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In the Matter of a Proposed Rule)
to Establish a Procedure for) Case No. AX-2003-0404
Handling Confidential Information)
in Commission Proceedings)

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

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CONNIE MURRAY,
STEVE GAW,
ROBERT M. CLAYTON,
LINWARD "LIN" APPLING,
COMMISSIONERS.

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

2 JUDGE WOODRUFF: Good morning, everyone.

3 Welcome to this rulemaking hearing. This is Case No.

4 AX-2003-0404, which is entitled in the matter of proposed

5 rule to establish a procedure for handling confidential

6 information in Commission proceedings.

7 This concerns a proposed rule that the

8 Commission has filed with the Secretary of State. It was

9 published on July 3rd. It is Rule No. 4 CSR 240-2.135

10 entitled Confidential Information. And this local -- or

11 excuse me. This public hearing was -- notice of this

12 public hearing was provided for in that publication.

13 We'll begin today by taking entries of

14 appearance. There are a number of attorneys here. We'll

15 begin with Staff.

16 MR. HAAS: Good morning. My name is

17 William K. Haas. I am a Deputy General Counsel at the

18 Public Service Commission. My address is Post Office

19 Box 360, Jefferson City, Missouri 65102.

20 JUDGE WOODRUFF: Thank you. Public

21 Counsel?

22 MR. DANDINO: Thank you, your Honor.

23 Michael Dandino, Deputy Public Counsel, Post Office

24 Box 2230, Jefferson City, Missouri 65102, representing the

25 Office of the Public Counsel and the public.

1 JUDGE WOODRUFF: Thank you. And AT&T
2 Missouri?

3 MR. GRYZMALA: Good morning, your Honor.
4 Bob Gryzmala for Southwestern Bell Telephone, LP, doing
5 business as AT&T Missouri, Room 3516, One AT&T Center,
6 St. Louis, Missouri 63101.

7 JUDGE WOODRUFF: Laclede Gas here? Okay.
8 Ameren?

9 MR. LOWERY: Good morning, your Honor.
10 James B. Lowery, Smith Lewis, LLP, 111 South 9th,
11 Columbia, Missouri 65205, representing Union Electric
12 Company, d/b/a AmerenUE.

13 MR. DORITY: Good morning, your Honor.
14 Larry W. DORITY, Fischer & DORITY, P.C., 101 Madison,
15 Suite 400, Jefferson City, Missouri 65101, appearing this
16 morning on behalf of CenturyTel of Missouri, LLC, Spectra
17 Communications Group, LLC, doing business as CenturyTel,
18 and Windstream Missouri, Inc. Thank you.

19 JUDGE WOODRUFF: All right. Well, since
20 this is a hearing for the purpose of taking public
21 comments, that's what we'll do, and I suggest we go ahead
22 and start with Staff. Mr. Haas, do you want to make any
23 comments aside from what your written comments have
24 already been filed?

25 MR. HAAS: Judge Woodruff, are you looking

1 for responses to the other proposals or any additional
2 revisions that I might be proposing?

3 JUDGE WOODRUFF: Well, both.

4 MR. HAAS: Yes, then I will have a few
5 comments.

6 JUDGE WOODRUFF: Go ahead.

7 MR. HAAS: In general, the General
8 Counsel's Office supports the adoption of the proposed
9 rule which codifies the existing standard protective
10 order. We have also suggested that the proposed rule be
11 revised to allow pro se litigants to see confidential
12 material.

13 I would also like to briefly respond to
14 some of the proposals from the other commenters. The
15 Office of Public Counsel has suggested that the Commission
16 should reaffirm that a full report should not be
17 designated confidential in its entirety, but only those
18 portions that provide the confidential analysis. And I
19 agree with that suggestion, that a page should not be
20 considered confidential just because of the presence of
21 one confidential number.

22 The Office of Public Counsel has suggested
23 that material should not be considered voluminous if it
24 can be duplicated from electronic records. I would agree
25 with that proposal.

1 The Office of Public Counsel has suggested
2 that Staff and Public Counsel should be able to use
3 confidential information in one case and move it to
4 another case if the confidentiality is maintained. I have
5 a concern with that proposal. I am concerned that the
6 utility providing the information in the first case may be
7 less forthcoming if it is worried that that information
8 may be used in a second case without the utility having
9 the opportunity in the second case to object to its
10 production.

11 AT&T Missouri has proposed to delete the
12 existing requirement that the party designating
13 information as proprietary or highly confidential must
14 inform in writing the party seeking discovery of the
15 reason for the designation at the same time it responds to
16 the discovery request.

17 I disagree with this proposal. I believe
18 that the party stamping material as confidential should
19 give it some thought before stamping it confidential, and
20 requiring the party to state why it has classified the
21 material requires it to go through that thought process.

22 AT&T Missouri also proposes that the party
23 challenging the designation shall serve the motion by
24 electronic mail. I disagree in that there is nothing
25 special about a motion challenging a confidential

1 designation to warrant a special service provision. It
2 may be appropriate in a general review of sending out
3 motions as to whether the time period should be looked at
4 for all types of motions.

5 AT&T Missouri proposes to require Staff and
6 Public Counsel to provide a list of names of employees who
7 will have access to designated information. I do not
8 believe that such a requirement serves a purpose in that
9 all employees of the Staff and Commission have access to
10 designated information, and it's a misdemeanor for those
11 employees to release that confidential information.

12 AT&T Missouri proposes to delete language
13 that is in the proposed rule but not in the standard
14 protective order. That rule includes language dealing
15 with penalties and sanctions. The language is, the
16 Commission may impose appropriate sanctions against any
17 party or person that violates any provision of this rule
18 pursuant to Rule 61.01 of the Missouri Rules of Civil
19 Procedure. In addition, the Commission may seek to
20 recover penalties by bringing an action in circuit court
21 as permitted by statute.

22 Given that Rule 61.01 includes sanctions
23 that the Commission can't impose, for example, payment of
24 expenses and contempt of court, the first sentence could
25 be improved by listing the available sanctions.

1 As regards the second sentence, the penalty
2 statute applies where it applies, and whether the language
3 is in the rule or not does not decide whether the
4 Commission can seek penalties for a violation of this
5 rule. Thank you.

6 JUDGE WOODRUFF: Thank you, Mr. Haas. Any
7 of the Commissioners have questions for Mr. Haas about the
8 Staff's position? Commissioner Murray?

9 COMMISSIONER MURRAY: Not right now. Thank
10 you.

11 JUDGE WOODRUFF: Commissioner Appling?

12 COMMISSIONER APPLING: Just got here, so
13 sorry.

14 JUDGE WOODRUFF: Mr. Haas, I do have one
15 question for you. There's been some discussion about the
16 question of the listing of Staff and Public Counsel
17 employees who would have access to the information. I
18 believe that is in the current standard protective order,
19 is it not, or is it?

20 MR. HAAS: I do not know, but --

21 JUDGE WOODRUFF: Well, at least the second
22 half of my question, is that a standard practice
23 currently?

24 MR. HAAS: It is not the standard practice
25 because the way the computer system is set up and the way

1 the agency runs, I believe any agency personnel can see
2 that information.

3 JUDGE WOODRUFF: So a list of the employees
4 that have access would be the same as a list of the
5 employees at the Commission?

6 MR. HAAS: Yes.

7 JUDGE WOODRUFF: I suppose there are people
8 here at the Commission who would not have access, or would
9 there? People -- the computer personnel, for example, who
10 don't deal with cases, would they have access to HC
11 information?

12 MR. HAAS: I don't know that.

13 JUDGE WOODRUFF: That's all I had. Thank
14 you. We'll move over to Mr. Dandino. You can testify or
15 speak from there if you like.

16 MR. DANDINO: Thank you, your Honor.
17 Public Counsel filed its comments to the rule. As we said
18 in comments, we generally support the rule. It embodies
19 the provisions substantially in the present protective
20 order.

21 We had pointed out in the rule, in our
22 comments three specific suggestions to the Commission to
23 amend the rule. The first one is a designation of an
24 entire document as confidential and the -- I think there
25 has been a recent decision, recent ruling by the

1 Commission in the -- in a case involving Ameren involving
2 a consultant's report and whether -- and I believe that
3 the Commission spoke to that in that ruling. But there
4 was also in the proposed ruling and in the protective
5 order an indication that the Commission doesn't want just
6 a blanket designation of highly confidential or
7 proprietary, but rather wants a specific -- if a specific
8 fact, information is present that is confidential, then
9 that should be the only thing redacted in the -- in the
10 evidence or in the testimony or in the document.

