
20 communication. If a party initiates the
21 communication, the party must report it.
22 Effectively, as you'll see through the rules, it's a
23 written communication, they have to file a copy of
24 that. If it is an oral or I should say a nonwritten
25 communication, they need to provide a summary of the

1 communication such that someone could determine what
2 was discussed.

3 And if a nonparty initiates it, then the
4 Commissioner who's -- the Commission entity, the
5 administrative judge or the Commissioner is the one
6 who does have the obligation. Currently the statute
7 attempts to put it on the person making the
8 communication. We realize that this doesn't
9 necessarily work when that person is not a party. It
10 could be a member of the public discussing a
11 contested case.

12 The regulations, in turn, place all of
13 the burden on the Commissioners. We thought this was
14 a good way where there is a party involved and
15 they're capable of filing, they should know better,
16 then we ask them to file in a situation where the
17 Commissioner or the administrative judge realizes
18 that there's unlikely to be a person who's capable
19 rather than try to say to a member of the public you
20 need to go do a filing now, the Commissioner would
21 have that obligation.

22 Please proceed. An attempt to -- also
23 to protect the Commissioners, there's been some
24 concern of what if someone effectively attempts to
25 have a communication to try to gain the

1 disqualification or otherwise entrap a Commissioner.
2 And you'll see there if a Commissioner attempts to
3 avoid or ends an ex parte communication that someone
4 else initiates, the Commissioner should avoid
5 punishment. And in fact, there's a provision in the
6 draft rules that provides this.

7 The other thing that I should have
8 included here that is another protection is that the
9 obligations for a Commissioner or administrative
10 judge to report only relate to actually pending
11 contested matters. We thought it was unfair to place
12 a burden on the Commission or Staff when they didn't
13 know that a matter was going to be filed to try to
14 have them guess what's going to be filed sometime in
15 the next 30 days. So in fact, if you check, there's
16 a slight variation there that for the obligation of
17 the Commission adjudicator, as I'll use the term, to
18 make the report, it is only on contested matters.

19 Please proceed. And this is really just
20 to provide sort of the clear reflection of the two
21 different rules. You'll see on the left we have the
22 ex parte communication, on the right the extra record
23 communication. And I've laid them out so you can
24 basically see the language is the same with the
25 exception of the -- of the provision that says that

1 an ex parte communication involves a Commissioner --
2 the Commission, the Commissioner, the technical
3 advisory staff or the presiding officer assigned to
4 the proceeding and either a party or anticipated
5 party or an agent of a party or anticipated party.
6 As you can see there, it's a narrower group than the
7 extra record communication.

8 The other difference here is that we do
9 make clear in the definition of extra record
10 communication that it does, in fact, include ex parte
11 communications, and so we just added that language so
12 that no one would question. If it's an ex parte,
13 it's also automatically going to be an extra record
14 communication.

15 Please proceed. And I, frankly, will
16 not run through these in great detail. This is the
17 definition of ex parte communication from the
18 proposed rule. The only addition that I would add at
19 this time is there's a sentence at the very end that
20 states, "Ex parte communications shall not include a
21 communication regarding general regulatory policy
22 allowed under Revised Missouri Statute 386.210.4.

23 You'll see -- the reason I reference
24 that is that later we -- we discuss whether we need a
25 better definition of what general regulatory policy

1 is. And the reason -- that's actually in both
2 definitions, but statutorily, members of the
3 Commission are allowed to have communications
4 regarding general regulatory policy without any sort
5 of sanction or without the ex parte communications,
6 we've attempted to respect that as well.

7 And we again believe that it's
8 consistent with the role of Commissioners as being
9 both persons that decide in a contested matter like a
10 judge, but also someone who is supposed to have a
11 special knowledge of the regulations of the industry
12 and also to be in a position where they can discuss,
13 in fact, what should occur with regulated policy.

14 Now, that having been said, I do think
15 this is a statutory term that is not very clear and
16 it may be something that this is an opportunity to
17 sort of provide greater clarity there.

18 Please proceed. And really, extra
19 record communication, you've already sort of seen the
20 difference, but there again, this has the same
21 reference to the general regulatory policy exception.

22 Go ahead. What cases are covered? And
23 I've mentioned this before. Any proceeding before
24 the Commission in which legal rights, duties or
25 privileges of a specific party are required by law to

1 be determined after a hearing. This is a contested
2 case. This is actually the statutory definition.
3 And we have discussed, and I, frankly, have pushed,
4 although, again, we wanted to see what people thought
5 was -- was appropriate, I thought it would be useful
6 at least to provide a list of types of cases that are
7 contested cases so that someone would have an
8 understanding of what likely would trigger these
9 things.

10 The only real difference with the
11 anticipated case is that it does provide a 30-day
12 window when someone knows or should know or
13 anticipates that they are going to, in fact, file one
14 of these cases. So you can see we've tried to
15 provide that protection at the front end.

16 Please proceed. Coverage. And you'll
17 see there really, the -- the effort is to define
18 party as encompassing anyone who could be a party in
19 the case, applicant, complainant, petitioner,
20 respondent, intervenor. You'll see also, and this is
21 consistent with other things, that the Commission
22 Staff and the Public Counsel are also parties unless
23 they file a notice of their intention not to
24 participate in a relevant proceeding.

25 Now, of course, it's difficult for them

1 to file a notice of intent not to participate in an
2 anticipated case, and therefore we aren't really able
3 to do that. But you'll see there a person who
4 anticipates, knows or should know the person will be
5 a party to an anticipated case will then fall under
6 the anticipated party.

7 Go ahead. Additional definitions. And
8 as mentioned, general regulatory policy is a
9 statutorily used term that to my knowledge is not
10 defined. I do think this may be something where we
11 could provide additional definition, and I suggested
12 perhaps examples or even a clear definition. This is
13 something where we've effectively said we'd like
14 further comment as to whether or not it's necessary.

15 Really, just sort of following up,
16 and -- and frankly, as I prepared this, I think maybe
17 it makes sense to move this earlier in the -- in the
18 outline, but you'll just see a very clear statement
19 that an extra record communication shall not be
20 considered as part of the record on which a decision
21 is reached. So again, an attempt to say if you have
22 an extra record communication, there should be notice
23 of it and it should not be something that the
24 Commissioners will -- or the presiding officer would
25 rely upon.

1 Go ahead. The prohibition. And again,
2 already mentioned, but really just to sort of show
3 you the statutory -- or the proposed language of the
4 regulation. "No party or anticipated party shall
5 initiate, participate in or undertake directly or
6 indirectly an ex parte communication." Again, an
7 attempt to make sure we really do cover the
8 waterfront there.

9 And you'll see there that, "A
10 Commissioner, technical advisory staff or presiding
11 officer to a proceeding shall not initiate,
12 participate in or undertake directly or indirectly an
13 ex parte communication regarding a contested case."

14 And those last few words there,
15 "regarding a contested case," are added to make
16 clearer that with regard to the Commissioner,
17 technical advisory staff, presiding officer, we're
18 really talking about pending cases because we think
19 it would be too hard for the Commission to have any
20 idea or to anticipate what may be a case that's going
21 to be filed within the next 30 days.

22 COMMISSIONER GUNN: Can I -- is it
23 appropriate to just ask a clarification question?

24 MR. DOWNEY: Sure. Sure.

25 COMMISSIONER GUNN: If you go back a

1 slide --

2 MR. DOWNEY: Yes.

3 COMMISSIONER GUNN: -- on the -- the no
4 consideration for extra record --

5 MR. DOWNEY: Yes.

6 COMMISSIONER GUNN: -- is that -- is the
7 rule, is that a -- is that an exclusion or is -- is
8 it -- would it -- is it possible for someone to enter
9 it into the record? So for example, if we get a
10 letter from a member of the public, which happens on
11 a fairly regular basis during a rate increase either
12 in favor of or against a rate increase and then we
13 file a notice of the extra record, would it then
14 because it's an extra record communication be out or
15 would -- would it be possible once the notice is
16 filed for like either Office of Public Counsel or
17 something like that to move that comment into the
18 record? Is that something that's anticipated by
19 that?

20 MR. DOWNEY: We hadn't necessarily
21 contemplated it. My thinking would be that if, in
22 fact, it was moved to be part of the record, it could
23 then be appropriate to consider it.

24 COMMISSIONER GUNN: Okay.

25 MR. DOWNEY: But short of that, they

1 should not be considered, and that --

2 COMMISSIONER GUNN: So they're not
3 initially part of the record, but it's not an
4 exclusion if they --

5 MR. DOWNEY: It's not saying they could
6 not ever become part of it, and frankly, probably
7 needs clarification. I will make a note of that. I
8 will state, however, that frankly, I would be a
9 little concerned in allowing an ex -- ex parte
10 communication to become part of the record.

11 There's a concern there where you have a
12 party that knows what's going on, you wouldn't
13 necessarily want them to be able to go back and then
14 sort of try to amend their problem. I -- I think
15 that you'd -- you'd rather have the prohibitions
16 applying there and -- and -- for justice and -- and
17 fairness purposes keeping those communications out.

18 COMMISSIONER GUNN: That's right.

19 COMMISSIONER JARRETT: Excuse me, I'm
20 sorry.

21 MR. DOWNEY: Yes.

22 COMMISSIONER JARRETT: But wouldn't that
23 give a party a chance if a party wanted to be
24 nefarious to sort of start slipping stuff in
25 ex parte --

1 MR. DOWNEY: Well --

2 COMMISSIONER JARRETT: -- sending it
3 anonymously and then it can --

4 MR. DOWNEY: Bring it in. And certainly
5 there's a possibility there, and that's one of the
6 reasons that the language is -- refers to agents of a
7 party and also the directly or indirectly language.
8 There's certainly an attempt to prevent that from
9 happening.

10 I mean -- and I think you brought up a
11 good point as I said to -- to Commissioner Gunn, I
12 think that there -- as you've sort of pointed out,
13 there's two levels: There's the comments from the
14 public where the Public Counsel may say we really
15 want to show the public is concerned and we've had
16 300 extra record communications.

17 I think that's different than -- than
18 what you're talking about where they're -- certainly
19 if someone saw behind the veil and saw that this was
20 going on, we wouldn't want to see it as an ex parte
21 communication that it would bring along potential
22 sanctions.

23 Further questions or comments?

24 (NO RESPONSE.)

25 MR. DOWNEY: The next section -- and --

1 and this is really just a continuation. You'll see
2 there that we've attempted to provide a safe harbor,
3 that if a Commissioner or presiding judge is
4 approached by someone that wants to have an ex parte
5 communication, as long as the -- as long as the
6 Commissioner or presiding judge did not initiate the
7 communication and immediately withdraws from it or
8 you'll basically say tells the person the
9 communication is not proper and attempts to withdraw
10 from it and files a notice as if it were an extra
11 record communication, that this would allow the
12 Commissioner to avoid sanction.

13 And really, this is an attempt to make
14 sure that someone doesn't intentionally go in and
15 pollute the process and -- and attempt to talk to a
16 Commissioner to create a reason and then seek
17 disqualification of that Commissioner. So we've --
18 we basically said, you know, if the Commissioner --
19 if they tell someone we're not supposed to be having
20 this conversation, attempts to leave the
21 communication and then files notice, that that should
22 solve the problem for the Commissioner or the
23 presiding judge.

24 Please proceed. And then you'll see
25 I -- I sort of jokingly called these communications

1 exclusions for everyone. I'm sorry. I'm -- my chest
2 is vibrating right now so I'm turning it off.

3 But these were things -- these were
4 types of communications. Several of them are
5 statutory -- or one of them at least is statutory.
6 Several of them also were mentioned as the types of
7 communications that various people said we don't
8 really have a problem with these. You'll see the
9 first is a communication with a member of the
10 government, the General Assembly or other government
11 official allowed by statute. We said we don't want
12 this to be governed by these regulations.

13 The second is a communication related
14 basically to the -- anticipate or actual interruption
15 or loss of service for providing update regarding
16 efforts to restore service. Again, this is -- we
17 realize that sometimes these communications may touch
18 upon a contested case, is a regulated entity doing a
19 proper job of restoring service, but at the same time
20 the Commissioners have an interest in knowing there
21 has been a loss of service, here's where we are in
22 getting service restored, et cetera.

23 And again, you'll see that there's an
24 effort to say these communications will be allowed,
25 however, you'll notice they still must be disclosed.

1 In other words, notice must be filed.

2 And the last one is the investigative
3 powers. We realize that when we drew the rule to
4 include anticipated cases and tried to make
5 prohibitions and governance very broad, that we
6 accidentally may have picked up communications where
7 the Commissioners may be aware that there's an
8 investigation going on, or in fact, there's a
9 suggestion that an investigation occur.

10 And so what we did was we attempted to
11 list the statutory provisions that deal with
12 investigative powers and make clear that those types
13 of communications should not be governed. This is
14 not an attempt to create a back door where the Staff
15 can come in and effectively have implements to
16 ex parte communications about a case that they are
17 likely to file. It's instead to try to say no.

18 If there's going to be an investigation
19 going on the Commissioners need to know about or, in
20 fact, a request occurs, that there needs to be a way
21 that they can have those communications without
22 everyone knowing exactly what's going on.

23 Please proceed. The notice provision
24 I've really sort of touched upon. There's an attempt
25 here on a very short deadline, you'll see the next

1 business day, filing either a copy of a written
2 communication and then serving it on the parties in
3 the case, or if it's not written, they shall file a
4 memorandum disclosing the communication and serving
5 it on the parties.

6 And you'll see here that the memorandum
7 must contain a summary of the substance of the
8 communication and not merely a listing of the
9 subjects covered. This is one area where I expect
10 people will probably try lots of nefarious things,
11 but at least there's an effort there to say you can't
12 just say, oh, we talked about rate issues. You have
13 to provide some sort of discussion of what -- what
14 occurred there.

15 Go ahead. And you'll see also in trying
16 to deal with anticipated cases, we've created
17 effectively the question of what happens to those.
18 And you'll see that they are asked to be filed -- and
19 you'll notice not later than five business days,
20 not -- "A person who initiates an extra record
21 communication regarding an anticipated case that is
22 not pending shall within five business days of the
23 later of becoming a party to the contested case or
24 the conversion of the contested case give notice of
25 the communication." We realize that here the party

1 may not know the very first day what has occurred,
2 but shortly thereafter they need to be -- to file
3 notice of these. And you'll see, "The notice shall
4 be made in a manner set forth as consistent with the
5 prior section."

6 "Notice by the Commission" I've already
7 talked a lot about, but, "If the extra record
8 communication is initiated by a person who is not a
9 party, then they shall give notice of the extra
10 record communication as set forth again in the same
11 manner."

12 The unfortunate reality of this is that
13 it does mean that Commissioners that receive extra
14 record communications may be forced to try to figure
15 out, okay, what are we going to do in providing a
16 memo of it? It's certainly not a great outcome, but
17 at least then it will provide the parties with what
18 was discussed.

19 In the sanction provision, you'll see at
20 this point -- and I anticipate this is one area where
21 there will be additional expansion and work. You'll
22 see there it's basically just setting up a provision.

23 The interesting thing about this is that
24 it includes a ex parte communication, a failure to
25 file notice and also there are obligations at the

1 very end of this rule relating to the attorneys for
2 parties, and a violation of those rules also could
3 result in sanctions under this rule as to the
4 attorney involved. Just a quick mention there that
5 it does not cover the party for the attorney. It
6 would be a personal sanction imposed upon the
7 attorney.

8 And actually, this was the slide I
9 thought was referenced before, but this is the -- the
10 secretary of the Commission shall create a repository
11 for extra record communications filed in anticipation
12 of an anticipated case. And once the case has been
13 filed, the secretary shall promptly file any of these
14 notices in the official case file for each discussed
15 case.

16 You will also see that we've added a
17 responsibility for the attorneys in a case that if
18 they know there have been extra record communications
19 that have not been moved over from this central
20 repository into the particular case, they should make
21 reasonable efforts to have that occur.

22 And this is -- in fact, that -- you'll
23 notice just -- just generally make reasonable efforts
24 to ensure that any person with -- that they're
25 representing does not participate in ex parte

1 communications, make reasonable efforts to ensure
2 that proper files -- notice is filed, prepare notices
3 when requested to do so, make reasonable efforts
4 to -- to notify the secretary when a notice needs to
5 be transferred into a case file and also to comply
6 with all the Missouri rules of professional conduct.

7 And this last provision was actually put
8 in because there was a concern that at this point
9 there's not clear authority that says that the
10 Commission has the ability to enforce other rules.
11 And as we discussed, we thought it was appropriate to
12 go ahead and add a provision here so the Commission
13 could take appropriate action against an attorney
14 that, for example, made misrepresentations to the
15 Commission or engaged in other conduct that's not
16 permitted.

17 And then just finally, as typically has
18 been done with these presentations, this is my
19 contact information, and I -- I also mention that --
20 and actually, it should even be broader than the
21 final note. I am logging communications from anybody
22 except for the Commissioners and their technical
23 advisory staff so when I do get calls from people,
24 and as I said I would, I'm keeping those. Please
25 feel free to contact me.

1 Please realize if you do contact me, I'm
2 going to make a record of your contact to me which is
3 why sometimes it's easier to do it by writing. And a
4 lot of times, when people have said what's the
5 appropriate way to file a comment -- or to handle a
6 comment, that frankly, if you file them in the -- in
7 the central repository, if you file them in EFIS in
8 the case, it makes it a lot easier for everyone to
9 find them. It also allows us to make sure that
10 everyone has seen what's being said.

11 And that is the end of my presentation.

12 JUDGE WOODRUFF: Thank you, Mr. Downey.
13 Any of the Commissioners have any questions for
14 Mr. Downey?

15 (NO RESPONSE.)

16 JUDGE WOODRUFF: All right. We'll open
17 up for questions from the -- from the floor, then. I
18 will note that we are transcribing this, and it is
19 also being web-cast, so if you'll come up to a
20 microphone when you want to speak and identify
21 yourself for the court reporter.

22 MR. DOWNEY: Do you want me to move?

23 JUDGE WOODRUFF: You can stay there.

24 Anyone wish to make a comment? Mr. Boudreau?

25 MR. BOUDREAU: Just -- just a point of

1 clarification. Are you saying putting -- putting
2 questions to Mr. Downey or just making comments?

3 JUDGE WOODRUFF: Well, questions or
4 comments as you like.

5 MR. BOUDREAU: Okay. I may have some
6 comments I want to make to the Commission --

7 JUDGE WOODRUFF: All right.

8 MR. BOUDREAU: -- if that would be -- be
9 okay. Can I do it from here or --

10 JUDGE WOODRUFF: You can do it from
11 there.

12 MR. BOUDREAU: First, let me introduce
13 myself. My name is Paul Boudreau. I'm an attorney,
14 I'm representing the Missouri Energy Development
15 Association in this proceeding. The association is
16 comprised -- its membership is comprised of electric,
17 gas, water utilities that are regulated by this
18 Commission. There are representatives of particular
19 members of the association that are here today that
20 may want to make additional comments or supplementary
21 comments, but what I'd like to do is make maybe some
22 overview comments from MEDA's perspective today.

23 First of all, I want to thank the
24 Commission for the opportunity to address it here
25 today. What I'm going to do is comment primarily on

1 the Hinshaw Law Firm's proposal, and also I want to
2 compliment Mr. Downey for consideration of the prior
3 comments that -- that I've made and that members of
4 the association have made. And I recognize that
5 you've taken a lot of comments into consideration and
6 I do appreciate that. Thank you for that.

7 MEDA has participated in a lot of these
8 discussions for -- for some time now, including the
9 Case Nos. AO-2008-0192 and AX-2008-0201. And
10 consistently it has stated that there are three basic
11 principles that should guide the Commission as it
12 pursues this -- this inquiry in terms of revisions to
13 ethical practice and proceedings before it.

14 The first is that sound public policy
15 requires a vigorous and robust exchange of ideas, and
16 this necessitates a free flow of information among
17 all the parties to the extent that those
18 communications do not address a pending adjudication.
19 And this policy is embodied in Section 386.210 RSMo.

20 The second point is that there should be
21 parity in application of the rules. Applying
22 restrictions to some parties and not to others raises
23 inherent due process concerns.

24 And the third principle that we've
25 annunciated before is that rules need to make a

1 meaningful distinction between adjudicative
2 proceedings and legislative undertakings such as
3 rulemakings.

4 Now, in a previous -- or in a filing
5 earlier in this case, MEDA pointed out that much of
6 the turmoil with the topic of ex parte communications
7 is concerned did not come about as a violation of
8 any of -- of any of the Commission's
9 conduct-during-proceedings rules. In fact, one of
10 the Commissioners at the time commented that the
11 existing rules are workable, perhaps, with some
12 clarification.

13 I mean, the bottom line is much of what
14 has gone on has come about as the result of certain
15 parties using the conduct-during-proceeding rules as
16 a part of a litigation strategy and to boldly
17 intimidate particular Commissioners and, frankly, by
18 extension, the entire Commission. And I guess the
19 point is that no rule rewrite will solve this
20 problem. I mean, it may help some clarity, some --
21 some brighter lines may help, but that's just a
22 reality of apparently the current practice before the
23 Commission.

24 As to the proposal that's currently
25 before the Commission that Mr. Downey has been

1 describing, if it should -- if the Commission
2 should -- should decide to pursue this approach,
3 there are two specific topics that I want to address
4 here today very quickly.

5 The first is the definition of an
6 anticipated contested case is problematic in its
7 application. And the effect of this provision is to
8 create what I'll call a 30-day blackout period during
9 which no one should communicate with the Commission
10 or the Commissioners about the subject matter of a
11 proceeding prior to its commencement.

12 Now, in practice, the 30-day period is
13 somewhat difficult to ascertain. I mean, sometimes I
14 could tell you from a practitioner's standpoint I'll
15 know exactly what the filing date is because it's a
16 firm, hard date that -- that we're going to meet come
17 hell or high water. Other times, things slip. You
18 know, the date -- the filing date gets slipped, for
19 whatever reason it's -- it's hard to get the
20 information together that you need, there's some
21 additional clarification that's needed, there's some
22 reconsideration of some aspect of the filing. And so
23 there may be a target date, but the fact of the
24 matter is, we may not meet it on a -- on a -- on a
25 real regular basis. It's probably more common

1 than -- than you might think.

2 Also, representatives of anticipated
3 parties may not know that a filing is imminent, so
4 frankly, it puts them at hazard. I mean, I won't
5 advocate for other parties' interest, but I -- it
6 just strikes -- strikes me that -- that, you know,
7 from my perspective as a utility lawyer, I kind of --
8 I generally have an idea of when something may
9 happen. Others parties who may be interested in the
10 proceeding may not.