11 Public Counsel suggests this rule in order
12 to try to clarify, I guess, the variance between the
13 Commission's ruling and -- recent ruling and the
14 present -- the present practice. We believe there's been
15 a number of cases where -- I won't say a number of cases,
16 but there has been a case, an example, I think it was in
17 the Southwestern -- or SBC competition case, where first a
18 list of the exchanges and the companies that were
19 providing competition to SBC, the entire document was
20 designated as confidential.

21 Public Counsel challenged it, and then SBC,
22 you know, removed the confidentiality as the names of the
23 exchanges that were subject to competition, but there
24 still was a number of questions about what was and what
25 was not confidential in those type of reports.

1 And I think that rather than designate
2 entire documents and charts and reports as confidential,
3 they need to be limited just to that -- to those issues or
4 to those factual -- or to those analysis or the facts that
5 are highly confidential.

6 The second suggestion Public Counsel makes
7 is in Section 12, and that basically is trying to bring
8 the rule up to recognize electronic storage and retrieval
9 of data, and I don't -- now, these days, probably not too
10 many things could be considered voluminous if it's
11 available in some type of electronic form that can be
12 easily transferred to another party by some electronic
13 media.

14 And finally, our last comment that we
15 provided in our comments, we propose a Rule 16(a) that
16 provides for that information obtained -- highly
17 confidential information obtained by Public Counsel and
18 the Staff in one case could be used for any purpose in
19 another proceeding involving the same utility. This was
20 -- and we did not have to -- either party would not have
21 to make a specific data request in order to reobtain that
22 information in order to use it in the other proceeding.

23 This was stemmed mostly from just the
24 language in 16 that says, all persons who have access to
25 information under this rule must keep the information

1 secure and may neither use nor disclose such information
2 for any purpose other than the preparation for and conduct
3 of the proceeding for which the information was provided.

4 This raises some question that can Public
5 Counsel and Staff use information that they acquired in a
6 case for the purpose of a foundation for a complaint, as a
7 purpose for a foundation for an investigation, or even as
8 use as cross-examination or impeachment in a subsequent
9 case involving that same company. That's the reason why
10 Public Counsel proposed such a rule. And to go back and
11 do the -- make subsequent data requests just seems like an
12 unnecessary step.

13 But at least Public Counsel and the Staff
14 should be able to use that information, whether or not
15 they -- whether or not the Commission agrees that
16 additional discovery would be required, but at least that
17 information obtained in one case should be available.

18 One other point that Mr. Haas brought up
19 about the designation of -- that the Commission Staff and
20 OPC shall be required to list the names of employees with
21 access to information that is confidential, this is --
22 some attorneys in our office do provide that, and some
23 don't. Once again, we rely upon the statute that Mr. Haas
24 indicated that all of the employees in our office, all 11
25 of us, have access to the data because just even for

1 filing and for -- filing and for storage of information,
2 retrieval of information, and we're all bound by the
3 statute that Mr. Haas -- prohibiting disclosure.

4 I believe that's all I have, your Honor.
5 Thank you.

6 JUDGE WOODRUFF: Commissioner Murray, do
7 you have any questions for Mr. Dandino?

8 COMMISSIONER MURRAY: I don't believe so.
9 Thank you.

10 JUDGE WOODRUFF: Commissioner Appling?

11 COMMISSIONER APPLING: No questions.

12 JUDGE WOODRUFF: I do have a question for
13 you, Mr. Dandino. It's concerning your proposed 16(a),
14 about the use of highly confidential and proprietary
15 information in other cases. What's the current practice
16 under the standard protective order?

17 MR. DANDINO: I believe that we make data
18 requests to get additional information. That's in some
19 cases. You know, I don't know how -- how prevalent it has
20 been. I know that some of the experts in our office have
21 raised that question as that being a problem. Dealing in
22 the telephone industry, we didn't have that many data
23 requests that rolled over to another case. But I think in
24 some of the energy and water cases, that was more
25 prevalent.

1 JUDGE WOODRUFF: Okay. That's all I have
2 then, Mr. Dandino. Let's move on then to AT&T,
3 Mr. Gryzmala.

4 MR. GRYZMALA: Good morning, Commissioner
5 Appling, Commissioner Murray, Judge Woodruff. Thank you
6 for taking our comments this morning. My name is Bob
7 Gryzmala on behalf of AT&T Missouri.

8 We have been in this proceeding, as Judge
9 Woodruff would know, for quite some time, and most
10 recently in December of last year when we and a number of
11 other industry participants responded to the judge's call
12 for improvements to the rule as was proposed, with the eye
13 toward replicating in the current protective order the
14 terms or carrying the protective order's current terms
15 forward into a rule.

16 We think that's a good idea. We added some
17 value to the process. We know other companies were
18 involved as well. And when the rule was published, we
19 generally found it acceptable, and we still do. Our
20 comments are limited to a few cleanup items, but of some
21 importance, and just to sum those up briefly, because we
22 did provide that in our comments filed August 2nd.

23 Under the proposed rule, if a party, if
24 AT&T Missouri is going to designate information as HC in
25 discovery context in response to a DR, the rule would

1 require that we state the nature of the grounds for the HC
2 designation when we stamp it HC. Now, the current -- or
3 the proposed rule doesn't require that in testimony. So
4 there's an inconsistency that we need to resolve. Either
5 the party in both cases is going to be forced to designate
6 or rather to justify the grounds up front or, as the rule
7 should be, we propose, a party should be bound to defend
8 that designation if it's challenged.

9 That is why in the discovery portion of
10 this protective order, which is where the HC is -- or the
11 proprietary or confidential information is provided in
12 response to discovery, we're asking that the language that
13 says you must justify the designation up front be deleted.
14 There's no provision for it, as I said, today in the
15 proposed rule regarding designation for testimony.

16 Now, I know when I draft a DR and I'm
17 asking a party for another piece of information, we're all
18 attorneys here behind the bench. I know what I'm looking
19 for, I know why I want it, and I have a good sense whether
20 it's HC or not. And if another party, the party who's
21 responding to the DR, provides me information and stamps
22 things HC and the like, obviously that limits disclosure.
23 If I don't have an outside expert, I'm sitting at my desk
24 alone to review this information, because recall employees
25 can't see HC information.

1 But again, I know, I have a sense for
2 what's a trade secret, highly confidential or not. In our
3 practice at AT&T, we've had very little question about
4 what is HC or what is not. I was not in the case, the
5 competition case that Mr. Dandino referred to, but the
6 point remains that I don't believe that this is a
7 situation that is so difficult that it calls for a
8 difficult answer. We just simply need to resolve the
9 current protective order. When a party designates
10 information as HC, they should be made to account for it
11 if they're challenged, and that's all.

12 We have every right to know the names of
13 individuals who have access to our HC information, our
14 confidential information. Every company has the right to
15 know those names. The current protective order today says
16 that the Commission Staff and OPC shall list the names of
17 those employees who have access to information designated
18 as confidential.

19 We haven't heard a compelling argument as
20 to why that ought not be ported to the current or current
21 proposed rule. It absolutely should be.

22 I would also ask that you-all keep in mind
23 that this is not a draconian measure. There are a number
24 of rules that are already being waived in the proposed
25 rule for the benefit of OPC and the Staff, the signature I

1 believe to a nondisclosure agreement and some other
2 things. I think the specific pieces are Parts 3, 4, 5 and
3 6 or thereabouts. So this is just a modest measure.
4 We simply deserve and the companies simply deserve to know
5 the names of those employees who have access to their
6 information, and it matters not whether it's with the
7 Staff or with OPC.

8 There's no need for a sanctions rule in
9 the -- of the nature that was suggested in the proposed
10 rule. There is no like language in today's current
11 protective order, and we have no particular experience
12 that AT&T has suggested that cries for a resolution. It
13 runs afoul of the Commission's case law, which the Staff
14 has recognized in prior occasions, that the Staff -- that
15 the Commission has no authority to impose money damages,
16 to award legal relief that would require a party to pay
17 another X amount of dollars for some discovery trans --
18 foul-up, mistake.