11 MEDA suggests that the Commission
12 consider an -- an alternative approach to this.
13 Instead of a 30-day blackout period, consider a
14 permit-but-disclose approach. That is, it requires
15 parties to make a filing shortly after the
16 commence -- the actual commencement of a case about
17 communications concerning the subject matter of that
18 case. This would address the principle concerns, I
19 think, that have been addressed by other parties who
20 have, as I understand their -- their principle
21 concerns, is that they -- that they get notice of the
22 fact and nature of an ex parte communication with the
23 Commission.

24 I think a similar -- I don't claim a lot
25 of familiarity with -- with how, in fact, it's --

1 it's used. I think the FCC uses an approach similar
2 to this. Beyond that, that's about the extent of my
3 knowledge. I don't -- I don't think it's
4 unprecedented, but the idea is instead of setting a
5 blackout period where communications are prohibited,
6 allow the communications to take place but require
7 disclosure when the case is actually filed.

8 Then as parties become parties to the
9 case, it's all right there in the EFIS system. You
10 know, they can go in and see what the filing party
11 has -- has put into the record. It also, I might
12 suggest, takes care of the -- the definitional
13 oddities. I know these were well-intended, but the
14 idea of an anticipated case and anticipated parties
15 to an anticipated case is -- is -- in and of itself
16 it's a little -- it's a little odd way to approach
17 things.

18 But anyway, just -- I'll just throw that
19 on the table. I think that may be -- from an
20 administrative standpoint, it may be something
21 that's -- that's more predictable and more fair to
22 all the parties.

23 The second point I want to address is to
24 the extent the Commission pursues the approach that
25 Mr. Downey has suggested with a safe harbor

1 provision -- and there's other ways to handle it, I
2 might add. I mean, it's a -- a safe harbor concept,
3 but to the extent that -- that we're going to move
4 down the road using this approach, I'm -- MEDA is
5 somewhat concerned that it's too narrow and should be
6 modified.

7 I mean, there are a lot of things that
8 go on concerning utility operations on a day-to-day
9 basis which the Commission should be kept advised of
10 beyond just loss of service incidents which are
11 important, obviously, but there may be billing issues
12 that come up, safety incidents. I'm just -- I'm
13 giving -- giving you an illustrative, not a
14 comprehensive list. Notices that the utilities may
15 give to the public through press releases, there may
16 be developments with regional transmission
17 organizations that -- that suggest that the
18 Commission be kept apprised of what's going on on
19 a -- on a more current basis.

20 We know from experience the
21 Commissioners, I don't think, appreciate necessarily
22 finding out about utility-related incidents by
23 getting a call from a reporter or reading about it in
24 the newspaper or hearing it on the broadcast news.
25 And -- and by that, I don't mean to cast any

1 aspersions with the broadcast news, I'm just saying
2 that when you get contacted by them, you should
3 hopefully be in -- you know, in a position to respond
4 to them in an informed way that we're aware of this
5 incident, here's what we know about it, you know,
6 whatever it may be.

7 And so I think that's an important thing
8 is that -- that the safe harbor be broad enough to
9 deal with these topics. And I think it helps to give
10 clarity to the parties about what kind of
11 communications are okay and what aren't. So maybe
12 that needs some -- I'm just going to suggest that
13 that needs some refinement, maybe a little bit of
14 broadening, and I think it just makes practical good
15 sense.

16 And it's not just dealing with the
17 press, it's just dealing with the general public if
18 there's an outage and you -- and then you are the
19 guys that everybody goes to to complain about service
20 outages. So I think it's helpful that you -- that
21 you be kept in the loop as -- as currently as
22 possible to -- to respond to those things.

23 I'm going to -- as far as the proposal
24 that the Hinshaw Law Firm has on the table, I think
25 I'm going to conclude my remarks with respect to

1 that.

2 As far as the -- the markups that
3 Chairman Clayton has proposed, those were filed late
4 last Friday. And -- and in all honesty, we haven't
5 had an opportunity as an association to properly
6 reflect on those proposals and to respond in a
7 meaningful way today. We'd like to reserve the right
8 to do so at an -- at an appropriate time.

9 I do want to touch on -- I just had
10 enough time to read, you know, through the markups
11 and the comments and -- and just want to touch on a
12 few of the things. I don't know if it was intend --
13 you know, on the comments that the -- that the
14 Chairman filed, there was a reference to utilities
15 having significant resources to engage in
16 communications with Commissioners. I don't know if
17 it was intended to suggest that somehow the utilities
18 are in a better or superior position to overwhelm the
19 Commission with communications.

20 If it was intended that way, I would
21 take issue with it and -- because I think the fact of
22 the matter is in -- in contested proceedings, the
23 utilities are typically vastly outnumbered by
24 opposing interests in hearings before the Commission.
25 And -- and just for an example, just all you have to

1 do is take a look at the number of interventions that
2 the Commission has just authorized in the AmerenUE's
3 pending rate case. So if that was the intent of it,
4 I'd just suggest that I'm not sure I share that view.
5 I don't know that it was intended that way, so I'd
6 just offer that.

7 The second thing is I wanted to talk
8 about the 60-day notice of intent to file. First of
9 all, if the Commission decides to go with the
10 proposal that I've suggested which is a permit but --
11 but disclose, it may make that an unnecessary aspect.
12 I don't -- I don't know which way this is going to
13 go. I'd just suggest that that would take care of it
14 and make that particular aspect of the proposal
15 probably unnecessary.

16 The second concern, and there -- there
17 may be others beyond this, but the other things
18 that -- that occur to me, one of them is a -- is a --
19 is a concern with most of the big utilities, the
20 large utilities are publicly traded, and the --
21 requiring them to disclose 90 days out or whatever
22 the period of time is, 60 days out that they're going
23 to be filing a rate case may present some disclosure
24 problems with SEC rules and regulations. So that's
25 something we have to go back and see if that -- if

1 that can be accommodated in a practical way given SEC
2 regulations. So it's just -- just an idea of the
3 sort of things that we need to go back to the -- and
4 discuss among ourselves and among the membership.

5 Another -- let me go -- kind of go to
6 the practical angle of -- of this. The 60-day notice
7 of intent to file certain types of cases may be too
8 long a period of time, and I'm thinking about rate
9 cases where increasingly the timing of the filing of
10 rate cases is driven by the in service date of
11 significant new plant additions.

12 A 60-day notice requirement on top of,
13 you know, the -- the 11-month processing of a rate
14 case has utilities trying to guess what the
15 in service date is more than a year in advance which
16 is, just practically speaking, more of a challenge
17 than it already is. So just something else to
18 consider when you're -- when you're looking at
19 something like that.

20 My third and final comment deals with --
21 and I -- and I don't know if this was intentional or
22 unintentional either. It's the language that appears
23 in -- in the new Section 11C of your markups. It
24 seems to run counter to the parity of treatment
25 principle that I discussed previously in that it

1 appears to only prohibit communications between a
2 large utility and the Commission. I don't know --
3 again, I don't know if it was intended that way.

4 You know, some of these things -- we're
5 all drafting things and putting things together
6 and -- and it can be missed. But that's -- that
7 would be problematic from the utilities' perspective.
8 If there was just a bar against utility
9 communications with the Commission, but anybody else
10 apparently can go ahead and -- and visit.

11 So I think it's important to come back
12 to what -- what -- and I think this echoes what
13 Mr. Downey was talking about is that, you know, it
14 regulates everyone and that kind of is a -- is a --
15 you know, this thing of the same side of the same
16 coin, I suppose, is what MEDA has been suggesting is
17 that the rules should be fair to everybody and handle
18 everybody the same way.

19 So with that, I'll conclude my comments.
20 Again, I appreciate you giving me the time to make
21 these comments. To the extent I can answer
22 questions, I'd be glad to do so, but I know there's
23 other parties that probably want to -- to address the
24 Commission.

25 JUDGE WOODRUFF: Thank you,

1 Mr. Boudreau. Anyone else wish to make a comment and
2 question?

3 MR. DOWNEY: May I make a comment to
4 Mr. Boudreau?

5 JUDGE WOODRUFF: Certainly.

6 MR. DOWNEY: Mr. Boudreau, you had made
7 a suggestion about broadening the language of the
8 exclusion, 3B.

9 MR. BOUDREAU: Yes.

10 MR. DOWNEY: Would it be -- it would be
11 very appreciated if you'd suggest language perhaps
12 within the filing.

13 MR. BOUDREAU: And in fact, we are
14 working on that --

15 MR. DOWNEY: Perfect. And I'm not
16 saying that's the only comment I heard, but it would
17 be great to hear from you, but --

18 MR. BOUDREAU: We -- we would be glad to
19 do it. Thank you.

20 MR. DOWNEY: Perfect. Thank you.

21 COMMISSIONER DAVIS: Mr. Boudreau,
22 you're here representing MEDA, correct?

23 MR. BOUDREAU: That's correct.

24 JUDGE WOODRUFF: And I'm not expecting
25 you to know the pedigree of every employee of every

1 MEDA member, but do you know of any utility employees
2 that have a degree from Harvard?

3 MR. BOUDREAU: I'm sure there are some,
4 but I couldn't -- I couldn't --

5 COMMISSIONER DAVIS: But you don't
6 know -- you don't know?

7 MR. BOUDREAU: I don't know anyone.

8 COMMISSIONER DAVIS: I -- I was just
9 thinking back to Mr. -- I believe it was Mr. Smith
10 from Noranda, and do you -- do you know of -- does
11 Ameren or does anybody have McKenzie on retainer?

12 MR. BOUDREAU: Not that I'm aware of.

13 COMMISSIONER DAVIS: Not -- not that
14 you're aware of. So nobody's got a McKenzie man in
15 the background, do they?

16 MR. BOUDREAU: Not to my knowledge.

17 COMMISSIONER DAVIS: Okay.

18 MR. BOUDREAU: Sorry.

19 COMMISSIONER DAVIS: All right. That's
20 all I have for now, Mr. -- oh, with regard to the --
21 the Chairman's proposed amendments to the -- to the
22 Downey draft, and I'll pose this to -- Mr. Downey,
23 have you had the opportunity to read that yet?

24 MR. DOWNEY: I have read it, yes.

25 I'm -- I think I'm in a similar position, I've read

1 it, but I wouldn't say I've fully digested it.

2 COMMISSIONER DAVIS: Do you think that
3 that can be read in harmony with 386.210?

4 MR. DOWNEY: I mean, I'm not -- the
5 first thing I would state is, as I've repeatedly
6 stated, I'm not a true utility lawyer. I'm -- I'm
7 not in a position at this point to say whether it's
8 consistent or inconsistent. I don't -- I honestly
9 don't know.

10 COMMISSIONER DAVIS: Okay.

11 CHAIRMAN CLAYTON: I'm eager to hear the
12 comments of others, so I'm just -- I just want to
13 respond so -- for clarity of -- just with your
14 inquiry. First of all, the significant resources
15 language was trying to define the difference between
16 the large utilities that have personnel that actively
17 come before the Commission as opposed to a small
18 utility that may not have any staff. And basically,
19 that was language used to justify the 8,000. It
20 wasn't that there was an undue influence or
21 inappropriate activity like that. It's basically the
22 MEDA members.

23 Let's be frank, they're larger, they're
24 more active, they have larger staffs, more attorneys,
25 that sort of thing. So they -- there's more

1 potential interaction than you would have for a small
2 utility, say, you know, in south central Missouri or
3 something. And the second thing on the parity issue,
4 I mean, there's no question that the way this is
5 written it does treat the large utilities in a
6 different way.

7 MR. BOUDREAU: I appreciate it.

8 CHAIRMAN CLAYTON: And that -- and
9 that's -- I mean, I -- I'm interested in the feedback
10 that we get from that.

11 MR. BOUDREAU: Okay. I appreciate that.
12 Thank you, sir.

13 JUDGE WOODRUFF: All right. Anyone else
14 wish to make a comment or questions? Mr. Lowery?

15 MR. LOWERY: Thank you, your Honor.
16 Mr. Downey, I -- I -- I think that I'm probably going
17 to be in a position to give you feedback on three
18 issues. And you've -- you've talked, I think, about
19 a couple of them. I first, I think, wanted to give
20 some general comments about the process, about the
21 rule, but let me just preview what those three issues
22 are.

23 One of them is this issue about the
24 general regulatory policy definitions, safe harbor
25 not impeding the ability to have communications that

1 need to take -- need to take place. And I think -- I
2 think you're correct that the general regulatory
3 policy language doesn't really tell us very much.
4 And probably the -- I'll call them safe harbor,
5 the -- the example that you've given, probably don't
6 go far enough and we're probably going to have some
7 commentary about that. But -- but I think that is an
8 issue and I think you've hit on something to identify
9 that that's an area that we need to address.

10 And I think it ties in with what you
11 also said where -- and I'm going to talk about this a
12 little bit more in a minute -- it's very important
13 not only that we know what we can't do and what
14 utilities or Mr. Mills or anybody else cannot do, but
15 what communications we can have because, as I'm going
16 to talk about in a moment, these folks, they have a
17 unique job and -- and there's a lot of communication
18 that needs to take place or they're not going to be
19 able to do that job.

20 I haven't had a lot of time to think
21 about it, I have some concern from a parity
22 standpoint. You talk about the investigative
23 statutes that you called out, particularly Section
24 three eighty -- 393.190, I guess it is, and the
25 complaint provision and how an over-earnings

1 complaint might come which is really a rate case in
2 reverse and the lack of parity and the lack of
3 reporting.

4 And I think it does -- and I don't think
5 it was intended, but I think it does have the
6 potential for inadvertently creating a very
7 unlevel -- level playing field between the utility
8 who may be the target of an over-earnings complaint
9 and the Staff who may be investigating that
10 complaint.

11 And then finally -- and I guess this
12 maybe responds more, Commissioner Gunn, to your
13 comment about an extra record communication then
14 becoming a part of the record. We talk around here
15 at different times with less precision about what the
16 record is. We've got case file and that's one thing,
17 but the evidentiary record that you would consider in
18 deciding a case is a different thing. And for
19 example, hearsay from anybody, whether it be one of
20 my folks or a member of the public, might not
21 necessarily need -- should -- should not necessarily
22 be something that you should be considering as part
23 of your delivery. I don't think that's what you
24 meant --

25 COMMISSIONER GUNN: No. And actually,

1 my -- when I said someone could move it into the
2 record, I would expect that that -- that that --
3 whatever that motion would be would be subject to all
4 the other evidentiary standards --

5 MR. LOWERY: Right.

6 COMMISSIONER GUNN: -- and would be --
7 it would -- could and -- and -- and potentially be
8 excluded based on challenges to that -- to that
9 movement. It would be like any other piece of
10 evidence that somebody wanted to exclude or be
11 excluded. So I agree with you 100 percent.

12 MR. LOWERY: I appreciate that. And --
13 and, in fact, it might be admissible also. It just
14 depends, but we just don't know.

15 COMMISSIONER GUNN: Right. Absolutely.
16 I just didn't -- I just wanted to make sure that --
17 that in and of itself, it wasn't an exclusion.

18 MR. LOWERY: Right.

19 COMMISSIONER GUNN: And that if -- if it
20 wasn't an exclusion, then, of course, it would be
21 subject to all the other -- all the other procedural
22 hurdles that it would have to go into to be
23 considered by the Commission.

24 MR. LOWERY: Right. And -- and I'd
25 agree that would be inappropriate to have this

1 blanket -- you know, not only have all this excluded
2 information that might otherwise be admissible and --
3 and appropriate.

4 COMMISSIONER GUNN: Right. But I -- I
5 agree with you, and point well taken.

6 MR. LOWERY: Just to go back to, I
7 guess, a little bit more general comments, I'd like
8 to step back a minute and talk about what the
9 Commission should and should not seek, I think, in --
10 in -- in seeking to accomplish if it does adopt rules
11 involving extra record ex parte communications
12 involving contested cases. And essentially, these
13 are things that are occurring outside the confines of
14 the hearing room.

15 I -- I don't -- I'm -- I'm perhaps
16 projecting what Commissioners think or don't think,
17 but I'm going to speculate a little bit about this a
18 minute. From where I sit, service on the Public
19 Service Commission is unique, complex and, frankly, a
20 difficult job. I deal with these engineering,
21 accounting, financial, regulatory issues every day
22 and have for -- for many years, and I learn something
23 new, I think, just about every day about this
24 business and about this process.

25 From the standpoint of a Commissioner

1 who may in most cases have come to the Commission
2 with no background or not much background and no
3 training in this area who then has to master multiple
4 industries, multiple companies in a fast-moving
5 industry, has the day-to-day task of keeping up with
6 that, I would suspect that the -- understanding the
7 issues is daunting at times, it might even be
8 overwhelming at times, and I can only imagine the
9 volume of paper that you have to deal with because
10 the volume of paper I have to deal with in just the
11 cases I have about overwhelms me and you have all the
12 cases.

13 I also think it's important to
14 recognize, and I think Mr. Downey's alluded to this,
15 Commissioners are not judges. You were created by
16 the legislature and your job is to implement what
17 really is the legislative policy of the state in
18 terms of regulating public utilities. There doesn't
19 have to be a Public Service Commission. The
20 legislature could do that themselves, but they've
21 chosen, I think probably wisely, to have a Commission
22 that does that. So you have a legislative hat, a
23 quasi legislative hat and sometimes a quasi judicial
24 hat when you are adjudicating a contested case.

25 The rules have got to recognize that you

1 have these disfer -- different hats and you're not a
2 judge like Judge Beetem and Judge Callahan down the
3 road, you don't sit in that same kind of role. And
4 at times this process has gotten off track and gone
5 down the road of treating you just like you're a
6 judge just like anybody else. I think Mr. Thompson
7 on behalf of Staff has made very clear the Staff's
8 view that, in fact, you are not judges and I agree
9 with that.

10 Against this backdrop, I think it's
11 critically important that Commissioners are not
12 deprived of the information they need to do their
13 jobs, to learn their jobs which is an ongoing process
14 to be effective regulators. That information and
15 communication about regulatory issues cannot as a
16 practical matter or as a matter of good policy take
17 place always within the confines of the hearing room
18 or in the agenda room.

19 Commissioners, I think, need to be in a
20 position sometimes to say, you know, this is probably
21 a really dumb question, but I'd like to ask it
22 without -- and again, there's nothing wrong with the
23 media, there's nothing wrong with the light of day
24 being shown on things. But I don't think we want to
25 set a set of rules or a set of rules that have such a

1 chilling effect on the ability to have communication
2 with Commissioners to do their jobs if the
3 Commissioners feel like they have to be behind a
4 closed door all the time and can't have any
5 communications that are pertinent to doing their job.

6 So -- so I guess the key message that
7 I'm trying to convey today is that communication
8 among Commissioners and stakeholders, whether that be
9 with Mr. Mills, with Ms. Vuylsteke, with Mr. Smith
10 from Noranda, with my clients' executives or whoever
11 that might be, it's not only important but it's
12 absolutely necessary. And Commissioners shouldn't be
13 handcuffed and scrutinized to the point that
14 effective open communication of that type cannot take
15 place.

16 So the starting point for any rule needs
17 to be that it doesn't go farther than is necessary to
18 address the fundamental problem if there is one, and
19 that would be essentially a threat -- I think
20 Mr. Downey used the term "a threat" to the contested
21 case process itself if it -- if -- and we should not
22 go further than is necessary to address that
23 particular issue.

24 And I think -- and -- and let me make
25 clear on that, it's not a -- I'm not advocating that

1 I or a utility executive or Mr. Smith from Noranda or
2 anybody else ought to be able to walk into a
3 Commissioner's office two weeks before a rate case is
4 filed and advocate their position on the issues. And
5 I think the mechanism that Mr. Boudreau proposes
6 which is much more practical and workable, addresses
7 that situation very well.

8 Everybody would be on the same footing,
9 everybody would have to disclose those
10 communications. Those communications that take place
11 in this sort of arbitrary window that would sort of
12 be fashioned are -- are going to be -- that the light
13 of day is going to shine on those. And I think that
14 was a serious concern and a serious issue when
15 this -- when this entire docket sort of came up in
16 the first place. But it wouldn't impair the ability
17 for communications to take place on a day-to-day
18 basis which -- which I think is critical.

19 The -- the other thing I just want to --
20 want to make clear, we -- we've been in a period of
21 time and I think we're approaching almost the
22 two-year mark since this sort of started, this --
23 this effort, this discussion, I guess I -- this
24 debate at the Commission took place. We've been in a
25 period where there's really been, I think, a very

1 much a chilling effect at the Commission going in
2 both directions among all parties. Nobody's really
3 known what the rules are, no one's known what to do,
4 when communications take place and when they
5 shouldn't take place.

6 And I -- and I think Mr. Boudreau is
7 correct that impairment has been promoted and I think
8 fostered by some parties who want to use allegations
9 about certain things to -- to advance the interest of
10 their own client regardless of the impact on the
11 public interest and the process as a whole.

12 So I -- I think that the majority of the
13 edits and suggestions we're going to have --
14 Commissioner Clayton, we haven't had a whole lot of
15 time to look at your specific -- I did look at them,
16 but I didn't see them until Monday morning and
17 frankly, had -- had a completely packed day
18 yesterday. But I think the majority of the comments
19 we're going to have are not going to take issue
20 structurally all that much with what Mr. Downey has
21 done.

22 We're going to consider, Commissioner
23 Clayton, what you -- what you have put out there,
24 but -- but are going to -- are going to try to direct
25 to making clear that communications need to take

1 place, that everybody needs to know what the rules --
2 and probably most importantly, the Commissioners need
3 to be comfortable with what they can do and what they
4 need to be doing, and -- and address some of these
5 other issues, these safe harbor type of issues so
6 that we can all be clear about that.

7 Let -- let me mention and let me amplify
8 just a little bit the comment I had about Section
9 386, 390. If I look at the draft rule and I look at,
10 I guess it's this 3A, B and C exclusions from
11 ex parte communications, it -- it appears pretty
12 clear that these investigative -- these
13 communications about investigative matters wouldn't
14 even have to be disclosed, I think, if I'm reading
15 this correctly -- correctly that that's what's
16 written here now.

17 As I said, a rate case, an over-earnings
18 complaint case, for example, which is just a rate
19 case in reverse, that to me at least leaves open the
20 possibility that the Staff could have all kinds of
21 communications about that reverse rate case right up
22 to the minute it's filed that a utility could not
23 have -- for example, if the utility was filing what
24 I'll call an affirmative rate case, and I think
25 that's a problem. I think that's a -- a parity

1 problem that needs to be addressed.

2 The -- the other thing that I would
3 mention is, and the reason this amplifying or
4 defining this general regulatory policy or safe
5 harbor more carefully and more fully I think is
6 important is because of the breadth of a rate case.
7 You know, how many times have we sat in this room and
8 talked about consideration of all relevant facts and
9 circumstances?