19 And bear in mind, there is no mens rea
20 requirement in this rule. The violation could be
21 unintentional. The rule doesn't accommodate that. It
22 just simply says for a violation, XYZ follows.

23 There's a statute in place, if I recall
24 it's 386.570, that allows the Commission to go to court to
25 enforce an order that has not been respected. So if, for

1 example, there is a discovery dispute and the judge issues
2 an order to do XYZ and another party does not do that,
3 there is a remedy and they can be made to pay.

4 The last information or the last change we
5 had had to do with a matter of cleanup. The beginning of
6 the rule defines trade secrets, and we simply offered some
7 red line edits so as to bring the kinds of information
8 regarded as a trade secret closer in line with what the
9 current rule provides.

10 So to sum up, we would not submit that a
11 party justify the nature of the HC when that designation
12 is made in discovery, OPC and the Staff's employees should
13 be listed, and we would exercise -- we would ask the
14 Commission to exercise great caution in implementing or
15 adopting a rule that calls for sanctions, as does the
16 current.

17 With regard to OPC's comments, let me start
18 with General Counsel. General Counsel likes the rule, and
19 that's good. We agree. One thing that General Counsel
20 proposes is that we need to fix the rule for pro se
21 litigants. General Counsel says today if a pro se
22 litigant in a case asks for information which is regarded
23 as HC, they can't see it, and gee, ought they not be
24 treated the same as other party litigants?

25 Well, intuitively that does make some

1 sense, equality, perhaps, but it's a bad proposal. It's a
2 bad proposal because the kinds of information that is
3 confidential is a matter of great effort and expense of
4 companies, and we need to take every safeguard to make
5 sure it is not released unwarranted.

6 Those who are on the hook today in the
7 current environment are folks like lawyers who have a bar
8 license at stake, professional consultants who likewise
9 may have licenses and at the risk of a transition could
10 lose those licenses or they risk future employment or they
11 have regular and recurring practice before the judges and
12 the commissioners here. These are the people today who
13 handle proprietary information and respect proprietary
14 orders.

15 We do not have that same kind of insurance
16 in a pro se litigant situation. A pro se litigant in most
17 cases, in the few cases I've been involved in, is not a
18 licensed attorney, not a member of any professional
19 society, not a regular practitioner before the judges and
20 the commissioners here, and frankly, if there is a
21 transgression, we have no recourse. That information is
22 gone and the damage is done.

23 Now, what does the pro se litigant have
24 available to him or her today? Under the current rule,
25 that individual could always move under a provision 23, I

1 believe it is, for a good cause order that says, I'm a
2 pro se litigant. The current rule does not envision my
3 seeing HC information, but for this, this, this reason I
4 need to see that information. Please give me an order.
5 That suffices. It's on a case-by-case basis, no blanket
6 rule of disclosure, and allows the judge to make sure that
7 that's appropriate. And we think that's an appropriate
8 measure given the circumstances I've outlined.

9 I would allude to Laclede Gas' point in
10 that regard to close. Laclede Gas makes the point that
11 perhaps the rule should have some clarification that an
12 individual has the right to see their own information.
13 That in my view, in our view, does not belong in our rule.
14 We have always operated under the premise that if X is
15 asking for information about X, that is not confidential
16 to X. That is their information. That is a matter of the
17 kind of practice that we just -- we understand. We
18 understand. There is no need for a rule on that point.

19 The Office of Public Counsel suggests that
20 we need to do something about blanket designations. We
21 have no disagreement that information that is highly
22 confidential should be protected but not more. We know of
23 no transgressions, significant violations. Again,
24 Mr. Dandino referred to the competitive case. I can't
25 speak to that. But I can tell you from the recitation I

1 heard from the audience, it looks like it got fixed. OPC
2 challenged SBC. SBC was made to account, and there was an
3 accommodation. I don't know whether in the end it was
4 satisfactory to OPC, but that's how the process works.

5 There's no particular need for a rule that
6 says one should not perform blanket designations. We
7 agree that if there is a line on a page that is regarded
8 as highly confidential but the remainder of that page is
9 not, then that portion of the page should be deleted but
10 not more. The rule is self evident in that regard.

11 We strongly oppose any notion, as OPC
12 advances, that HC information or confidential information
13 utilized in one case should be, bluntly put, ported to
14 another case. That should not go anywhere. General
15 Counsel makes the winning point. Companies produce
16 information in response to specific discovery requests.
17 They know what the information is that's being asked for.
18 They have a good sense as to how it's going to be used and
19 why it's relevant because they made that decision when
20 they provided the information to the requester.

21 That same assurance, the opportunity to be
22 heard, the opportunity to object, is not available in
23 Case B. If I produce confidential information in Case A,
24 I have no anticipation whatsoever that it's going to be
25 ported down the road two years later in some case and I

1 don't know anything about it.

2 I think the point was made here that, or in
3 one of the folks' pleadings, that if that's to be the
4 rule, folks are going to become a little bit more stingy
5 about providing confidential information at the front end,
6 not knowing the use to which it will be put perhaps at the
7 back end.

8 I have the right to know in a subsequent
9 case what information is being asked for so that I can
10 determine whether it's in our corporate best interest,
11 putting the balance of the case in view, as to whether
12 that information should be turned over or we should make a
13 legitimate objection.

14 Now, what burden does that impose on OPC?
15 Zero. If OPC has got confidential information in Case A,
16 they already have on their desk or they've seen what
17 they're looking for. It takes no time at all to dictate
18 or draft a DR that goes after the very same information
19 you've already seen. So relative harm is great. The need
20 to avoid an expense or a burden is simply not there. It
21 is not difficult. It is not in the current protective
22 order.

23 In response to the judge's question, I
24 believe the answer is that under S, as in Sam, the current
25 protective order today, all persons who are afforded

1 access to information under the terms of this protective
2 order shall neither use nor disclose such information for
3 purposes of business or competition or any other purpose,
4 or any other purpose other than the purpose of preparation
5 for and conduct of this proceeding. This proceeding.
6 That's the rule today. That should be the rule tomorrow.

7 And I would emphasize one last point on
8 this. Again, in keeping with Mr. Haas, there is a
9 fundamental principle of fairness here. The party whose
10 information we're talking about should have the
11 opportunity to know when it's going to be used and how.
12 If it's going to be used in another proceeding, they need
13 to know that. That runs head on with OPC's proposal.

14 We are not particularly opposed in concept
15 to the voluminous electronic language that OPC presents.
16 The point being that OPC says, look, if it's electronic,
17 it's by definition not voluminous. So if it's not
18 voluminous, then why allow particular precautions because
19 it would have been voluminous in paper context. We
20 understand. Electronic information is passed back and
21 forth quite frequently. It's a means of getting
22 information over to other folks very quickly.

23 So in concept we have no particular
24 opposition to that. Frankly, as a practical matter, we
25 don't believe that a rule, the language on the point is

1 necessary. The legal community and industrial community
2 have operated under my understanding quite easily, quite
3 well without it.

4 And we also want to make very certain that
5 only -- if such a rule is adopted, it would be triggered
6 only if the information is already available
7 electronically. I don't think Mr. Dandino couched his
8 comments in that regard. If the information is already
9 available electronically, then the rule is triggered. We
10 don't want any suggestion that parties would have to as a
11 matter of course or necessity in any case take paper and
12 convert it into electronic. Wouldn't sound like a lot,
13 but it can be quite detailed, it can take time, costs
14 money, and it can be burdensome.

15 We don't anticipate that Mr. Dandino
16 encompasses that effort, which we would object to
17 strenuously, but in any case we don't believe a rule is
18 necessary for voluminous electronic documents anyway. So
19 it's a solution that doesn't really have a problem
20 associated with it in our view.

21 That's all I have, your Honors,
22 Commissioner. Any questions?

23 JUDGE WOODRUFF: Thank you. Commissioner
24 Murray?

25 COMMISSIONER MURRAY: Yes. I have a

1 question about the issue of the pro se litigant. I
2 certainly understand what you're saying about the ability
3 for the information to be misused and there to be no
4 recourse. However, if a party is pro se and there is
5 information that is necessary for that party to see in
6 order to be able to go forward with the case, you're
7 suggesting that they file a motion to release the
8 information; is that correct?

9 MR. GRYZMALA: Yes, your Honor. Maybe more
10 specifically, we do not believe that a rule that would
11 allow blanket authority in all cases for a pro se litigant
12 to see HC or confidential information on the same
13 arrangement as regular practitioners and industrial
14 representatives before your Honors, we do not believe that
15 should happen.

16 The proposed Rule 22 -- I'm sorry. I may
17 have said 23. Proposed Rule 22 says the Commission may
18 waive or grant a variance from any provision of this rule
19 for good cause shown. So we believe that that would be an
20 appropriate avenue for the Commission to decide on a
21 case-by-case basis, A, whether the pro se litigant should
22 have access to that material, and B, under what
23 conditions, you know, how many copies to be made, who else
24 might see it, whatever the case may be. We believe that's
25 appropriate.

1 example of a billing dispute. What kind of information
2 would be likely to be highly confidential in a billing
3 dispute?

4 MR. GRYZMALA: The things that occur most
5 intuitively to me would be copies of the customer's bills,
6 copies of their toll. Depends on the nature of the
7 billing dispute. Of course, I think one of the parties
8 suggested that there should be some specific rule language
9 provided to allow a person to see their own HC. In that
10 scenario I just presented to you, we wouldn't require
11 there be any special mechanics or procedure.

12 If Ms. Murray from St. Louis brings a claim
13 against AT&T Missouri regarding her bill and Ms. Murray
14 asks for the last 12 months of her bills, the fact that it
15 would be confidential if CenturyTel asked for it or
16 Expedia has nothing to do with anything. It is not
17 confidential. It is not in the trappings of the
18 protective order. I would provide that to a customer.
19 Their monthly bills would be confidential as regard to
20 third persons, but a customer in that scenario should be
21 able to get copies of their bills. That's one variety of
22 confidential information.

23 In a case which I am familiar with, one
24 might have asked a question about the amount of revenues
25 that we enjoy from a particular service or how many

1 customers we have in the state of Missouri. That's a
2 hypothetical that's not altogether hypothetical, but not
3 to name the case. And the argument there is, that's
4 confidential information. Not only is it not relevant,
5 it's confidential. And if that individual asks that
6 question, what's your revenues, how many customers, and we
7 say no, this is confidential information, and if you want
8 that information -- and it's irrelevant, and we're going
9 to stand on our objection.

10 That individual could come back with a
11 short letter to the Commission, pro se litigant, I asked
12 AT&T for such and such. They said no. I need this. I
13 deserve it. Please afford me relief. That would be a
14 Rule 22 matter. You come right in, you make your point as
15 a pro se litigant.

16 COMMISSIONER MURRAY: All right. Thank
17 you.

18 MR. GRYZMALA: You're welcome. Thank you.

19 JUDGE WOODRUFF: Commissioner Gaw?

20 COMMISSIONER GAW: I may have some later,
21 but refresh my memory, counsel, are you -- do you work for
22 a law firm or directly for AT&T?

23 MR. GRYZMALA: No, sir. I work for AT&T.
24 I'm Senior Counsel at AT&T, Missouri.

25 COMMISSIONER GAW: That's what I thought.

1 Okay. Senior Counsel for AT&T Missouri. Thank you.

2 JUDGE WOODRUFF: Commissioner Appling?

3 Mr. Gryzmala, I have a question for you about the list of
4 names of Commission employees and OPC employees. Are you
5 getting those now in cases?

6 MR. GRYZMALA: No. The short answer, your
7 Honor, is no.

8 JUDGE WOODRUFF: Has that caused you any
9 problems?

10 MR. GRYZMALA: Candidly, in my experience,
11 no. Have I caused a stink on the other hand in those
12 particular circumstances when I recognize that information
13 was not -- was provided to the Staff or OPC and I didn't
14 get a list back? No. But you know what, if it's ported
15 in the new rule, what difference does it make today?
16 What's to say that practice won't continue tomorrow?

17 I mean, if I -- at least I have the
18 protection of knowing that in a specific case where I
19 wants to push the button because something has gone awry,
20 I want that list. I can at least go back after the fact
21 and get it.

22 I'm not saying that that would suffice
23 under the current rule, but I just haven't heard an
24 argument that says that what's under the current
25 protective order is bad. I'm hearing it's not respected,

1 it's not complied with, but nobody's told me it's bad.

2 Nobody's arguing it's a bad rule.

3 JUDGE WOODRUFF: Okay. That's all I have
4 then.

5 MR. GRYZMALA: Thank you, your Honor.

6 JUDGE WOODRUFF: Let's move on then to
7 Mr. Lowry for Ameren.

8 MR. LOWERY: Good morning, Judge and
9 Commissioners. As the judge said, I'm appearing on behalf
10 of AmerenUE. We have submitted comments informally a
11 couple of points in time in this docket earlier, including
12 last December at Judge Woodruff's request, and I submitted
13 some brief comments yesterday primarily in response to
14 comments that OPC had filed last week. To be perfectly
15 honest, we were not on the service list somehow and didn't
16 get notice of this.

17 So I'm three or four days late in
18 submitting those, and i apologize for that, but I'd ask
19 you to consider those. And Judge Woodruff has comments to
20 those -- copies of those to the extent that you don't have
21 them at this point. I will speak to them this morning.

22 JUDGE WOODRUFF: Do any of the
23 Commissioners need copies of this? This was filed on
24 Sunday. Go ahead, Mr. Lowery.

25 MR. LOWERY: We especially appreciate the

1 Commission's efforts in codifying procedures that allow,
2 and I think it's beneficial to the Commission, the data
3 center staff and everybody involved, to have a rule in
4 place that allows confidential information to be dealt
5 with from the inception of the case without having to go
6 through what has really become a fairly perfunctory step
7 of asking for a protective order. I think it will
8 facilitate matters administratively and allow cases to be
9 handled more efficiently, which is something we've all
10 been trying to work toward.

11 Let me -- many of my comments I think have
12 been addressed, and I won't belabor the points and try to
13 take up too much of your time this morning, but let me
14 address in particular the two or three points that OPC had
15 made and that we had responded to yesterday. I want to
16 clarify one thing about that.

17 OPC in I'll call it its Proposal 1 -- they
18 have three proposals that are numbered. In their Proposal
19 No. 1, they essentially asked the Commission to require
20 that consultant reports, that companies or it could be
21 them or it could be Staff, it could be any party, would
22 have to go through consultant reports and parse through
23 line by line, word by word, if there may be information
24 that might otherwise in isolation be available publicly in
25 those consultant reports.

1 That very issue, as I think the Commission
2 is aware, was before the Commission about two or three
3 months ago in AmerenUE's IRP case, the precise issue was
4 before the Commission I would say, and the Commission
5 already ruled that that's not appropriate in recognition
6 of the fact that when a consultant does a report and a
7 consultant looks in public sources of data and other
8 sources of data, one of the value-added services that
9 consultant is bringing to the table is to sort of separate
10 from the wheat from the chaff, so to speak, and figure out
11 what is relevant, what kind of information is reliable,
12 how does it fit in the analyses, how should it be compiled
13 and presented in a way that the company and ultimately the
14 Commission itself, if that information is going to be used
15 in a Commission case, can understand and use the
16 information.

17 And the suggestion that's being made here
18 is that litigants or parties should pay for that
19 information, and it's not cheap, as you I'm sure can
20 appreciate, and then turn it over to the world simply
21 because it might -- if somebody else would take hours and
22 days and all of the effort to go find it simply because
23 they might be able to find that information.

24 You know, there's certain public
25 information that might not be very reliable, might not be

1 very relevant or up to date. One of the things that
2 consultants do is separate through that and make it
3 useful. We are not proposing and never have proposed and
4 don't propose that company information itself, company
5 documents that don't fall within the rule be blank -- be
6 designated in a blanket fashion. When we file matters and
7 when we file our public versions of our -- an integrated
8 resource plan where this case came up, we redacted just
9 the number and the rest of the page was there, for
10 example.

11 So we're not suggesting that for general
12 company records, but we are suggesting for consultant
13 reports as the practice has always been that we shouldn't
14 simply because it's been compiled and searched through and
15 analyzed by the consultant and might be somehow available
16 publicly, that it should just be opened up to the world
17 and then be filed information. That's the suggestion
18 that's been made, and we strongly oppose it, and we think
19 the Commission's already ruled on that issue.