10 A rate case examines a utility's
11 business from head to toe, so to speak. And we're
12 going to have to be very clear about where those
13 lines are because there's so many things that have
14 nothing to do with specific facts and issues and
15 merits, positions and -- and that language is very
16 nice and we can all talk about what that means, but
17 that communications need to take place about those,
18 there's nothing wrong with that, but if we aren't
19 clear about that, we're going to go back to the
20 situation where this -- where the -- where the gears
21 are sort of frozen up and -- and -- and no
22 communications, and helpful and useful and important
23 communications can't take place because nobody really
24 knows exactly what they -- they need to do.

25 So that's probably an area we're going

1 to focus on quite a lot, and hopefully we can help --
2 help the process along in a way that makes those --
3 makes those rules clear. And we'll try to also come
4 up with a way -- I understand -- I understand you
5 can't handcuff the Staff in their investigative
6 matters and that's what you were trying not to do. I
7 understand that. But -- but I think we need to try
8 to probably come up with a little bit better way not
9 to have it so broad that it also swallows the -- the
10 exception sort of swallows the rule.

11 We -- we very much appreciate the
12 opportunity to appear today and -- and going to try
13 to provide some constructive comments and help to --
14 to advance this process.

15 JUDGE WOODRUFF: Thank you, Mr. Lowery.
16 Anyone else wish to comment?

17 MR. DOWNEY: Actually a follow-up for
18 Mr. Lowery.

19 JUDGE WOODRUFF: Go ahead.

20 MR. DOWNEY: You had suggested that
21 perhaps you -- I think you called it over-earnings
22 cases should be not included in investigative
23 matters.

24 THE COURT REPORTER: I'm having trouble
25 hearing.

1 MR. DOWNEY: Let me step forward too or
2 pull this forward. You had mentioned that perhaps an
3 over-earnings case would not be appropriate to be
4 exempted out of the investigative matters provision.
5 And what I'm curious about is -- and you don't have
6 to answer here, but think about perhaps written
7 comments or other comments. If we exempted those out
8 and said investigative matters other than other --
9 other -- over-earnings cases, would that solve the
10 problem or are there other matters that need to be
11 treated in a similar fashion? And as I said, I'm not
12 soliciting for an answer, but that seems to me to be
13 perhaps a quick fix.

14 MR. LOWERY: I do need to think about
15 that, and it's a fair question, and I actually -- it
16 occurred to me. I mean, that's the one that jumped
17 out at me which I might suggest that that's the one
18 that really is the -- is the main issue, but I would
19 want to think a little bit more about other kinds of
20 cases before I --

21 MR. DOWNEY: Sure. And I'm -- I'm also
22 not suggesting -- I think -- Mr. Mills, I think, was
23 about to speak -- but I'm not saying to necessarily
24 take it, I'm just curious if that at least is a
25 proposal that will solve the problem.

1 MR. LOWERY: I will definitely think
2 about -- along those lines.

3 MR. DOWNEY: Thank you.

4 JUDGE WOODRUFF: All right. Mr. Cooper?
5 You need to identify yourself for the court reporter.

6 MR. COOPER: Yes. Dean Cooper. I'm an
7 attorney here in Jefferson City. I have been asked
8 by -- by a couple of my clients, the Empire District
9 Electric Company and Missouri Gas Energy, which is a
10 division of Southern Union Company, to affirmatively
11 express their -- their support for the comments that
12 have been made by Mr. Boudreau and MEDA here this
13 afternoon.

14 On a -- on a different subject, just
15 kind of from a practitioner's point of view, I did
16 want to make one other comment in regard to also an
17 issue that was raised by Mr. Boudreau. But it --
18 it's the 60-day sort of notice proposal or -- or idea
19 that's contained in Chairman Clayton's comments
20 for -- for consideration and discussion. And I
21 just -- from a practical standpoint, I'm afraid
22 what -- what that sort of notice requirement may do
23 is just provide a 60-day or whatever day period it
24 might be, waiting period for filings, that it --
25 filings that might otherwise be made in October get

1 made in December.

2 And I say that because over the years
3 of -- of practicing, while I can think of some
4 situations where my clients knew 60 days out and
5 could have made such a filing, I probably can -- can
6 think of many more situations where various
7 considerations and -- and -- and variables and -- and
8 things that were kind of coming together to -- to
9 help them decide what they wanted to do and when they
10 wanted to do it just didn't happen 60 days out and --
11 and happened much closer to the ultimate filing date.

12 So again, I -- from a practitioner's
13 standpoint, I just wanted to express that to the
14 Commission and ask you to take that into account on
15 that issue.

16 JUDGE WOODRUFF: Thank you. Mr. Mills?

17 MR. MILLS: Thank you. On behalf of the
18 Public Counsel, Lewis Mills. I do have a number of
19 comments and some questions. Just sort of following
20 through the rule as it's written, I'll -- I'll try
21 to -- try to go in order just to make sense of it.

22 First of all, with -- with respect to
23 the -- the anticipated case and the 30-day time
24 frame -- and I'll put this first as a question to
25 Mr. Downey. You've done a huge amount of research on

1 other states. Do other states that have sort of what
2 you'd call the halo, do they use 30 days or do they
3 use something more?

4 MR. DOWNEY: I think actually most
5 states do not. I'm -- I'm -- I'm thinking of at
6 least three states that have something. I think one
7 has a 45 and two have a 60.

8 MR. MILLS: Okay. Does Florida have a
9 90?

10 MR. DOWNEY: They may. I think they do.
11 I'd have to look. That wouldn't surprise me. And --
12 and so you know, they were not one of the three that
13 I was thinking of.

14 MR. MILLS: And -- and I think if -- if
15 you -- and -- and this is more of a comment. I think
16 if you do a 30, then I think you really do sort of --
17 you know, you have utilities just sort of weigh the
18 question of, well, yeah, let's -- let's just put it
19 off for 30 days so we can go lobby the Commissioners
20 about it, and that's not that big of a deal. I think
21 if you stretch it out longer, then it becomes a lot
22 more meaningful. I think -- I think a 30-day time
23 clock is really -- you know, and for some cases maybe
24 that's appropriate, and I'm really thinking more
25 of -- of Commissioner Clayton's proposed changes with

1 the exceptions for the larger utilities and the more
2 significant cases that have a larger time clock.

3 You know, you could, I suppose, divide
4 it even further and then allow some -- some
5 particular matters for some utilities to have a --
6 sort of a 30-day blackout period. But with respect
7 to the whole concept, I think it -- certainly I think
8 this rule has come a lot farther than -- than -- it's
9 come a long way from the original draft. I -- I
10 think we're -- we're really getting down to -- to,
11 you know, sort of brass tacks and -- and, you know,
12 focusing then on some of the issues that are really
13 critical.

14 And -- and it may sort of surprise
15 everyone that -- that I -- I don't disagree a whole
16 lot with -- with Mr. Boudreau on the -- on the
17 permit-and-disclose kind of issue, although I think I
18 would phrase it differently. I think I would say
19 disclose, then permit and record. And I -- because I
20 think the -- the principle that I think is -- is most
21 critical is that there really should not be an
22 occasion in which Commissioners or a Commissioner or
23 a presiding judge has had a communication with --
24 with anybody who's got an interest in a case that the
25 other entity -- in a case whether it's pending then

1 or whether it's going to be pending in 60 days or 90
2 days or -- or -- or, you know, even longer, that the
3 other parties don't have the ability to discover
4 and -- and look at and find out what was said in that
5 communication.

6 And you know, I -- I think -- I think
7 when -- when Mr. Boudreau was talking about disclose,
8 I don't know what he meant, but -- but to my mind,
9 you know, a one-page memo that summarizes a two- or
10 three-hour meeting is probably not enough. I think,
11 you know, there ought to be at least some window in
12 which communications are verbatim transcribed, if
13 not, you know, videotaped so -- so that parties know
14 very specifically what was discussed, how it was
15 discussed and -- and -- and they -- both sides of the
16 conversation, rather than simply a -- a -- a short
17 summary -- even a, you know, a good faith detailed
18 summary could leave out some important details. So I
19 think there ought to be at least some window in which
20 if communications are permitted under disclosure,
21 they ought to be recorded or transcribed.

22 And I think any -- any -- and that --
23 that also goes to some of the comments that
24 Mr. Lowery had. I don't disagree with him that it's
25 very important for the Commissioners to have access

1 to information. I -- I have -- I have never
2 suggested in -- in as far as I know, and if I have, I
3 really didn't mean it, that -- that the people should
4 not be able to talk to Commissioners when they want
5 to. But I don't think people should be able to talk
6 to Commissioners about things that are going to be
7 issues for Commissioners to decide in quasi judicial
8 settings that other people don't have access to.

9 So it's not -- it's not the -- it's not
10 the -- the substance of the communication, it's the
11 question of whether other parties or anticipated
12 parties can discover it and have a chance to know
13 what was said and what could be said.

14 And I think really the only argument
15 I've ever heard about not disclosing all
16 communications, one, as sort of a practical matter,
17 that you -- if you -- if you bump up against somebody
18 on the street, you're not going to be able to record
19 that really quickly. And the other one is this whole
20 notion that, you know, the -- the Commissioners will
21 be afraid to ask dumb questions if they know that
22 their dumb question is later going to be revealed.
23 There -- there is so much more at stake in this
24 process than a fleeting embarrassment of a
25 Commissioner from asking a question that -- that

1 maybe he should have known the answer to, that I
2 don't think that's even a consideration.

3 I think if -- if the rules are designed
4 to somehow, you know, minimize the -- the -- the
5 possibility that some Commissioner may someday be
6 embarrassed by having a dumb question revealed to
7 the -- to the public, I -- I think that's a -- not a
8 worthwhile goal of these rules. I don't think that
9 should even be a consideration in terms of keeping --
10 keeping communications secret.

11 Moving on to the -- to the definition of
12 a contested case --

13 COMMISSIONER GUNN: Mr. Mills, before
14 you move on --

15 MR. MILLS: Oh, sure.

16 COMMISSIONER GUNN: -- could I ask --
17 could -- could -- I want to talk about your initial,
18 the -- this -- the first part of that --

19 MR. MILLS: Okay.

20 COMMISSIONER GUNN: -- which is the kind
21 of -- it might be described as de minimus or purely
22 kind of social -- social contact. I mean, how -- how
23 would you deal with that? I mean, would you just be
24 okay with a disclosure or do you think that they
25 don't need to be disclosed or do you think that...

1 MR. MILLS: I think if you -- if you
2 bump into me or someone on my staff or someone from
3 Union Electric or another utility on the street
4 and -- and they, you know, without thinking blurt out
5 something that may have a bearing on a case, then
6 that needs to be disclosed, absolutely. And --
7 and -- and as -- you know, as soon as anybody
8 involved in that recognizes that it's treading on
9 that ground, he or she ought to stop it.

10 But I don't -- I don't think -- I don't
11 think you can draw a rule that would -- that would
12 absolutely prohibit that from ever happening. So I
13 think you have to -- for those kinds of unintentional
14 fleeting moments, I think you have to -- you have to
15 settle for some sort of an after-the-fact disclosure
16 because you're not going to be able to transcribe it,
17 you're not going to be able to prevent it. So -- so
18 in that situation, I think the best you can do is
19 some sort of a -- an after-the-fact summation of what
20 happened. But only in situations where you can't
21 have transcribed or recorded or had it done in
22 writing or had it done in the presence of other
23 parties should that be done.