20 The other proposal that we object to that
21 Public Counsel has made, and Mr. Gryzmala has already
22 spoken to this, is this idea that we pro-- we're asked a
23 data request in a particular case, let's take a rate case,
24 and as I think you know, in rate cases we may have 2,000
25 data requests from all the various parties, and we're

1 asked data requests in that rate case. We look at what
2 the issues in that rate case are, we provide that
3 information. Everybody does this, of course,
4 electronically now. There's word processors and there's
5 all these standard Data requests, and Public Counsel
6 certainly has many of them as well. We produce that
7 information. We know what the issues are in the case. It
8 helps us all join the issues. It helps us perhaps know
9 what's going to be at issue. We are able to resolve more
10 things before we get to the hearing room because everybody
11 knows what the issues are.

12 But Public Counsel is proposing that two
13 years, three years, whatever later in another case, that
14 information can just simply be used simply because it was
15 produced in this other case. That deprives whichever
16 party it is of the ability to object in that later case if
17 it's not relevant or there are other reasons that it needs
18 to be objected to.

19 It deprives the ability to make sure that
20 up-to-date information, accurate information is being used
21 at that later time. It fosters the potential for undue
22 and unfair surprise at that later hearing process, rather
23 than people knowing what is going on in that later case,
24 what the issues are, so that we can probably resolve. I
25 mean, we resolve -- I think as you know, in most litigated

1 cases, many issues are typically resolved before we ever
2 get to hearing.

3 If we didn't do that as a matter of course,
4 just like the law generally favors settlement when that's
5 possible, we already spend a lot of time in the hearing
6 room, and so do you folks, we would spend even more time
7 needlessly because we wouldn't be joining issues and
8 knowing what that information is. So we strongly object
9 to that proposal.

10 On OPC's other proposal, as Mr. Gryzmala
11 mentioned, we also have no objection to the concept that
12 if we have -- you know, we have a document's already PDF'd
13 or it's already in Word or it's already in whatever
14 electronic format, it's available already, we have no
15 objection to attaching that to an e-mail and sending it,
16 assuming that's technologically feasible to do, and it
17 usually is, and not claiming that it's voluminous. We
18 don't do that as a matter of course now, and we wouldn't
19 propose to do it.

20 I do think that the language that the OPC
21 has proposed, the language that OPC has proposed needs to
22 be clarified to make sure that -- and I don't think
23 Mr. Dandino is suggesting this -- but needs to be
24 clarified to make sure that if I get a stack of documents
25 on paper like this, and I think this point's already been

15 If we allow a blanket release of all highly
16 confidential information in those cases, I'm afraid we may
17 run into some unintended consequences that will be harmful
18 to the companies and ultimately that can harm ratepayers.
19 You know, in the electric industry in particular, as I
20 think you know, even though on the energy delivery side of
21 the business and the distribution area we have regulated
22 monopolies, so we, quote, don't necessarily compete,
23 although there is competition with non-regulated entities
24 to some extent.

25 On the other sides of the business where

1 our inputs come from, our purchased, our coal,
2 transportation, other kinds of fuel or off-system sales
3 markets, which have a very important impact on revenue
4 requirements, as you know, which are very important to a
5 utility like AmerenUE that has a lot of base load
6 generation and energy available, that's very competitively
7 sensitive information.

8 And it probably doesn't come up in most pro
9 se cases, but who knows what we might be asked for.
10 Sometimes we're asked for a lot of broad information, and
11 we need an ability not to just as a blanket matter release
12 that, because as Mr. Gryzmala said, once it's gone, once
13 the cow's out of the barn door or whatever, it's gone. We
14 cannot get it back. The Post Dispatch could have it next
15 week, for example, and there's nothing we can really do
16 about that. So we do not support a blanket waiver of that
17 requirement, and I think the existing protective order is
18 sufficient.

19 Again, I want to commend the Commission for
20 this effort, though. I think this is a very, very good
21 idea to codify these procedures, and I think the proposed
22 rule as drafted with a few of the minor things that have
23 been suggested is a good proposed rule, and we support the
24 effort in general. Thank you.

25 JUDGE WOODRUFF: Commissioner Murray?

1 COMMISSIONER MURRAY: I don't have any
2 questions. Thank you.

3 JUDGE WOODRUFF: Commissioner Gaw?

4 COMMISSIONER GAW: No, not right now.
5 Thank you.

6 JUDGE WOODRUFF: Commissioner Appling?

7 MR. LOWERY: Thank you for your time,

8 JUDGE WOODRUFF: All right. Mr. Dority
9 then.

10 MR. DORITY: Your Honor, i just wanted to
11 indicate for the record that the CenturyTel companies and
12 Windstream Missouri, inc. wanted to go on record in
13 support of the comments that have been entered by AT&T,
14 Laclede Gas and AmerenUE, and we would be supportive of
15 the oral comments that both Mr. Gryzmala and Mr. Lowery
16 have made this morning as well. Thank you.

17 JUDGE WOODRUFF: Thank you. Is there
18 anyone else here who would like to make a comment?

19 (No response.)

20 JUDGE WOODRUFF: All right. Of course, the
21 purpose of this hearing is to get as much information as
22 possible. So I'm going to go back through the parties
23 again one more time, see if there's any rely you want to
24 make to any other comments you've heard today, and I'm
25 going to give the Commissioners a final chance to ask any

1 questions of the parties that they want to ask. So we
2 start with Staff, so Mr. Haas, is there anything else you
3 want to add?

4 MR. HAAS: Nothing further, your Honor.

5 JUDGE WOODRUFF: Mr. Dandino?

6 MR. DANDINO: Yes, your Honor. Just to
7 clarify Public Counsel's position on, I guess you could
8 call it suggested Amendment No. 3 about adding the new
9 Rule 16(a) about the use of confidential information.
10 Basically, the concern was how 16 was worded, which would
11 prohibit the use of confidential information obtained in
12 one case from being used for any other purpose or use.
13 And we believe that language would be too broad,
14 especially when it comes to OPC and the Commission.

15 JUDGE WOODRUFF: Are you concerned that
16 that language is broader than the current practice?

17 MR. DANDINO: Well, I believe that it could
18 be used to prevent the Staff or Public Counsel from using
19 information as a defense, create unnecessary litigation,
20 because what I'm looking at is information, once it gets
21 in the hands of the agency, government agency, it should
22 not be made unavailable for use by that agency without any
23 delay. It's like the agency has no institutional memory
24 of this. And I think for purposes of investigations, to
25 commence a complaint, whether it's service or a rate

1 complaint, to cross-examine a witness or impeach a witness
2 where there's no opportunity or very little opportunity or
3 time for a DR, it depends on the nature, and to have that
4 information or the use of it I guess controlled by the
5 company, I think it raises a public policy question.

6 I certainly would be willing to consider
7 that perhaps a DR -- I've been sitting here trying to
8 think of how we -- how to revise the suggest suggestion
9 Public Counsel made about not requiring a separate data
10 request, and I think that can be I think made perhaps --
11 that could be taken out, perhaps if, you know, because I
12 think that Public Counsel the Staff could probably design
13 a data request which would say in this case in data
14 request No. so and so, are there any additional
15 information to that answer or is that answer true,
16 accurate and correct as of this time, and if not, provide
17 supplemental information.

18 I think that may overcome the concern that
19 the utilities have raised here about they would have no
20 not that Public Counsel or Staff was even -- was looking
21 at that time of information. I think that's the only
22 comment I have, your Honor,

23 JUDGE WOODRUFF: Mr. Gryzmala, anything you
24 want to add?

25 MR. GRYZMALA: Just one brief item that I'd

1 forgot to raise earlier, but that Mr. Dandino gives me
2 pause to think about. The Commission and the parties have
3 for years operated under the presumption embedded in the
4 protective order that information used or obtained in this
5 proceeding shall not be used for other than this
6 proceeding. It has worked well, and the construct of the
7 current rulemaking has been that we are endeavoring to as
8 closely as possible codify the protective order in today's
9 rule.

10 This is a 180 degree change in thought.
11 Every party that I've heard out here has opposed that,
12 including the General Counsel. Clearly the industry
13 opposes it. And Mr. Dandino has yet to announce how a
14 newly crafted DR would not fix the problem the OPC appears
15 to be facing.

16 JUDGE WOODRUFF: Thank you. Mr. Lowery,
17 anything you'd like to add?

18 MR. LOWERY: Just a couple of very quick
19 items. One item I did forget to mention that I don't
20 think will be controversial at all. The Staff has been
21 using for some time redaction software that allows one to
22 block and redact data in highly confidential information
23 as opposed to having to count the number of underlines and
24 use the asterisks and those types of things. In fact, the
25 protective order that's being used currently typically

1 accommodates that.

2 This rule doesn't contain that similar
3 language, and I would suggest, and I can certainly do this
4 probably today, but perhaps I could submit later today
5 just the language that's used in the current protective
6 order to accommodate. I think it's beneficial for
7 everybody, including the data center, that we accommodate
8 the technological advances we have to that we can actually
9 use redaction software. It's just a minor technical
10 matter that I think ought to be addressed.

11 Back to the point Mr. Gryzmala was just
12 making, at the end of Mr. Dandino's comments, in effect he
13 suggested that Public Counsel can do what we're all
14 suggesting that they should do, and that is simply send --
15 simply use the word processor to go back and pick those
16 data requests that may -- you may have used before that
17 you'd like to use again or you have information in a
18 particular case and you'd like to have that information
19 updated or that same information as of the current time,
20 simply send a data request and that information can be
21 provided, as opposed to porting information from older
22 cases to newer cases.

23 And again, that's not administratively
24 burdensome. It's consistent with what's done now, and it
25 addresses the concerns we have. Thank you.

1 JUDGE WOODRUFF: Mr. Dority, anything you'd
2 like to add?

3 MR. DORITY: No, thank you, Judge.

4 JUDGE WOODRUFF: Commissioner Murray, do
5 you have any questions?

6 COMMISSIONER MURRAY: No questions. Thank
7 you.

8 JUDGE WOODRUFF: Commissioner Gaw?

9 COMMISSIONER GAW: Thank you, Judge.

10 On this issue regarding the, I guess it's
11 Point 3 that Public Counsel has raised, I'm struggling a
12 little bit trying to understand this concept of having
13 some sort of a discussion of a bar of using information in
14 a previous case in a subsequent case, as opposed to the
15 question of whether it just remains confidential instead
16 of public. And I need a little bit more discussion on
17 that.

18 From Public Counsel's standpoint, is Public
19 Counsel suggesting that information that's available in
20 another case should be available to be used or at least
21 requested to be used as evidence in a subsequent case as
22 confidential -- as confidential material? I'm trying to
23 understand what this issue is. It seems to me like we're
24 mixing issues, and I'm trying to understand that.

25 MR. DANDINO: Commissioner Gaw, what we're

1 looking at is, because the present rule says -- or present
2 provision provides that the information, not only must it
3 be kept secure, but may be neither used or disclosed such
4 information for any other purpose. It's very, very
5 broad. So not only would it exclude, I think, evidence in
6 another case, but raises the question of could that same
7 information be used as a basis of an investigation.

8 Without having to -- what I'm aiming for is
9 that I just don't think there ought to be a rule which
10 forecloses or at least can be read that it forecloses the
11 use by Staff or Public Counsel, agencies that represent
12 the public and the regulator, from using any information
13 that comes into its hands, especially information that
14 comes from the utility, for purposes of investigating a
15 utility or taking action against a utility.

16 COMMISSIONER GAW: Are you telling me that,
17 first of all, this language is in the current order on
18 confidential information?

19 MR. DANDINO: The language which is in the
20 current order says, all persons who have access to
21 information under this rule must keep the information
22 secure and may neither use nor disclose such information
23 for any purpose other than the preparation for and conduct
24 of the proceeding for which the information was provided.

25 COMMISSIONER GAW: Well, do you think that

1 that interpretation that you're giving that current
2 language in the order has barred Public Counsel or Staff
3 from using it for that purpose of other investigations?
4 Do you believe that's a current bar?

5 MR. DANDINO: I think it certainly could be
6 -- could be read that way.

7 COMMISSIONER GAW: I understand that point.

8 MR. DANDINO: Sure.

9 COMMISSIONER GAW: My point -- my question
10 more specifically is whether or not it's been viewed that
11 way by Public Counsel and Staff. That's very disturbing
12 to me if that's the case.

13 MR. DANDINO: Well, certainly I think
14 Public Counsel would always -- would argue that it
15 wouldn't be that way.

16 COMMISSIONER GAW: I understand, and I
17 understand your concern. That's not what I'm questioning
18 right now. I'm just trying to see whether or not we've
19 had cases that should have been -- we've had the lack of
20 filing of cases because of Public Counsel or Staff
21 believing they couldn't use that information for
22 subsequent follow-up on other cases, including complaints.

23 MR. DANDINO: No, I am not aware of that.
24 I think the way that -- once again, what we did is you
25 just start over with a whole data request, duplicate the

1 data request, not just update the data request, but to
2 duplicate the data request or, if you use depositions,
3 depositions. And, you know, we don't think that's a wise
4 use of public money.

5 COMMISSIONER GAW: Seems rather inefficient
6 to me, to have to go back and ask for the same material
7 you already have been provided.

8 MR. DANDINO: Well, I think that's true.
9 And what Mr. Haas had brought up, that, well, if you have
10 something like this, maybe the company won't be as
11 forthcoming on the first time it's asked, well, I think
12 they have an obligation and a duty, the company or
13 whoever's responding to the data request, that they be
14 true, accurate and correct and fully in response to the
15 data request.

16 COMMISSIONER GAW: Let me ask a different
17 kind of a question. Let's so suppose the information in
18 the previous case was not labeled as highly confidential
19 or proprietary. It was not protected under the previous
20 case. What would be the process for using that
21 information in a subsequent case in regard to notice, in
22 regard to other things that have been raised here by the
23 parties as objections?

24 MR. DANDINO: I don't think it would fall
25 under this order or this rule.

1 COMMISSIONER GAW: That's not my question.
2 My question relates to something that has nothing to do in
3 my opinion with confidential information, but regarding
4 process here and the use of information that's been
5 divulged in other cases.

6 MR. DANDINO: Which is --

7 COMMISSIONER GAW: Whether or not there are
8 some requirements of giving the parties notice that you
9 intend to use that in testimony or that you intend to use
10 it to impeach a witness or other things, what kinds of --
11 if you know off the top of your head, what kinds of
12 requirements for notice are there? I can ask the other
13 thing, too. There must be some there or I wouldn't be
14 hearing this outcry of concern, I wouldn't think.

15 MR. DANDINO: There is not, none that I'm
16 aware of.

17 COMMISSIONER GAW: Well, let me ask
18 Mr. Lowery if he knows.

19 MR. LOWERY: Commissioner, I'm not aware of
20 there being any such rule either. And just back if I can
21 address a point you had earlier, no one in the utility
22 industry that I know of has viewed the current language in
23 the current protective order, which really is not
24 materially different than the language in the proposed
25 rule, as precluding the ability of Staff or Public Counsel

1 to review that information and come back and say, okay,
2 we're now investigating this. You've provided this
3 information. Is this correct? Update this information.
4 Send us another -- no one has ever taken that position.
5 It's never been a problem. So I'm not entirely sure what
6 concern is even being raised.

7 COMMISSIONER GAW: Well, I can understand
8 his concern in regard -- just reading the language by
9 itself, but it doesn't mesh with what my understanding of
10 what practice has been here.

11 MR. LOWERY: True.

12 COMMISSIONER GAW: So to me it's a question
13 of making sure that it's not read differently than what
14 practice has been in part. And then I guess the other --
15 in regard to the confidential information question, regard
16 to the process question in regard to whether or not you
17 have to make additional inquiries before you can get that
18 information in the new record or you have to ask another
19 data request to get the same information again. That has
20 been the practice, is that what you're telling me?

21 MR. LOWERY: Yes, it has. One of the
22 reasons is, when you're dealing with highly confidential
23 and proprietary information, and because of the very
24 sensitive nature of it to begin with, it's important, I
25 think, that the utility have an opportunity know that that

1 information's going to be at issue, so that if any steps
2 need to be taken, they can be taken and those things can
3 be addressed. I think that's why it's been treated
4 differently. But that has been the practice.