24 COMMISSIONER GUNN: Thanks.

25 MR. MILLS: With respect to the

1 definition of a contested case, I think that's a --
2 it certainly is sort of a blackletter definition of a
3 contested case. One of the things that you may not
4 be aware of is -- is there -- there is an issue
5 that's sort of circulating around in -- in a few
6 cases having to do with the Commission is whether a
7 case can be contested and then noncontested and then
8 contested later and whether a case, once it becomes
9 contested, is -- is always contested through its
10 course.

11 So there -- there -- there may need to
12 be some more attention given to, you know, what is a
13 contested case, when does it become contested and --
14 and does it always stay contested. I don't disagree
15 with what you have here. I think you may need
16 more -- you know, until there -- there are decisions
17 on those issues, it may be helpful to -- to more
18 carefully define what a contested case is.

19 Several -- several times throughout the
20 rules there's -- there's reference to an agent of a
21 party. I don't remember the technical definition of
22 an agent, but that may be a narrower term than you're
23 really looking for. You may need something like
24 agent, employee, representative of. I think agent
25 has to have either -- either authorized --

1 authorization or apparent authority or something to
2 that -- to that nature, and that may be a narrower --
3 narrower term than you really need throughout the
4 rules.

5 With respect to -- and there's a --
6 there's another term that shows up several times in
7 the rule -- in the rule, and it's -- it's talking
8 about undertaking ex parte communications. And I'm
9 not sure exactly what that means. You -- you have --
10 you also use the terms initiate and participate.

11 So I assume that undertake means
12 something other than one of those two, and I -- and
13 I'm at a loss to figure out what it is, and I -- I'm
14 not -- so I think it -- I think it either needs to be
15 more -- more well explained or -- or dropped out
16 because to my mind, it's -- it's unclear how you
17 would undertake a -- a communication without
18 participating or initiating in it.

19 With respect to communications under
20 386.210.5, you know, I think -- I think the statute
21 speaks for itself. I don't know that -- that you
22 really need to try to -- to shoehorn it into an
23 exclusion from an ex parte communication. By -- by
24 statute there's a specific kind of communication
25 under that particular section that's not. But you

1 know, to -- to my mind, the way -- the way this
2 particular -- and I'm talking about 3A on page 2 --
3 it seems as though it's trying to make that statutory
4 section broader than -- than the statute is. And
5 maybe just allowing the statute to speak for itself
6 would take care of that problem.

7 There was some discussion about the
8 so-called safe harbor, and the only safe harbor
9 really that's in the rules as drafted is -- is
10 service outages. I don't disagree that -- that
11 that's -- that that's a good thing. I don't disagree
12 that perhaps it could be broader. I don't see that
13 there's any reason why any of these kinds of
14 communications, even if it's a broader field of play
15 can't be made and then disclosed.

16 I mean, if you're talking about a
17 service outage, you know, an upcoming closure of a
18 service center or something of the nature that --
19 that, you know, will -- will soon be publicly
20 disclosed and would be helpful for -- for a
21 Commissioner to know about, tell the Commissioners
22 and tell everybody at the same time. I mean, if
23 it -- if it has to be kept secret for SEC purposes,
24 do it in a writing which is later disclosed when
25 it's -- when it's allowed to be. You know, if it's

1 something that can be disclosed to Commissioners but
2 not disclosed to the public, then there's no reason
3 why it can't be done in writing and preserved in that
4 fashion.

5 With respect to the -- the questions
6 that -- I'm now at 3C -- the -- the parity question.
7 And again, I don't disagree with Mr. Boudreau and --
8 and Mr. Lowery that the parity is generally an
9 appropriate thing. There may be instances in which
10 it's not entirely achievable, but I think you can
11 treat, for example, a Staff earnings complaint in
12 sort of the same way that you would a utility rate
13 increase case in which, you know, early on when it's
14 a general concept, you know, the -- the Staff can go
15 to the Commission and seek Commission approval to
16 pursue a complaint, but with regard to specific
17 topics that are going to come up for Commission
18 decision, then the Staff shouldn't be able to talk to
19 the Commissioners about that in secret any more than
20 a utility would be able to talk to Commissioners
21 about that in a general rate increase case.

22 So I think as long as you -- as long as
23 you allow whatever is necessary, you know, under
24 the -- the -- sort of administrative structure in
25 which the Staff works for the Commission to allow

1 that to get started without having the Staff
2 communicate to the Commission about specific issues
3 in such a way that the other parties can't hear about
4 those communications, I think you can solve that
5 problem.

6 And I think that's true not just with --
7 with rate complaints, but with other cases as well.
8 I mean, there is -- there -- because the Staff works
9 for the Commission, there are instances in which
10 the -- the Staff has to get either permission from
11 or -- or at least a checkoff from the Commission to
12 proceed in a certain course, but I think once that's
13 done, that the Staff should not be meeting behind
14 closed doors to tell the Commission about specific
15 issues that are likely to come before the Commission
16 for decision any more than -- than anyone else
17 should.

18 And to the extent that, you know, the
19 Commission adopts a sort of, you know, disclose,
20 permit and record, that -- that could approach --
21 that could involve this as well too. I mean, it's --
22 it's -- if there is -- for some reason that the Staff
23 needs to talk to the Commission about some topic that
24 would otherwise not be appropriate to talk about,
25 then to record that entire conversation and later

1 disclose it to the parties when -- when the case is
2 actually filed.

3 There -- I was going to talk about the
4 question of an extra record communication being made
5 part of the record, but I think the exchange that --
6 that Commissioner Gunn initiated clarified that. I
7 think that's -- I think that was -- was well done.

8 With respect to the disparity between 6
9 and 7, I think there was some effort to try to
10 perhaps minimize the amount of work that
11 Commissioners would have to do to -- to record or --
12 or to -- to document an ex parte communication if it
13 was initiated by a nonparty. Again, I don't think
14 that simply a summary or -- or -- or a brief
15 after-the-fact recap is appropriate for any kinds
16 of -- any kind of communication that -- that is
17 anticipated. Those should be recorded or transcribed
18 or both.

19 To the extent that -- that such a thing
20 comes up and it is later -- you know, sort of comes
21 up in passing and it was unable to be transcribed or
22 recorded, I think that -- with all due respect, I
23 think the Commissioners are -- are perfectly able to
24 and should document that kind of communication to the
25 same extent that a party would.

1 386.210.4. There was some discussion
2 about that and what it really means. And again, I'm
3 not entirely sure that that's clear exactly what it
4 means. And so simply reciting in the rules without
5 an -- an -- any attempt to -- to clarify it or try to
6 pin it down, I think, you know, either -- either it
7 should not be referenced or it should be referenced
8 and interpreted I think in the Commission's rules
9 because there -- there -- there's debate over exactly
10 what it means.

11 I think -- and moving on to -- to
12 Section 8 under the draft rules, I think at one
13 point, Mr. Downey, in your -- in your discussion at
14 the beginning, you -- you refer -- you use the phrase
15 "sanctions on Commissioners," and it doesn't appear
16 as though there's anything under Section 8 that would
17 talk about a sanction on a Commissioner. And I -- I
18 don't -- in fact, I don't think there's anything in
19 the rules that -- that talk about a recourse if there
20 is a prohibited ex parte communication with a
21 Commissioner, and perhaps there should be.

22 There's been discussion with respect to
23 Chairman Clayton's sort of large utility case concept
24 which -- which I like. And I think some of the
25 comments from -- from the utilities were that

1 utilities don't necessarily know 60 days in advance
2 or they -- they think they're going to file something
3 60 days in advance and it turns out to be 90.

4 The -- the latter situation I don't
5 think is a problem because they -- they act as though
6 they were going to file it within 60 days. If it's
7 filed later, then you simply have a longer window and
8 I don't see that that's really a problem.

9 With respect to the notion that a --
10 that, you know, a large utility doesn't know 60 days
11 in advance of when it's going to file a rate case,
12 I -- I don't really think that that's true these
13 days. I mean, it may have been true way back in the
14 beginning of the -- the -- you know, of the
15 regulation at the -- the turn of the last century,
16 but, you know, from all -- all of the discussions
17 I've had with the large utilities, they know
18 sometimes years in advance when they're going to file
19 a rate case. Merger cases as well, that they know
20 well in advance when they're going to file. I don't
21 think it's an undue burden to make them figure out
22 60 days in advance when -- when those kinds of
23 utilities are going to file this kind of a case. I
24 don't think that that's a real -- a real problem.

25 And with respect to the question of

1 whether 11C should apply to all parties, I would say
2 it should. I mean, I think, you know, to the extent
3 that a utility can't come in and talk to
4 Commissioners about what's going to be happening in
5 an upcoming case, I don't think other parties should
6 be able to do it either.

7 One of the issues you have is that, you
8 know, with -- with respect to the 60-day notice, once
9 it's been filed, all parties are sort of on notice
10 that there's going to be a case filed. But for
11 example, you know -- and not to pick on Union
12 Electric, but we recently had an on-the-record in
13 which Union Electric said that regulatory lag is a
14 big focus of their current rate case. You know,
15 60 days in advance of that case, they probably knew
16 that regulatory lag was going to be a big part of
17 their rate -- big focus of the rate case. Other
18 parties wouldn't necessarily know.

19 So it would be -- it would be hard for,
20 you know, the -- one of the Commission Staff
21 attorneys or somebody like, you know, myself or -- or
22 a representative from Noranda to know that we can't
23 come talk to the Commission about something in which
24 would otherwise be just general regulatory policy,
25 the concept of regulatory lag, although it would be

1 clear to the utility who knew that they were going to
2 make that a focus that that would be a kind of
3 communication that's -- that's not allowable.

4 So there -- there will almost
5 necessarily be some disparity in the application of
6 that kind of rule simply because one party almost
7 always knows more about what is going to be involved
8 in a case than the other parties do at this point at
9 a -- in a prefiling point.

10 I think those are all the comments I
11 have on -- on the rules as drafted. I'd be happy to
12 take questions.

13 COMMISSIONER GUNN: Just -- just a quick
14 one. Do you think we have -- I'm concerned about the
15 statutory authority that we have to sanction each
16 other, that the statute is -- seems to indicate that
17 basically the General Assembly and the Governor are
18 the ones that have -- that have the -- an ability to
19 sanction or -- or if a court found bias or something
20 like that. So does -- do you have concerns about
21 that? I mean, I don't necessarily disagree that if a
22 Commissioner acts improperly that they should not be
23 subject to some sort of sanction. But does -- is --
24 is that appropriately done by the Commission or is it
25 appropriately done by the Circuit Court or other

1 entities outside of that?

2 MR. MILLS: Well, I mean, that's a valid
3 question. I hadn't -- I wasn't really thinking that
4 the rule should say, you know, the Commissioner --
5 the Commission as a body, you know, will impose X, Y
6 and Z fines or whatever on a Commissioner. I was
7 thinking that the rules at the most would provide
8 something that, you know, any Commissioner who, you
9 know, knowingly or willfully or -- or whatever
10 engages in ex parte communication will recuse himself
11 or herself from that particular case.

12 And I don't know that -- that really
13 there -- that, you know, the rules could go to an --
14 could give you the authority to enforce that, but I
15 think you could set that out as a rule that that's
16 what the -- a Commissioner would do.

17 COMMISSIONER GUNN: And -- well, and
18 then you -- you're kind of setting up for -- for a
19 Circuit Court to impose a sanction for a double rule
20 violation, both the violation of the ex parte rule
21 and then a violation of not recusing -- recusing
22 themselves.

23 I don't disagree with you, I just --
24 as -- as it's -- as Commission -- I think there --
25 there need to be rules about Commissioners out there,

1 but it's very difficult for -- an enforceability
2 standpoint. And -- and so I would be concerned about
3 putting something in that I just don't think that we
4 had an enforce -- be able to enforce.

5 And it's something I've struggled --
6 struggled with too because -- because, you know,
7 when -- when the first -- right when I came on the
8 Commission, there was a question about -- about
9 recusal and when it was appropriate and when it
10 wasn't. And -- and there aren't really good
11 guidelines out there for -- for the -- for the
12 Commission.

13 And as I did the research, there's very
14 little statutory authority, and I'm not sure that
15 there is any for Commissioners to -- to do anything
16 to the other Commissioners. And I'm not entirely
17 sure that it's -- that it's appropriate under the
18 legislative scheme that's been -- that's been set up.
19 So I just think putting a rule in there that's
20 unenforceable may not be the best idea in the entire
21 world.

22 Now, getting some clarity at about -- as
23 about what -- when -- what actions of a Commissioner
24 are deemed or not deemed kind of appropriate by -- as
25 a general policy, I think is -- is something that we

1 definitely need to -- to look at. But the -- the
2 sanction part I think is -- is -- is troublesome --

3 MR. MILLS: And -- and --

4 COMMISSIONER GUNN: -- from a -- from an
5 authority standpoint. Not necessarily from a good
6 government standpoint, but from an authority
7 standpoint.

8 MR. MILLS: I agree, and I think
9 sanction would be the wrong term in that context.
10 You know, setting -- the rule setting forth the
11 appropriate conduct of a Commissioner, I think, would
12 be a more appropriate way to say it as opposed to
13 sanction.

14 COMMISSIONER GUNN: All right.

15 MR. DOWNEY: If I may, I will also add
16 that if I did -- I was not thinking of some sort of
17 sanctions being imposed upon Commissioners by other
18 Commissioners, so if I said that -- said that or
19 suggested that, that was not my intention.

20 To real quickly run through a couple of
21 other points so people are aware, my personal
22 inclination is to define any vague term, and I
23 believe the definition of contested case is vague and
24 deserves further definition.

25 I also believe that the general

1 regulatory policy term is a vague term that deserves
2 better definition. So if people are looking for
3 where I'm -- you know, if you make me king for a day,
4 I'm going to give you definitions. So if people have
5 suggestions for those definitions, I would very much
6 like to see those.

7 The other thing I just wanted to make
8 you aware of is it's been discussed -- currently the
9 provision is a safe harbor for outages. And the
10 request made was that there should be notice given.
11 And just so you were aware, the section that precedes
12 the subparts A through C states that for subpart 3A
13 and 3B, there would be notice given. So just realize
14 that is actually taken care of there.

15 JUDGE WOODRUFF: Anyone else wish to
16 comment? Mr. Fischer?

17 MR. FISCHER: Hi. Yes, my name's Jim
18 Fischer. I'm with the law firm of Fischer & Dority,
19 and we represent a number of public utilities and
20 telecommunications companies, as most of you know.

21 Initially, I guess, I would just endorse
22 what -- some of the comments that have been made by
23 Mr. Boudreau, Mr. Lowery and Mr. Cooper. I did have
24 a couple other points, though, particularly on behalf
25 of Kansas City Power & Light I did want to mention.

1 First of all, though, going to just
2 definitions from a practitioner's standpoint, I think
3 Commissioner Gunn made a good point in one of his
4 comments in his written filing that we need to make
5 it clear that procedural matters can be discussed
6 with the regulatory law judge. That's not -- wasn't
7 clear to me whenever I read the definition of
8 ex parte communication.

9 From a practitioner's standpoint, it's
10 very important that we be able to visit with a
11 regulatory law judge on uncontested procedural
12 matters that need to be dealt with quickly. If
13 everything has to be filed, it's really going to
14 bring, I think, business to -- to a halt.

15 On more substantive things, I think
16 everybody on this side of the -- of the aisle has
17 expressed the feeling that the ex parte communication
18 rule should apply to everybody, not just public
19 utilities, and certainly Kansas City Power & Light
20 feels that way. If you're Public Counsel, Staff or
21 intervenor, you should be under the same rules.

22 We -- Kansas City Power & Light also has
23 a concern that's been expressed about having too long
24 of a blackout period ahead of -- ahead of time.
25 60 days is unworkable from our standpoint. 30 days

1 would be much more workable. We deal with that in
2 Kansas on an intent-to-file-a-rate-case basis. It's
3 not related to the ex parte rules there, but there is
4 a notice period. It gives the Staff and Public
5 Counsel and others some period of time to get ready
6 for that. I do like Mr. Boudreau's idea that -- on
7 behalf of MEDA, that the disclosure after not having
8 a specific 30-day time frame.

9 I guess I also would endorse a lot of
10 Mr. Lowery's comments today about the role of the
11 Commissioners, how important it is that you under --
12 that you have a broad understanding of the industries
13 that are out there, how you don't feel like you're
14 the last ones to know. Sometimes I know whenever
15 I've had that role, I felt that way, and I don't
16 think that's a good thing. We don't want to turn off
17 the communications to the point where -- where
18 Commissioners are the last to know. And you have to
19 decide these cases based on the competent and
20 substantial evidence in the record, and that doesn't
21 mean, though, that you have to decide it without -- I
22 mean, that's what -- that's what you have to decide
23 it on. You also have to understand the broad policy
24 implications of what you're deciding. So anyway,
25 with that, I would close.

1 JUDGE WOODRUFF: Any comments or
2 responses?

3 MR. DOWNEY: If I may, so people are
4 also aware, to follow up on your comment about
5 understanding what is permitted, this conversation
6 today or the hearing today has led me to believe that
7 it may be appropriate to substitute a term in for
8 substantive matters for the language we had used and
9 then define substantive matters to include those
10 matters and not to include them and include
11 procedural matters as something not included, just to
12 make clear that there are some things that are
13 governed and some things that intentionally are not
14 governed.

15 MR. FISCHER: I think that's how the
16 practitioners generally understood the rules up till
17 now.

18 MR. DOWNEY: And that was certainly the
19 intent, but I think we may even want to make that
20 clearer.

21 JUDGE WOODRUFF: All right. Anyone else
22 wish to offer comment or questions? Go over to the
23 Chairman.

24 CHAIRMAN CLAYTON: Thank you, Judge. I
25 had several questions. I want to go Mr. Mills first.

1 I want to make sure I understand the -- the comments
2 that you've provided. If you had to choose --
3 assuming that a case has been filed -- let's ignore
4 the anticipated piece, but assuming that a case has
5 been filed, are you saying that you would prefer or
6 you are ambivalent about whether all communications
7 should be prohibited versus all communications being
8 disclosed and how they would be disclosed? Did you
9 express a preference?

10 MR. MILLS: Well, I may have confused
11 the -- the concept of the antici -- the anticipatory
12 period with the -- the pending case period. I -- I
13 believe that to my mind it's very clear that during
14 the -- when -- when a contested case is filed and --
15 and -- and actually docketed, then I think almost any
16 communication having to do with the merits is a
17 prohibited ex parte communication. What I was
18 talking about is the anticipatory period.

19 CHAIRMAN CLAYTON: Okay. Well,
20 that's -- that's fine. You're narrowing down --
21 you're getting into the -- the area I'm trying to
22 figure out where you stand.

23 Assume that a case has been filed -- a
24 general rate case, assume a case has been filed.
25 Where do you stand on communications such as one of

1 the other speakers brought up like an RTO issue or a
2 billing issue or some issue that doesn't relate to an
3 outage? I think an outage is -- has an exception.

4 So how do you think that communication
5 should be addressed where a utility is contacting the
6 Commission or Commissioners, a case has been filed,
7 it doesn't directly address the merits of the case?
8 First choice, should that be prohibited, should it be
9 allowed but disclosed, and if so, how detailed should
10 that disclosure be?

11 MR. MILLS: I -- I don't think it should
12 be prohibited because, you know, I agree that
13 Commissioners need information on a lot of issues and
14 there -- there are issues that have to do with
15 utilities that aren't going to come up as contested
16 issues. So if, for example, there's an issue that
17 has to do with an RTO that it's important that the
18 Commission know about even though a contested case is
19 pending that won't touch on that --

20 CHAIRMAN CLAYTON: Okay.

21 MR. MILLS: -- I think that should be
22 allowed but disclosed.

23 CHAIRMAN CLAYTON: Okay. But disclosed.
24 And then what is the level of that disclosure?

25 MR. MILLS: And --

1 CHAIRMAN CLAYTON: Transcripted,
2 stenographer or summary...

3 MR. MILLS: No, no, no. Definitely if
4 it's not done in writing, I would think that it ought
5 to be transcribed or recorded.

6 CHAIRMAN CLAYTON: Okay. So --

7 MR. MILLS: Unless -- you know, unless
8 there's an emergency situation that's come up that
9 there isn't time to set that up, and that would be an
10 exception, but the preference is if it can be
11 recorded or transcribed, it should be.

12 CHAIRMAN CLAYTON: Okay. So you would
13 disagree with the provision in my draft which puts
14 the -- which basically prohibits all communication
15 between a large regulated utility and Commissioners
16 while the case is pending?

17 MR. MILLS: I think that's going farther
18 than it needs to. I mean, there are -- there are
19 communications that won't impact the contested issues
20 that you-all need to hear about in a timely manner.

21 (DISCUSSION HELD OFF THE RECORD.)

22 CHAIRMAN CLAYTON: Let's go to the
23 anticipated case window. Okay. So in the
24 anticipated window, the 30-, 60-day -- whatever the
25 window is, so if -- if outside that or within that

1 period of time, your preference would be to allow
2 rather than prohibit with disclosure, correct?

3 MR. MILLS: My -- my preference would be
4 to allow communications that don't deal with the
5 anticipated issues and the case to be filed.

6 CHAIRMAN CLAYTON: Okay.

7 MR. MILLS: But --

8 CHAIRMAN CLAYTON: On the issues in the
9 case?

10 MR. MILLS: -- for -- on -- on any
11 issues, there ought to be recording, if possible,
12 transcription, if possible, and disclosure at a
13 minimum. But the -- the -- even -- even with
14 recording and disclosure, I don't believe -- and that
15 anticipatory period -- it's appropriate for any party
16 to be talking to Commissioners about issues outside
17 of the hearing room. So --

18 CHAIRMAN CLAYTON: Even -- even if
19 it's -- even if a record is made?

20 MR. MILLS: Even if a record is made.
21 If the party who is making that communication knows
22 or should know that that's going to be an issue
23 coming to the Commission for a decision, it ought to
24 be made on the record rather than made in some
25 fashion that's later preserved. Think about the RTO

1 issue, for example. I mean, that should be the same
2 kind of thing that would happen during -- during the
3 pendency of a -- of a case.

4 CHAIRMAN CLAYTON: Okay. Assuming --
5 assuming that a case is not filed, a general rate
6 case or a large complex case is not filed and it's
7 outside of any anticipatory window, outside the
8 anticipated case window, whatever that is. Does
9 Public Counsel believe that there should be any level
10 of disclosure on interaction between regulated
11 utilities and -- and the Commission?

12 MR. MILLS: Sure. And I -- yes. I
13 mean, I think to the extent -- I mean, there --
14 there's -- there's a couple of things going on here.
15 One -- one is just the general Sunshine Law
16 principles of open government. The -- the other has
17 to do with more specific restrictions on the flow of
18 information in a contested case or anticipation of a
19 contested case.