5 I'm just not aware of it having been a
6 problem for anybody or an issue for anybody, and I'm
7 really not hearing much of an issue or problem being
8 raised today, other than perhaps some concern about, well,
9 is this going to be interpreted or used differently than
10 it's been used in the past.

11 COMMISSIONER GAW: In regard to the
12 question of whether or not it's going to be used in a
13 subsequent case, if that -- if that information were
14 public to begin with, what would be your notice in the
15 subsequent case that it would be used that you're saying?

16 Help me to understand whether this is a
17 problem with confidential information or something else,
18 because I think I heard you say a while ago it's public
19 information, we don't get any notice unless they're
20 putting it in testimony because that's what they're
21 showing as rebuttal or surrebuttal testimony in the
22 written testimony before the hearing is held.

23 MR. LOWERY: That's true. You get whatever
24 notice would be normal and required and acceptable under
25 the rules of evidence and the rules of -- not civil

1 procedure -- administrative procedure in this case.

2 COMMISSIONER GAW: So let me break it down
3 to the next step. I'm trying to shave this down to
4 understand where the line is as far as the parties are
5 concerned. If it's confidential information in the
6 previous case, in regard to whether you're getting notice
7 or not, I don't see much difference if -- and I'm going to
8 make an assumption here -- if the parties in the previous
9 case and the parties in the subsequent case are exactly
10 the same.

11 If they were exactly the same, I don't see
12 much difference between the information being treated
13 public and private in regard to whether you have notice
14 about that information being used in the subsequent case.
15 Would you agree with that or not?

16 MR. LOWERY: I'm not sure, to be honest
17 with you.

18 COMMISSIONER GAW: I understand. And
19 I'm -- I am sort of trying to put you on the spot, but I'm
20 not wanting to do it unfairly. The other --

21 MR. LOWERY: I haven't thought nearly about
22 this as I think you have this morning.

23 COMMISSIONER GAW: You know, I just thought
24 of it a while ago, which is a bad sign. So the other
25 thing is, let's say you do have -- let's say you do have

1 different parties, then the other parties that are in this
2 case that were not in the other case would not know about
3 this information, correct?

4 MR. LOWERY: Yes.

5 COMMISSIONER GAW: Now, there it seems to
6 me you have an issue that needs something done with it
7 because there is a difference between it being labeled
8 confidential initially and public initially in regard to
9 who would have access or know that that information
10 exists.

11 MR. LOWERY: Well, I think the way that's
12 been handled is, as the current protective order indicates
13 and as this proposed rule indicates, and it really is not
14 difficult, if Staff -- I'll use Staff, though it doesn't
15 make any difference -- has eight pieces of information,
16 eight data requests from a case three years ago and it
17 dealt with so and so, that data might be outdated and
18 there may be other issues, but they have report XYZ and
19 they've like to have report XYZ now. It's not at all
20 difficult to stick a different case number on top of that
21 DR they sent us three years ago and send it again, and
22 then we're on notice, and if there are these other parties
23 involved.

24 We have a heightened sensitivity about this
25 information already for good reason. That's why we're

1 here this morning discussing this. We have to have a rule
2 because it's important. And the way the rule has worked
3 and I think will work in the future would allow that issue
4 to come up so that we can deal with that highly
5 confidential information and have it dealt with.

6 COMMISSIONER GAW: I'm sorry. I don't mean
7 to interrupt. It seems like to me there you have two
8 questions. One is the question of whether or not the
9 parties were the same and, therefore, some of them may not
10 know that information exists, and so there may be some
11 question of fairness there.

12 Now, a request, a data request doesn't
13 necessarily disclose that to all the parties because
14 you-all don't share all the data request information
15 around with all of the parties, do you?

16 MR. LOWERY: Well, the practice is evolving
17 to where requests are typically sent to everybody.

18 COMMISSIONER GAW: And that would make a
19 big difference to me if that were the new practice because
20 then I would know everyone were getting notice on these
21 data requests.

22 MR. LOWERY: That is essentially the
23 practice that has evolved in the last few cases. Then
24 those parties who get all of the requests can look at
25 those and say, well, there's 800 data requests in this

1 rate case, there may be 2000, but there's hundreds or
2 thousands usually, and then they can, you know, I'd like
3 to see the response to 74, 85 and so on and so forth, and
4 then they can simply send a data request and ask for those
5 responses, that's the way it's typically handled.

6 COMMISSIONER GAW: Now, it would seem to me
7 that there might be another issue, and tell me if this is
8 would be an issue or not. If you had a request -- if you
9 had something labeled as highly confidential in the past
10 case, maybe this -- maybe it be would better asked this
11 way:

12 Is it possible that information labeled as
13 proprietary in a previous case would potentially be --
14 could potentially be requested by the party that has the
15 information to be labeled HC in a subsequent case because
16 of the difference in the parties to the case? Do you
17 understand that question? You don't have to ask that
18 first if you don't want to, Mr. Lowery. That may come up
19 more in teleco cases.

20 MR. LOWERY: I don't know for sure. I
21 think the definitions are what the definitions are
22 probably, the definitions of the various kinds of
23 information.

24 COMMISSIONER GAW: That would make sense to
25 me, although I could also see some cases where there might

1 be some more concern about a particular party in the case
2 than there would have been if that party were not in the
3 case.

4 MR. LOWERY: I think I might have a
5 heightened sense of thinking very, very carefully about
6 whether something might qualify as HC if some of those
7 other parties are in a case. Whereas, I might not
8 particularly care as much -- it's only Staff, for example.
9 Staff's not treated any differently for purposes of
10 proprietary HC. You know, my coal supplier, much
11 different situation. I absolutely don't want their
12 employees seeing that HC information.

13 COMMISSIONER GAW: Let me come back to
14 Public Counsel. Mr. Dandino, I'm slicing these things
15 very thinly because I'm thinking this wording needs to be
16 adjusted personally to match closer to what all of you are
17 saying, because to some extent I think you're not
18 disagreeing entirely on some parts to this, but the
19 language doesn't reflect exactly what all of you are
20 agreeing on, not that you're agreeing on all of it.

21 MR. DANDINO: Perhaps I can -- by looking
22 more at the intent or the real concern, basically we want
23 to -- Public Counsel wants to revise this language not
24 necessary -- because it involves our right to use the
25 information. We think this present rule or the rule as

1 proposed impinges upon our right and Staff's right to use
2 the information for any purpose.

3 Now, the other secondary question is the
4 process for using that information, and I think that's
5 where we get into the data requests --

6 COMMISSIONER GAW: Yes.

7 MR. DANDINO: -- and that, and I see a
8 difference between that. And we are more concerned with
9 our right to use it because if we -- following this we
10 don't have a right, we may run into a problem about using
11 the process in order to get it.

12 COMMISSIONER GAW: I understand. I have
13 a -- I would have a major problem with that also if that
14 were read that way.

15 MR. DANDINO: That's correct. And one of
16 the things is, just because something hasn't necessarily
17 been a problem in the past or the present parties haven't
18 read that, I think one of the things is when you're taking
19 it from an order, you're taking it into a rulemaking, a
20 formal rulemaking, you should also have a rulemaking to
21 avoid problems.

22 So if it could reasonably come up as a
23 problem, a rule is meant to prevent a problem from coming
24 out, to try to avoid litigation and to simplify the
25 matter. That's why we don't want somewhere down the line

1 someone challenging our right to use this information in
2 the midst of a hearing or midst of another proceeding or
3 as, you know, the time we get to circuit court on a
4 complaint case, you know, they raise that issue against
5 Staff or Public Counsel.

6 COMMISSIONER GAW: I understand. I
7 understand why you would be raising the issue.

8 COMMISSIONER MURRAY: Could I just throw
9 out a potential change here, just for feedback on this
10 issue?

11 JUDGE WOODRUFF: Sure. Go right ahead.

12 COMMISSIONER MURRAY: On Section 16, if we
13 added at the end of that sentence, that last, I guess it's
14 one sentence, for which the information was provided
15 unless, upon application to the Commission in a later
16 proceeding, the Commission orders that the information may
17 be used in the preparation for and conduct of a later
18 proceeding.