20 I think -- and I wasn't really dealing
21 with my comments in general about, you know, the more
22 general Sunshine Law implications, but I think it's
23 probably a good idea for Commissioners to keep open
24 calendars and make notes when they're talking to
25 utility people, make notes when they're talking to

1 consumer advocates, make notes when they're talking
2 to customer representatives.

3 I don't know that -- you know, if I'd
4 come in and talk to you about, you know, gosh,
5 what a -- what a great, you know, concept energy
6 efficiency is, that that needs to be transcribed.
7 Nor if, you know, some utility executive comes in and
8 talks to you about what a -- in general what a --
9 what a killer concept regulatory lag is, that that
10 needs to be transcribed. But it's probably -- I
11 think it would be a good idea for the Commissioners
12 to -- to make available to people who are interested
13 that they have talked to me about energy efficiency
14 or they have talked to a utility executive about
15 regulatory lag.

16 CHAIRMAN CLAYTON: So would that --

17 MR. MILLS: But that's -- to my mind,
18 that's a -- that's a different question than --
19 than -- than the rules we're talking about here.

20 CHAIRMAN CLAYTON: I understand. I
21 understand. So basically, any potential stakeholder
22 we would have to document any conversation we ever
23 had even if there is no case pending, there's --
24 there's no contested case pending, there are no
25 issues at stake that every communication with you,

1 with utilities, with Staff, everything needs to be
2 kept -- we need to document every conversation we
3 make?

4 MR. MILLS: No, I don't think you need
5 to document everything, but I think -- I think the --
6 the sort of list of contacts and the kinds -- the
7 kinds of things that you're having substantive
8 meetings about ought to be available for people to
9 find out later. And the more general it is, the more
10 brief it is, the -- the less it has to do with
11 anything that's likely to be contested, I don't think
12 there has to be a great deal of effort to do that,
13 but --

14 CHAIRMAN CLAYTON: What I guess I'm
15 trying to get at, should we address any other
16 communications in this rule outside that 30- or
17 60-day window and doesn't -- I guess I just -- I'm
18 trying to get where you're coming from.

19 MR. MILLS: No. I -- I wasn't thinking
20 about any of that in terms of this rule. I'm --
21 the -- but what you and I are talking about now is
22 not something I've thought about in advance of
23 this -- this question, because to my mind it comes
24 outside of the -- the kinds of issues that we were --
25 that I thought we were trying to deal with in this

1 rule which is just sort of general meetings and
2 conversations with potentially interested entities.

3 CHAIRMAN CLAYTON: While cases are
4 pending or anticipated to be filed?

5 MR. MILLS: Right. Those are the kinds
6 of issues that I thought we were addressing in this
7 rule. And I -- I -- I am not at this point
8 recommending that we go beyond that.

9 CHAIRMAN CLAYTON: Okay. What -- how
10 many days are you recommending that we consider for
11 the anticipated case time period?

12 MR. MILLS: You know, when I drafted
13 rules in AX-2008-0201, my notion was that it would
14 sort of be open-ended, that it would be any period in
15 which the utility knows or -- that the utility or any
16 other party knows or should reasonably know that an
17 issue will be coming before the Commission for a
18 decision. You know, the utilities have objected to
19 that, Commissioners have objected to that. So I
20 think, really, as a practical matter, perhaps you do
21 need an actual time frame. I don't think 60 days is
22 too long for significant cases with big utilities. I
23 mean, I don't think -- I don't think that's a -- I
24 don't think that is a -- an insurmountable issue for
25 them to deal with. I think 30 days is too short for

1 most things.

2 I think -- Mr. Chairman, as you've tried
3 to do, I think the idea is sort of a sliding scale
4 depending on the utility and the type of case is
5 probably appropriate. You know -- you know, some --
6 some flexibility having to deal with, you know,
7 emergency situations and things like that ought to be
8 built in. But 60 days for big cases or big utilities
9 is definitely not too short.

10 CHAIRMAN CLAYTON: Do you believe
11 there's a need for rules to be more strict
12 surrounding larger more complex cases than -- and I
13 don't want to lessen the significance of any other
14 case, but certainly when you have a general rate case
15 which could be complex, multitude of issues,
16 multitude of parties, should the rules be the same
17 for every single case or can -- or is it appropriate
18 for them to be more strict on larger more complex
19 cases?

20 MR. MILLS: I think the general
21 framework ought to be the same for any kind of case.
22 I think there ought to be, you know, shorter time
23 lines, if possible, for smaller cases. But you know,
24 I don't -- I don't think it's any less inappropriate
25 for, you know, the owner of a small water company

1 to -- to try and -- and influence a Commissioner in
2 advance of filing than it is for, you know, somebody
3 from a large utility. So --

4 CHAIRMAN CLAYTON: Okay. So -- so is
5 that a yes or a no? I guess...

6 MR. MILLS: I think it's sort of both.
7 As I said, I think the -- the time lines can be
8 different, but I think the restrictions ought to be
9 the same --

10 CHAIRMAN CLAYTON: Okay.

11 MR. MILLS: -- for -- no matter the size
12 of the utility.

13 CHAIRMAN CLAYTON: Okay. Mr. Boudreau,
14 representing the MEDA companies, does MEDA think it
15 would be appropriate or inappropriate to have a
16 higher degree of prohibition or restriction on
17 communication at times of higher profile, more
18 complex, more comprehensive type of cases?

19 MR. BOUDREAU: That's -- that's a fair
20 question, and I've been -- I've been reflecting on
21 that. The -- as a practical matter, just haven't had
22 a chance to discuss that with the MEDA membership. I
23 don't know that -- I don't know where the association
24 is on that topic. It's a -- it's a good inquiry, but
25 I'm not in a position to tell you that it's a good

1 idea or a bad idea --

2 CHAIRMAN CLAYTON: Okay.

3 MR. BOUDREAU: -- at this stage. We'd
4 certainly be glad to discuss that and file
5 supplemental comments.

6 CHAIRMAN CLAYTON: Well, I guess the
7 reason why I threw that concept out is that at any
8 given time, just about every utility is going to have
9 some -- some level of contested case. Maybe it's
10 just an application for a certificate that could
11 quite simple and -- and not controversial or not
12 objected to, and if that is the case, then you could
13 have a real restriction on any level of
14 communication. And so that's why I was trying to
15 find where certain cases require a higher degree of
16 scrutiny by us and the -- a higher degree of
17 prohibition on communications.

18 MR. BOUDREAU: Yeah.

19 CHAIRMAN CLAYTON: Because otherwise,
20 you really do get into a situation where you can
21 never have a -- you can never have a conversation,
22 whether it be social or otherwise, I mean, it -- and
23 it requiring multiple filings. So that's -- that's
24 the purpose behind the higher profile cases. And I
25 guess from Mr. Mills' perspective, there's no

1 difference.

2 MR. MILLS: Well, there's not a --
3 there's not a substantive difference, but in terms of
4 how the restrictions would play out in practice, I
5 think there is. So for example, if -- if a big
6 utility has -- the only pending contested case has to
7 do with an accounting authority order for storm
8 damages, then that really only limits communications
9 to those issues. And -- and you can talk to the
10 utilities about general issues outside of that.

11 There -- when -- when you're talking
12 about generate cases, almost everything is an issue,
13 and so, yeah, there's going to be a lot more
14 restrictions if there's a general rate case pending
15 or --

16 CHAIRMAN CLAYTON: Let's me give you an
17 example. Let's take your -- your -- your suggestion
18 there of having an AAO for storm damage. It's
19 limited to a certain issue in -- in a case that is
20 focused in on just a handful of facts. And say a
21 regulated entity wants to come in and talk about
22 energy efficiency. Is that inappropriate conduct if
23 the door is closed?

24 MR. MILLS: Shouldn't be.

25 CHAIRMAN CLAYTON: So in no way even

1 though there is no -- there is no communication on
2 the facts that involve that AAO?

3 MR. MILLS: Right. I don't -- I don't
4 think that's inappropriate.

5 CHAIRMAN CLAYTON: You don't think --
6 wait a minute.

7 MR. DOWNEY: He thinks it's appropriate.

8 CHAIRMAN CLAYTON: You think that's
9 appropriate?

10 MR. MILLS: I thought -- maybe I --
11 maybe I --

12 CHAIRMAN CLAYTON: You did a double
13 negative.

14 MR. MILLS: I did. I thought you did
15 and I was --

16 CHAIRMAN CLAYTON: I'm allowed to do it.

17 MR. MILLS: No. I think -- I think it's
18 okay for you to talk to them about energy efficiency
19 during the -- if that's -- it's the only thing they
20 have pending is the storm AAO case. I think that's
21 okay.

22 CHAIRMAN CLAYTON: Okay. I don't think
23 I have -- I've got other questions, but I think I'll
24 let someone else have a shot. I appreciate the
25 discussion here today. This has been very helpful

1 and hopefully we'll try to conclude this matter soon.

2 Thanks.

3 JUDGE WOODRUFF: All right.

4 Mr. Pendergast?

5 MR. PENDERGAST: Please excuse the
6 absence of a suit coat. When you said it was going
7 to be informal, I took it seriously.

8 I concur on behalf of Laclede Gas
9 Company with most everything Mr. Boudreau and
10 Mr. Lowery have said as well as Mr. Cooper and
11 Mr. Fischer. The one thing I would like to just
12 address very briefly, and I don't want to address it
13 in detail because it's a matter that's still pending
14 before the Commission.

15 But Mr. Fischer had indicated that there
16 needs to be an exception for procedural matters as
17 far as the applicability of whatever ex parte
18 restrictions we may ultimately or you may ultimately
19 develop as a result of this proceeding. And my only
20 point is that there are times when procedural matters
21 and when things get disposed of and when they get
22 scheduled and when they get determined can have a
23 very significant impact on the particular parties
24 involved in a particular case.

25 The Commission requires that if you want

1 expedited treatment, for example, that could be
2 viewed as being a procedural matter. But it's
3 something that could only be granted in the event
4 that you file a motion which gives parties the
5 opportunity to go ahead and respond to it.

6 And my only point is when you have a
7 time-sensitive matter or a matter where procedure and
8 when things get scheduled can have a significant
9 impact on potential outcome of a case and how it gets
10 disposed of, that probably more transparency rather
11 than less is appropriate under those circumstances.

12 So to the extent that an exception is
13 made for procedural matters, I think it needs to be
14 drafted and drafted carefully so that those
15 particular instances are provided for. Thank you.

16 JUDGE WOODRUFF: Mr. Fischer?

17 MR. FISCHER: And certainly I wouldn't
18 disagree with what Mr. Pendergast -- Mr. Pendergast
19 said on that. I think generally uncontested
20 procedural matters have been what have been brought
21 to the attention of the RLJ. You know, dealing with
22 where the local hearing is going to be next week and
23 changing -- you know, changing something that's not
24 really a contested matter, we often will come to the
25 RLJ as a group, if necessary, if there's any

1 discussion or any concern that there might be
2 something that's contested that does relate to
3 procedure. But I don't think we should just
4 foreclose all communications with the RLJ on -- on
5 procedural matters that are really not -- not
6 contested and not -- not going to affect the outcome
7 of a case.

8 JUDGE WOODRUFF: Anyone else want to
9 make a comment or ask a question?

10 (NO RESPONSE.)

11 JUDGE WOODRUFF: Anything else from the
12 Commissioners?

13 (NO RESPONSE.)

14 JUDGE WOODRUFF: All right. Then we are
15 adjourned. Thank you.

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