19 I don't know if the parties would -- I'm
20 sure off the top of your heads you can't respond
21 immediately, but is that -- is that language -- oh, I
22 don't have my mic on, do I? I'm sorry. I apologize.

23 MR. LOWERY: I could hear you.

24 COMMISSIONER MURRAY: I was just throwing
25 out this possible language to the end of that Section 16:

1 Unless, upon application to the Commission in a later
2 proceeding, the Commission orders that the information may
3 be used in the preparation for and conduct of a later
4 proceeding.

5 MR. DANDINO: Commissioner, just off the
6 top of my head, too, it's closer, but I still think it
7 impinges more on Public Counsel's right then because then
8 it becomes subject to the Commission's or subject to the
9 Commission's approval to use that rather than, you know,
10 our right to use it for investigation.

11 The other aspect of it is, in a proceeding,
12 I think we'd want to call it a proceeding or investigation
13 just to broaden it. But, you know, it does have -- it is
14 attractive to a point where there is a -- well, first of
15 all, I would limit it to Public Counsel and the Staff. I
16 don't -- I don't know if any -- if it ought to be broad
17 enough to have any party be able to do that, or the other
18 parties can fend for themselves, at least OPC -- I'll try
19 to work with OPC and Staff, and the other parties can
20 address it themselves.

21 MR. LOWERY: Commissioner, I mean, off the
22 top of my head, I don't see any reason that we would
23 object to something like that at all. I think it would
24 provide the proper opportunity for the issue to be dealt
25 with and would provide relief to Public Counsel and Staff

1 if they need to use the information at the same time.

2 And also, I'll reiterate again, and I don't
3 even think we would probably be opposed to this, just
4 thinking about it off the top of my head, we're not
5 attempting to preclude Staff or Public Counsel from
6 reviewing and considering information in their possession
7 for purposes of determining if they want to initiate some
8 type of investigation within the scope of their authority.
9 We're not attempting to do that.

10 MR. GRYZMALA: My observation,
11 Commissioner, is the sort of language -- I'm sorry.

12 JUDGE WOODRUFF: Go ahead.

13 MR. GRYZMALA: Thank you. My observation,
14 Commissioner, is that that sort of escape hatch, if you
15 will, that you've elucidated, that's Part 22 in the
16 proposed rule. The Commission may waive or grant a
17 variance from any provision of this rule for good cause
18 shown. So OPC comes in three years later wanting to use
19 information from year zero case and they ask the
20 Commission to allow them to use information gleaned in a
21 prior proceeding toward a new proceeding or investigation,
22 I think that's what Rule 22 envisions.

23 It's the kind of flexibility that is
24 important when you're talking about confidential
25 information, and that rule would get some exercise if OPC

1 wants to put it to the test.

2 COMMISSIONER MURRAY: Thank you for letting
3 me interrupt, Commissioner Gaw.

4 JUDGE WOODRUFF: Commissioner Gaw, anything
5 else you'd like to add?

6 COMMISSIONER GAW: Maybe a couple things to
7 Public Counsel, I think is who I'm wanting to make this
8 inquiry. Mr. Dandino, this proposed rule deletes and
9 eliminates a few things from it, including a requirement
10 that goes out in every order that the party asserting the
11 claim that information should be kept from the public must
12 justify it.

13 Now, I recognize the fact that parties in
14 cases have often ignored this portion of the order, but it
15 is disturbing to me that there is no requirement, as I
16 understand it, in this draft that there be a justification
17 for keeping secret information, and I just was curious
18 about whether or not Public Counsel supported deleting
19 that from the current requirements.

20 MR. DANDINO: We don't have a problem with
21 it as long as there was a provision, which I believe is in
22 Section 11, that provides that you can challenge that
23 designation and it would get back to the Commission rather
24 than having a designated up front as we said in --

25 COMMISSIONER GAW: Does that shift the

1 burden under the language that's in the current order from
2 the company to justify it to those challenging it to
3 demonstrate why it should not be highly confidential?

4 MR. DANDINO: In section A it just says, if
5 the designation is challenged, the party asserting the
6 information has to justify it.

7 COMMISSIONER GAW: So if -- what's the
8 timeline on that? When do you have to -- is there a
9 timeline on when you must challenge it?

10 MR. DANDINO: Ten days.

11 COMMISSIONER GAW: Ten days from when it's
12 initially designated as HC or proprietary?

13 MR. DANDINO: After filing.

14 COMMISSIONER GAW: After filing. Is it
15 your belief that there is anything in this -- and I guess
16 I -- I guess I'd have to suggest to you that that is,
17 although it sounds like you're not objecting to it, it
18 sounds as though that is incrementally shifting the burden
19 of raising the issue to begin with.

20 Is there anything in this rule that would
21 make information more -- would make it more likely that
22 information would be public than the current -- the
23 current order?

24 MR. DANDINO: I really haven't given that
25 thought. As I approach looking at this, I would start

1 with the assumption that everything that should be public
2 or everything that -- everything should be public as much
3 as possible, especially if it ends up being as part of the
4 proceedings of this Commission, because I think that's
5 within the whole concept of the Sunshine Law and the idea
6 that agencies should take public decisions based upon
7 public facts.

8 Yet we always run into this problem with
9 the right of the companies with their highly confidential
10 and proprietary information, and Public Counsel doesn't --
11 you know, wants to have this open process, but we don't
12 want to, I guess to spend a lot of time over the des--
13 over the confidential and highly confidential to delay
14 filing ahead of time. Usually the issues don't come up so
15 much then -- well, I don't know.

16 I don't see it as shifting the burden to us
17 as long -- even though we have to make the designation as
18 to whether it's confidential or not, it's just a matter of
19 getting around to you object when there's a problem rather
20 than they'd have to justify something we wouldn't have any
21 problem with. That's a long way to get to that short
22 answer. I apologize for that.

23 COMMISSIONER GAW: But you don't know of
24 anything in this rule that makes any information more
25 likely to be public than it was -- than it is in the

1 current order?

2 MR. DANDINO: Not that I'm aware of, but I
3 really didn't use that as a consideration.

4 COMMISSIONER GAW: Perhaps part of the
5 reason I'm -- that that's a concern for me is, and it
6 tends to be a concern for me anyway, is that when we
7 started out discussing this several years ago as a
8 potential change, the whole concept at least in my
9 recollection came about because of discussion of trying to
10 make this rule so that information was less restricted,
11 and it appears to me that the rule that we have
12 incrementally shifts to making it somewhat more
13 restrictive or at least not changing it at all.

14 MR. DANDINO: I think probably if you were
15 going to make any substantive change on whether it was
16 public or not, you'd probably need to revise the
17 definitions of proprietary and highly confidential.

18 COMMISSIONER GAW: And that was part of the
19 initial discussion when this was initially brought up,
20 initiated by -- in front of the Commission, but that's not
21 where we are today in this draft it appears.

22 MR. DANDINO: That's correct.

23 COMMISSIONER GAW: I think that's all I
24 have. Thank you, Judge.

25 JUDGE WOODRUFF: Thank you. Commissioner

1 Clayton?

2 COMMISSIONER CLAYTON: I don't have any
3 questions.

4 COMMISSIONER MURRAY: I've got just one
5 follow-up.

6 JUDGE WOODRUFF: Go ahead, Commissioner
7 Murray.

8 COMMISSIONER MURRAY: Mr. Dandino, you
9 indicated that the party that disagreed with the
10 designation had ten days to -- is that accurate or --

11 MR. DANDINO: I was looking at Section 11.
12 It says, not later than ten days after it's filed, the
13 party wishes to challenge, it may file an appropriate
14 motion with the Commission. And then I believe the party
15 asserting the information as highly confidential has ten
16 days.

17 COMMISSIONER MURRAY: All right. Thank
18 you. I was looking at the Section 2 where it indicates
19 that the party designating the information as confidential
20 shall have ten days to file a response, but each party has
21 ten days; is that correct? I -- that's fine. I just
22 didn't read the whole thing. Thank you.

23 JUDGE WOODRUFF: Anything further from the
24 Commissioners? Anything further from any interested
25 parties out there?

1 All right. Then with that, then, we are
2 adjourned. Thank you all very much.

3 WHEREUPON, the hearing of this case was
4 concluded.

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